Probir Kumar Misra vs Ramani Ramaswamy on 28 August, 2009

Author: P.Jyothimani

Bench: P.Jyothimani

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 28.8.2009

Coram:

The Honourable Mr.Justice P.JYOTHIMANI

Company Appeal Nos.11 to 15 of 2009

Probir Kumar Misra .. Appellant in C.A.No.11 of 2009, 6th respondent in C.A.Nos.12, 13 & 5th respondent in C.A.No.15 of 2009

vs.

1. Ramani Ramaswamy
2. R.Rangarajan
3. Creative Port Development Private Limited
"Mahalakshmi", 1st Floor, New No.290
Peters Road, Gopalapuram
Chennai 600 086 .. Respondents 1 to 3 in all C.As.

4. SREI Venture Capital Limited
Investment Manager of Infrastructure
Project Development Fund (A Scheme
of SREI Venture Capital Trust) both
having its Regd. Office at
"Vishwakarma", No.86-C
Topsia Road (South), Kolkata-700 046. .. 4th respondent in C.A.Nos.11 to 14/2009 and Appellant in C.A.No.15/2009

5. Naveen Bansal .. 5th respondent in C.A.Nos.11, 13, 14

of 2009,
4th respondent in
C.A.No.15 of 2009
C.A.No.12/2009

6. Swapan Chakrabarti .. 6th respondent in
C.A.Nos.11, 12
and 15 of 2009,
Appellant in
C.A.No.13 of 2009,
and 7th respondent in
C.A.No.14/2009

7. SREI Infrastructure Finance Limited
"Vishwakarma", No.86-C
Topsia Road (South), Kolkata-700 046. .. 7th respondent in
C.A.Nos.11 to 13
and 15 of 2009,
and Appellant in
C.A.No.14 of2009

(Respondents 4 to 7 in all C.As.
are given up as not necessary parties)

COMMON PRAYER: Appeals filed under Section 10F of the Companies Act, 1956 against the or

For Appellant in C.A.No.11/2009 : Mr.P.S.Raman, Senior Counsel
for M/s.S.Mukundan

For Appellant in C.A.No.12/2009 : Mr.A.L.Somayajee, Sr.Counsel
for M/s.Cibi Vishnu

For Appellant in C.A.No.13/2009 : Mr.P.Arvind Datar, Sr.Counsel
for Mr.P.H.Arvindh Pandian

For Appellant in C.A.Nos.14 : Mr.S.N.Mookherji, Sr.Counsel
and 15/2009 assisted by Mr.Anil Choudry
for Mr.P.Valliappan

For Respondents 1 and 2
in C.A.No.11/2009 : Mr.Vedantham Srinivasan,
Senior Counsel
for M/s.K.Moorthy & S.R.Sundar

For Respondents 1 and 2
in C.A.No.12/2009 : Mrs.Nalini Chidambaram,
Senior Counsel
for M/s.K.Moorthy & S.R.Sundar

For Respondents 1 and 2
in C.A.No.13/2009 : Mr.V.Raghavachari
for M/s.K.Moorthy & S.R.Sundar

For Respondents 1 and 2
in C.A.No.14/2009 : Mr.T.V.Ramanujun, Sr.Counsel
for M/s.K.Moorthy & S.R.Sundar

For Respondents 1 and 2
in C.A.No.15/2009 : Mr.Sudipto Sarkar, Sr.Counsel
for M/s.K.Moorthy & S.R.Sundar

COMMON JUDGMENT

These appeals are filed under Section 10F of the Companies Act, 1956 (for brevity, "the Act") by respondents 2 to 6 before the Company Law Board, Additional Principal Bench, Chennai against the order dated 27.5.2009 passed in C.P.No.13 of 2008 filed by respondents 1 and 2 in all these appeals under Sections 397, 398 and 402 of the Act.

2. While C.A.No.11 of 2009 is filed by the fourth respondent before the Company Law Board, C.A.No.12 of 2009 is filed by the third respondent, C.A.No.13 of 2009 is filed by the fifth respondent, C.A.No.14 of 2009 is filed by the sixth respondent and C.A.No.15 of 2009 is filed by the second respondent.

3. For the purpose of brevity, the parties are referred to in this judgment as shown in the impugned order of the Company Law Board.

4.1. The petitioners before the Company Law Board, who are the professionals, promoted the first respondent-Company, viz., Creative Port Development Private Limited (CPDP), being subscribers to the Memorandum and Articles of Association and are stated to have originally had 100% of shares. The company, having been constituted with an object of development of sea ports, was incorporated on 6.2.2006.

4.2. The second respondent, which is a wholly owned subsidiary of the sixth respondent (SREI), was stated to have been issued 70% of shares of the company by virtue of an Investment Agreement dated 26.5.2006 on an understanding that the second respondent, being an investor, should meet the entire funding requirements in respect of the projects undertaken by the first respondent-Company. Therefore, after the said Investment Agreement, the shareholdings of the petitioners, which was 100%, has come down to 30% in the first respondent-Company and the second respondent was given 70% of equity. The petitioners were to take care of the management in its day-to-day administration, while the second respondent had substantial right of management over the first respondent-Company as 70% shareholder.

4.3. It is stated that the fourth respondent, who is the appellant in C.A.No.11 of 2009 was also made as a first and permanent Director of the first respondent-Company in its Articles of Association. The said fourth respondent is a nominee of the second respondent-Investor and is also stated to be a Journalist and a Fellow Member of Institute of Cost and Works Accountants of India and its past Secretary and Vice Chairman.

4.4. The third respondent Mr.Naveen Bansal, appellant in C.A.No.12 of 2009, who was subsequently made as a nominee Director of the first respondent-Company, nominated by the second respondent-Investor, is having experience relating to infrastructure projects.

4.5. The fifth respondent, who is the appellant in C.A.No.13 of 2009, was also made as a nominee Director of the first respondent-Company by the second respondent-Investor and he was the Chairman of Haldia Port Trust and a retired Civil Services Officer of I.A.S. Cadre of 1969 batch.

4.6. It is stated that in January, 2007, two projects were secured for the first respondent-Company, one from the Government of Andhra Pradesh for Machilipatnam Port Project and another from the Government of Orissa for Subarnarekha Port Project. In respect of the Machilipatnam Port Project awarded by the Government of Andhra Pradesh, the same was awarded in favour of a "Consortium" consisting of Maytas Infra Limited (Maytas), Nagarjuna Company Limited (NCC), SREI and Sarat Chatterjee & Co. (VSP) Private Limited (SARAT).

4.7. It appears that Maytas and NCC, who were pre-qualified to develop Port at Machilipatnam in Andhra Pradesh as per the tender floated by the Government, approached a partnership firm called Creative Infrastructure (Creative) owned by the petitioners to strengthen the technical qualification of the bid. It is stated that since the said partnership firm of the petitioners refused to join the above said Maytas and NCC stating that the same is not possible without SREI, a Memorandum of Understanding was entered on 8.2.2006 between Maytas, NCC, SREI and SARAT in the form of Consortium on the one hand and the partnership firm (Creative) on the other hand by which it was agreed that the Creative of the petitioners shall associate with the Consortium till the award of the project and in the event of such award till the commencement of its commercial operations of the port. As per the agreement, while 51% of the Machilipatnam Port Project would be owned by Maytas and NCC, the remaining 49% should be with SREI and the first respondent-Company and therefore, Maytas-NCC combine and SREI and the first respondent-Company combine were to share in the ratio of 51:49. The 51% on the side of Maytas-NCC was agreed to be shared at the rate of 40% and 11% each. In respect of 49% on the side of SREI and the first respondent-company combine, SREI was to have the holding of 38%, while the remaining 11% was to be held by the company.

4.8. A Consortium Agreement was entered into on 25.3.2006. According to the petitioners the name of the second respondent (SREI) was proposed in the consortium, since at that time the first respondent-Company was a new entity which was incorporated only on 6.2.2006. On the other hand, it has been the stand of respondents 2 to 6 that the project was not that of the first respondent-Company. It was the case of the petitioners that the second respondent has not funded for the said project as per the assurance and committed breach of its commitments and also parted its interest over the Machilipatnam Port Project in favour of Maytas-NCC combine for obtaining personal gains at the cost of the first respondent-Company, while, as stated above, it has been the case of respondents 2 to 6 that the first respondent-Company, which was jointly promoted by the petitioners and the second respondent-Group has no stake or interest in the Machilipatnam Port Project.

4.9. While the petitioners have challenged the conduct of the second respondent (SREI) as oppression, the same was defended by the second respondent-Investor and others stating that the second respondent is neither a shareholder nor a Director of the Company and therefore, the petition for oppression in respect of Machilipatnam Port Project is not maintainable.

4.10. In respect of the second project, namely Subarnarekha Port Project of the first respondent-Company, it has been again the case of the petitioners that there was no proper funding by the second respondent and ultimately, it has resulted in a Memorandum of Understanding by which the second respondent has agreed to go out of the company for a price of Rs.52.50 Crores. On the other hand, it has been the case of the second respondent that it has always been ready and willing to extend financial assistance as provided under the Investment Agreement and therefore, they cannot be excluded from the affairs and management of the Company under the guise of the Memorandum of Understanding dated 14.11.2007 and according to the second respondent, the said Memorandum of Understanding is not valid in the eye of law and cannot be enforced in a petition filed under Sections 397 and 398 of the Act.

4.11. After elaborate submissions made by both the petitioners and the respondents, the Company Law Board has disposed of the Company Petition filed under Sections 397, 398 and 402 of the Act by granting the following reliefs:

> "(i) The second respondent shall transfer its shares and all other interests held in the Company to the petitioners at a consolidated price of Rs.52.50 Crores, or at a fair value as at 31.03.2008, whichever is higher. The fair value shall be determined by an independent Expert Valuer, appointed by the Bench. The second respondent shall exercise either of the options, by filing an appropriate affidavit before the Bench Officer, within 30 days of the receipt of the copy of the order, towards due completion of the exit formalities of the second respondent from the Company.
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> (ii) The respondents 2 to 6 shall ensure reimbursement, in favour of the Company, 30% of all benefits enjoyed by SREI from and out of the Machilipatnam Port Project as at 31.03.2008, which shall be ascertained by the Expert Valuer.
>
> (iii) The petitioners shall forthwith reconstitute the Board of directors of the Company, in exclusion of the nominees of the second respondent, upon which the Company is at liberty to carry on its business, in terms of the articles of association of the Company.
>
> (iv) The petitioners shall keep informed the second respondent of any major developments in the Subarnarekha Port Project every month, within seven days of the following month commencing from June 2009, till completion of the whole of exit formalities of the second respondent from the Company."

4.12. For arriving at such conclusion, the Company Law Board has accepted the contention of the petitioners that the Machilipatnam Port Project was a project of the first respondent-Company and

therefore, the petitioners, being 30% shareholders of the first respondent-Company, are entitled to reimbursement of benefits stated to have been enjoyed by the second respondent under the said project. Further, accepting the contentions of the petitioners that the Memorandum of Understanding entered between the petitioners and the second respondent dated 14.11.2007 is binding on the second respondent since under the said agreement the second respondent has agreed to exit from the Company, the Company Law Board directed the second respondent to transfer all its shares in the first respondent-Company in favour of the petitioners on the price as fixed, namely Rs.52.50 Crores.

5.1. While the above appeals came up for admission before this Court on 24.6.2009, the learned counsel for the petitioners, who are respondents 1 and 2 in the appeals, has, in fact, submitted that pursuant to the Company Law Board order which is impugned in these appeals, the Board of Directors have been reconstituted, however, he has undertaken that till 9.7.2009, the newly constituted Board of Directors will not convene any meeting. The said undertaking was continued by order dated 9.7.2009 and in addition to that it was made clear that if the time granted by the Company Law Board in the impugned order under paragraph 9(i) for filing an affidavit expires, the same shall not be put against respondents 2 to 6, who are the appellants. The order dated 9.7.2009 is as follows:

> "The undertaking already given by Mr.T.V.Ramanujun, learned Senior Counsel dated 24.6.2009 shall continue. In addition to that it is made clear that by virtue of the impugned order of the Company Law Board under Clause 9(i), if the time granted for filing affidavit expires, the same shall not put against the appellants."

5.2. Subsequently, the matter was taken up for hearing on 10.7.2009 and the following order was passed by this Court:

> "In continuation of the earlier orders dated 24.6.2009 and 9.7.2009 made in Company Appeal Nos.11 to 15 of 2009, the following order is passed.
>
> 2. Mr.T.V.Ramanujun, learned Senior Counsel appearing for the respondents submits that in the newly constituted Subarnarekha Port Pvt. Ltd., the respondents 1 and 2, namely Mr.Ramani Ramaswamy and Mr.R.Rangarajan are holding 100% shares.
>
> 3. While making it clear that the Subarnarekha Port Pvt. Ltd's project as stated to be approved by the Government of Orissa will continue, the respondents 1 and 2 shall maintain status quo in respect of their share holding in Subarnarekha Port Pvt. Ltd.
>
> 4. The Learned Counsel appearing for respondents are directed to produce all subsequent records to this court during the course of arguments."

The said order was passed taking note of the fact that Subarnarekha Port Project is a public project and public interest is involved.

6. Even though under the relief granted by the Company Law Board in paragraph 9(iv) there was a direction against the petitioners to keep informed the second respondent of any major developments in the Subarnarekha Port Project every month, the complaint was that the same was not followed, for which the contention raised on behalf of the petitioners is that if the above said direction is accepted, respondents 2 to 6 must withdraw their appeals.

7.1. Before going into the contentions raised by the respective counsel and merits of the case relating to the impugned order of the Company Law Board, it is relevant to point out some of the factual circumstances to arrive at a proper conclusion in these appeals.

7.2. The scope of this Court in deciding appeals against the order of the Company Law Board under Section 10F of the Act is limited to the extent of deciding on a question of law arising out of the order. Section 10F of the Act is as follows:

> "Section:10F. Appeals against the order of the Company Law Board.- Any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

7.3. The Andhra Pradesh High Court in D.Ramkishore and others v. Vijayawada Share Brokers Ltd. and others, [2008] 144 Company Cases 326 (AP), by referring to a series of judgments of the Apex Court regarding the scope of Section 10F of the Act has held as under:

"8. Under Section 10F of the Companies Act, 1956, any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court on any question of law arising out of such order. It is only on a question of law, and not of fact, that an appeal would lie against the order of the Company Law Board to the High Court. There is no jurisdiction to entertain an appeal on grounds of erroneous findings of fact, however gross the error may seem to be, for if the question to be decided is one of fact it does not involve an issue of law. (Deity Pattabhiramaswamy v. S. Hanymayya AIR 1959 SC 57). It is only an error of law which can be corrected by the High Court in exercise of its jurisdiction under Section 10F of the Companies Act. If the finding recorded by the Company Law Board is one of law or of mixed law and fact, the High Court can certainly examine its correctness, but if it is purely one of fact, the jurisdiction of the High Court would be barred. (Mattulal v. Radhe Lal, AIR 1974 SC 1596). A finding on a question of fact is open to attack as erroneous in law only if it is not supported by any evidence, or if it is unreasonable and perverse, but where there is evidence to consider, the decision of the Company Law Board is final even though the High Court might not, on the materials, have come to the same conclusion if it had the power to substitute its own judgment. (Sree Meenakshi Mills Ltd. v. CIT, AIR 1957 SC 49). In between the domains occupied respectively by questions of fact and of law, there is a large area in which both

these questions run into each other, forming enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. The ultimate finding on the issue must, therefore, be an inference to be drawn from the facts found, on the application of the proper principles of law, and in such cases an inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination, equally with the finding or ascertainment of basic facts, does not involve the application of any principle of law. The proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact. When the finding is one of fact, the fact that it is itself in inference from other basic facts will not alter its character as one of fact (Sree Meenakshi Mills Ltd. v. CIT)."

7.4. The scope of Section 10F of the Act, which provides for an appeal against the order of the Company Law Board, has been enunciated by the Apex Court in V.S.Krishnan and others v. Westfort Hi-Tech Hospital Ltd. and others, [2008] 3 SCC 363 as under:

> "It is clear that Section 10F permits an appeal to the High Court from an order of the Company Law Board only on a question of law i.e., the Company Law Board is the final authority on facts unless such findings are perverse based on no evidence or are otherwise arbitrary. Therefore, the jurisdiction of the appellate Court under Section 10F is restricted to the question as to whether on the facts as noticed by the Company Law Board and as placed before it, an inference could reasonably be arrived at that such conduct was against probity and good conduct or was mala fide or for a collateral purpose or was burdensome, harsh or wrongful. The only other basis on which the appellate Court would interfere under Section 10F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to construe relevant materials."

7.5. By virtue of the limited powers of this Court while deciding as an Appellate Court under Section 10F of the Act wherein the question of law has to be considered, the basic questions that are raised before this Court in these appeals are:

> (i) as to the jurisdiction of the Company Law Board to grant remedy for the breach of Investment Agreement and the Memorandum of Understanding dated 14.11.2007;
>
> (ii) when the respondents have given an undertaking to act as per the Investment Agreement, whether in spite of the same the oppression will continue;
>
> (iii) whether there was any oppression at all on the factual matrix of the case before the Company Law Board;
>
> (iv) whether it was within the power of the Company Law Board in not deciding about the Contempt Application while disposing the Company Petition;

(v) as to whether it was lawful for the Company Law Board to permit the petitioners to reconstitute the Board of Directors of the Company without even securing the payment of consideration;

(vi) as to whether the Company Law Board was right in allowing the reconstitution of the Board of Directors, without the approval of the shareholders and whether the same is within the provisions of the Act;

(vii) as to whether the claim on Machilipatnam Port Project, which is based on the Memorandum of Understanding, can be a subject matter of oppression;

(viii) as to whether it is proper for the Company Law Board to rely upon the Memorandum of Understanding dated 14.11.2007, which is held by the Company Law Board itself as not enforceable;

(ix) as to whether it is within the jurisdiction of the Company Law Board to decide an issue which is referable to arbitration as per the Investment Agreement;

(x) as to whether respondents 3 to 5 can be personally made responsible in respect of an amount stated to have been received by the second respondent; and

(xi) as to whether the relief granted by the Company Law Board by virtue of the powers conferred under Section 402 of the Act can be sustained.

7.6. The grounds of oppression which are broadly raised by the petitioners before the Company Law Board alleged against respondents 2 to 6 were:

(i) the Machilipatnam Port Project is a project of the first respondent-Company and the second respondent, being an Investor under the Investment Agreement dated 26.5.2006, instead of working for the benefit of the first respondent-company has chosen to transfer its shares in the said project in favour of third parties, namely Maytas and NCC, thereby taking away the said project granted by the Government of Andhra Pradesh, which is prejudicial to the interest of the Company;

(ii) the second respondent, being an Investor bound under the Investment Agreement dated 26.5.2006, who has to fund the various projects has failed to do the same which is detrimental to the interest of the members as well as the Company;

(iii) the second respondent, having agreed under a Memorandum of Understanding dated 14.11.2007 to exit from the first respondent-Company, has chosen to go back from the agreement which is detrimental to the interest of the Company and its members;

(iv) the second respondent, being the majority shareholder of the first respondent-Company holding 70% of the shares, has frozen the bank accounts which is prejudicial to the interest of the company;

(v) the second respondent, in whose premises the registered office of the first respondent-Company was situated, has deliberately locked the premises thereby closing the registered office of the first respondent-Company which is not only detrimental to the affairs of the Company, but it had blocked the entire process of the business of the company.

7.7. On the other hand, it was the contention of respondents 2 to 6 as a defence that:

(i) Machilipatnam Port Project is not a project of the first respondent-Company and it was between the Consortium of Maytas, NCC, SREI and SARAT, and therefore, it was never treated as a project of the first respondent-Company. The Investment Agreement dated 26.5.2006 in respect of the Machilipatnam Port Project can at the most be treated as a contractual obligation and in the guise of complaint under Sections 397 and 398 of the Act, contractual obligations are sought to be enforced, which is not permissible;

(ii) the second respondent had been always willing to make funding and the funding as per the Investment Agreement is not as and when the petitioners have been demanding, and it is only those demands which are pertinent to the projects of the Company, the second respondent-Investor can be expected to fund. On the facts of the case, an enormous amount has been claimed as strategic expenses without explaining the reasons and in such circumstances, it cannot be said to be a refusal to fund when the explanation from the petitioners, who are in the day-to-day affairs of the Company, has not given the reasons for such extraordinary claim of strategic expenses and even assuming that there is a breach of funding obligation under the Investment Agreement, the same cannot be attempted to be enforced in the guise of oppression and mismanagement;

(iii) the Memorandum of Understanding dated 14.11.2007 is not valid and enforceable since there is no contract in existence, but the real intention of the petitioner in approaching the Company Law Board complaining under Sections 397 and 398 of the Act is only to enforce the said Memorandum of Understanding dated 14.11.2007, thereby to make exit of respondents 2 to 6 at any cost. It is also the case that by virtue of the subsequent agreement by the petitioners in constituting a new Company in the name of Subarnarekha Port Private Limited, by which there has been a subrogation of the rights of the Concession Agreement entered with the Government of Orissa in favour of the newly constituted company, the said newly constituted company has entered into a Memorandum of Understanding with Signature Group International Limited, Cayman Islands of U.A.E. on 4.6.2009 to the extent of Rs.6000 Million equivalent to US$ 125 Million and therefore, the very

purpose of filing the petition under Section 397 of the Act before the Company Law Board is with an ulterior desire that respondents 2 to 6 should exit from the first respondent-Company so that by virtue of the new Memorandum of Understanding stated above, the petitioners can earn enormous profit and that cannot be the reason for approaching the Company Law Board for relief under Sections 397 and 398 of the Act, and further, the Memorandum of Understanding dated 14.11.2007 attempts to purchase the shares of the majority shareholders, namely respondents 2 to 6 and such conduct of the minority cannot be a ground to complain about oppression and mismanagement;

(iv) there was absolutely no business of the Company except in respect of the two projects. While in respect of Machilipatnam Port Project the same is not connected with the first respondent-Company, the only remaining project, viz., Subarnarekha Port Project, is at a preliminary stage and even lands have not been allotted by the Government of Orissa and therefore, by freezing of bank accounts there is no prejudice to the Company's interest or the interest of the members. Moreover, the freezing of accounts was not with an intention of causing prejudice to the first respondent-Company's affairs, but was only to prevent the conduct of the petitioners in attempting to make exit of respondents 2 to 6, which has been proved to be a correct assessment by the respondents as evident from the documents obtained under the Right to Information Act. Even during the pendency of the proceedings before the Company Law Board, the petitioners have created a new Company-Subarnarekha Port Private Limited without informing the same to the majority shareholders of the first respondent-Company, namely respondents 2 to 6;

(v) locking of the premises is not only due to the reason that the premises belongs to the second respondent, which has been granted to the first respondent-Company to have its registered office, but on the basis that the petitioners have been carrying on their own private and other activities in the said premises, which are detrimental to the interest of the first respondent-Company and the sealing itself was only after the intention of the petitioners was known, viz., that they have not been acting in the interest of the first respondent-Company and therefore, there was no question of oppression or mismanagement.

7.8. The Company Law Board, while holding that the Memorandum of Understanding dated 14.11.2007 is not enforceable, has directed the second respondent to transfer all its shares in the first respondent-Company in favour of the petitioners for a consideration of Rs.52.50 Crores, which is stated to form part of the Memorandum of Understanding dated 14.11.2007. The Company Law Board, while arriving at such conclusion, has decided that the second respondent was only an Investor/Money Lender and cannot be treated as a Promoter of the first respondent-Company and therefore, as an Investor its interest is only to earn money out of the money invested. To come to such a conclusion the Company Law Board has referred to various documents to show that the second respondent has itself voluntarily decided to go out of the Company and in such event, by exercising the powers under Section 402 of the Act, the Company Law Board has concluded that no

useful purpose would be served in retaining the second respondent and it was based on the said concept the Company Law Board has passed the above said order directing the second respondent to transfer its shares in favour of the petitioners for consideration.

7.9. The Company Law Board has further found that the second respondent has committed breach of its obligation in funding and that locking of premises and closing of the accounts is prejudicial to the interest of the first respondent-Company. That apart, the Company Law Board in the impugned order has found that the Machilipatnam Port Project is project of the first respondent-Company and by the conduct of the second respondent the project has been thwarted and taking advantage of the project it found that the second respondent has earned certain profits and therefore, directed the second respondent to transfer 30% of the profit to the petitioners who are 30% shareholders in the first respondent-Company.

8.1. The first respondent Creative Port Development Private Limited was incorporated as a company under the Act on 6.2.2006. It is true that in the Memorandum and Articles of Association of the first respondent-Company, the petitioners are the subscribers, each holding 5000 equity shares. In the Articles of Association of the first respondent-Company, in Clause 22.a, the petitioners as well as the fourth respondent are shown as first and permanent Directors of the company. The said Clause 22.a is as follows:

> "22.a. The following shall be the first and permanent Directors of the Company.
>
> 1. Mr.RAMANI RAMASWAMY
>
> 2. Mr.R.RANGARAJAN
>
> 3. Mr.PRABIR KUMAR MISRA"

8.2. Clause 23 of the Articles of Association also states that no share qualification is required to be held by any Director in the Company. There is a provision in the Articles of Association for making "Nominated Directors".

8.3. The main objects of the first respondent-Company, viz., Creative Port Development Private Limited, are as follows:

> "1. To own, develop, design, construct, erect, build, repair, re-model, demolish, develop, improve, grades, curve, pave, macadamize, cement, and maintain sea and sea ports, dams, bridges, buildings, structures, apartments, hospitals, malls, places of worship, highways, roads, educational institutions, food storage, power plants, energy installations, marine structures, desalination plant, distribution utilities, energy trading, convention centers, water treatment and distribution facilities, alleys and to do other similar infrastructure and for these purposes to purchase, take on lease, or otherwise acquire and hold any lands and prepare lay-out thereon or buildings of any tenure or description wherever situate, or rights or interests therein

or connected therewith.

2. To own, develop, sell, distribute, lease, hire, license, use, operate, assemble, record, maintain, repair, recondition, work, alter, convert, improve, procure, install, modify and to act as consultants or otherwise deal in all kinds of infrastructure projects and developments and to promote, encourage, develop, maintain, organize, undertake, manage, operate, conduct, and to act as consultants, Advisors, negotiators and service providers."

8.4. It is not in dispute that before floating of the first respondent-Company, the petitioners had their partnership in the name of "Creative Infrastructure". The petitioners themselves claim only two projects, namely Machilipatnam Port Project of Andhra Pradesh and Subarnarekha Port Project of Orissa, as the projects of the Company after its formation, while it is the case of the second respondent that Machilipatnam Port Project is not forming part of the first respondent-Company.

8.5. Even before the first respondent-Company was floated there were discussions and exchange of views on the Port Project of the Government of Orissa between the petitioners and the authorised representative of the second respondent (SREI). In the communication of the first petitioner dated 14.12.2005, writing as a partner of Creative Infrastructure, it was made clear that as per the wish of the Government of Orissa which want a person from infrastructure, the second respondent was made as a Lead member of the Consortium by replacing JV. The discussion in respect of the Machilipatnam Port Development Project also appeared to be in existence between the petitioners and the second respondent-Investor even before the incorporation of the first respondent-Company, which is evident from the email communication dated 5.2.2006. In the said communication of the authorised representative of the second respondent addressed to the Managing Director of the second respondent-Hemant Kanoria, it is stated that in respect of the Machilipatnam Port Development Project a meeting of presentation of consortium members Maytas, NCC has taken place on 4.2.2006 at Hyderabad and in that email it is stated about the first petitioner as follows:

"Mr.Ramani Ramaswamy approach was very impressive and very convincing and all the participants in the meeting were very much pleased with him and his comprehensive answers with logical explanation to all the questions posed during the 3 hour session.

With my limited 2 years plus exposure to the port sector, I would describe the presentation & the explanation of Mr.Ramani Ramaswamy as EXCELLENT."

A reading of the said communication also reveals that at one stage the members of the consortium Maytas and NCC wanted to exclude the second respondent which was not acceptable to the petitioners. The letter states as follows:

"Maytas & NCC have a wild opinion of proposing a 80:20 equity sharing between Maytas & NCC group and SREI & Ramani group respectively. It is understood that they are serious on not letting go anything more than 26% to us. In the worst case,

> they may propose 60:40. Mr.Ramani highlighted and made it very clear in the presentation itself by SREI-Ramani group needs to hold majority stake since SREI-Ramani group has the expertise which is very critical for the entire project. Maytas & NCC appeared to have been a bit inconvenient with the firm statement made by Mr.Ramani on the majority stake."

In the said communication, it is also stated as follows:

> "SREI-Ramani group will be the Lead Member/Partner of the bidding consortium. The preliminary terms for drafting the (i) Consortium Agreement; (ii) Joint Venture Shareholders Agreement; (iii) Work Distribution Agreement; (iv) Non-compete Agreement; (v) Agreement on permission to use Technical Data/Documents/Know-how; (vi) Agreement on Selection of Other Operators & Subcontractors; and (vii) Advisory Services Agreement etc., may be included in the MOU to avoid disputes at a later stage."

The fund requirement for the Machilipatnam Port Project as estimated on 5.2.2006 was around Rs.1100 Crores with range of 50 Crores plus or minus. It was stated in the above said communication as follows:

> "Gangavaram Port development was estimated to cost Rs.2300 Crore although it costed only about Rs.1675 Crores and similarly Dhamra Port was estimated to cost Rs.1300 Crores but has costed less. When referred these things to him, Mr.Ramani Ramaswamy assures that the Machilipatnam Port Development Project cost will also be far less than the Govt. estimated Rs.1100 Crores. However, he has not confirmed any approximate figure at least with a range of about Rs.50 cfrores plus or minus to have an understanding on the fund requirement for the project.
>
> Although the studies conducted for this bid submission and the experience gained will help us tremendously in taking part in the bids to develop other minor ports that are in the pipeline for development, I request to get clarifications from Mr.Ramani Ramaswamy on the above aspects exempting those on which you are convinced and/or have the required clarification/information."

8.6. It was during pendency of such discussions in respect of the said two projects between the petitioners and the representatives of the second respondent and its Managing Director, the first respondent-Company came to be incorporated on 6.2.2006.

8.7. The argument advanced on behalf of the petitioners is that they are the only promoters of the first respondent-Company and the second respondent has nothing to do with the floating of the first respondent-Company, while it is the contention on behalf of the second respondent that even before the incorporation of the first respondent-Company, discussions were going on between the petitioners and the second respondent and its officials, as found on record, at the time when the petitioners were only a partnership firm "Creative Infrastructure" and during the course of

discussion, the Company was floated and therefore, the second respondent should also be treated as a promoter of the company which floated the affairs.

8.8. Whether the second respondent is a joint promoter of the first respondent-Company along with the petitioners may not be of much relevance for the purpose of deciding the issue involved in these appeals, nevertheless, on the basis of the communication exchanged before incorporation of the first respondent-Company between the petitioners and the representatives of the second respondent, it is clear that the second respondent has been taken as a Lead Member in respect of the said projects, as admitted by the petitioners themselves when they were partners of the Creative Infrastructure before incorporation of the first respondent-Company. It is true that at the time when the first respondent-Company was incorporated none of the representatives of the second respondent-Company were made a signatory to the Memorandum and Articles of Association. But, the presence of the representative of the second respondent as a first and permanent Director of the company is available under the Articles of association as stated above.

8.9. It is well known that the promoters of the Company, who act before the incorporation of the legal person, need not necessarily be either a signatory of the Memorandum and Articles of Association or shareholder or the Director of the Company. The promoter, who is called as a "midwife" of the business as coined by Henn and Alexander in Law of Corporations, has not been defined under the provisions of the Act. Nevertheless, before the legal person has come into existence, it is the promoter who does the major role for the purpose of bringing the corporate person into existence like proposing the objects of the company to be incorporated, arranging finance, formation of the original scheme, making arrangement to get the company registered, preparing prospectus, Memorandum and Articles of Association, etc., which are very crucial for the company to come into existence. In fact, they perform vital functions to bring out a corporate person and are made liable to the Company as well as the third parties in respect of their conduct and contracts entered by them during pre-incorporation stage including the statement in prospectus, either treating them as the agents or trustees of the Company to be incorporated, but still they are not recognized in order to focus the legal fiction of corporate personality. Law is clear that while the company which has come into existence is not bound by the conduct of the Promoter, at the same time it is entitled to make claim against such promoter in case it was subsequently found that the conduct of the promoter was detrimental to the interest of the company incorporated on the basis of principles of breach of trust.

8.10. As per Section 62(1)(c) of the Act, "for any misstatement in the prospectus every person who is a promoter of the company" could be made liable for any loss or damages. Section 62(1) of the Act is as follows:

> "Section:62. Civil liability for misstatements in prospectus.
>
> (1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have

sustained by reason of any untrue statement included therein, that is to say,-

(a) Every person who is a director of the company at the time of the issue of the prospectus;

(b) Every person who has authorised himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of time;

(c) Every person who is a promoter of the company; and

(d) Every person who has authorised the issue of the prospectus:

Provided that where, under section 58, the consent of a person is required to the issue of a prospectus and he has given that consent, or where under sub-section (3) of section 60, the consent of a person named in a prospectus is required and he has given that consent, he shall not, by reason of having given such consent, be liable under this sub-section as a person who has authorised the issue of the prospectus except in respect of an untrue statement, if any purporting to be made by him as an expert."

A reading of Section 62(1) of the Act makes it clear that even if a promoter is not chosen to become a Director, he is liable for any such loss or damages.

8.11. Section 62(6)(a) of the Act, while explaining the expression "Promoter" in the context of the liability for misstatement, states as follows:

"Section 62: Civil liability for misstatements in prospectus.

(1) to (5) .....

(6) For the purposes of this section-

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company; and

(b) ..... "

8.12. It is also abundantly clear that a promoter need not become a Director. On the facts of the present case, the communication between the parties stated above makes it clear the second respondent in the pre-incorporation stage of the first respondent-Company has, in fact, participated in framing the objects of the Company, in the sense created basis for the two projects of the

company to be incorporated, namely Machilipatnam Port Project of Andhra Pradesh and Subarnarekha Port Project of Orissa.

8.13. Whether Machilipatnam Port Project has formed part of the first respondent-Company after its incorporation is an issue to be decided, while it is not in dispute that the Subarnarekha Port Project of Orissa, which has been in discussion between the petitioners and the representatives of the second respondent before the incorporation of the first respondent-Company has formed part of the first respondent-Company's project. Considering the same along with the undisputed fact of making the nominee of the second respondent, viz., the fourth respondent as the first and permanent Director of the first respondent-Company, makes it clear that the second respondent has been a promoter of the company, of course along with the petitioners who are, no doubt, the principal architects and the brain behind the formulation of the project, which cannot be put into action but for the financial assistance of the investor, namely the second respondent. Inasmuch as in the said projects both the creative idea of the petitioners as well as the finance of the second respondent-Investor are so intrinsically linked with each other, it cannot be said that the petitioners alone were the promoters of the first respondent-Company.

8.14. It is in this context, the definition of "Member" under Section 41 of the Act is relevant. The said provision makes it clear that if a promoter becomes a subscriber of the Memorandum and Articles of Association, he becomes a member of the Company on its registration. In addition to that, any other person who becomes a member after incorporation also becomes a member under the provision. After the Depositories Act, 1996, which has come into effect from 20.9.1995, such depositors who are holding equity share capital of the company and whose name is entered as beneficial owner are also deemed to be members of the company, thus making three types of members under the Act. Section 41 of the Act is as follows:

"Section 41. Definition of "member"

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

8.15. Therefore, the second respondent, who has acted as a promoter of the Company, who has not been made as a subscriber of the Memorandum of Association but its representative was only made as a first and permanent Director, has become a member by virtue of Section 41(3) of the Act as an investor after the Investment Agreement dated 26.5.2006 has come into existence.

8.16. I am, therefore, of the considered view, on the facts and circumstances of the present case and as submitted by the learned Senior Counsel appearing for the appellants herein that the second respondent-investor has been a promoter of the first respondent-Company along with the petitioners. The said fact has been expressly admitted by the first petitioner himself, being a signatory to the Memorandum of Understanding dated 8.2.2006 entered between Maytas and NCC on the one hand and the second respondent and the first respondent-Company on the other hand. In the said agreement the following clause is relevant:

> "Whereas, Maytas Nagarjuna Combine approached Creative Infrastructure, a BOT Port development firm operating from Chennai for assistance/joint participation in the Bid process and Whereas, Creative Port Development Pvt. Ltd., is the project development company jointly floated by Creative Infrastructure and Infrastructure Project Development Fund (IDPF), a fund promoted by SREI Infrastructure Finance Limited, Kolkata."

8.17. Inasmuch as it is specifically admitted that the second respondent has jointly floated the first respondent-Company along with the petitioners, there is nothing more required to show that the second respondent was a promoter jointly with the petitioners.

8.18. My above view is fortified by the following decisions. In Lydney and Wigpool Iron Ore Company v. Bird, 1886 [Vol.XXXIII] Ch.D. 85, Lindley,L.J., while speaking about the term "promoter" observed as under:

> "... for the word "promoter" is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are"

It was further held that:

> "…. Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases; and using the word "promoter" to describe a person acting as James Bird did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as if the relationship of principal and agent or of the trustee and cestui que trust had really existed between them and the company when the money was so obtained. Nor in such a case is it necessary for the company to rescind the whole transaction of which the payment by the company of the money in question is found to be part."

8.19. The Court of Appeal in Twycross v. Grant and others, 1877 [Vol.46] LJ QB 636, while deciding about the status of promoters in issuing prospectus of the company, in the words of Cockburn, CJ, held as under:

> "... The question as to when one, who in the outset was a promoter of a company, continues or ceases to be so, becomes, therefore, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose."

8.20. This Court in G.Thiruvenkatachariar, Official Liquidator of the National Live Stock Registrtion Bank Ltd. (In liquidation) v. A.T. Velu Mudaliar and Anr., [1937] 2 MLJ 820, after referring to the decision in Twycross v. Grant and others, referred supra, in the words of Alfred Henry Lionel Leach, CJ. has held as under:

> "3. I will first discuss the question whether the first respondent can be deemed to be a promoter. In Twycross v. Grant (1877) 2 C.P.D. 469 Cockburn, C.J., defined the word 'promoter ' as being one who undertakes to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose. Other definitions have been given by learned Judges from time to time, but it is impossible to define accurately what is meant by the word "promoter". The difficulty is discussed at length by the learned author of Palmer's Company Precedents at pages 103 to 109. After referring to a number of the more prominent cases the learned author observes at page 106:
>
> It is obvious, therefore, that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this control which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls.
>
> But a person who has done much less than this--takes a much less prominent part--may bring himself within the meaning of the term and may be held liable as a promoter.
>
> 4. Each case must be decided according to the evidence. If it is clear that the persons charged were merely servants or agents of the promoters or servants or agents of the company they cannot be classified as promoters, and in this connection the learned author makes mention of brokers, bankers and solicitors. Of course, brokers, bankers and solicitors could put themselves in the position of being promoters, but in order to do so they would have to travel outside their ordinary spheres."

8.21. In D.R.Patel v. A.S.Dimellow, AIR 1961 MP 4, while speaking about promoters, it was held as follows:

"9. ..... This principle of the promoter's personal liability is only a fair one. Otherwise, a third party who does something at the instance of a promoter will be obliged to run after the company with which he has no nexus and can have no nexus, until with his consent it takes over the promoter's liability."

8.22. A Division Bench of this Court in The Weavers Mills Limited, Rajapalayam v. Balkis Ammal and Others, AIR 1969 Madras 462= [1969] 2 MLJ 509, summed up the position of Promoter as under:

> "16. There is very little guidance in the Companies Act, 1913 and the new Act to decide the question before us. One of us in W. P. Nos. 475, 555 and 1249 of 1960 (Mad), Nandi Transport (P.) Ltd. v. S. T. A. T., had occasion to consider in a different context the legal implications in relationship of a promoter and the company under incorporation. There was there an elaborate consideration of that matter with reference to authorities, A Division Bench in appeal W. A. Nos. 85 and 86 of 1963 (Mad), Palaniswami v. Nandi Transports (P.) Ltd., and etc, arising out of those petitions also covered the question in some detail. But, for our present purpose, we think it is not necessary to cover the entire ground. A pro-motor according to Cockburn C. J. in Twycross v. Grant. (1877) 2 C. P. D. 469 is one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose. 6 Halsbury's Laws of England, 3rd Edn, page 91 and Palmer's Company Law 19th Edn. 322, elaborate this idea. In the writ petitions, one of us after referring to these authorities summed up the position of a promoter :--
>
> "A 'Promoter' therefore, is a compendious term given to a person who undertakes, does and goes through all the necessary and incidental preliminaries, keeping in view the objects, to bring into existence an incorporated company. This process leading to the genesis of a company may include a variety of things, not the least of them, I think, being some of the steps taken by a promoter to ensure commencement, within a reasonable time, of the business, for the carrying on of which the company is formed. He makes purchase of moveable and immovable assets, enters into contracts involving rights and obligations and applies to authorities for a variety of things, all on behalf of the company to be formed"

8.23. At this juncture, it is also relevant to point out that the concept of promoter as enunciated in the Securities Exchange Board of India (Disclosure and Investor Protection), 2000 is mostly from the disclosure perspective. Some of the basic duties which the promoter has towards the company are: (i) he must not make any secret profit out of the promotion of the company; and (ii) he must make full disclosure to the company of all relevant facts material to any transaction made by him with the company and thereby use his position fairly and reasonably and in the interest of the company and must abstain from exercising undue influence and fraud.

9.1. The Company Law Board under the impugned order dated 27.5.2009 has chosen to rely upon the contents of the Investment Agreement dated 26.5.2006 to conclude that the second respondent is not a promoter for the purpose of the Act. The said Investment Agreement was entered into between the second respondent being "VC Investor", which is an Infrastructure Project Development Fund, a scheme of SREI Venture Capital Trust and the petitioners, referred to as Promoters, as seen in Schedule-I of the Investment Agreement based on the number of shareholdings. Clause 15.5 of the said Investment Agreement relied upon by the Company Law Board for holding that the second respondent is not a promoter is as follows:

> "15.5. PROMOTER: Notwithstanding anything set out in Clause 15.2 the VC Investor shall at no point in time be considered/deemed to be the "promoters" (as defined in the SEBI Guidelines for Disclosure and Investor Protection and in the Companies Act) of the Company."

9.2. The term "Promoter" under SEBI (Disclosure & Investor Protection) Guidelines, 2000 is in the form of instruction issued to Merchant Bankers relating to issue of capital issue from time to time by Primary Market Development. By the Guidelines of 2000, the rights and liabilities of the promoters as per the SEBI Guidelines have been demarcated to the effect that the promoters contribution for public issues by unlisted as well as listed companies has been made uniform at 20% in respect of issue size. Likewise, in respect of offer for sale of securities of unlisted companies, the promoters shareholding subject to lock-in has been increased to 20%, apart from making it clear that all securities issued to the promoters not forming part of promoters contribution are locked-in for a period of three years whether issued to the promoters or persons other than promoters. The obligations of such promoters as per the SEBI Guidelines, as amended in the Guidelines 2000, are as follows:

> "5.3.5 Undertaking 5.3.5.1 The issuer shall submit an undertaking to the Board to the effect that transactions in securities by the `promoter', the 'promoter group' and the immediate relatives of the promoters during the period between the date of filing the offer documents with the Registrar of Companies or Stock Exchange as the case may be and the date of closure of the issue shall be reported to the stock exchanges concerned within 24 hours of the transaction(s).
>
> 5.3.6 List of Promoters Group and other Details.
>
> 5.3.6.1 The issuer company shall submit to the Board the list of the persons who constitute the Promoters Group and their individual shareholding.
>
> 5.3.6.2 The issuer company shall submit to the Stock Exchanges on which securities are proposed to be listed, the Permanent Account Number, Bank Account Number and Passport Number of the promoters at the time of filing the draft offer document to them."

9.3. In fact, it is based on the said Guidelines, in the Investment Agreement Clause 11.7 contains an indemnity clause by the petitioners in favour of the second respondent by treating the petitioners as promoters and the second respondent as VC Investor, which is as follows:

> "11.7. INDEMNIFICATION: The Promoters and the Company hereby agree jointly and severally to indemnify and keep indemnified the VC Investor and each of its Affiliates and agree to hold each of them harmless from and against any and all damage (including any claim, charge, action, depletion or diminution in value of the assets of the Company or the Ordinary Shares), loss, liability and expense (including, without limitation, reasonable expenses of investigation and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding) (hereinafter referred to as "Loss") incurred or suffered by the VC Investor or any of its Affiliates arising out of any misrepresentation or breach of warranty, covenant or agreement made or to be performed by the Promoters or the Company pursuant to this Agreement."

9.4. Therefore, the term "Promoter" as per SEBI Guidelines is only in respect of the instructions to Merchant Bankers relating to issue of capital with various stipulations, including the rights and obligations of the promoters, which is evident from the very Clause 11.7 of the Investment Agreement, wherein the petitioners indemnify the second respondent and to that extent of indemnity towards the second respondent, the petitioners are treated as promoters as per the SEBI Guidelines. Otherwise, it cannot be said that the petitioners alone are promoters within the concept of Corporate Law.

9.5. In fact, the petitioners are termed as promoters only for the purpose of safeguarding the interest of the second respondent and to that limited extent as per the lock-in period mentioned in the SEBI Guidelines and that has been consciously incorporated under Clause 15.8 of the Investment Agreement as follows:

> "Clause 15.8. LOCK IN PERIOD: The Promoters undertake to submit such number of shares for lock-in as may be required under the SEBI Guidelines for Disclosure and Investor Protection prevailing at that time and/or any other regulatory authority. In the event that the VC Investor' are considered to be promoters of the Company under any regulation then in force, due to their shareholding in the Company exceeding a certain percentage or otherwise, the Promoters agree to negotiate a solution to ensure that the VC Investor are not considered "promoters" including without limitation, purchasing from the VC Investor, such excess number of shares, which would otherwise be required to be submitted for lock-in by the VC Investor."

9.6. By the said Clause, the petitioners have specifically excluded the second respondent within the meaning of promoters of the Company to ensure that the second respondent, as Venture Capital Investor, is not considered as a promoter without limitation and therefore, the term "promoter" has been restricted towards the petitioners alone only to safeguard the interest of the second respondent-Investor.

9.7. The Company Law Board in the impugned order itself narrates about various protections which are conferred to VC Investor under various clauses of the Investment Agreement, but has chosen to state that the letter and spirit of the Investment Agreement does not support the plea that the second respondent is a joint promoter of the Company. This is certainly an erroneous finding. The further finding by the Company Law Board that the fourth respondent was made a permanent Director of the first respondent-Company pursuant to the Investment Agreement and not at the time of formation of the Company is also factually incorrect, since, on record, it is shown in the Memorandum and Articles of Association of the first respondent-Company that the fourth respondent is the first and permanent Director of the first respondent-Company even at the time of its inception, namely on 6.2.2006. The manifest error committed by the Company Law Board in this regard by not distinguishing the status of a person as a promoter in the incorporation of the Company and the term "promoter" for the purpose of SEBI Guidelines is a patent error and is a total mis-appreciation of the terms of the Investment Agreement in relation to the term "promoters".

9.8. By applying the General Law of Corporations which has been consistent from the beginning to the facts and circumstances of the present case, as narrated above, during the pre-incorporation stage of the first respondent-Company, it has to be necessarily held that the second respondent-Company has jointly floated the first respondent-Company, as it is seen in the Memorandum of Understanding dated 8.2.2006, which was just two days after the incorporation of the first respondent-Company along with the petitioners. The second respondent and also the first respondent-Company have specifically admitted that the Creative Port Development Private Limited as a Project Development Company jointly floated by Creative Infrastructure (the petitioners partnership) and the Infrastructure Project Development Fund (IPDF), a fund promoted by SREI Infrastructure Private Limited, Calcutta, which is the sixth respondent to which the second respondent is a wholly owned subsidiary.

9.9. Therefore, on law, this is a patent error committed by the Company Law Board in holding as if the second respondent cannot be treated as a promoter for the purpose of the Act, ignoring the fact that the Investment Agreement intends to magnify the petitioners as promoters only to protect the second respondent-Investor and that itself shall not take away the real fact as admitted between the parties and the Memorandum of Understanding dated 8.2.2006 wherein the parties have specifically admitted the joint participation of the second respondent in promoting the first respondent-company.

9.10. Be that as it may, now that it is clear that the facts of the case show that it is not as if the second respondent is being made liable for any pre-incorporation liabilities either towards the petitioners or towards any third parties or towards the first respondent-Company, the finding as to whether the second respondent is also a promoter of the first respondent-company is purely academic. In spite of the same the matter has been dealt with in some detail only for the purpose of making out the legal position clear in respect of the conduct of the parties in the pre-incorporation stage.

10.1. The Memorandum of Understanding dated 8.2.2006 entered between Maytas Infra Private Limited and Nagarjuna Construction Co. Ltd. on the one hand and SREI Infrastructure Finance

Limited and the first respondent-Company on the other hand, wherein the first two parties are termed as MAYTAS-NAGARJUNA Combine, while the second parties, viz., SREI Infrastructure Finance Limited and Creative Port Development Pvt. Ltd., are jointly called SICP makes it clear that MAYTAS-NAGARJUNA Combine were already qualified in the development of Machilipatnam Port Project of Government of Andhra Pradesh and they approached the Creative Infrastructure, the partnership of the petitioners, for assistance and joint participation in the bid process and it was in those circumstances, the second party, as stated above, was considered to supplement the already qualified MAYTAS-NAGARJUNA Combine for submitting a proposal for development of Machilipatnam Port Project on BOOT basis (build, own, operate and transfer basis) and in that agreement there was a consensus to share the equity between MAYTAS-NAGARJUNA Combine and SICP at the rate of 51:49, agreeing thereby that the said percentage will be adopted after the successful award of the project based on which a Special Purpose Vehicle (SPV) was agreed to be constituted. Out of the 49% allotted to SICP, the SICP has to identify the Port Operator to whom 11% is to be given as an equity stake and accordingly, Sarat Chatterjee & Co. (VSP) Private Limited was identified as the Port Operator to whom 11% should go by retaining the remaining 38% between the SICP.

10.2. Under the said Memorandum of Understanding dated 8.2.2006, SICP has been entrusted with the responsibility of traffic studies to assess the hinterland, apart from identifying and appointing technically competent agency for conducting bathymetry in the identified region of the port mouth and for designing the port concept layout and appointing a competent agency to assess and prepare traffic report in a phased manner, while MAYTAS-NAGARJUNA were entrusted the responsibility for all strategic relations with the Government and Port region information for bid finalization.

10.3. It is also further agreed under the Memorandum of Understanding, which was a pre-bid arrangement in respect of the Machilipatnam Port Project, that the Memorandum of Understanding will be valid up to the earliest of the following two events:

> "10. This MOU will be valid up to the earliest of the following event:
>
> Rejection of the proposal submitted by the Maytas Nagarjuna Combine & SICP led Consortium.
>
> Entering into a more detailed shareholders' agreement between SICP and/or its associate and Maytas Nagarjuna Combine upon winning of the project by the Consortium."

10.4. On the same day, viz., 8.2.2006, there was another Memorandum of Understanding entered between the Consortium of Maytas Infra Private Limited, Nagarjuna Construction Company Limited, SREI Infrastructure Finance Limited, Kolkata and Sarat Chatterjee & Co (VSP) Private Limited on the one hand and Creative Infrastructure, the partnership of the petitioners, on the other hand. The said Memorandum of Understanding shows that it was MAYTAS as a lead member of the Consortium, who along with Nagarjuna Construction Company Limited has submitted their bid for the Machilipatnam Port Project of Government of Andhra Pradesh and were financially qualified,

while to make further proposal as per the stipulations laid down in the Request for Proposal (RFP), having found that Creative Infrastructure, partnership of the petitioners, have strong BOT Port Development experience in the development of Kakinada Port privatization, Dhamra Port development, Haldia Port Development, etc., sought support from Creative Infrastructure in the bidding process and subsequently, on the development of the port upon success.

10.5. In that Memorandum of Understanding also it is stated that the Creative Infrastructure, the partnership of the petitioners, shall undertake the traffic study for the proposed port at Machilipatnam and develop a phased market plan and the said Creative shall associate with the Consortium till the award of the project and upon successful award till commencement of commercial operations of the port on the terms to be mutually agreed.

10.6. It was in accordance with the combined effect of the said two Memorandums of Understanding dated 8.2.2006, a Consortium Agreement came to be entered on 25.3.2006 among M/s.Maytas Infra Private Limited as a first party, M/s.Nagarjuna Construction Company Limited as a second party, M/s.SREI Infrastructure Finance Limited, the second and sixth respondent, as a third party and M/s.Sarat Chatterjee & Co. (VSP) Private Ltd., as a fourth party.

10.7. In the Consortium Agreement dated 25.3.2006, neither the petitioners nor the first respondent-Company are parties, while the second and sixth respondents are parties to the same. It is in the said Consortium Agreement, the advertisement of the Government of Andhra Pradesh (GOAP) calling for Expression of Interest (EOI) dated 26.9.2005 and 8.10.2005 in respect of the selection of a Developer for Machilipatnam Port was stated as under:

> "The Transport, Roads & Buildings (Ports) Department, Government of Andhra Pradesh hereinafter referred to as "GOAP", invites sealed proposals for Development of a modern, multipurpose, all weather, deep water port at Machilipatnam in Krishna District, Andhra Pradesh, India, on BOOT (Build, Own, Operate and Transfer) basis, hereinafter referred to as "PROJECT"."

10.8. The contents of the earlier Memorandums of Understanding dated 8.2.2006 that MAYTAS and NAGARJUNA Combine have submitted Expression of Interest is mentioned in the following words in the Consortium Agreement:

> "The proposals are due for submission on 29th March 2006 and in the line with the requirements of the proposal and so as to make a strong and competitive proposal the shortlisted Consortium has inducted additional members with a view to strengthen the Consortium with port specific experience and also fulfilling certain stipulations of the RFP."

This shows that in order to fulfill Request for Proposals additional members are inducted, which probably means the induction of the Creative Infrastructure, namely the partnership of the petitioners and may also include SICP, namely the combination of the sixth respondent and the first respondent, as stated in the Memorandum of Understanding dated 8.2.2006, referred above.

10.9. Even though such clause about the additional members is provided in the said Consortium Agreement under which a Special Purpose Company (SPC) was agreed to be incorporated on award of contract by the Government of Andhra Pradesh to the Consortium to undertake the project, the nominated members of the Consortium are stated as follows:

> "a. Mr.T.Nagarjuna .. MAYTAS b. Mr.Chiranjeevi Rao .. NCC c. Mr.T.K.Bharathan .. SREI d. Mr.B.Rama Gopal .. SCC"

10.5. It is also specifically stated in Clause No.5 of the Consortium Agreement that "it is agreed that the Members of the Consortium shall be jointly and severally liable for the implementation of the PROJECT". There is also an arbitration clause under the Consortium Agreement, further stating that the Consortium Agreement shall be terminated on the happening of following two events:

> "a. Rejection of the Bid submitted by the Consortium.
>
> b. Upon formation of the SPC and subscribing to the equity in the SPC in the proportion mentioned in clause No.4 above."

10.6. Under Clause 4 of the Consortium Agreement the shareholdings and roles and responsibilities of each member in the SPC after the same is incorporated on award of contract by the Government of Andhra Pradesh was stated as follows:

> MAYTAS 40% (forty) Lead Member/Developer/ Contractor NCC 11% (eleven) Member/Co-Developer/Contractor SREI 38% (thirty eight) Member/Co-Developer/Terminal Marketing SCC 11% (eleven) Member cum O&M operator 10.7. Admittedly, this Consortium Agreement does not contain either the petitioners as partners or the first respondent-Company as parties. While it is the contention of the petitioners that the Machilipatnam Port Project of Government of Andhra Pradesh is the project of the first respondent-Company, the reason given in not including the first respondent-Company either in the Memorandum of Understanding dated 8.2.2006, wherein Creative Infrastructure, partnership, is alone made as a party, or in the Consortium Agreement dated 25.3.2006 is that the first respondent-Company was in the infant stage having been incorporated only on 6.2.2006 and therefore, its name has not been incorporated, but still the first respondent-Company is one of the parties to the project.
>
> 10.8. The contents of the email dated 28.3.2006 sent by the second and sixth respondents to the first respondent-Company, relied upon by the petitioners to substantiate that even though under the Consortium Agreement in respect of the Machilipatnam Port Project dated 25.3.2006 the first respondent-Company was not a party, the first respondent forms part of the project, is as follows:
>
> "All payments to consultants etc vil have to be paid from CPDP, SREI vil fund CPDP for such expenses as loan. I m working out the modalities of the investment in CPDP.

> This being year end, vil probably transfer funds in first week of April.
>
> The bill u sent is related to Machilipatnam port which is jointly done by us and Maytas. Isn't this bill supposed to be borne by the concerned JV. Also what is the total pre op cost for this project ??
>
> Best regards:
>
> Bajrang Kumar Choudhary Vice President SREI Infrastructure Finance Limited 86C, Topsla Road (South) Kolkata-700 046."

It is to be remembered that at the time of the said email, the Investment Agreement dated 26.5.2006 between the second respondent and the petitioners has not come into existence.

10.9. It was on 20.1.2007, the Government of Andhra Pradesh issued a Letter of Intent (LOI) to M/s.Maytas Infra Private Limited, Hyderabad directing the said Maytas to furnish performance security for Rs.10 Crores based on the Request for Proposal (RFP) document in the form of an unconditional and irrevocable bank guarantee from a scheduled bank in India acceptable to Government of Andhra Pradesh and also directed Maytas to pay Rs.1 Crore as project development fund, of which 50% was to be paid at the time of signing the Concession Agreement as first instalment and the balance as second instalment on the date of financial closure.

10.10. The email of the first respondent-Company dated 12.4.2006 addressed to Mr.Farooque refers to the Consortium Agreement to be signed among the Consortium members and it also refers to various financial particulars about the Members of the Consortium signed by the Company Secretary or Auditor or Chartered Accountant, etc. But, by the time the said email was sent by the first respondent-Company, the Consortium Agreement has already been signed in respect of Machilipatnam Port Project on 25.3.2006 itself, in which neither the first respondent nor the petitioners were made as parties. It shows that without the knowledge of the Consortium Agreement, the first respondent has chosen to send the said email on 12.4.2006.

10.11. The email of Bajrang Chowdhary, Vice President, SREI Infrastructure Finance Limited, dated 3.5.2006 addressed to the first respondent shows that there has been some exchange of views between the petitioners on behalf of the first respondent-Company and the second and sixth respondents and during the course of the discussion the contents of the Investment Agreement have been considered, while, on fact, the Investment Agreement has not come into existence on the said date and was entered only on 26.5.2006.

10.12. The Government of Andhra Pradesh by letter dated 8.5.2006 addressed to Maytas asked for certain clarifications regarding the technical proposals titled "project design/ construction/ development/ operation / management experience for similar port projects". The clarification required by the Government of Andhra Pradesh runs as follows:

> "Bidder has furnished details of experience of Creative Infrastructure with whom only a Memorandum of Understanding is signed. They do not form a part of the Consortium. However, the main capability of the Consortium for port development is claimed from this company. Therefore, Bidder should submit a definite commitment from Creative Infrastructure."

10.13. The above said clarification required by the Government of Andhra Pradesh shows that there has been some communication from Maytas to the Government regarding the experience of the Creative Infrastructure based on the Memorandum of Understanding dated 8.2.2006 and the Government was conscious that Creative Infrastructure was not a party to Consortium and insisted for a definite undertaking or commitment from the Creative Infrastructure. The said letter also shows that the Government has not required such commitment from the first respondent-Company, but from the petitioners as partners of Creative Infrastructure based on their technical competency. Even though by the time the letter was sent by the Government on 8.5.2006 the first respondent-Company has already come into existence on 6.2.2006 itself, there is no reference about the first respondent-Company in the said letter dated 8.5.2006.

10.14. While replying the said letter of the Government of Andhra Pradesh dated 8.5.2006, the second and sixth respondents, through its Vice President Bajrang Choudhary, in the letter dated 19.5.2006, has stated as under:

> "With reference to your letters mentioned above and with specific reference to point no.18 therein, we wish to clarify that we are a member of the consortium for this project. Our share in this project would be undertaken through a Special Purpose Port Development Vehicle named Creative Port Development Company Private Limited (CPDP), wherein M/s.Ramani Ramaswamy and R.Rangarajan (joint promoters of Creative Infrastructure) hold substantial stake as individual investors and prime promoters of the company. Therefore the owners M/s.Ramani Ramaswamy and R.Rangarajan of M/s.Creative Infrastructure would have a direct commitment in the development of Machilipatnam Port. This is further to the already signed MOU between Creative Infrastructure and the Consortium for the development & operation of the Port.
>
> This we hope would clarify the commitment and binding nature of Creative Infrastructure's role in the development of the port for the Consortium."

10.15. No doubt, it is true that in this letter dated 19.5.2006, the said respondents have referred to the first respondent-Company stating that it would undertake the project as a Special Purpose Port Development Vehicle and that the petitioners are holding substantial stake as prime promoters of the said Company. The said letter, however, states that the petitioners, as partners of Creative Infrastructure, would have commitment in the development of the Machilipatnam Port Project, thereby referring to the Memorandum of Understanding already entered between the Consortium and Creative Infrastructure dated 8.2.2006, referred supra.

10.16. In the reply dated 24.5.2006 to the clarification as sought for by the Government of Andhra Pradesh in its letter dated 8.5.2006, the Lead Member Maytas has clarified about the constitution of SREI Infrastructure Finance Limited with a list of its Directors, apart from the list of Key Management Personnel of Maytas and various particulars about Sarat Chatterjee & Co. (VSP) Private Limited have been given with all technical particulars regarding the staff in the management as well as the skilled workers level, apart from tariff structure and in respect of Point No.18, Maytas have informed the Government as follows:

> "As mentioned in our bid document, an MOU has been entered into with Creative Infrastructure for assisting/advising us in port development.
>
> This MOU shall be converted into an agreement upon award of the project."

10.17. Obviously, Maytas has referred about the second Memorandum of Understanding dated 8.2.2006 entered between Maytas as Lead Member and the petitioners as Creative Infrastructure (partners). In the said clarification, there are absolutely no particulars given about either the first respondent-Company or about the petitioners themselves as partners of Creative Infrastructure in respect of Machilipatnam Port Project, except referring about the second Memorandum of Understanding dated 8.2.2006, as stated above.

10.18. It is relevant to remember that at that stage the second and sixth respondents SREI has 38% share in the Machilipatnam Port Project as per the Consortium Agreement dated 25.3.2006.

10.19. As stated above, while awarding contract in respect of the Machilipatnam Port Project, the Government of Andhra Pradesh has granted it only to Maytas and in the said order dated 20.1.2007 there is nothing to show that the grant of project to Maytas is depending upon the participation of the first respondent-Company.

10.20. It was in that background, the Investment Agreement came to be entered on 26.5.2006 between the newly constituted scheme of SREI Venture Capital Trust called Infrastructure Project Development Fund, the trust having been incorporated and registered as Venture Capital Fund under SEBI (Venture Capital Funds) Regulations, 1996 called as "VC Investor" represented by the second respondent, which is a company registered under the provisions of the Act, as Investment Manager of VC Investor as a party of the first part, the petitioners referred to as promoters as a party of the second part and the first respondent-Company as a party of the third part.

10.21. As per the said Investment Agreement, in addition to the present paid up equity share capital of the first respondent-Company which was Rs.3 Lakhs comprising in 30000 ordinary shares which were subscribed to by the petitioners as its promoters - each 15000 shares, VC Investor has agreed to subscribe to 70000 equity shares as fresh shares of face value of Rs.10/- each aggregating to the fresh share capital of Rs.7 Lakhs, thereby making VC Investor, represented by the second respondent-Company as its Investment Manager, as 70% shareholder in the first respondent-Company, while the shareholdings of the petitioners as promoters remained as 30%.

10.22. The said Investment Agreement also defines Creative Infrastructure as partnership firm consisting of the petitioners and refers to the second respondent-Company as an Investment Manager of the Infrastructure Project Development Fund. The term "Project Development Expenses" is defined as:

> "1.1.33. "Project Development Expenses", means the expenses incurred by the Company to operate, identify, develop and procure the identified Projects either through the MOU route or through Tender participation or any other innovative process."

10.23. As per Schedule-5 of the said Investment Agreement, the fourth respondent, who has been termed as First and Permanent Director in the Memorandum and Articles of Association of the first respondent-Company, was recognized as a nominee Director of Infrastructure Project Development Fund with two more nominee directors. It is not in dispute that the third and fifth respondents were nominated by the Infrastructure Project Development Fund as the Directors, who were of course nominated only pursuant to the Investment Agreement dated 26.5.2006, while the already existing permanent Director, viz., the fourth respondent, who was nominated from the date of incorporation of the first respondent-Company, has been re-designated as nominee Director of Infrastructure Project Development Fund after the Investment Agreement has come into existence.

10.24. Under the Investment Agreement, which in effect has made some change in the basic documents of the first respondent-Company, one of the petitioners was made to continue as the Managing Director and the VC Investor was empowered to nominate the Directors based on which the nominations have been made and the management has been vested with the Board consisting of the Directors, including the nominee Directors of the second respondent. Clause 8 of the Investment Agreement confers rights to VC Investor, which shows that the management of the first respondent-Company is under its control, while the Managing Director post remains with one of the petitioners. The financial control of the petitioners has been restricted to the minimum of 30% of the issued and paid up capital of the company at all times.

10.25. The pre-emption right of the petitioners as promoters of the first respondent-Company has been waived under the terms of the Investment Agreement. As enumerated above, Clause 11.7 of the Investment Agreement indemnifies VC Investor jointly by the petitioners and the first respondent-Company in respect of any loss or liability or expenses incurred by VC Investor by the conduct of the petitioners as well as the first respondent-Company.

10.26. In respect of the powers of the Board of Directors, Clause 13 of the Investment Agreement makes it clear that any decision or resolution of the Board which may affect the borrowing, amalgamation, etc. shall be with the concurrence of VC Investor's Director voting in favour of such resolution, which includes any change in the corporate name, address of the company or any of its divisions, branches, works or offices, etc., as it is seen in Clause 13.1.9.

10.27. Clause 16 of the Investment Agreement relates to the undertakings of the VC Investor in providing of financial support to the Company and the undertakings of the Key Promoters to the VC

Investors that they would devote their full time for the business of the Company and the petitioners are to concentrate on the project of the first respondent, except three projects, viz., (i) M/s.Marg Constructions Limited; (ii) M/s.Rajakkamangalam Thurai Development Trust; and (iii) M/s.Thengapattinam Fishing Harbour Development Trust, in respect of which the Creative Infrastructure, partnership of the petitioners, has already entered agreements.

10.28. As per Clause 17 of the Investment Agreement, in the event the petitioners, being promoters, want to sell their shares, the pre-emption right has been given to VC Investor.

10.29. There is also a clause regarding dispute resolution and arbitration under Clause 23 of the Investment Agreement. It is also stated that in cases where there is conflict between the terms of the agreement and the Memorandum and Articles of Association and the new Memorandum and Articles of Association provided in the agreement, the new Memorandum and Articles of Association as per the agreement shall prevail.

10.30. Therefore, an overall reading of the Investment Agreement makes it clear that it is by virtue of the investment made by VC Investor, through the second respondent, the second and sixth respondents developed a control over the first respondent-Company and the funding agreed by VC Investor is in respect of the projects of the first respondent-Company. The Investment Agreement nowhere speaks about either the Machilipatnam Port Project about which various terms have been discussed admittedly between Maytas and the second respondent, in which the second respondent has joined the petitioners either as partners of Creative Infrastructure or otherwise, or about the Subarnarekha Port Project.

11.1. As stated above, the Government of Andhra Pradesh has granted the project to the Lead Member of the Consortium Maytas as per its letter dated 20.1.2007 and required Maytas to furnish a performance security of Rs.10 Crores. Pursuant to the said letter, it is seen that Maytas in the letter dated 25.1.2007 addressed to the Government of Andhra Pradesh has enclosed the performance security amount of Rs.10 Crores in the proper format provided by Maytas and Nagarjuna Construction Company equally on behalf of the consortium and seeking permission to replace the said two guarantees with guarantees from all four members of the consortium equally, namely Mayta, NCC, SREI and SARAT.

11.2. In the letter of the second respondent dated 15.3.2007 addressed to the Government of Andhra Pradesh, while referring to the Consortium Agreement dated 25.3.2006 and also the Memorandum of Understanding dated 8.2.2006, in addition to the clarification issued by Maytas in the letter dated 24.5.2006, the second respondent has informed the Government of Andhra Pradesh that the petitioners as owners of M/s.Creative Infrastructure have direct commitment in the development of the said port.

11.3. By the subsequent letter dated 21.6.2007 addressed to the Government of Andhra Pradesh, the second respondent has reiterated that the 38% obligation of the consortium member, viz., SREI will be through the first respondent-Company, which is based on the Investment Agreement dated 26.5.2006 entered between the second respondent and the petitioners along with the first

respondent-Company.

11.4. By letter dated 10.7.2007, Maytas, viz., the Lead Member of the Consortium to whom the contract has been awarded by the Government of Andhra Pradesh in respect of Machilipatnam Port Project, have only forwarded the above said letter of the second respondent informing that the equity portion of 38% of SREI for Machilipatnam Port Project will be through the Creative Port Development Company as an associate of the second respondent.

11.5. The Government of Andhra Pradesh in its letter dated 15.6.2007 addressed to Maytas, obviously referring to the letter of the second respondent through Bajrang Chowdhary, Vice President, SREI Infrastructure Finance Limited dated 19.5.2006 straight-away addressed to the Government of Andhra Pradesh and the subsequent letter dated 15.3.2007 has informed, by referring to Clause 4.4 of Request for Proposal (RFP) issued to the bidders, that any change in the consortium without approval of the Government would lead to disqualification of the bidder and that any communication can be made only through the Lead Member Maytas to whom the contract has been awarded.

11.6. While there is no difficulty to construe that the second respondent being one of the members of the Consortium Agreement dated 25.3.2006 is bound to meet 38% in respect of the Machilipatnam Port Project with Lead Member-Maytas, it has been only the case of the second respondent that under the Investment Agreement between it and the petitioners and the first respondent, the petitioners and the first respondent being experts should also meet the liabilities. That itself cannot be construed to mean that Machilipatnam Port Project which has been awarded to the Lead Member-Maytas, on behalf of the consortium to which the second respondent is a member, is a project of the first respondent-company, while admittedly neither the petitioner nor the first respondent is a member of the consortium.

11.7. It was after referring to the letter of the Government of Andhra Pradesh dated 15.6.2007, quoting Clause 4.4. of the Request for Proposal threatening to cancel the contract, the second respondent by subsequent letter dated 6.11.2007 addressed to the Government of Andhra Pradesh has withdrawn its earlier letter dated 21.6.2007. It is this letter which is sought to be the reason for the petitioners to agree for making exit of the second respondent from the first respondent-Company completely by fearing that the new project from Orissa, viz., Subarnarekha Port Project also would be spoiled by improper funding of the second respondent.

11.8. It is the case of the petitioners that it was due to that reason the new Memorandum of Understanding was entered on 14.11.2007 and that was alleged to be a conduct of oppression on the part of the second respondent, being a majority shareholder of the first respondent-Company. The oppression sought to be raised against the second respondent in this regard was that due to the non-funding of Machilipatnam Port Project, the petitioners as well as the first respondent-Company had to be compelled to enter Memorandum of Understanding on 14.11.2007 agreeing to part away a huge amount of Rs.52.50 Crores for Subarnarekha Port Project and for sale of the interest held in Machilipatnam Port Project to the extent of Rs.35 Crores. In fact, the pleadings in this regard show that the petitioners have specifically pleaded that the conduct of the second respondent regarding

Machilipatnam Port Project in not providing bank guarantee to the Government of Andhra Pradesh is only in breach of the Investment Agreement.

11.9. It is relevant to point out that the petitioners and the first respondent-Company issued legal notice to Maytas-NCC stating that they are interested in the Machilipatnam Port Project and without their consent the same should not be executed, marking copies of the said notice to various officers of the Government of Andhra Pradesh, including the Chief Secretary, Special Secretary to Government, Principal Secretary to the Chief Minister and Principal Secretary, Finance Department, Government of Andhra Pradesh. In the reply issued to the said legal notice on behalf of Maytas on 5.3.2008, it has been made clear that neither the petitioners nor the first respondent-Company have any right or interest over the Machilipatnam Port Project and are not the parties to Consortium Agreement dated 25.3.2006 and that a reference to the Memorandum of Understanding dated 8.2.2006 is of no avail as in the subsequent Consortium Agreement dated 25.3.2006, the petitioners and the first respondent were not made parties, also stating that they are not parties to the Special Purpose Vehicle, viz., Vajra Seaport Private Limited.

11.10. The Company Law Board while dealing with the said aspect, having found that the Consortium Agreement dated 25.3.2006 is conspicuously silent on the participation of the first respondent-Company in implementation of the Machilipatnam Port Project, has relied upon the contents of the Consortium Agreement that the consortium has inducted additional members with a view to strengthen the consortium with port specific experience and also to fulfill the stipulations of Request for Proposal and therefore, it should be deemed that the additional members should be Creative Infrastructure as well as the first respondent-Company in terms of the Memorandums of Understanding dated 8.2.2006, and has come to a conclusion that the Machilipatnam Port Project is the project of the first respondent-Company.

11.11. It is very strange that the Company Law Board to arrive at such a conclusion has relied upon a letter of Maytas dated 22.4.2006 wherein a reference has been made to the expertise of Creative Infrastructure, of which the petitioners are partners, and inasmuch as Creative Infrastructure has entered into a Memorandum of Understanding on 8.2.2006 and by the communication of the second respondent dated 19.5.2006 and 15.3.2007 has made a commitment that the first respondent-Company, wherein the petitioners are holding substantial stake, would have direct commitment in the development of Machilipatnam Port Project, ignoring the fact that even by the conduct of the second respondent if it is incumbant on it as per the Investment Agreement between it and the petitioners dated 26.5.2006, inasmuch as neither the petitioners nor the first respondent-Company are, admittedly, members of the Consortium Agreement dated 25.3.2006, neither the petitioners nor the first respondent-Company can be made members of the Consortium to which the contract was awarded by Government of Andhra Pradesh.

11.12. Again, in my considered view, the Company Law Board has committed gross error in concluding that the first respondent-Company is a party to the award of the contract of Machilipatnam Port Project by Government of Andhra Pradesh due to reason that Maytas, the Lead member of Consortium Agreement has enclosed its letter of assurance to the first petitioner and the second respondent in the email dated 17.5.2007 sent to the first respondent-Company and informed

that SREI portion of equity would be contributed by the first respondent and therefore, it should be presumed that the Machilipatnam Port Project is that of the first respondent-Company. There is absolutely no reason for arriving at such a conclusion. Even assuming that the second respondent has taken a stand that as a member of the Consortium for which contract was granted its portion of contribution to the Machilipatnam Port Project will be contributed through the first respondent, the non-funding by the second respondent towards the project cannot at all be deemed as either a conduct oppressive to the first respondent-Company or against the interest of its members.

11.13. The further finding that the letter of intent dated 20.1.2007 issued by the Government of Andhra Pradesh in favour of Maytas, Lead Member of Consortium shall form part of the Concession Agreement dated 21.4.2008 between Government of Andhra Pradesh and Vajra, and that it makes an unequivocal commitment of Maytas and the second respondent, acted upon by the petitioners and Government of Andhra Pradesh and therefore, it should be presumed that the petitioners as far as the first respondent-Company form part of the consortium is certainly a perverse finding.

11.14. A reference to the Concession Agreement dated 21.4.2008 makes it very clear that the contribution of equity capital after concession is in the form of 51% for Maytas-NCC Combine and 49% for the second respondent and Sarat Chatterjee & Co. (VSP) Pvt. Ltd. The shareholding pattern is specifically stated as follows:

> "3.4. Shareholding Pattern in SPC The Authorised Share Capital of the Special Purpos Company is Rs.1 Million. This maybe increased from time to time if required. The subscribed capital of this Special Purpose Company is Rs.1 Million.
>
> In the equity share capital of the Concessionaire, not less than 51% and 13% of the total subscribed equity capital will be held by the lead member of the Consortium along with Nagarjuna Construction Company Limited and other Associate and Affiliate companies and Port Operator respectively, atleast till the expiry of 5 years from the Commercial Operations Date.
>
> The equity capital of the Concessionaire shall be contributed by the Consortium Members by cash as follows:
>
> (a) Maytas Infra Ltd and (40%)
>
> (b) Nagarjuna Construction Company Limited (11%) Both (a) and (b) combined to contribute 51%, subject to minimum of 26% from (a)
>
> (c) SREI Infrastructure Finance Limited (38%) and Sarat Chatterjee & Co. (Visakhapatnam) Private Limited (11%) The lead member of the Consortium shall have Control over the Associate and Affiliate companies as shown in (b) above. "Control" shall mean:

(i) control over the appointment and removal of majority of the board of directors of the company; or

(ii) control of at least 26% (twenty-six percent) of the issued equity share capital and voting power of the company."

11.15. There is nothing to presume under the Concession Agreement as if the first respondent-Company or the petitioners as Creative Infrastructure have become party to the awarding of contract by Government of Andhra Pradesh in respect of Machilipatnam Port Project. Merely because there is a private agreement between the second respondent and the petitioners and the first respondent-Company for the purpose of financing under the Investment Agreement, in the absence of any proof to show that the Machilipatnam Port Project has been awarded to the first respondent-Company, it cannot be held by any stretch of imagination that even in the absence of any contribution by the second respondent towards its share under the Concession Agreement to the Government of Andhra Pradesh, by sharing with Maytas, the lead member, the same can be taken as an oppression on the part of the second respondent towards the first respondent-company based on the Investment Agreement dated 26.5.2006. In such circumstances, the withdrawal of an earlier letter by the second respondent addressed to the Government of Andhra Pradesh dated 6.11.2007 is in no way connected with the first respondent-Company and its objects and functions.

11.16. If that be so, the second respondent's letter of withdrawal cannot be taken as a failure of fiduciary responsibility or suppression of any material fact made either by the second respondent or by the other respondents, who are the nominee directors. In such circumstances, the consequential finding by the Company Law Board as if there is a loss caused to the business and profit of the first respondent-Company has absolutely no meaning.

11.17. A further reference to the letter of Vajra Seaport Private Limited dated 29.4.2008 calling upon the second respondent to contribute the first call of Rs.19 Crores out of the total equity amount of 38%, which certainly proves the involvement of the second respondent in the project, cannot be a ground for the Company Law Board to come a conclusion that the second respondent has proposed to exit from Machilipatnam Port Project for a consideration of Rs.52.50 Crores based on an email communication of the third respondent dated 30.10.2007.

11.18. The email of the third respondent dated 30.10.2007 addressed to Maytas with the following clause namely "it has been agreed upon that a sum of Rs.15 Cr is to be paid on signing of this agreement, and the balance of Rs.35 Cr within 7 days of the occurrence of point no.3.2(b)" and the subsequent email by Maytas dated 3.11.2007 has been taken into consideration by the Company Law Board to come to a conclusion that the second respondent and Sarate Chatterjee & Co. (VSP) Private Limited have agreed to sell their equity shares held in Vajra in favour of Maytas and NCC and the subsequent allotment of shares in Vajra to third parties as it is found out from Form-2 dated 22.9.2008, are all not absolutely relevant for the purpose of deciding the issue about the oppression stated to have been committed by the second respondent towards the first respondent-Company.

11.19. The reliance placed by the Company Law Board on Section 88 of the Indian Trust Act, 1882 for the purpose of arriving at a conclusion that the second respondent has obtained unjust benefit in the Machilipatnam Port Project by not funding adequately and the subsequent result of sale of its share towards Maytas and NCC amounts to breach of trust and therefore, the second respondent is liable to repay the 30% of benefit received out of the said conduct is totally uncalled for.

11.20. As I have stated earlier, inasmuch as on admitted facts it is seen, as it is also found by the Company Law Board, that the first respondent-Company is not a party to the Consortium Agreement to which the Government of Andhra Pradesh has granted the contract, the mere failure of the second respondent as one of the members of the consortium in fulfilling its obligation towards the Government of Andhra Pradesh is only harmful to the lead member-Maytas to whom the contract was granted and if in their process of negotiation the second respondent is asked to go out of the project for a consideration, it cannot be said that the second respondent should disclose his interest in the said project to the first respondent-Company or the petitioners, being its Directors. There is absolutely no question of fiduciary relationship in this regard and the application of Section 88 of the Indian Trusts Act is totally misconceived.

11.21. It is relevant to point out that it is not even in the pleadings of the petitioners that in respect of Machilipatnam Port Project the second respondent and other respondents stood in fiduciary relationship. There is nothing to show that Machilipatnam Port Project has been granted to Maytas based on the obligation of the second respondent towards the first respondent-Company under the Investment Agreement dated 26.5.2006.

11.22. Section 88 of the Indian Trusts Act reads as follows:

> "Section 88. Advantage gained by fiduciary - Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

11.23. While making a director liable under the fiduciary relationship with the company, the conduct must be relating to the affairs of the company. In any event, respondents 3 to 6 cannot be mulcted with the liability. Law is settled that duty to disclose on the part of a Director in relation to his conduct towards the company in fiduciary relationship and that the director should not be permitted to retain the benefit of any contract entered on behalf of the company and such breach will be termed as violation of fiduciary relationship, as it was held by the Privy Council in Cook v. G.S.Deeks, AIR 1916 PC 161. The dictum laid down by the Privy Council cannot be made applicable to the facts and circumstances of the present case to make respondents 3 to 6 liable under the concept of fiduciary relationship.

11.24. Taking into consideration the overall picture that in the letter of intent by the Government of Andhra Pradesh dated 20.1.2007, the first respondent was not a party and contract was awarded only to Maytas, Lead Member of the Consortium, to which the second respondent is a party along with others, that in the Concession Agreement dated 21.4.2008 entered between the members of Vajra and the Government of Andhra Pradesh, the first respondent-Company is not a party, and neither the first respondent nor the petitioners conduct has ever been discussed in the Concession Agreement and that apart from Maytas, NCC and Sarat Chatterjee & Co. (VSP) Pvt. Ltd., it was only the second respondent who was a party, and that in the shareholders agreement dated 3.3.2008, which is an agreement entered again between Maytas, NCC, SREI and Sarat Chatterjee & Co. (VSP) Pvt. Ltd., wherein the Maytas-NCC Group and SREI-SCPL Group have been collectively called as Vajra Sea Port Private Limited, the petitioners or the first respondent-Company is not a party and there is no reference about them anywhere in the said agreement, it is patently improper for the Company Law Board to consequently direct respondents 2 to 6 to reimburse in favour of the first respondent-Company 30% of all benefits enjoyed by the second respondent from and out of the Machilipatnam Port Project as on 30.3.2008.

11.25. A reference to the pleadings, especially relating to the finding of the Company Law Board as if there is a breach of fiduciary duty on the part of the respondents 2 to 6, shows that there is nothing in the Company Petition filed by the petitioners in that regard. What is stated in the pleading in respect of Machilipatnam Port Project is that the second respondent pursuant to the obligation under the Consortium Agreement with Maytas, NCC and Sarat has failed to contribute the amount of 38% to the Government of Andhra Pradesh, by which the benefit of the project could not be enjoyed by the first respondent-Company. That is merely based on the Memorandum of Understanding dated 8.2.2006. Consequently, that has resulted in the petitioners, who in the meantime got another project from Government of Orissa - Subarnarekha Port Project, feel that the second respondent would not fund in accordance with the Investment Agreement dated 26.5.2006 and out of that fear they were compelled to enter into a Memorandum of Understanding dated 14.11.2007, thereby the second respondent has agreed to go out of the first respondent-Company on receipt of consideration of Rs.52.50 Crores and that it is the only ground as far as the Machilipatnam Port Project is concerned as could be seen in the pleadings before the Company Law Board.

11.26. In such factual situation, it cannot be said that the breach of fiduciary relationship has been pleaded by the petitioner before the Company Law Board. Law is well settled as it was held by the Supreme Court in Sangramsinh P.Gaekwad and others v. Shantadevi P.Gaekwad (Dead) through Lrs. And others, [2005] 11 SCC 314=AIR 2005 SC 809, by referring to a judgment of the Calcutta High Court in In re Bengal Laxmi Cotton Mills Ltd., [1965] 35 CC 187 (Cal), that:

> "200. It is now well settled that a case for grant of relief under Sections 397 and 398 of the Companies Act must be made out in the petition itself and the defects contained therein cannot be cured nor the lacuna filled up by other evidence oral or documentary. (See Bengal Luxmi Cotton Mills Ltd., In re,[1965] 35 CC 187 (Cal))"

11.27. In the absence of such pleading regarding fiduciary relationship, the finding and the consequential decision of the Company Law Board as directed in 9(ii) is perverse. In any event, making the nominated directors of the second respondent, namely respondents 3 to 5 liable to indemnify to the extent of 30% to the petitioners is absolutely unwarranted and cannot be accepted by any stretch of imagination.

11.28. The reliance placed on the judgment of the Madras High Court in Syed Mohamed Ali v. M.R.Sundaramurthy and others, MANU/TN/0089/1958=AIR 1958 Madras 587=[1958] 2 MLJ 259 for the Company Law Board to come to a conclusion that even without a prayer a wider power is available under Section 402 of the Act, is not applicable to the facts and circumstances of the present case. It is true that under Section 402 of the Act there is ample jurisdiction to the Company Law Board in the larger interest of the company and the public interest to investigate. It is also true that even in the absence of specific prayer in the petition under Section 397 of the Act, the powers of the Court to investigate under Section 402 of the Act are wider. But that does not mean that in the absence of specific plea of breach of fiduciary relationship, the court can enter into the same to hold that there is a breach of fiduciary relationship. In any event, as held by the Supreme Court, as stated above, even for a grant of relief under Section 397 of the Act, a case must be made out in the petition which cannot be cured at a later stage, even if lacuna is found out by evidence which is oral or documentary. On the factual matrix which has been discussed above, in this case there is absolutely nothing for any one to presume that there has been any breach of fiduciary relationship.

12.1. The next submission relating to improper funding is actually connected with Subarnarekha Port Project of Government of Orissa predominantly.

12.2. The said complaint relating to funding by the second respondent and its obligation thereof emanates from the Investment Agreement dated 26.5.2006. As already elicited above, the funding obligation of VC Investor on behalf of the second respondent is as per Clause 3.1 wherein VC Investor has agreed to support the projects and extend or arrange Project Development Expenses to be incurred by the first respondent-Company for the identification, development and procurement of the BOT projects identified. The said Project Development Expenses include the fixed organizational expense agreed to by the Board of the first respondent-Company and also the expenses incurred by the Company in developing the various projects identified under the Broad Business Plan to be agreed between the parties.

12.3. Even as per the petitioners the only two projects of the first respondent-Company which were undertaken after its incorporation were the Machilipatnam Port Project of Government of Andhra Pradesh and Subarnarekha Port Project of Government of Orissa. As far as Machilipatnam Port Project is concerned, as I have analyzed in detail earlier, the complaint is that in respect of Rs.10 Crores claimed against the Consortium Agreement by its Lead Member-Maytas, the second respondent, being one of the members of the Consortium, has not contributed towards performance security. It is not the complaint of Maytas, the Lead Member, against the second respondent that the second respondent has not performed its function as per the Consortium Agreement. Even if such complaint is made by Maytas, in the context of my holding that Machilipatnam Port Project cannot be treated as a project of the first respondent-Company, any such complaint by Maytas against the

second respondent cannot be made available either to the first respondent-Company or the petitioners to bring home the complaint of oppression under Section 397 of the Act towards the first respondent-Company by the second respondent. Even the petitioners as partners of Creative Infrastructure or as Directors of the first respondent-Company to contribute the share of the second respondent to the extent of 38% arose only from the Investment Agreement dated 26.5.2006. Inasmuch as under the Investment Agreement Maytas is not a party, there is nothing to infer that in respect of the affairs of the first respondent-Company there has been oppression on the part of the second respondent in non-furnishing of performance security in accordance with the letter of intent by the Government of Andhra Pradesh dated 20.1.2007.

12.4. There is nothing on record to show that in accordance with the said Clause 3.1 of the Investment Agreement, there has been any decision of the Board of the first respondent-Company regarding the expenses to be funded by the second respondent as VC Investor. It is only in the email of the first petitioner dated 20.2.2007, being a Director of the first respondent-Company, addressed to the second respondent, by which based on the terms and spirit of the Investment Agreement, the first petitioner has referred for the first time about the requirement of Rs.50 Crores towards strategic expenses and bank guarantee margin. In the said letter, he has also chosen to refer about Rs.25 to 30 Lakhs as strategic expenses for Subarnarekha Port Project complaining about the second respondent in not forwarding the same.

12.5. The Company Law Board in the impugned order, while dealing about the said strategic expenses and other allegation of non-funding of the second respondent, decided that the second respondent has not performed its obligation of funding as per the Investment Agreement and having found that there was no approval from the Board of the Company for such request for funding has concluded that such approval from the Board has been waived by the second respondent. The Company Law Board has also relied upon the principles of legitimate expectation arising from the agreement and undertaking to decide that the conduct of the second respondent has infringed the proprietary rights of the petitioners which would constitute an act of oppression in the affairs of the first respondent-company.

12.6. The judgment which has been relied upon by the Company Law Board for arriving at the above-said conclusion in order to pass appropriate orders under Section 402 of the Act is Government of West Bengal v. Chatterjee Petrochem (Mauritius) Co. and Others, [2008] 143 Company Cases 837 (Cal). In that case the issue involved was relating to the question of transfer of 155 million shares held by West Bengal Industrial Development Corporation Ltd. to Chatterjee Petrochem (Mauritius) Co. and that transfer was effected as per the agreement dated 12.1.2002 between Haldia Petrochemicals Limited and such transfer was sought to be effected hurriedly on the basis of circular resolution and that was contended to be a conduct against the affairs of Haldia Petrochemicals Limited in a manner prejudicial to the public interest and oppressive to the petitioners before the Company Law Board. It was also contended that such transfer would bring a material change in the management of Haldi Petrochemicals Limited which will be prejudicial to the interest of the members. On such factual matrix, the Calcutta High Court has held that the same is not relating to the affairs of the Haldia Petrochemicals Limited and therefore, the petition under Section 397 of the Act cannot be decided by the Company Law Board on such factual circumstances.

The relevant portion of the judgment is as follows:

> "In my view, the question is whether regarding the question of transfer of the said 155 million shares by the WBIDC in terms of the agreement dated January 12, 2002, the HPL was competent or supposed to do anything; and if the answer is in the affirmative, then it must be held that it was one of its affairs. Mr.Bimal Chatterjee, in my opinion, is right in saying that though the HPL was a party to the agreement dated January 12, 2002, it was not competent or supposed to take any decision or to do any other thing regarding the question of transfer of the said 155 million shares by the WBIDC to the CP(M)C, or to its nominee the CP(I)PL that entered into a separate agreement dated March 8, 2002, with the WBIDC. The agreement dated March 8, 2002, was not an agreement between shareholders of the HPL, the CP(I)PL that was deemed to have pledged the deemed transferred and delivered shares was not a shareholder of the HPL. Simply because the HPL subsequently wrote letters seeking confirmation from the WBIDC whether it had transferred those shares, and seeking the IDBI's decision regarding approval of the transfer, I do not think it can be said that the matter became an affair of the HPL. To my mind, the Board committed an error of law by holding that the question of transfer of the said 155 million shares was an affair of the HPL.
>
> .....
>
> I therefore do not see how the question of transfer of the said 155 million shares could be considered an affair of the HPL. Hence, I hold that the board was not competent to decide anything connected with that question while considering the company petition under Section 397."

12.7. The Division Bench of the Madras High Court in Shoe Specialities P. Ltd. and others v. Standard Distilleries and Breweries P. Ltd. and others, MANU/TN/0114/1996, while considering about the term "affairs of the company" under Section 397 of the Act with the corresponding Section 210 of the English Companies Act, relied upon its earlier Division Bench judgment in Syed Mahomed Ali v. R.Sundaramurthy, [1958] 28 Company Cases 554 = [1958] ILR 838 (Mad), observed that the decision of the English Court and its technicalities cannot be made applicable in the Indian context and held that Section 402 and 406 of the Act give ample jurisdiction to the Court to dispose of the matter in the interest of the Company. The relevant portion is as under:

> "34. A Division Bench of our High Court considered a similar question and the decision is Syed Mahomed All v. R. Sundaramurthy [1958] 28 Comp Cas 554; [1958] ILR 838 (Mad). At page 845, the corresponding sections of the English Act and the Indian Act were compared and the Bench held thus:
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> "The learned Advocate-General referred to the decision in Antigen Laboratories Ltd., In re [1951] 1 All ER 110 (Ch D) and a passage from Buckley's Company Law at page 1091, in support of the proposition that a petitioner seeking relief under section 210

of the English Companies Act which corresponds to section 397 of the (Indian) Companies Act should state in the prayer in clear terms the general nature of the relief sought, whether it be for the appointment of a director or of some other kind. His contention was that in the petition the only relief prayed for was regulation of the conduct of the affairs of the company in future and not in regard to any action against the directors for the alleged malfeasance and misfeasance. That may be so, but the petition contains an elaborate statement of the charges against the directors and an investigation into those charges would be necessary even for the purpose of regulating the affairs of the company. We do not think that the absence of any formal prayer in the petition under section 397 would entitle the court to refrain from investigating into the various charges levelled against the directors. In Gower's Modern Company Law (second edition), at page 513, the scope of section 210 of the English Act which corresponds to section 397 of the (Indian) Companies Act is discussed and referring to the Cohen Report, on which the section in the English Act was based, the learned author says 'that it was the intention that the court should "have power to impose upon the parties whatever settlement the court considers just and equitable". While recognising that the court could not be expected in every case to find and impose a solution it was thought that its discretion must be unfettered for it is impossible to lay down a general guide in the solution of what are essentially individual cases'. Referring to the decision in Antigen Laboratories Ltd., In re [1951] 1 All ER 110 (Ch D), the learned author says 'that it has been held that the petitioner cannot just ask the court to exercise its discretion but must indicate the nature of the relief wanted. This decision though perhaps inevitable seems regrettable and inconsistent with the intention that the court should have power to find and impose a solution'. The decision of the English court was, as pointed out by the learned author, the result of the procedure of the English High Courts 'which was ill adapted for the exercise of the inquisitorial and constructive role thus imposed upon the court'. We are not hampered by such rigid technicalities of procedure and if the minority in a company complains of an oppression and discloses certain grounds of complaint in the petition which are made the basis follow the relief, we would hold that the court should ordinarily investigate the charges. Such investigations may in certain cases be necessary even to regulate the future conduct of the company for providing against recurrence of such abuses of power by the majority. We are, therefore, of opinion that notwithstanding the omission in the petition to pray for relief against the delinquent directors, an enquiry into the charges against them was properly within the scope of the petition. Sections 402 and 406 of the (Indian) Companies Act give ample jurisdiction to the court to dispose of the matter in the larger interests of the company.""

It was also further held that:

"36. ..... In our view, therefore, the position is clear that while acting under section 398 read with section 402 of the Companies Act, the court has ample jurisdiction and very wide powers to pass such orders and give such directions as it thinks fit to

> achieve the object and there would be no limitation or restriction on such power that the same should be exercised subject to the other provisions of the Act dealing with normal corporate management or that such orders and directions should be in consonance with such provisions of the Act."

12.8. In Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. and others, AIR 1981 SC 1298= [1981] 3 SCC 333, while referring to Section 397 of the Act and Section 210 of the English Companies Act and also taking note of the dictionary meaning of the word "oppression" in the light of the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer, [1959] AC. 324 wherein it was termed as "burdensome, harsh and wrongful", observed as follows:

> "46. Coming to the law as to the concept of oppression , Section 397 of our Companies Act follows closely the language of Section 210 of the English Companies Act of 1948. Since the decisions on Section 210 have been followed by our Court, the English decisions may be considered first. The leading case on oppression under Section 210 is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer [1959] AC. 324. Taking the dictionary meaning of the word oppression , Viscount Simonds said at page 342 that the appellant-Society could justly be described as having behaved towards the minority shareholders in an oppressive manner, that is to say, in a manner burdensome, harsh and wrongful . The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that Section 210 warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view . Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr.Meyer and Mr.Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members . Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of Section 210 (page 344, per Lord Keith; pp. 368-69, per Lord Denning)."

After analyzing the various decisions and construction of Section 397 of the Act, the Supreme Court has held as follows:

> "54. It is clear from these various decisions that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as a shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had

> suggested the substitution of the word oppression in Section 210 of the English Act by the words unfairly prejudicial in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see Gower s Company Law, 4th Edn., page 668). But that recommendation was not accepted and the English law remains the same as in Meyer and in Re H.R. Hartner Ltd., [1959] WLR 62 as modified in Re Jermyn St. Turkish Baths, [1971] 3 All ER 184 (CA). We have not adopted that modification in India."

12.9. It is by referring to the said judgment of Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. and others, referred supra, the Division Bench of the Madras High Court in Shoe Specialities P. Ltd. and others v. Standard Distilleries and Breweries P. Ltd. and others, referred supra, has held as follows:

> "39. Even if the unlimited powers expounded by the various decisions are not exercised, the decision in Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. MANU/SC/0050/1981 will be of some help. In that case, their Lordships said that in a given case even if the case of oppression is not proved, substantial justice must be done between the parties and the parties must be placed as nearly as may be in the same position if they could have been placed. The relevant portion of the said paragraph 172 reads thus (at page 845 of 51 Comp Cas) :
>
> "Even though the company petition fails and the appeals succeed on the finding that the holding company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same position in which they would have been, if the meeting of May 2, were held in accordance with law.""

12.10. In Sangramsinh P.Gaekwad and others v. Shantadevi P.Gaekwad (Dead) through Lrs. And others, referred supra, while deciding about Section 397 read with Section 402 of the Act and the jurisdiction of the Court, it was observed that there are wide powers to the Court while exercising jurisdiction under Section 402 of the Act, but it is not in all cases relief can be given and the same must be depending upon the exigencies of the situation and a decision can be arrived at only on analyzing the materials. The observations are as follows:

> "181. The jurisdiction of the court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. (See Bennet Coleman & Co. v. Union of India, [1977] 47 Comp Cases 92 (Bom) and Syed Mahomed Ali v. R. Sundaramoorthy. AIR 1958 Mad 587). But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analysing the materials

> brought on record that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress a minority of the members including the petitioners vis-a-vis the entire body of shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding up of the company but such winding-up order would be unfair to the minority members. The interest of the company vis-a-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956."

It was also held in that case that when a complaint is made on the contractual right, for initiating action under Section 397 of the Act an extraordinary situation must be brought to the notice of the Court since the power of the Court under Section 402 of the Act is far-reaching in its character. The relevant portion is as under:

> "185. It has to be borne in mind that when a complaint is made as regards violation of statutory or contractual rights, the shareholder may initiate a proceeding in a civil court but a proceeding under Section 397 of the Act would be maintainable only when an extraordinary situation is brought to the notice of the court keeping in view the wide and far-reaching power of the court in relation to the affairs of the company. In this situation, it is necessary that the alleged illegality in the conduct of the majority shareholders is pleaded and proved with sufficient clarity and precision. If the pleadings and/or the evidence adduced in the proceedings remains unsatisfactory to arrive at a definite conclusion of oppression or mismanagement, the petition must be rejected."

It was also held by the Supreme Court that even in cases where no instance of oppression has been made out relief can be granted to render substantial justice, as under:

> "199. In a given case the court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties."

12.11. These legal principles which have been crystallized by hierarchy of judgments are not in dispute. But, the question is, on the facts and circumstances of the case, when the allegation made by the petitioners is that there was improper funding by the second respondent as per the Investment Agreement, while the second respondent being a party to the Investment Agreement had the obligation of funding in respect of Machilipatnam Port Project towards the Lead Member, Maytas, as per the Consortium Agreement dated 25.3.2006, there is absolutely no reason to conclude that in respect of the affairs of the first respondent-Company there is an extraordinary situation to grant relief which is far-reaching in its nature by holding as if the affairs of the first respondent-Company have been prejudicially conducted by the second respondent being the

majority shareholder particularly with reference to the Machilipatnam Port Project.

13.1. In respect of Subarnarekha Port Project, the Memorandum of Understanding dated 18.12.2006 entered between the Government of Orissa and the first respondent-Company imposes an obligation on the first respondent-Company to furnish a security deposit in the form of bank guarantee for a value of Rs.2.50 Million within three weeks of signing of the Memorandum of Understanding and that Memorandum of Understanding is attested by the fourth respondent as one of its attesting witnesses. Ultimately, the Concession Agreement for development of Subarnarekha Port was entered only on 11.1.2008 giving concession period of 34 years, including maximum period of four years for construction and the commencement date is mentioned in Clause 2.1 as date on which items (1) and (2) of the port premises as per Clause 2.20 along with land for adequate road connectivity is given to the first respondent by the Government of Orissa. The said Clause 2.1 is as follows:

> "2.1. Commencement Date: Commencement date means the date on which the physical possession of items (1) and (2) of the port premises as defined in clause 2.20 alongwith Land for adequate road connectivity for port construction purposes is given to CPDP by Government."

13.2. The formation of Special Project Company has been contemplated under Clause 2.4, which is as follows:

> "2.4. Formation of Special Project Company (SPC): It is recognized by the parties that the CPDP is in the process of promoting a Special Project Company (hereinafter called SPC) which will be a body corporate incorporated under the Indian Companies Act, 1956, with its registered office in the State of Orissa. CPDP and its Subsidiaries shall hold not less than 51% (fifty one percent) of total equity capital subscribed of the SPC which shall be locked till In-Operation Date. This body corporate shall be duly incorporated prior to the commencement date. It is agreed by the parties hereto that the CPDP shall be entitled to subrogate all its rights and obligations under this agreement in the form of an instrument in favour of the said body corporate which the Government consents. Before granting the subrogation, the CPDP shall inform the Government in respect thereof and all necessary steps shall be carried out by the parties to give effect to the said subrogation within 30 days from the date of such information.
>
> After the subrogation, the new body corporate (SPC) shall be recognized by the Government for all legal and operational purposes. It is further agreed that the CPDP shall cause to provide suitable required letter from the new body corporate (SPC) consenting to the above arrangement and for the smooth implementation and the SPC shall be the successor to the rights, duties and obligations under this agreement of CPDP."

13.3. The term "Port Premises" as referred to in Clause 2.1, is defined in Clause 2.20 as follows:

> "2.20 Port Premises: Port premises means and include (1) land (including submerged land) and water area as notified by the Government as port limit given on lease to the CPDP (2) all structures and facilities constructed or provided by the Government on premises sub component (1) above; (3) land reclaimed by the CPDP during the pendency of this agreement (4) additional tenanted land acquired or to be acquired by the Government for providing of port service during the pendency of this agreement, (5) all structures and facilities including modifications constructed or provided by the CPDP or its sub-contractors or any other assignees on port premises sub components(1) to (4) above during the pendency of this agreement and (6) economic corridor including road and rail facilities, wayside amenities."

13.4. It is not in dispute that Government of Orissa has not yet allotted the lands as per the said Concession Agreement and therefore, the same is in a preliminary stage. However, for the purpose of providing the performance guarantee since the second respondent has not come forward, it is the case of the petitioners that they have raised the amount personally by creating encumbrance of their own property, which includes that of their near relatives, and raised an amount of Rs.1 Crore to pay the same to Government of Orissa. Therefore, as far as the Subarnarekha Port Project is concerned, the basic contention of the petitioners is that they have been made to raise funds of their own initiative at the cost of their personal properties due to the failure of the second respondent in funding for the project as per the Investment Agreement. Hence, the question is whether that can be treated as an instance of oppression which will be otherwise available as a ground for the extreme step of winding up of the company under Section 433 of the Act on just and equitable grounds.

13.5. In this regard, it is relevant to note that the second respondent in the letter dated 23.1.2008 has replied to the first petitioner stating that they continue their commitment towards the investments in respect of the projects. As far as the Subarnarekha Port Project is concerned, as it is revealed from the communications exchanged between the first respondent-Company and the Government of Orissa, it is clear that it is in the preliminary stage, but it is not known as to what prompted the petitioners to take the pain of creating encumbrance of their private properties for raising Rs.1 Crore to pay to the Government of Orissa. While there are no documents to show that the second respondent has deliberately refused to fund for Subarnarekha Port Project, there are records to show that the second respondent has taken objection regarding the strategic expenses of Rs.50 Crores. It is not the case of the petitioners that the second respondent in its funding position is not capable of extending funds. A consideration of the said fact along with the letter of the second respondent dated 23.1.2008 makes it clear that even though Subarnarekha Port Project is a project of the first respondent-Company and the funding obligation of the second respondent is in relation to the affairs of the company as per Section 397 of the Act, inasmuch as the entire project itself is in preliminary stage and no damage has been caused to the project, one cannot come to a conclusion that due to the said isolated incident an extraordinary circumstance is in existence to warrant interference by this Court normally to wind up the company and in order to avoid the same to invoke the powers under Section 397 read with Section 402 of the Act.

13.6. It is apposite to point out at this stage the resolution of the Board of Directors of the first respondent-Company dated 7.11.2007 authorizing to avail Bank Guarantee from AXIS Bank,

R.K.Salai to the extent of Rs.10 Millions (Rupees One Crore) in favour of the Government of Orissa. The said resolution is as under:

> "RESOLVED THAT the consent of Board of Directors of the Company be and hereby given for applying for and availing Bank Guarantee from AXIS Bank, R.K.Salai Branch, Chennai (hereinafter referred to as "Bank"), to the extent of Rs.10.00 Millions (Rupees Ten Millions only) in favour of The Government of Orissa, in terms of the Memorandum of Understanding entered with the Government of Orissa, a precondition to signing of the Concession Agreement.
>
> RESOLVED FURTHER that the consent of Board of Directors of the Company be and hereby given for depositing a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) in Fixed Deposit Account with the Bank, and the bank is hereby authorised to mark lien on the same, towards Margin Money payable by the company in respect of the above bank guarantee.
>
> RESOLVED FURTHER that a banking account for the Company be opened with AXIS Bank Ltd at R.K.Salai Branch in Chennai and following persons are responsible to operate the account in the manner given below:
>
> Mr.Ramani Ramaswamy .. Director OR Mr.R.Rangarajan .. Director And Mr.Naveen Bansal .. Director RESOLVED FURTHER that Sri R.Rangarajan and Sri Ramani Ramaswamy, Directors, are individually authorised to sign/execute the applications, undertakings and all other documents as may be required by the Bank in this regard.
>
> RESOLVED FURTHER that the common seal of the company be affixed on the documents, wherever required, in the presence of Sri R.Rangarajan and Sri Ramani Ramaswamy, Directors, who shall countersign the same in witness thereof.
>
> RESOLVED FURTHER a copy of the resolution, duly certified by one of the Directors, be furnished to the Bank for their records."

13.7. The above referred to resolution dated 7.11.2007 shows that the amount authorised relates to Subarnarekha Port Project and it is also significant to note that the petitioners are individually authorised to give undertakings and sign/execute all documents as per the requirement of the Bank. By the time the said resolution was passed, the Subarnarekha Port Project has come into existence by award of the same in the form of Memorandum of Understanding with the Government of Orissa dated 18.12.2006, while the Concession Agreement with the Government of Orissa in respect of the said project was entered long afterwards, viz., on 11.1.2008.

13.8. It is immediately after the passing of the said resolution dated 7.11.2007, a Memorandum of Understanding was entered on 14.11.2007 by which it is stated that the second respondent has opted to come out of the first respondent-Company for a consideration, coupled with the subsequent email of the third respondent Naveen Bansal dated 15.11.2007 addressed to the petitioners. Therefore, it

is clear that in respect of Subarnarekha Port Project, the petitioners have taken up the personal responsibility at their own risk on the mortgage of the flats owned by them and accordingly, a Concession Agreement was obtained from the Government of Orissa on 11.1.2008. This is also factually found by the Company Law Board in its impugned order. While so, it cannot be said that there has been any oppression on the part of the second respondent, since the petitioners have consciously taken a decision to involve themselves in the Subarnarekha Port Project by excluding the second respondent probably based on the Memorandum of Understanding dated 14.11.2007, as stated above, along with the subsequent letter of the third respondent dated 15.11.2007.

13.9. In such view of the matter, there is no question of any detriment suffered by the petitioners as the members or promoters of the first respondent-Company in whatever name they are called. But, that is not the issue. The real issue lies in the Memorandum of Understanding dated 14.11.2007 stated to have been entered between the petitioners on the one hand and the second and third respondents as Infrastructure Project Development Fund (IPDF) on the other hand, in which the second respondent which is managing IPDF has expressed its intention to sell its investment in the first respondent-Company to the petitioners. The said Memorandum of Understanding is as under:

> "It is hereby agreed between the Parties as follows:
>
> 1. Infrastructure Project Development Fund, (IPDF) a fund managed by SREI Venture Capital Ltd (SVCL) (a wholly owned subsidiary of SREI Infrastructure Finance ltd), having its registered office at "Vishwakarma" 86C, Topsia Road (South) Kolkata-700 046, intends to sell its investments in Creative Port Development Pvt Ltd (CDCP), having its registered officat at "Mahalakshmi", 1st Floor, New No.290, Peters Road, Gopalapuram, Chennai-600 086, to prospective investors / Investment Company to be brought in by M/s.Ramani Ramaswamy, residing at New No.84, Old No.50, DAKSHIN, 1st Avenue, Indra Nagar, Adyar, Chennai 600 020 and R.Rangarajan residing at 149, Krishnamachari Nagar, V Street, Alapakkam, Porur Post, Chennai-116.
>
> 2. The potential investors would be starting their due diligence for the investments in CDCP by 15th November 2007 and will complete by 31st January 2008.
>
> 3. Once the due diligence is completed to the satisfaction of the investors, the payment will be made by 28th February, 2008 at a consideration to be mutually agreed upon.
>
> 4. M/s.Ramani Ramaswamy and R.Rangarajan will get the Concession Agreement signed with the Government of Orissa for the Subarnarekha Port Project within thirty days from the date of issue of Government Order and take all necessary steps to take the project forward.

This Undertaking will be valid till 28th February, 2008, within which if the transaction of the investments does not get concluded, then this Understanding will become null and void."

13.10. In the above said Memorandum of Understanding dated 14.11.2007, there is no reference about the consideration to be received by the second respondent for the purpose of sale of its interest in the first respondent-Company. The words in paragraph (3) of the said Memorandum of Understanding are to the effect that once the due diligence is completed to the satisfaction of the investors (the second respondent), consideration has to be mutually agreed upon. The said Memorandum of Understanding also authorised the petitioners to get Concession Agreement signed with the Government of Orissa. Admittedly, immediately thereafter the Concession Agreement has been signed with the Government of Orissa on 11.1.2008, during the time when the Memorandum of Understanding was kept valid, which was up to 28.2.2008.

13.11. From the above, it is clear that the petitioners have acted upon the Memorandum of Understanding signed by the third respondent on behalf of the Infrastructure Project Development Fund and that the negotiations between the parties have fructified into a concrete term of consideration to be paid to the second respondent for the exit of the second respondent from the first respondent-Company, as it is seen from the email of the third respondent sent on behalf of the second respondent-Company addressed to the petitioners dated 15.11.2007, in which it is stated as follows:

> "This has reference to the MOU that we signed on 14/11/07 between us for the takeover of IPDF portion of the investments. In this regard please note that the total consideration for this stake sale inclusive of all equity, preference shares, convertible bonds issued and funding / work undertaken by SREI Capital Markets for the DPR for Subarnarekha Port shall be Rs.52.5 Crores (Rupees fifty two crores and fifty lakhs only).
>
> This total amount shall be paid as per mutually agreed break-up."

13.12. The sequence of events make it clear that the second respondent has consciously accepted for the Memorandum of Understanding dated 14.11.2007 and has agreed to receive the consideration of Rs.52.50 Crores to sell the equity, preference shares, convertible bonds and funding/work undertaken by the second respondent in respect of the Subarnarekha Port Project, which is the only other project of the first respondent-Company.

13.13. In this regard, the contention of Mr.Sudipto Sarkar, learned Senior Counsel appearing for the petitioners is relevant. It is his submission that when once the second respondent under Memorandum of Understanding dated 14.11.2007 has decided to go out of the first respondent-Company at least in respect of the Subarnarekha Port Project, no useful purpose will be served in continuing the said respondents with the first respondent-Company. Further, the categoric terms by which the second and third respondents in the email dated 15.11.2007 agreed to receive an amount of Rs.52.50 Crores in consideration for the sale of all their rights in the first respondent-Company relating to Subarnarekha Port Project are certainly binding upon the said respondents, who cannot rescind from the undertaking specifically given by them. Therefore, the contention raised on behalf of the appellants by their respective counsel, including the Senior Counsel Mr.S.N.Mookherjee, Mr.A.L.Somayajee, Mr.P.Raman and Mr.P.Arvind Datar that the

direction of the Company Law Board in the impugned order directing the second respondent to transfer its shares and go out of the first respondent-Company on consolidated price of Rs.52.50 Crores would amount to specific performance of the Memorandum of Understanding dated 14.11.2007, cannot be accepted.

13.14. A reference to the Memorandum of Understanding dated 14.11.2007, as extracted above, makes it clear that there is nothing to be enforced as per its terms. But the parties have acted upon the said Memorandum of Understanding which is evidenced from the fact that the petitioners have approached the AXIS Bank for raising fund for the purpose of providing Bank Guarantee for Subarnarekha Port Project on their own and that the third respondent on behalf of the second respondent by email dated 15.11.2007 has agreed to receive the amount of Rs.52.50 Crores in full and final claim towards all the rights in the first respondent-Company at least in respect of Subarnarekha Port Project. Therefore, it cannot be said that the Company Law Board has directed the parties to enforce the Memorandum of Understanding dated 14.11.2007. The Memorandum of Understanding is not an enforceable one, but the subsequent conduct of the third respondent makes it clear that the second respondent has agreed to exit from the first respondent-Company and it is only the undertaking of the second respondent which has been directed to be performed by the second respondent in the impugned order of the Company Law Board which is well within its jurisdiction. The relief granted by the Company Law Board in paragraph 9(i) of the impugned order is only as per the undertaking of the second respondent and cannot be said to be a decision that there has been any oppression committed by the second respondent and therefore, the second respondent has been directed to go out of the company as a matter of penalty for such oppression.

13.15. In Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535, when a question arose while deciding about the conduct under Section 397 of the Act based on a finance agreement in respect of which the allotment of share of the company should be made, while in the agreement the company was not a party and the agreement was not also adopted in the Articles of Association, it was found:

> "20. The main plank of the appellant's case to prove oppression is the agreement of July 27, 1954, between himself and Patnaik and Loganathan. At that time he was not a member of the company. It is not disputed that the company was not a party to that agreement and is thus strictly speaking not bound by its terms. Bat even apart from this strict legal aspect of the matter, let us see what exactly the agreement provides. At that time Patnaik and Loganathan groups held shares of the value of Rs. 21 lakhs in the company, and the main provision of the agreement is that the share capital would be increased and the appellant would be given shares of the face value of Rs.10,50,000 so that his holding should be equal to the holdings of the other two groups. It also provides that the three groups would have an equal number of representatives on the board of directors and the appellant would be its chairman. Other provisions of the agreement refer to matters of detail to which it is unnecessary to refer. It will be seen, however, that there is no provision in the agreement as to what would happen if and when the share capital was actually increased beyond the increase envisaged at the time of the agreement. There is also no provision in the agreement to the effect that the articles of association of the private company as it

> then was would be amended suitably to bring the provisions of the agreement with respect to shareholding and the board of directors into line with the agreement. Thus there is nothing in the agreement about the future in the matter of allotment of shares in case capital was actually increased thereafter."

The Supreme Court, on the facts of the said case, held that the haste with which the allotment of shares has been made cannot be held to be an oppression in the following words:

> "27. It is, however, urged that the haste with which the new shares were issued on July 30, 1958, shows a design to harm the appellant as a minority shareholder. It is no doubt true that the shares were issued in haste. But, as we have already indicated, the company was in need of money for expansion and its getting the loan from the Industrial Finance Corporation also depended upon the increase of subscribed share capital. Therefore, the haste with which the shares were allotted on July 30, 1958, cannot really be said to be a part of a design to oppress the minority. The haste became necessary because the interim injunction was vacated on that day and it was felt that if immediate action was not taken and the new shares allotted, there might be further injunction which would further delay the issue of shares and getting the loan from the Industrial Finance Corporation. The haste therefore appears to have occurred because of the action taken by the appellant in bringing a suit and getting a temporary injunction. It was feared that even after the vacation of the temporary injunction the appellant would go in appeal and get another injunction from the appeal court. This fear was justified because the subordinate judge's court two hours later withheld the operation of its order vacating the temporary injunction. The haste in the particular circumstances of the case in allotment of shares cannot therefore lead to any inference of oppression but arose out of circumstances brought about by the appellant's conduct.", and ultimately, it was held as follows:
>
> "30. The case of oppression, therefore, based on the agreement of July, 1954 as the sheet-anchor of the appellant's case must fail. In the first place that agreement was strictly speaking not binding even on the private company--it was much less binding on the public company when it came into existence in 1957. The agreement did not contain any specific provision as to future issue of capital. Further, at the time when the agreement took place the appellant was not even a member of the private company and it was really an agreement between a non-member and two members of the company, which would go to show that the agreement could in no circumstances bind the company."

Therefore, there is nothing to conclude on the facts and circumstances of the case on hand as if the Company Law Board under the impugned order has directed specific performance of the Memorandum of Understanding dated 14.11.2007.

13.16. It is well established that even in cases where on analyzing the facts while deciding an issue under Section 397 of the Act it is decided that oppression has not been made out, it is not as if the

Courts are powerless in giving solution since the remedy under Sections 397 and 402 of the Act is equitable in nature. That was the law laid down by the Supreme Court in Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. and others, referred supra, in the following words:

> "174. We must mention that we have rejected the charge of oppression after applying to the conduct of Devagnanam and his group the standard of probity and fairplay which is expected of partners in a business venture. And this we have done without being influenced by the consideration pressed upon us by Shri Nariman that Coats and NEWEY, who were two of the three main partners, were not of one mind and that NEWEY never complained of oppression. They may or they may not. That is beside the point. Such technicalities cannot be permitted to defeat the exercise of the equitable jurisdiction conferred by Section 397 of the Companies Act. Shri Seervai drew our attention to the decision in Blissett v. Daniel, 68 E.R. 1024, the facts of which as they appear at pp 1036-37, bear, according to him, great resemblance to the facts before us. The following observations in that case are of striking relevance:
>
> As has been well observed during the course of the argument, the view taken by this Court with regard to morality of conduct amongst all parties-most especially amongst those who are bound by the ties of partnership- is one of the highest degree. The standard by which parties are tried here, either as trustees or as co-partners, or in various other relations which may be suggested, is a standard, I am thankful to say so, far higher than the standard of the world ; and, tried by the standard, I hold it to be impossible to sanction the removal of this gentleman under these circumstances. (p 1040) Not only is the law on the side of Devagnanam but his conduct cannot be characterized as lacking in probity, considering the extremely rigid attitude adopted by Coats. They drove him into a tight corner from which the only escape was to allow the law to have its full play.
>
> 175. Even though the company petition fails and the appeals succeed on the finding that the Holding Company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same position in which they would have been, if the meeting of 2nd May were held in accordance with law."

As enumerated above, in that judgment, the Supreme Court has distinguished Section 210 of the English Companies Act where the interference under the caption "oppression" was permissible only in cases where the issue is "burdensome, harsh and wrongful", while under Section 397 of the Act such technicalities are held to be not applicable.

13.17. That was the consistent view of the Supreme Court as confirmed in the later judgment in Sangramsinh P.Gaekwad and others v. Shantadevi P.Gaekwad (Dead) through Lrs. And others, referred supra, wherein the Supreme Court has held in no uncertain terms, after analyzing the entire case law on the said issue including the English and Indian Law, as follows:

> "199. In a given case the court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties."

13.18. The said position has also been reiterated in Kamal Kumar Dutta and another v. Ruby General Hospital Ltd. and others, 2006 AIR SCW 4594=[2006] 134 Company Cases 678 (SC), wherein the Supreme Court has distinguished Sections 397 and 398 of the Act, and held as follows:

> "As per Section 397, any person who is eligible to apply under Section 399, can apply before the CLB that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up. If the Tribunal is satisfied that there exists a situation where the business of the company is being conducted in a manner prejudicial to the interest or in a manner oppressive to any member or members and that winding up of the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, it may with a view to bringing to an end the matters complained of, make such order as it deems fit. Therefore, what it transpires in the present context is, we have to examine whether the acts of the company were oppressive to any member or members justifying the winding up as just and equitable. It is not necessary that in every case, the relief of winding-up should be made. It is an option with the Tribunal if it considers that in order to bring to an end the matters complained of, it can pass orders for winding-up if it is just and equitable or it can pass such order as it thinks fit. It does not necessarily mean that in every case such winding-up order need be passed. Similarly, under Section 398 also, if the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or that a material change not being a change brought about by, or in the interests of any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, the Tribunal can order winding-up of the company in order to bring to an end of all these mismanagement or make such order as it thinks fit. The condition of Section 399 of the Act is also equally applicable in the present case. In fact, Section 398 talks much about the mismanagement, or apprehension of mismanagement in the affairs of the company. As against this, Section 397 deals with oppression of the members. Therefore, both Sections 397 & 398 to some extent have commonality for the purpose like, prejudicial to public interest and application for winding-up can be made by members as per Section 399. Apart from this commonality, for the purpose

> of Section 397, if the company acts in a manner oppressive to any member or members and if it otherwise justifies on the ground of just and equitable, then Tribunal can wind up the company or pass such order as it thinks fit. Whereas in Section 398 the basic features are that the management is working in a manner prejudicial to the interest of the company by bringing about the material changes in the management or by alteration in its Board of Directors, then in that case, if it is found by the Tribunal that in order to bring to an end or preventing further mismanagement, it can pass such order as it deems fit including that of winding-up. Therefore, the parameters in both the Sections i.e. Sections 397 & 398 are very clear. It will depend upon case to case. No hard and fast rule can be laid down. In the case of oppression to the interest of member or members, if the Tribunal is satisfied that the winding-up is just and equitable then it can do so or pass any order as it thinks fit. Likewise in Section 398 if the management wants to bring any material change in the management and control of the company prejudicial to the interest of the company, then in that case, appropriate order can be passed by the Tribunal. The acts which would amount to oppression to the members or mismanagement or material alteration in the control of the company or prejudice to the interest of the company would depend upon facts of each case."

The Supreme Court has confirmed the decision in Sangramsinh P.Gaekwad and others v. Shantadevi P.Gaekwad (Dead) through Lrs. and others, referred supra, with approval.

13.19. The Supreme Court in M.S.D.C.Radharamanan v. M.S.D.Chandrasekara Raja and another, AIR 2008 SC 1738=[2008] 143 Company Cases 97 (SC) held that while dealing with a case of oppression under Section 397 of the Act, there should be a finding of fact to the effect that there has been oppression, but the jurisdiction of the Company Law Board to pass any further order in the interest of the Company is still available. S.B.Sinha,J. in the said judgment has reiterated the legal position once again in the following words:

> "13. Ordinarily, therefore, in a case where a case of oppression has been made a ground for the purpose of invoking the jurisdiction of the Board in terms of Sections 397 and 398 of the Act, a finding of fact to that effect would be necessary to be arrived out. But, the jurisdiction of the Company Law Board to pass any other or further order in the interest of the company, if it is of the opinion, that the same would protect the interest of the company, it would not be powerless. The jurisdiction of the Company Law Board in that regard must be held to be existing having regard to the aforementioned provisions.
>
> The deadlock in regard to the conduct of the business of the company has been noticed by the Company Law Board as also the High Court. Keeping in view the fact that there are only two shareholders and two Directors and bitterness having crept in their personal relationship, the same, in our opinion, will have a direct impact in the matter of conduct of the affairs of the company. When there are two Directors, non-cooperation by one of them would result in a stalemate and in that view of the

> mater the Company Law Board and the High Court have rightly exercised their jurisdiction.
>
> Before us, learned Counsel for the parties, have referred to a large number of decisions operating in the field. We may notice the legal principle emerging from some of them."

In fact, in that case, the Supreme Court has made an elaborate discussion about the entire case law on the subject, apart from the jurisprudential aspect of oppression and observed as follows:

> "32. This Court noticed that although the Indian Companies Act is modelled on the English Companies Act, the Indian Law is developing on its own lines. It was opined that the principle of 'just and equitable clause' is essentially equitable consideration and may, in a given case, be superimposed on law.
>
> The Court in arriving at the said conclusion considered the decision of House of Lords in Re:Ebrahimi and Westbourne Galleries Ltd. 1973 AC 360 whereupon strong reliance has been placed by Mr. Sundaram as also in Re:Yenidje Tobacco Co. Ltd. (1916) 2 Ch. 412 amongst others. What is important is not the interest of the applicant but the interest of the shareholders of the company as a whole. If such a principle is applied in a case of winding up of a company, we do not see any reason not to invoke the said principle in a case under Section 397 of the Act, subject of course to the applicability of the well known judicial safeguards."

13.20. The Company Law Board in the impugned order while referring to a similar contention of Mr.S.N.Mookherjee, learned Senior Counsel appearing for the appellants has, in fact, found that in the Memorandum of Understanding dated 14.11.2007 the proposed investor M/s.Clear Water Fund was not a party, that the contents of the Memorandum of Understanding regarding the transfer of shares by the second respondent in favour of the petitioners does not relate to the affairs of the company, that the consideration of Rs.52.50 Crores has not been crystallized in the Memorandum of Understanding, that the Memorandum of Understanding was not supported by consideration, that the Memorandum of Understanding has not been approved by the Board of Directors of the first respondent Company and that it suffers from various other legal infirmities, but still came to a conclusion that they are not relevant for granting relief under Section 397 of the Act, holding that by virtue of the said Memorandum of Understanding dated 14.11.2007 and the subsequent email dated 15.11.2007, the second respondent has clearly made out its intention to go out of the first respondent-Company, especially relating to Subarnarekha Port Project and that the petitioners have acted upon the Memorandum of Understanding by furnishing the Bank Guarantee by themselves to the extent of Rs.1 Crore in favour of the Government of Orissa and ultimately, the Concession Agreement came to be entered with the Government of Orissa on 11.1.2008 based on the Memorandum of Understanding dated 14.11.2007.

13.21. As crystallized by the established judicial precedents, as referred to above, to the effect that even in cases where oppression is not made out under Section 397 of the Act, the powers of the

Company Law Board are wide enough while enforcing equitable jurisdiction, in my view the Company Law Board has correctly held that the second respondent having decided to go out of the project expressly has to necessarily act upon his own written undertaking and the same cannot be said to be outside the powers of the Company Law Board under Section 397 of the Act.

13.22. At this point it is relevant to note the historic judgment of the House of Lords in O'Neill and another v. Phillips and others, [1999] 97 CC 807. By referring to the binding nature of contractual obligation and enforceability of promise as a matter of justice even though the same would not be enforceable in law, it was held as follows:

> "This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In Blisset v. Daniel the limits were found in the "general meaning" of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law."

13.23. At this juncture it is relevant to refer to Sections 397, 398 and 402 of the Act, which are as follows:

> "Section:397. Application to Company Law Board for relief in cases of oppression.-
>
> (1) Any member of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.
>
> (2) If, on any application under sub-section (1), the Company Law Board is of opinion-
>
> (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the

ground that it was just and equitable that the company should be wound up, the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

"Section:398. Application to Company Law Board for relief in cases of mismanagement.-

(1) Any members of a company who complain-

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit."

"Section:402. Powers of Company Law Board on application under section 397 or 398.-

Without prejudice to the generality of the powers of the Company Law Board under section 397 or 398, any order under either section may provide for-

(a) The regulation of the conduct of the company's affairs in future;

(b) The purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) The termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand; and any of the following persons, on the other, namely:-

(i) the managing director,

(ii) any other director,

(iii) and (iv) [***]

(v) the manager, upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case;

(e) the termination, setting aside to modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made."

13.24. Sections 397 and 398 of the Act, which relate to oppression and mismanagement respectively, ultimately enable the Company Law Board to pass orders with a view to bring to an end the matters complained of or to prevent the apprehended conduct, of course subject to the procedural restrictions under Section 399 of the Act. In addition to the inherent and general powers which are conferred on the Company Law Board while deciding the issue of oppression and mismanagement under Sections 397 and 398 of the Act, express powers are given to the Company Law Board under Section 402 of the Act. A combined reading of it makes it very clear that the powers of the Company Law Board are wider, but the intention is to bring to an end the matter complained of.

13.25. By applying the basic purport and intent of Sections 397, 398 and 402 of the Act based on the very terms of the provisions and also the interpretations made by the Hon'ble Apex Court and other Courts in India when compared to similar concept in English Law, it is clear that, on the factual matrix of the present case, the direction given by the Company Law Board in paragraph 9(i) is well within its powers. Even though the act of the second respondent is complained of by the petitioners as a matter of oppression, since the funding as required has not been done in accordance with the Investment Agreement dated 26.5.2006 and due to the said improper conduct the petitioners had to

suffer by creating encumbrance in respect of their personal properties for raising an amount of Rs.1 Crore to be paid to the Government of Orissa for Subarnarekha Port Project, that itself may not in strict sense be claimed as an oppression due to various reasons including that by such act of the second respondent complained of by the petitioners there is no much detriment suffered either by the petitioners or the first respondent-Company and particularly, the public purpose which is the basic object of the project undertaken by the first respondent-Company has not been thwarted.

13.26. In any event, the continuous association of the second respondent with the first respondent-Company in respect of the said project would only hamper the project which is of public importance, since the cordial relationship between the parties has become strained to an irrecoverable position and looking from that angle, I am of the view that the order of the Company Law Board insofar as paragraph 9(i) directing the second respondent to sell its shares, etc. to the petitioners for Rs.52.50 Crores or any other amount that may be fixed by the Valuer is just and equitable and that part of the decision needs no interference by this Court.

14.1. One other submission raised by the learned Senior Counsel appearing for the appellants in all these cases that by the impugned order of the Company Law Board the majority shareholders are directed to sell their shares to the minority shareholders and that is not permissible under the Act, deserves to be rejected. The main focus of the contention is that when the second respondent is holding 70% of the shares with utmost control over the affairs of the first respondent-Company and the petitioners are holding only 30% of the shares, having not invested monetarily to a large extent and claiming stake only based on their merit and ability in the port project, the direction of the Company Law Board in paragraph 9(i) is really against the basic principles of Corporate Law that the majority rule will prevail.

14.2. At the outset, as elicited above, the relevant provisions of the Act dealing with the concept of oppression, mismanagement and powers of the Company Law Board, nowhere restrict the Company Law Board in appropriate cases to direct the majority shareholders to submit to the minority shareholders. It is of utmost importance to understand that the concept of oppression and mismanagement itself is an exception to the general rule that majority shall rule the company, which is acceptable in normal circumstances. Therefore, under Sections 397 and 398 of the Act, the minority who feel as oppressed in the hands of the majority, of course subject to the requirement under Section 399 of the Act, complain to the Company Law Board for appropriate relief. While granting such relief since the powers of the Company Law Board are wider, which are always in the angle of bringing an end to the matter complained of with an equitable jurisdiction, it can never be said that under the facts and circumstances of the case, the Company Law Board cannot compel the majority to submit itself to the minority with the sole object of bringing an end to the matter complained of.

14.3. On the factual matrix of the present case, the said direction of the Company Law Board under paragraph 9(i) has been given basically on the premise that the second respondent has agreed to go out of the project, based on which the parties have acted upon resulting in certain consequences, and it was in those circumstances, such relief has been granted by the Company Law Board. Contrary to the submission of Mr.Vedantham Srinivasan, learned Senior Counsel it is immaterial as

to whether the said Subarnarekha Port Project is a scheme which forms part of the life and blood of the petitioners and the second respondent-investor can always find some other person to finance in some other project. But the issue here is as to whether the project has to be continued in the public interest as specifically enshrined under Section 397 of the Act.

14.4. The factual circumstances show that there is no meeting point between the petitioners and the second respondent which is certainly a grave circumstance warranting the Company Law Board to invoke the just and equitable ground for winding up of the company. But, on winding up of the company, greater prejudice will be caused not only to the first respondent-Company but also to the public interest and in such view of the matter, the relief granted by the Company Law Board cannot be said to be unjust or unreasonable.

14.5. Further, as rightly submitted by Mrs.Nalini Chidambaram, learned Senior Counsel appearing for the petitioners when the majority shareholders have shown no interest in the projects of the first respondent-company and in the absence of such legitimate interest, certainly the Company Law Board was right in permitting the minority shareholders to purchase the majority rights.

14.6. The impugned of the Company Law Board in that regard is in consonance with the decision of this Court in Syed Mohamed Ali v. M.R.Sundaramurthy and others, referred supra, wherein the Division Bench presided over by P.V.Rajamannar,C.J. has held as under:

> "We are not hampered by such rigid technicalities of procedure and if the minority in a company complains of an oppression and disclosed certain grounds of complaint in the petition which are made the basis for the relief, we would hold that the Court should ordinarily investigate the charges. Such investigations may in certain cases be necessary even to regulate the future conduct of the company for providing against recurrence of such abuses of power by the majority."

14.7. Apropos the said issue it is also apt to refer to the decision in Ramashankar Prosad and others v. Sindri Iron Foundry (P) Ltd. and others, AIR 1966 Calcutta 512, wherein a Division Bench of the Calcutta High Court held that there is no lower limit of qualification of any shareholder or group of shareholders for complaining of oppression and mismanagement and further observed that even the majority shareholders can apply under the said provisions, in the following words:

> "56. Relying on the English cases and Shantiprasad Jain's case 1965-1 SCA 556: (AIR 1965 SC 1535) before the Supreme Court it was argued that the right to apply under Section 397 or 398 must be confined to cases where the complaint is by a minority against the majority and not vice versa. It was further said that the majority had the power to put things in order by calling meetings and passing necessary resolutions. I however find myself unable to accept this argument. So far as the English section and English cases are concerned, it cannot be gainsaid that the Judges have laid down in no unmistakable terms that the right is given to a minority. So far as the English section is concerned it is the heading 'minorities' which affords some clue to its interpretation. The English Act does not contain a section like Section 399 of the

> Indian Act which is a code by itself as to the qualification necessary for application under Sections 397 and 398. I see no reason for holding that Section 399 was only aimed at fixing the lower limit of qualification of any shareholder or group of shareholders complaining of oppression and mismanagement. If the legislature has fixed a lower limit but no upper limit as to qualification for relief and if the object of the section be to prevent a mischief and to remove oppression and mismanagement of the company. I see no reason why an upper limit should be implied so as to bring the section in line with the English section. If the section is of a remedial nature, its proper construction should be to give the words used their widest amplitude. Probably the legislature in England did not contemplate belligerent and unprincipled shareholders like the appellants before us in this case. The facts in this case show very clearly that there is no chance of redress in the domestic forum of the company. If a Board meeting was to be called, one group would contend that there were five directors, whereas the other group would urge that there were seven. If a meeting of the shareholders was to be convened, according to one group there would be only sixteen shareholders while according to the other the number would exceed twenty-five. One group would contend that the number of shares issued was 8606, while the other group would assert that another lot of 2113 had been issued. There is no certainty even about the registered office of the company. According to one group the registered office is at Dr. Abani Dutta Road, while according to the other it is at Jogendra Mukherjee Road. There would be complete chaos and confusion if any meeting was to be summoned."

It was further held that if a Court arrives at an equitable conclusion based on evidence even if certain facts are lacking justice will not suffer, as under:

> "64. It must be admitted that a strong case was not made out in the petition and what view the court would have taken if a point of demurrer had been argued it is difficult to say. But once all the evidence is before the court and the case of oppression clearly emerges from the facts disclosed, it would not be proper to measure the rights of the parties only in terms of the assertion made in the petition. In Firm Sriniwas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, the court observed that "there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. Again in Kedar Lal v. Hari Lal, AIR 1952 SC 47, it was observed by Bose,J. (paragraph 51) "I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs." In this case the respondents ought not to be heard to complain that the case of oppression had not been fully made out in the petition if it transpires as a result of the hearing that the petitioners were oppressed so as to bring the case under Section 397 of the Companies Act. The case of justice will not suffer by the court arriving at a conclusion

> on a consideration of all the evidence before it even if the original plaint was lacking in particulars. Moreover in cases like this the dictum of Lord President Cooper in Elder's case, 1952 SC 49 that "the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view" adopted by Jenkins, L. J. in (1958) 3 All ER 689 at p. 701, ought to be borne in mind."

In the said decision, while considering the argument that the learned Single Judge has not evolved a method to put an end to the permanent evil of the company, viz., conflict between two groups of shareholders, the Division Bench held as under:

> "66. A complaint was justly made that the learned Judge failed to evolve a formula for remedying the permanent evil of the company, namely, the conflict between two groups of shareholders. In my opinion, the company cannot function properly if these two warring groups continue to hold the shares. As a matter of fact, at the early stage of the hearing of the appeal, a suggestion was made that one of the two groups should buy up the other's holding but nothing tangible came out of attempts made by counsel on that behalf. In my opinion, the special auditor should be directed to find out the fair value of the shares at the date of the petition as was directed by Lord Denning in Scottish Co-operative Wholesale Society Ltd.'s case 1959 AC 324. We also order the oppressor i.e. the respondents to the petition to buy the shares of the petitioners. In case the respondents are unable or unwilling to buy the shares, the petitioners should have an option to buy the respondent's shares at the same price. The price is to be arrived at on the basis of the break-up value of the shares. The respondents should be given three months time after the submission of the report of the special auditor and the ascertainment of the value of the shares to buy out the petitioners'. In default the petitioners will have the right to buy up the respondents' shares within a further period of three months from that date. Except for this modification the order made by the learned trial Judge will stand."

15.1. As far as the last submission complained about oppression and mismanagement which relates to the alleged locking of the premises of the registered office of the first respondent-Company by the second respondent-Company and others and freezing of the accounts of the first respondent-Company, it is no doubt true that there was actually no transaction conducted on behalf of the first respondent-Company. I have already found that there are only two projects of the first respondent-Company and the Machilipatnam Port Project cannot be termed as the project of the first respondent-Company, while in respect of Subarnarekha Port Project even though it is the project of the first respondent-Company, the entire project is in the preliminary stage since the lands required have not even been allotted by the Government of Orissa and therefore, it cannot be said that the first respondent-Company's affairs have been conducted in a manner oppressive to the petitioners by virtue of the closure of the registered office premises, which admittedly belonged to the second respondent.

15.2. Further, it was found in the Advocate Commissioner's report that some of the documents which were found in the registered office of the first respondent-Company, which belonged to the

second respondent-Company, are relating to the private transactions of the petitioners. It is no doubt true that the learned counsel appearing for the petitioners have submitted that those papers are intrinsically connected with the port projects and therefore, cannot be said to be private affairs of the petitioners, so as to draw a conclusion that the petitioners who have undertaken to work full time for the projects of the first respondent-company have been doing their private works in a commercial manner.

15.3. Again, in respect of the alleged freezing of the bank accounts by the second respondent which is complained as an incident of oppression, it is not the case of the petitioners that the funds have been diverted by the second respondent by freezing the account. The controversy between the parties erupted only after the middle of the year 2007. As found by the Company Law Board, in my view correctly, when the bank account has been jointly operated by the petitioners along with the third respondent there can be no scope for wrongful withdrawal of funds by the petitioners, which is also not the case of the petitioners against the second and third respondents.

15.4. In the absence of any factual finding by the Company Law Board in the impugned order that by virtue of either locking of the registered office of the first respondent-Company or by freezing of the accounts, the objects of the first respondent-Company have been hampered by any impediment or the petitioners have suffered any loss, it is not possible to accept the view of the Company Law Board that the said two incidents would amount to oppression and mismanagement. It is true that by virtue of the strained relations between the petitioners and second and third respondents there has been a deadlock created in the first respondent-company's affairs and there is a loss of mutual trust and lack of probity. Such incident itself is not sufficient, in my view, to constitute oppression which should be tested in the light of the powers of the Court under Section 433(f) of the Act to take the extreme step of winding up of the company under just and equitable ground, as such extreme step would be more prejudicial to the affairs of the company and also the interest of its members and therefore, remedial measures are given under Sections 397 and 402 of the Act and hence, the relief given in that regard in paragraph 9(i) of the impugned order is quite within the jurisdiction of the Company Law Board for rendering substantial justice between the parties. In fact, the Company Law Board has given a proper reason for arriving at such conclusion, which is as follows:

> "The only Board meeting, which was held on 21.5.2008 in the course of the present proceedings amidst the controversies raised by the petitioners could not serve any purpose in view of non-implementation of any of the resolutions passed at the aforesaid Board meeting. These mutual steep differences do pave the way for the exit of one group of shareholders from the Company to ensure that the port projects are timely implemented without affecting the public interest. The end situation would show that the parties cannot any more work together and therefore, the relationship should be ended, as claimed by the petitioners, especially when they are not solely responsible for the present situation. It is, therefore, evident that the proposal of the respondents for setting up a Project Co-ordination Committee with participation of the representatives from both sides will in no way be feasible for carrying forward the Subarnarekha Port Project. The CLB is even otherwise empowered to grant reliefs under section 397 in order to do so substantial justice between the parties, in the

facts of the present case, in the light of the principles enunciated in (a) Kamal Kumar Dutta and Anr. Vs. Ruby General Hospital Ltd. and ors. and (b) M.S.D.C. Radharamanan Vs. M.S.D.Chandrasekara Raja and Anr."

15.5. Therefore, there is absolutely no reason to interfere with the said finding and the consequential relief granted under 9(i) of the impugned order.

16.1. Coming to the next direction given by the Company Law Board under the impugned order under paragraph 9(iii) of the impugned order, the Company Law Board is no doubt well within its right and jurisdiction to direct the petitioners to reconstitute the Board of Directors of the first respondent-Company in exclusion of the second respondent and its nominees and carryon business in terms of its Articles of Association, since the same is consequential to the relief granted under paragraph 9(i) of the impugned order of the Company Law Board.

16.2. As submitted by the learned Senior Counsel on the side of the appellants, inasmuch as a statutory appeal is available to the affected parties before this Court under Section 10F of the Act, the Company Law Board should have directed the reconstitution after the relief granted under paragraph 9(i) of the impugned order is complied with. As it has been held in hierarchy of judgments, as elicited above, the power of the Company Law Board to grant relief is on just and equitable ground and it is in that sense the power is wider. Still, while passing such orders by exercising the wide powers conferred, the Company Law Board is certainly bound to consider the interest of all the parties concerned before giving such far-reaching directions. When once the second respondent and its nominees are directed to go out of the first respondent-Company on receipt of the consideration which is well within the powers of the Company Law Board under Sections 397 or 402 of the Act, the Company Law Board ought to have secured the interest of the second respondent and its nominee Directors at least insofar as it relates to the relief granted under paragraph 9(i) of the impugned order.

16.3. As rightly submitted by the learned Senior Counsel for the appellants, the exercise of such power by the Company Law Board in a far-reaching manner has certainly resulted in causing detriment to respondents 2 to 6 even in implementing the relief granted under paragraph 9(i) of the impugned order. In that view of the matter, the relief under paragraph 9(iii) of the impugned order ought to have been granted only after securing the interest of the second respondent, which has been directed to go out of the first respondent-Company.

16.4. It is under such circumstances that the subsequent conduct of the petitioners is relevant as to how it has sought to make the implementation of the relief granted under paragraph 9(i) of the impugned order, even if it is accepted by the second respondent, impracticable and otiose. While it is true that by virtue of the said relief the petitioners are entitled to reconstitute the Board of Directors of the first respondent-Company and carryon the business in terms of the Articles of Association, such right should be permitted to be exercised by the petitioners only after protecting the interest of the second respondent and other nominee Directors.

17.1. It is to reveal the subsequent conduct of the petitioners as well as the second respondent, both the parties sought to adduce additional evidence in the form of documents and filed M.P.Nos.2, 3 and 4 of 2009 in C.A.No.11 of 2009, M.P.Nos.2, 3, 4 and 6 in C.A.No.12 of 2009, M.P.Nos.2, 3 and 6 in C.A.No.13 of 2009, M.P.Nos.2, 3 and 7 in C.A.No.14 of 2009 and M.P.Nos.2, 3, 4 and 7 in C.A.No.15 of 2009. The said miscellaneous petitions are ordered.

17.2. The Company Law Board which has directed the second respondent to transfer all its shares and interest in the first respondent-Company for a consideration of Rs.52.50 Crores or for any other fair value to be fixed by an Expert Valuer and has further directed the case to be posted after filing of appropriate affidavit by the parties for completion of such formalities in fixing the consideration as per the Expert's value, ought not to have directed the reconstitution of the Board of Directors of the first respondent-Company even before such exercise could be completed.

17.3. It is relevant to point out that after the Company Law Board passed the impugned order on 27.5.2009, the present appeals have been filed well within the statutory period of limitation prescribed by presenting the appeals on 18.6.2009. As stated earlier, when the matter came up for admission before this Court on 24.6.2009, Mr.T.V.Ramanujun, learned Senior Counsel appearing for the petitioners has submitted that pursuant to the impugned order of the Company Law Board, the Board of Directors have been reconstituted, but he has undertaken that the newly constituted Board of Directors will not convene any meeting.

17.4. It is seen that even during the pendency of the proceedings before the Company Law Board, the petitioners have floated the said Subarnarekha Port Private Limited on 23.9.2008 as subscribers to the Memorandum and Articles of Association and the company was incorporated on 1.10.2008, constituting it as a Special Purpose Vehicle of the first respondent-Company and the petitioners have signed as signatories to the Memorandum and Articles of Association, each having been allotted 5000 equity shares as it is also evidenced from Form 32 filed before the authorities under the Act. In Form 1 filed by the newly constituted Company - Subarnarekha Port Private Limited on 1.10.2008, the authorised capital of the company is stated as Rs.10 Lakhs with number of equity shares as one lakh of Rs.10/- face value.

17.5. In Form 18 filed by the newly constituted Company as per Section 146 of the Act on the same day, viz., on 1.10.2008, the registered office of Subarnarekha Port Private Limited has been stated as at Bhubaneswar, Orissa. On fact it is true that these factual things, which were in existence at the time when the proceedings before the Company Law Board were pending, were not brought to the notice of the Company Law Board nor were informed to this Court at the time when the appeals came up for admission.

17.6. Pending the Company Petition, the Company Law Board passed an interim order on 18.9.2008 in C.A.No.136 of 2008 in C.P.No.13 of 2008 to the following effect, based on the statement made on behalf of the second respondent and others that the petitioners have been corresponding with the Government of Orissa without informing anything to the majority shareholders:

"(a) the petitioners shall make available to the respondents 2 to 6, copies of the entire correspondence so far exchanged between Government authorities and the petitioners, in connection with the land requirement for development of Port at Subarnarekha Mouth;

(b) the petitioners shall henceforth mark, in favour of the respondents 2 to 6, copy of any correspondence which may be sent to Government authorities in connection with the land requirement, for development of Port at Subarnarekha Mouth. The respondents are at liberty to move the Bench, if needed, on receipt of any such copy of the communication from the petitioners;

(c) the respondents shall not directly correspond with Government authorities in connection with the land requirement for development of Port at Subarnarekha Mouth, until further orders; and

(d) the petitioners shall ensure that the project of the Company is in no way be prejudiced on account of any of their actions."

17.7. The first petitioner, by letter dated 20.4.2009, informed the Deputy Secretary to Government, Commerce and Transport Department, Government of Orissa about the allotment of lands, renewal of Bank Guarantee, etc., but has not chosen to reveal anything to the Government of Orissa, even at that stage, about the constitution of a new company - Subarnarekha Port Private Limited by the petitioners themselves.

17.8. Immediately after the impugned order dated 27.5.2009 was passed by the Company Law Board, it is seen that the third respondent sent an email dated 29.5.2009 to the petitioners informing them that the respondents are taking legal action against the order of the Company Law Board. On the same day, the third respondent has sent a letter to the petitioners stating that the meeting of the Board of Directors of the first respondent-Company will be held on 6.6.2009 to decide about the impugned order passed by the Company Law Board.

17.9. By a letter dated 29.5.2009 addressed to the Chief Secretary, Government of Orissa, the first petitioner as a Joint Managing Director of the first respondent-Company has informed the Government about the order of the Company Law Board and requested for an appointment to meet the Government officials in person. On the same day, by another letter addressed to the Commissioner-cum-Secretary, Department of Commerce and Transport, Government of Orissa, the first respondent has enclosed a copy of the order of the Company Law Board and requested the said official to confirm the appointment on 3.6.2009 at 2.30 pm. On the very same day, a similar letter was addressed to the Principal Secretary to the Hon'ble Chief Minister, Government of Orissa.

17.10. On the same day, viz., on 29.5.2009, the petitioners have passed a resolution on behalf of the first respondent-Company without notice to the second respondent, who is the majority shareholder, and inducted (i) Ilangumaran Matchendran, (ii) Prabhakar Ram Tripathi, and (iii) Ashok Bhatnagar as Additional Directors and further resolved that respondents 3 to 5 cease to be

Directors of the first respondent-Company by virtue of the order of the Company Law Board dated 27.5.2009 and that the registered office of the company be changed to New No.84, 'Dakshin', 1st Floor, 1st Avenue, Indranagar, Adayar, Chennai 600 020 with effect from 29.5.2009. It was also resolved to authorise the first petitioner to operate all bank accounts and file statutory forms like Form 32, etc. Accordingly, it is seen that Form 32 has also been filed on the same day, viz., 29.5.2009, however in the said form, the registered office of the first respondent-Company is stated as "Mahalakshmi", 1st Floor, New No.290, Peters Road, Gopalapuram, Chennai-600 086. It is not the case of the petitioners that for passing such resolution notice has been given to the second respondent and other nominee Directors.

17.11. On the next day, viz., on 30.5.2009, the first petitioner has communicated to the Government of Orissa about the reconstitution of the Board of Directors of the first respondent-Company by inducting the new Directors and informing the cessation of the second respondent and its nominee Directors as Directors of the first respondent-Company as per the Company Law Board order dated 27.5.2009.

17.12. It is really surprising that on the very next day, viz., on 31.5.2009, which is stated to be a Sunday, the first respondent-Company passed a resolution resolving to subrogate the rights and obligations of the first respondent-Company in the Concession Agreement entered with the Government of Orissa dated 11.1.2008 relating to Subarnarekha Port Project in favour of the newly constituted Subarnarekha Port Private Limited.

17.13. On the same day, viz., on 31.5.2009, the newly constituted company - Subarnarekha Port Private Limited, represented by the petitioners themselves passed a resolution accepting the subrogation of the Concession Agreement which stood in the name of the first respondent-Company and authorising the petitioners themselves to execute necessary documents of subrogation. It is further astonishing to note that, on the same day, on behalf of the first respondent-Company the petitioners addressed to the Government of Orissa about the constitution of Subarnarekha Port Private Limited with its registered office at Bhubaneswar, even though the company- Subarnarekha Port Private Limited came to be floated much earlier, viz., on 1.10.2008 itself, stating that "M/s.Subarnarekha Port Private Limited will hereafter undertake all aspects of the project envisaged in the Concession Agreement. This letter is for your information as per Clause 2.4 of the Concession Agreement". The said letter was signed by the first petitioner as Joint Managing Director of the first respondent-Company.

17.14. On the same day, viz., 31.5.2009, the first petitioner, as Director of Subarnarekha Port Private Limited, has intimated the Commissioner-cum-Secretary, Department of Commerce and Transport, Government of Orissa consenting to all the terms of the subrogation. The contents of the said letter are as follows:

> "This has reference to the Clause 2.4 of the signed concession agreement for the Subarnarekha Port Project. We wish to introduce ourselves as the Special Purpose Company incorporated for this project. Our Company has already entered into a Deed of Subrogation on 31st May 2009 with M/s.Creative Port Development Pvt. Ltd.

> In this regard we confirm and consent to all the terms of the Subrogation as in the deed mentioned above with Creative Port Development Pvt. Ltd. We also confirm and consent to being the successors to the rights, duties and obligations of M/s.Creative Port Development Pvt. Ltd. as per the terms of the signed Concession Agreement on 11th January, 2008.
>
> All activities for the project as per the above Concession Agreement shall be undertaken by us hereafter.
>
> This information is being submitted to your office as per the clause 2.4 of the concession agreement."

17.15. The first respondent-Company, which has been taken over by the petitioners by virtue of the reconstitution within a matter of two/three days, on 31.5.2009 filed Form-2 before the authorities as required under Section 75(1) of the Act, stating about re-allotment of shares in the first respondent-Company, by allotting 75000 equity shares to each of the petitioners of Rs.10/- each and 25000 of preference shares to each of the petitioners of Rs.100/- each in the share capital of the said company.

17.16. The Deed of Subrogation entered by the petitioners on behalf of the first respondent-Company in favour of Subarnarekha Port Private Limited, represented by the petitioners themselves, which is stated to have entered on 31.5.2009 as per the resolution, has been in fact signed by the petitioners themselves on behalf of the first respondent-Company only on 1.6.2009 and the non-judicial stamp papers also shows that the stamp papers have been purchased on 1.6.2009. Therefore, it is clear that having signed such a deed of subrogation on 1.6.2009 the petitioners have chosen to create records stating that everything has been done on 31.5.2009 itself. This only shows the hurried way in which the entire act has been done by the petitioners, probably to complete the entire issue taking advantage of the order of the Company Law Board to frustrate the claim of the second respondent and its nominee Directors.

17.17. The more shocking of all the conducts of the petitioners is entering of Memorandum of Understanding dated 4.6.2009 between Subarnarekha Port Private Limited, represented by the petitioners and Signature Group International Limited, Cayman Islands of U.A.E., by which the said company has agreed to be responsible for arranging the entire equity which is estimated at around Rs.6000 Million or around US$ 125 Million. The said Memorandum of Understanding entered into by the Subarnarekha Port Private Limited has also been communicated by the first petitioner, as a Director of Subarnarekha Port Private Limited, by letter dated 5.6.2009, to the Deputy Secretary to Government, Department of Commerce and Transport, Government of Orissa.

17.18. All these acts are, no doubt, well within the powers of the petitioners since they are empowered by the impugned order of the Company Law Board. But, they are relevant for the purpose of deciding the correctness of the direction given by the Company Law Board in the context of the magnitude of implications caused by the conduct of the petitioners.

17.19. By virtue of the subrogation of the Concession Agreement in respect of Subarnarekha Port Project, all the rights have been transferred to the newly constituted - Subarnarekha Port Private Limited consisting of the petitioners alone, who in their turn have completely made it over to the Signature Group International Limited, Cayman Islands of U.A.E., thereby leaving nothing to be recovered by the second respondent even in respect of the relief given by the Company Law Board under the impugned order under paragraph 9(i) from the first respondent-Company. This is not an ordinary situation to be lightly taken by any judicial forum. This can only be treated as one of the apt instance as to how the consequence of a judicial order can be disastrous if the same is passed without any sense of anticipation, even though the same is consequential and within the jurisdiction of such forum, as happened in the present case. In my considered view, at least for the purpose of giving effect to its own order in relief 9(i), the Company Law Board ought not to have granted such far-reaching relief under paragraph 9(iii) which has been taken advantage of by the petitioners to the maximum possible extent which has definitely resulted in great hardship to the second respondent having invested major share in the first respondent-Company. The concept of justice and equity which has prompted the Company Law Board to grant relief under paragraph 9(i) should have been applied equally while granting the relief under paragraph 9(iii).

17.20. It is true that by such hasty conduct of the petitioners, the petitioners have simply created a big vacuum in the legal and financial status of the first respondent-Company to which the second respondent, as a financial partner having majority shareholding to the extent of 70%, has invested substantial amount. It is now legally possible for the first respondent, as on date, to even say that by virtue of the Company Law Board order the first respondent is ceased to exist and therefore, there is no obligation on the part of the first respondent even to make such payment to the second respondent as found in paragraph 9(i) of the impugned order of the Company Law Board. This is really a status of deadlock which has been created by the order of the Company Law Board by granting relief under paragraph 9(iii).

17.21. As it is well settled principle that an equitable and workable order has to be passed in the interest of the members of the first respondent-Company, especially with reference to respondents 2 and its nominee Directors, and at the same time the public interest has to be preserved since the project, namely Subarnarekha Port Project is a project which is to be enjoyed by the public at large, this Court is empowered to pass an equitable order by striking a balance between the two extremes and the virtual deadlock which has been created by the impugned order of the Company Law Board in this regard. While arriving at such conclusion, this Court is of the view that at any cost the public project should not be invalidated.

18.1. As far as the last relief granted under paragraph 9(iv) of the impugned order of the Company Law Board which states that the petitioners shall inform the second respondent about the major developments in the Subarnarekha Port Project every month, by virtue of the additional documents which are stated to have been received by the second respondent as well as the documents filed on behalf of the petitioners, all material facts required from the date of passing of the order by the Company Law Board till 25.6.2009 are available before this Court either by way of information obtained under the Right to Information Act by the second respondent or otherwise. It is also relevant to point out that in compliance of the directions of this Court dated 10.7.2009 extracted

above, Mr.T.V.Ramanujun, learned Senior Counsel appearing for the petitioners has also produced copies of the documents in the form of typeset relating to the subsequent events starting from 1.8.2008 till 25.6.2009.

18.2. After perusal of the said documents filed in the form of typeset of papers by Mr.T.V.Ramanujun, learned Senior Counsel copies were directed to be given to the learned counsel for the second respondent, which has been complied with and based on the information and documents obtained, the second respondent has filed miscellaneous petitions for receiving additional documents, apart from the petitioners themselves filing applications for receiving additional documents, which are all allowed, as already stated, and therefore, there is nothing more to be communicated to respondents 2 and others by the petitioners up to the last communication dated 25.6.2009.

19. Taking into account all the findings given by me in respect of each and every point raised in the light of the enlightened legal and factual submissions by M/s.S.N.Mookherji, A.L.Somayajee, P.S.Raman, P.Arvind Datar, learned Senior Counsel and Mr.P.H.Arvindh Pandian, learned counsel on the side of the appellants and M/s.Sudipto Sarkar, Vedantham Srinivasan, T.V.Ramanujun, Mrs.Nalini Chidambaram, learned Senior Counsel and Mr.V.Raghavachari, learned counsel on the side of the respondents, but for whose assistance it would not have been possible to decide the issues in a precise manner, the issues raised are answered as follows:

(i) the fourth respondent (P.K.Misra), being the nominee of the second respondent (SREI), is a promoter of the first respondent-Company (Creative Port Development Private Limited);

(ii) Machilipatnam Port Project granted by Government of Andhra Pradesh in favour of the Consortium in accordance with the Consortium Agreement dated 25.3.2006 and the letter of intent dated 20.1.2007 is not a project of the first respondent-Company (Creative Port Development Private Limited);

(iii) there is no obligation on the part of respondents 2 to 6 (appellants in these company appeals) to reimburse 30% of benefits enjoyed by the second respondent (SREI) to the petitioners or the first respondent-Company (Creative Port Development Private Limited);

(iv) the alleged conduct of the second respondent (SREI) in relation to Machilipatnam Port Project cannot be held to be oppressive towards the petitioners or towards the first respondent-Company (Creative Port Development Private Limited) under Section 397 of the Act;

(v) the Subarnarekha Port Project granted by Government of Orissa entered by way of Memorandum of Understanding dated 18.12.2006 and subsequent Concession Agreement dated 11.1.2008 is a project of the first respondent-Company (Creative Port Development Private Limited);

(vi) the non-funding by the second respondent-Investor (SREI) on the said project cannot be treated as oppressive or against public interest in the light of Memorandum of Understanding dated 14.11.2007 and the consequent conduct of the petitioners who have chosen to contribute an amount of Rs.1 Crore towards the Government of Orissa and the third respondent who has agreed to receive Rs.52.50 Crores as a consideration for leaving from the first respondent-Company in respect of the said project respectively;

(vii) by virtue of the Memorandum of Understanding dated 14.11.2007 read with the categoric letter of the third respondent dated 15.11.2007, by which the second respondent has agreed to receive a sum of Rs.52.50 Crores to leave the first respondent-Company relating to Subarnarekha Port Project is binding on the second respondent and by applying the principle of estoppel, it is not open to the second respondent to go back from such letter, especially when the same has been acted upon by the petitioners; and the impugned order of the Company Law Board is not in effect enforcing the Memorandum of Understanding dated 14.11.2007 since the order of the Company Law Board in that regard is only to give effect to the letter of the third respondent dated 15.11.2007, which is certainly binding upon the second respondent;

(viii) the directions of the Company Law Board under the impugned order against the second respondent to transfer its shares and interest in the first respondent-Company in favour of the petitioners for consideration of Rs.52.50 Crores or any such fair value as to decided by the Expert Valuer is well within the powers of the Company Law Board and the same cannot be held to be without jurisdiction, perverse or illegal;

(ix) the direction of the Company Law Board permitting reconstitution of the first respondent-Company and the subsequent conduct of the petitioners, as brought to the notice of this Court by way of additional documents, have caused great impediment to the rights and interest of the second respondent in the first respondent-Company even in respect of implementation of the direction of the Company Law Board to sell their shares and interest for a consideration stated above and therefore, requires a proper and equitable order taking into consideration the interest of both the parties and the public purpose for which the Subarnarekha Port Project is intended for;

(x) the relief of disclosure of subsequent events have been in effect complied with by production of various documents as on 25.6.2009;

(xi) the closing of the registered office of the first respondent-Company by the second respondent and others by putting an over lock and the freezing of the accounts of the first respondent-Company cannot be said to be an instance of oppression and mismanagement since the same is not so grave for the Company Court to decide for

an ultimate order of winding up under Section 433(f) of the Act on just and equitable grounds for the reasons explained; and

(xii) since the Company Law Board has decided the entire issue as a whole and due to the reasons arrived at by the Company Law Board, there is no necessity for the Company Law Board to give a separate finding in the Contempt Application while disposing the Company Petition.

20. For the foregoing reasons, the appeals are partly allowed in the following terms:

(i) the order of the Company Law Board in respect of relief granted under paragraph 9(i) is confirmed with a direction to the second respondent to transfer its shares and all other interest held in the first respondent-Company (Creative Port Development Private Limited) to the petitioners either at an agreed consolidated price of Rs.52.50 Crores or any fair value to be arrived at by an independent Expert Valuer as at 31.3.2009, whichever is higher. The Company Law Board shall appoint, on an application by the second respondent within a period of thirty days from the date of receipt of a copy of this order, an independent Expert Valuer and decide about all other formalities in that regard;

(ii) the relief granted by the Company Law Board under paragraph 9(ii) stands set aside, holding that the second respondent shall not have any obligation to reimburse any benefit accrued by it under Machilipatnam Port Project either to the petitioners or the first respondent-Company;

(iii) all further acts of the petitioners pursuant to the order of the Company Law Board dated 27.5.2009 are directed to be kept in abeyance, except those vital acts which require the petitioners to act for the purpose of retaining the Subarnarekha Port Project with the Government of Orissa, till the formalities in respect of fixing the consideration for exit of the second respondent is fixed by the Company Law Board, as stated above, and the entire amount is paid to the second respondent; and

(iv) the petitioners who have disclosed the affairs of the Subarnarekha Port Project as on 25.6.2009, shall continue to disclose any further developments and communications by sending copies to the second respondent periodically once in a month commencing from the end of August, 2009 till the formalities for exit of the second respondent are completed in full and till such formalities are completed respondents 2 to 5 shall be deemed to continue as the Directors of the first respondent-Company.

No costs. With regard to the miscellaneous petitions to implead Subarnarekha Port Private Limited, viz., M.P.Nos.10 of 2009 in C.A.No.11 of 2009, M.P.No.5 of 2009 in C.A.No.12 of 2009, M.P.No.10 of 2009 in C.A.No.13 of 2009, M.P.No.6 of 2009 in C.A.No.14 of 2009, and M.P.No.5 of 2009 in C.A.No.15 of 2009, since as per the discussions Subarnarekha Port Private Limited is found to be

controlled by the petitioners themselves who are before this Court and the documents have also been produced and discussed in detail, it is not necessary to implead Subarnarekha Port Private Limited as a party and hence, these miscellaneous petitions are closed as unnecessary. All other miscellaneous petitions seeking injunction and direction, viz., M.P.Nos.5 to 9 in C.A.No.11 of 2009, M.P.Nos.7 to 11 in C.A.No.12 of 2009, M.P.Nos.4, 5 and 7 to 9 in C.A.No.13 of 2009, M.P.Nos.4, 5 and 8 to 10 in C.A.No.14 of 2009, and M.P.Nos.6 and 8 to 11 of 2009 in C.A.No.15 of 2009, are closed.

28.8.2009 Index : Yes Internet : Yes sasi P.JYOTHIMANI,J.

[sasi] C.A.Nos.11 to 15 of 2009 28.8.2009