Vls Finance Ltd. vs Sunair Hotels Ltd. And Ors. on 16 December, 2005

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Bench: Mukul Mudgal

JUDGMENT

Mukul Mudgal, J.

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1.This appeal under Section 10 of the Companies Act, 1956 (hereinafter referred to as the Act) challenges the order dated 13th June, 2001 passed by the Company Law Board (hereinafter referred to as the CLB), Bench at Delhi dismissing the Company Petition No. 45/1998 filed by the appeal VLS Finance Limited under Sections 250, 397 and 398 of the Act. The appeal arises from a dispute in respect of a company called Sunair Hotels Limited (respondent No. 1) which is at the moment running the Metropolitan Nicol Hotel in New Delhi. Sunaero Limited, respondent No. 2 is the wholly owned subsidiary company of respondent No. 1. Respondents No. 3 to 5 are the promoter Directors of respondent No. 1 and respondents 6 to 27 are the shareholders of respondent No. 1 company. The facts of the case as per the appellant briefly stated as follows:-

(i) In February, 1977, the respondent No. 1 company was incorporated and the third respondent Mr. S.P. Gupta was the main promoter along with his family members. The company was incorporated to carry on hotel and other cognate businesses. By License deed dated 5th December, 1982 along with supplementary deed executed in 1988, a plot of land was allotted Page 2607 to the company in 1982 by the NDMC. The complete possession of the land was received by the respondent in 1988. In the interregnum, there was cancellation of the license deed by the NDMC in 1990 owing to some claim relating to the license fees and the said cancellation was challenged in this Court. During the pendency of the proceedings, the respondent 1 company received the complete possession of land in 1992.

(ii) In June 1993 M/s Aeroflot and respondent 1 entered into an agreement for joint venture hotel project under the name and style of Sunaero Limited which was in fact a wholly owned subsidiary company of respondent 1 company. In October, 1993.

Owing to the withdrawal by the Aeroflot of its proposal, respondent 2, Sunaero Limited entered into a management contract with ACCOR for the hotel project and obtained the necessary approval from the Government for the said project. In 1994, pursuant to the decision of this Court in favor of the company, the land license was restored to the respondent 1.

(iii) The subject matter of the dispute between the parties is the Memorandum of Understanding entered into on 11th March, 1995(hereinafter referred to as the `MOU') according to which the appellant was to invest Rs.7 crores as share capital in the respondent 1 company and was also to provide a sum of Rs.10 crores as security deposit and the respondent promoters were to invest a sum of Rs.22 crores by way of their contribution to the share capital. The appellant was also to arrange for public issue of shares for Rs.10 crores and to mobilise a sum of Rs.85 crores by way of loans. In performance of its part of the agreement, the appellant invested a sum of Rs.7 crores along with security deposit of Rs.8 crores in 1995. The main grievance raised by the appellant is that the respondents got the shares issued in fraudulent manner to them without actually remitting their part of the cash contribution towards the consideration for the shares by referring the method of rotation of funds of the respondent 1 company through the respondent 2 company. In 1997 also the company had issued 15.3 lakhs further share to the respondent group without offering any correspondingly proportionate shares to the appellant, contrary to the terms of the MOU which stipulated parity in the ratio of shares between the appellant and the respondent 3.

(iv) The main grievance of the appellant is that the appellant which is holding 24.17% shares in the respondent 1 company was a victim of the oppressive conduct of the respondent demonstrated by the fact that the respondents 3 to 5 had fraudulently allotted shares worth Rs.21 crores to respondents 3 to 27 and consequently, a prayer has been made by the appellant for the cancellation of allotment of these shares as null and void and the consequential rectification of the Register of Members. The challenge is also to the issue of further 15.3 lakhs shares to the respondent group because no corresponding offer so as to maintain parity in the ratio of shareholding was made to the appellant.

(v) The stand of the respondent as reflected in the impugned order of the Company Law Board dated 13th June, 2001 is that the respondent 1 company had transferred the land development rights to the respondent Page 2608 No. 1 in 1993 and it was respondent 2 who pursued the High Court proceedings successfully. Consequently, when an order was passed in favor of the respondent 1 company, a decision was taken to retransfer the development rights from respondent 2 to respondent 1 company for a consideration of Rs.21 crores which was in fact 1/3rd of the prevailing market value of the land of the company housing the hotel. Consequently, the amount of Rs.21 crores paid by the respondent 1 to respondent 2 was given to the various respondents for a valuable consideration and these respondents invested in the share capital and

the allegation of the appellant that the shares were allotted without any consideration from the respondents was baseless.

3. Before I deal with the merits of the matter, it is necessary to record the unsuccessful efforts towards settlement made by the CLB as reflected eloquently in paragraph 18 of the impugned order of the CLB, which reads as under:-

"18. We have considered the pleadings and arguments of the counsel. Before dealing with merits of the case, it is appropriate to record that during the pendency of the proceedings, on our advise given in the hearing 23/9/98 that the parties should try to resolve the disputes amicably, the parties attempted to settle the disputes amicably Initially, the respondents offered a sum of Rs.16 crores to the petitioner towards the shares and the security deposit, but the petitioner desired a sum of Rs.24 crores. However, in the hearing on 18.11.98, the counsel for the parties reported that an agreement had been reached by which the petitioner would go out of the company on receipt of Rs.19 crores payable within 15 months from 1.12.1998 and that they would require some time to work out the modalities. In the hearing held on 24.12.98, it was reported that out of the Rs.19 crores, the company would pay Rs.12 crores in final settlement of the security deposit and the other respondents would purchase the shares of the petitioner for Rs. 7 crores and that the first installment of Rs.6 crores would be paid on 11.1.99 and the balance of Rs.13 crores on or before 6.8.2000. The counsel had desired time to finalize necessary terms in this regard and accordingly the matter was adjourned to 11.1.1999. On this day, the matter was adjourned to 20.1.1999. On this day also, the parties did not place before us the agreed draft settlement, but the respondents produced bank drafts for Rs.6 crores. Since the parties had not placed before us the draft settlement, the matter was adjourned to 9th Feb 1999. In the next hearing, even though both the parties presented their own terms of settlement, yet, they did not place before us an agreed draft. However, the Bench itself prepared a draft settlement and handed over to them on 28.7.1999 and the counsel conveyed their acceptance to the same. Accordingly, the parties were directed to file a formal agreement signed by both the parties on 1.9.1999 and it was also directed that the respondents will hand over a draft for Rs.6 crores on that date. However, on 1.9.1999, it was reported that the Income Tax Department had attached the amount payable to the petitioner in terms of the agreement before the CLB and has restrained Page 2609 the petitioner from transferring the shares held by it in the company and the petitioner had filed a writ petition before the Delhi High Court challenging the attachment and that the High Court has directed as the 1st installment should be kept in a fixed deposit and therefore the respondents were moving an application to seek a clarification from the Delhi High Court about the title of the respondents in respect of the shares. Accordingly, the matter was adjourned to 10.11.1999 with the directions that the respondents would bring the first installment of Rs.6 crores on that day. On 10.11.1999, the respondent brought demand drafts worth Rs.2 crores and sought for a few more days for paying the balance of Rs.4 crores along with interest. However, the petitioner was not willing to accept this

amount. In the hearing held on 1.3.2000, the respondents produced before us demand drafts for Rs.6.5 crores and cheque for Rs.50 lacs towards the 1st installment of Rs.6 crores and towards interest for the delayed payment with an assurance that the balance amount will be paid positively on or before 31.5.2000 failing which the petitioner could forfeit the amount of Rs.6 crores. However, the representative of the petitioenr submitted that the Board of Directors of the petitioner company had already passed a resolution on 29.10.199 deciding not to proceed with the compromise. We advised him that the Board of the petitioner company might review their earlier decision in view of the offer of payment of Rs.7 crores and assurance of the respondents to complete the settlement by 31.5.2000. The matter was accordingly fixed on 14.3.2000 to ascertain the reaction of the petitioner. On that day it was reported that the Board of Directors of the petitioner company had reconsidered ha matter and decided not to proceed with the compromise. Thus, the compromise effors which were going on for nearly two years came to an end and it was decided to hear the petition on merits. The respondents who had filed an application in terms of Section 8 of the Arbitration and Conciliation Act on 24.2.1999 when the compromise efforts were on, desired that this application should be heard before proceeding with the main petition. After hearing the counsel on this application seeking for referring the disputes to arbitration in terms of the MOU dated 11.3.1995, this Bench passed an order on 21st August, 2000 dismissing the application as not maintainable. Thereafter, the petition was heard on merits and concluded on 5.3.2001."

4. The CLB on merits recorded the following findings:

(a) The appellant/petitioner company was not an ordinary/common shareholder and was a Finance company with expertise in funding of projects. Since in the present case the MOU between the parties stipulated mobilisation of fund through public issue and in fact dealt with a hotel project in which the component of land was most important and valuable, it is inconceivable that the appellant would not have gone through the land license agreement which is said to form part of the MOU.

(b) Even though on the basis of investment by the financial institutions, an element of public interest was sought to be brought in by the appellant's counsel, the appellant had already made complaints to the financial Page 2610 institutions and this was a factor necessary to be taken in to account in the exercise of equitable jurisdiction under Section 397 and 398 of the Act.

(c) The main allegation of the appellant is that the respondent has allotted shares worth Rs.21 crores without investing any money and by fraudulent rotation of the funds. The consequent transfer and retransfer of the development rights were assailed by the appellant as sham transactions.

(d) The crux of the matter deducible from the proceedings revolves around the transfer of development rights from the second respondent to the respondent 1

company for Rs.21 crores.

(e) Notwithstanding the cancellation of the license both the NDMC and the respondent 1 company had taken steps in terms of the earlier license deed. Therefore, the respondent 1 company, perhaps in anticipation of favorable decision by the High Court had transferred the development rights.

(f) The Management contract between the second respondent and ACCOR dated 9th September, 1994 demonstrated the knowledge of the appellant about the transfer of development rights as it was specifically referred to in the MOU dated 11th March, 1995 at page 2. The respondent 2 was described in this contract dated 9th September, 1994, as the owner.

(g) Since the MOU mentioned the restrictive clauses and the management contract with ACCOR and described the respondent 2 as the owner, the appellant cannot now claim that it was not aware of the transfer of the development rights to the second respondent at the time of signing the MOU. Consequently, in so far as the transfer of development rights was concerned, the appellant cannot disclaim the knowledge thereof.

(h) In the proposal given by the appellant to the respondent 1 company dated 13th February, 1995, the appellant had itself indicated that the promoters equity of Rs.20 crores would be land and in the inter office memo, the appellant had indicated that the appellant valued the land at Rs.21 crores as against the market value of Rs.70-80 crores.

(i) A perusal of the documents demonstrates that from the beginning the intention of the promoters was to put a value on the land and get shares allotted against the value. The MOU of the company with Aeroflot and the MOU between the respondent 1 and ACCOR dated 29th August, 1994 clearly provided that the property was to be contributed as a part of equity limited to the extent of 20% of the total project cost of about US$ 5.15 million.

(j) The amount of US$ 5.15 million equivalent to Rs.22 crores has perhaps been adopted in the MOU as contribution by the respondents.

(k) The appellant was aware of the value being put on the land because of the MOU dated 29th August, 1994 with ACCOR according to which the promoters were to contribute the land for the shares.

(l) The plea of the appellant that since no money was paid by the respondent 2 while transferring the rights to the respondent 1 by the Sunaero, there is no justification in paying Rs.21 crores.

(m) The appellant had the knowledge of the proposal to pay Rs.21 crores to the second respondent as its letter dated 18th November,1996 to the IDBI noted that the company had acquired the land rights from its subsidiary for Rs.21 crores.

(n) Once the liability of the respondent 1 is in the knowledge of the appellant, it could not question the ingenious method followed by the respondents in discharging the liability and at the same time having issued the shares to the respondents.

(o) Even though the manner in which the discharge of Rs.21 crores was done indicated some hanky panky, since the appellant was aware of the discharge of the liability, it cannot question the illegality in the rotation of the money as the discharge of the liability of the respondent 1 company towards the second respondent.

(p) In any event the appellant as a financier, before writing the letter to the financial institutions that the land has been acquired from the 2nd respondent, should have checked up the mode of payment, particularly when it had a right to access to the accounts of the company in terms of the MOU.

(q) Even assuming that the rotation of Rs.1 crores was irregular, yet knowledge and consent of the appellant has to be attributed to the appellant.

(r) Since respondent 2 is wholly owned subsidiary of the respondent 1 company, with a view to protect the interest of the respondents, the second respondent is directed to take steps to recover the amount of Rs.21 crores paid to HJ Consultants either in cash or by way of property valued worth Rs.21 crores within nine months.

(s) It cannot be said that the allotment of shares by way of rotation would not be in conformity with the MOU which stipulated cash contribution of Rs.22 crores by the respondents towards the share. Once the cheques issued by the respondents were encashed and utilized by the respondent 1 company, the appellant could not complain that no cash was received for the shares.

(t) The appellant did not come with clean hands so as to entitle him to claim relief under Sections 397/398 of the Act as once the dispute started between the parties, the appellant in total disregard in the interest of the company took steps to block and harm the project by writing to various parties and authorities.

(u) The prejudicial acts were continued by the appellant even during the pendency of the proceedings before the CLB and even while the process of amicable settlement was under way.

(v) The contention of the respondent that the company petition was filed with an oblique motive to get back the investment by the appellant at a high rate of interest is correct as the offer was to get back the money and not to seek redressal of the alleged grievance of oppression or mismanagement.

(w) In the letter dated 14th March, 1998, the appellant complained that the grievance against the respondent is non payment of interest and its desire was to recover its investment.

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(x) The intention of the promoters had always been to get the shares allotted against the value of the land and the appellant was aware of the same transfer and retransfer of the development rights are not shame transactions. The rotation of Rs.1 crore could not be termed as fraudulent as there is ample evidence that the shares were to be allotted against the value of the land.

(y) The appellant has disentitled itself to the grant of any equitable relief owing to IT prejudicial conduct against the interest of the company and if the prayer for cancellation of the allotment of shares impugned in the petition is granted, the appellant would become the majority shareholder in the company with 84% shares. Such a relief is unjustified as the appellant had claimed itself only to be a financier and not the promoter at the time when the financial institutions sought the personal guarantee of the appellant.

(z) Assuming that the respondent had not contributed to the capital of the company initially, its contribution towards expertise for the benefit of the company cannot be ignored in exercising the discretion to grant equitable relief under Section 397 and 398 of the Act. Such factors have to be taken in to consideration while moulding the relief sought by the appellant. The grant of the relief claimed by the appellant would be a great act of oppression against the respondents who had nurthered the project from 1982 and the project was at that time running well.

(aa) In so far as the proposal for not giving shares in 1997 at the time of further allotment of shares was concerned, the respondent gave an undertaking that the appellant shall be given proportionate shares and accordingly this grievance does not survive.

(ab) Even assuming that the clearance of the liability by the respondent was done in a questionable method so as to get the allotment of shares to them, taking into consideration all aspects of the case and the direction by the CLB that the respondent 2 should take steps to recover the money paid to HJ International within a set time frame, there is no scope of granting any other relief to the appellant particularly when the petition is motivated and the appellant had disentitled itself owing to its own conduct from being granted any equitable relief. Consequently, since there were only two groups of shareholders in the company and that the appellant having invested a substantial amount of money in the company, felt oppressed, the appellant should be given an option to exit on return of investment in shares of Rs.7 crores in the company. Rs. 8 crores have not been considered as the respondent had forfieted the same and in any event have no connection with the status of the appellant. Consequently the CLB issued the following directions:-

> "In case the petitioner is willing to part with his shares, then the company/respondents should purchase the shares on a valuation to be made by an independent valuer. The valuation will be based on the Balance Sheet as on 31.3.1998, being the proximate date of the petition. In case the petitioner desires to

> continue with its membership, it has the option to apply for proportionate shares in respect of the shares allotted in 1997. Either of the options should be exercised within a period of three months of this order. In case it desires to go out of the company, then on an application Page 2613 made by it, we shall appoint a suitable valuer. In case it desires to continue with the company and opts to acquire proportionate shares, the same will be at part and the respondents should arrange to have the requisite number of shares transferred to the petitioner on receipt of consideration."

5. In view of the above findings and the consequential orders, the company petition was dismissed leading to the present appeal.

6. The plea of the appellant as raised by the learned senior counsel, Shri Manmohan, is that in so far as the preliminary question raised by the respondent that there is no question of law which arose in this appeal is concerned, such a plea cannot be substantiated. The position of law is well settled by the judgment of the Hon'ble Supreme Court in Dale & Caringtton Invt. Pvt. Ltd. v. P.K. Prathapan reported as wherein the following position of law has been laid down:-

> "If a finding of fact is so perverse and is based on no evidence, it can be set aside in appeal even if appeal is permissible only on a question of law. The perversity of the findings itself become a question of law."
>
> "The Company Law Board has dealt with the issues in a very cursory and cavalier manner and have not gone into the real issue which are germane to the controversy in question."

7. The appellants have contended as under:-

> (a) That since the order of the CLB is perverse and the real issue germane to the issue in question has been ignored, this Court can interfere even in its jurisdiction confined to a question of law under Section 10A of the Act.
>
> (b) That the main grievance of the appellant is that while the entire transaction flowed from the Memorandum of Understanding dated 11th March, 1995 between the appellant and the respondents herein, yet in the impugned judgment of the CLB there is only a passing reference to that MOU of 11th March, 1995 and the terms of the said MOU and the impact of the said terms have not even been referred to let alone considered by the impugned judgment thus making it wholly unsustainable.
>
> (c) That the appellant company has been duped of several crores of rupees as the respondents while persuading the appellant by virtue of the Memorandum of Understanding to part with their contribution of Rs. 7 crores of share money and Rs. 8 crores of deposit have not themselves contributed the corresponding amount as per the MOU and funds which ought to have been used for the benefit of the company have instead been diverted by rotation to purchase the company's own shares.

(d) That the sheet-anchor of the appellant's case is that at the time of issuing of equity shares in its favor, Rs. 1 crore was rotated 21 times by virtue of cheques which were all signed by Mr. S.P. Gupta and such a fact was not disputed by the respondents. It has been submitted that the diversion of the company funds constitute an act of oppression as per the Page 2614 judgment in Bhaskar Stoneware Pipes Pvt. Ltd. v. Rajinder Nath Bhaskar reported as 1988 (63) CO. Cases 184 @ 208 (Ist Para).

(e) That not only the complained actions of the respondents are illegal but the same affect the appellant's rights as a shareholder and are not in the interest of the company as well as in the public interest. In case the company had not been deprived of its funds it could have become a debt-free company and shareholders such as the appellant could have received dividends without their being any Rights Issue.

(f) That the respondents' conduct is burdensome, harsh and wrongful which lacks probity and fair dealing in relation to the appellant's proprietary rights as a shareholder and there is visible departure from the standards of a fair-play expected by a shareholder. The lack of confidence stems from the respondents' conduct as Directors in respect of the company's business and not in respect of their private affairs and the series of actions complained of in the company petition leads to the conclusion that the object of these actions was to cause the oppression of the appellant.

(g) That the impugned judgment of the CLB has proceeded on an erroneous and baseless findings based on conjectures and surmises by making out a new case which had not even been pleaded by the respondents.

(h) That the Court has power under Section 397-398 of the Act read with Section 402 of the Act to grant the claimed relief in the company petition as settled by the following judgments:-

(I) Shanti Prasad Jain v. Kalinga Tubes (II) H.R. Harmer Ltd., 1958 3 All ER 689 (III) Bhaskar Stoneware Pipes Pvt. Ltd. v. Rajinder Nath Bhaskar 1988 (63) CO. Cases 184 @ 208 (Para 1)

(iv) Bennet Coleman & Co. v. Union of India 47 Comp Cases 92 @ PG 116-117

(v) Mohan Lal Ganpatram and Anr. v. Sh. Sayaji Jubilee Cotton & Jute Mills Ltd. and Ors.,

(vi) Needle Industries,

8. The acts of oppression and mismanagement by the respondents as per the appellant's averments are as follows:-

(a) that the respondents did not contribute any money into the project contrary to the terms of the MOU dated 11th March, 1995 between the appellant and the respondents 1 and 3 to 5.

(b) that consequently the majority shareholding is that of the appellant who would then control 87% of the actual paid up capital of the respondent No. 1 company.

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(c) that the rights issue without a corresponding offer to the appellant was solely with a view to reduce the appellant to a minority contrary to the terms of the agreement dated 11th March, 1995 where it was stipulated that the ratio of shareholding set out in the said agreement would not be altered unless mutually agreed to by the parties and such an alteration was also contrary to the provisions of Section 81 of the Act.

(d) That the oppression is evident from the fact that in spite of making a very negligible investment in the project and siphoning the company's funds through rotation and booking bogus expenditures and diverting funds to non-existing companies/shell companies and various other methods of misappropriation of funds, there is a gross mismanagement on the part of the respondents.

9. The learned senior counsel Shri Sudhir Chandra on behalf of the respondent No. 1/Sunair has contended as follows:-

(a) that the grievance of the appellant that it was kept in dark by the respondent and was unaware of their transactions with their subsidiaries such as Sun Aero and other subsidiaries like HJ Consultants was wholly devoid of merit as the appellant is a large financier which could and would not venture into any financial arrangement involving an investment of more than Rs. 7 crore without a prudent and comprehensive examination of the documents and the accounts of the respondent company. Several documents detailed hereinafter would demonstrate that the appellant was fully aware of the contents and effect of the said documents and the state of affairs and the relationship between the respondent No. 1 and its subsidiaries and to now plead ignorance was merely a ruse adopted so as to coerce and coax the respondent company to part with the control of what is now a lucrative hotel business.

(b) The principal aim of the appellant company was to cash in on the goodwill of hotel which was now being run by the respondent in view of its success which had not been envisaged hitherto by the appellant. That the petition filed by the appellant under Section 397-398 of the Companies Act was not a bona fide petition and was filed with an ulterior motive. That the principal grievance of the appellant to plead the mala fides of the respondent is the rotation of more than Rs. 21 crores. This so called rotation was done with the knowledge and approval of the respondent and the raising of such a grievance was nothing but an afterthought.

(c) As per the case set up by the appellant the fraud occurred in April, 1995. The petition under Sections 397-398 was filed in August belatedly when the hotel project had taken off and was successfully functioning.

10. The further plea of Shri Sudhir Chandra is that the following documents show that the appellant was well aware of the existence and participation of the subsidiary companies of the respondent such as Sun Aero and HJ Consultants (for the sake of convenience the documents compiled by the appellant are named Vol. C and those by the respondent Vol.R):-

(a) C 45 is the license dated 5th December, 1982 made between the NDMC and M/s Sunair Hotels Ltd by virtue of which the licensee was required to use the plot of land admeasuring 7109 sq. yards for construction of a Page 2616 hotel to be run by licensee on license basis on the terms and conditions and at an annual license fee of Rs. 34,01,400 from the date of handing over the said plot of land to the licensees.

(b) C-57 is the supplemental agreement to the license deed dated 5th December, 1982 whereby the license fee of the hotel was increased to Rs. 49,90,33 instead of Rs. 34,01,400 and that the license fee would commence from the date of handing over possession of the land in full to the licensee.

(c) C-61 is the letter by Sunair Hotels to NDMC seeking possession to have subsidiary by the name of Sun Aero Ltd.

(d) C-66 is the Memorandum of Understanding dated 29th August, 1994 executed between ACCOR and Sunair. As per the MOU, Sunair is required to contribute the the property as part of the equity in the limit of 20% of the total project cost amounting to USD 5.15 million.

(e) C118 is the letter dated 9th Jan., 1985 by the Ministry of Industry to Sun Aero Limited approving the foreign collaboration of Sun Aero with ACCOR.

(f) C143 is the Memorandum of Understanding dated 10th March, 1995 between Sun Aero (Mr. SP Gupta, father) and H.J. Consultants (Mr. Vipul Gupta, Son)

(g) C124 is an appraisal note dated 24th March, 1995 prepared by VLS for getting loan from Tourism Finance Corprn., of India for the purpose of setting up a 5 star hotel under the Brand name `SOFITEL' at Connaught Place, New Delhi. C124 also describes that Guptas also proposed to sell the estate properties owned by them to deploy their cash contribution of Rs. 8.33 lakhs.

(h) C212 is the inter office memo of VLS dated 25th November, 1995 which clearly shows that VLS knew that Sunair's contribution had come from the land which had market value of Rs. 70-80 crores.

(i) C213 is a letter dated 18th November, 1996 by VLS Finance Ltd., to the Dy. General Manager, Industrial Development Bank of India clarifying the points raised by the latter regarding the Hotel Sunair, Delhi.

(j) C-214 is the letter dated 19th November, 1996 by VLS Finance Limited to the Deputy General Manager, Industrial Development Bank of India, saying inter alia that since the land rights have been acquired at Rs. 21 crores by Sunair Hotels from its subsidiary company, the difference on account of enhanced land cost shall be met by promoters contribution/deposits advances from commercial complex.

(k) C-215 is the letter dated 17th December, 1996 by VLS Finance Limited to the Managing Director, The Tourism Finance Corporation of India stating that the VLS Finance Ltd is an institutional investor in the company and is neither involved/associated with the management and functioning of Sunair Hotel Limited nor represented on the Board of the company through any nominee.

(bb) C220-221 is the letter by VLS to the Managing Director, Tourism Finance Corporation of India to bring to its notice the litigation proceeding to be initiated by VLS against Sunair and its promoters which indicated a rift between the parties.

Page 2617 (cc) C222 is the letter dated 17th March, 1990 by VLS to Tourism Finance Corporation of India asking TFCI to stop payment of the cheque issued by it to the promoters of Sunair Hotels.

(dd) C-224 is a letter dated 4th May, 1998 by VLS to TFCI asking it to withdraw the loan given to Sunair Hotels Ltd.

(ee) C150 is the Memorandum of Understanding dated 10th March, 1995 between VLS Finance, Sunair Hotels Ltd. and Sh. Satyapal Gupta.

(ff) R1 is the agreement dated 17th June, 1993 between Sunair Hotels Ltd and International Commercial Department of Civil Aviation, Russia.

(gg) R1/Annex.1 shows the decision to float Sun Aero and Annex. 2/P.4C states contribution by Mr. Gupta in form of land.

(hh) R4 is the document of NDMC dated 27th January, 1994 whereby Sun Aero as a subsidiary of Sunair Hotels Ltd was allowed to be floated by NDMC.

(ii) R-6 is the letter dated dated 8th February, 1999 by VLS to TFCI asking it to send necessary documents so that VLS could apply for loan to TFCI.

(jj) R7 is the letter dated 13th February, 1995 by VLS to SP Gupta, Sunair stating that cost of the proposed commercial project would be Rs. 75 crores including the cost of the land and that the total equity should not be more than Rs. 30 crore & offer prive to be in the range of Rs. 60-70 per shares.

(kk) R-9 is the letter dated 13th February, 1995 by TFCI to Sun Aero stating that TFCI is ready to consider the proposal of Sun Aero for financial assistance subject to detailed appraisal based on the merits of the case.

(ll) R10 is a letter dated 15th February, 1995 by VLS to TFCI stating the agreement between ACCOR and Sun Aero.

(mm) R12 is a letter dated 27th February, 1995 by VLS to Sunair Hotels wherein it is stated that TFCI undertakes that it would pledge an assistance of Rs. 75 crore for the Hotel project.

(nn) R14 is the letter dated 10th March, 1995 by Sunair to its shareholders offering rights shares in the ratio of new 29 shares for each share hold in the company as on 11th March, 1995.

(oo) R14-16 is the letter dated 10th March, 1995 sent to Chirag a subsidiary of Sunair which transferred its shares to VLS.

(pp) R52 is the letter dated 22nd April, 1996 by VLS to Sunair stating that no reply was snet by Sunair to this letter.

(qq) R55 is the letter dated 25th July, 1997 by VLS to Sh. SP Gupta stating that according to the agreement between them interest @ 20% was payable on the loan amount.

(rr) R56 is the letter dated 20th October, 1997 by VLS to Sh. SP Gupta reminding about the interest due.

(ss) R57 is the letter dated 31st October, 1997 by Sunair to VLS stating that it will not be able to pay interest as it has incurred heavy losses and non arrangement of commuted funds in time by VLS.

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11. Another letter dated 21st September, 2000 was also sent to M/s Nikko Holds to abort the collaboration of the respondent so as to harm the venture floated by the respondent company. It is further contended that the VLS was merely a financial promoter and Clauses 5 to 6 clearly demonstrate that as the entire responsibility of the public issue of Rs. 85 crores, i.e., Rs. 100 per share was that of VLS. Clause 9 of the agreement between the parties dated 11th March, 1995 clearly provided that the financial statements were to be given to VLS and the books of accounts were available for inspection by VLS. The fact that the market value of shares was Rs. 100 per share of the face value of Rs. 10/- and such a share was available to the appellant at the face value of Rs. 10 per share clearly demonstrated that the real arrangement between the partner was that the shares worth Rs. 70 crores had in fact been given to the appellant for merely Rs. 7 crores.

12. It was submitted that the company was attempted to be destroyed by the appellant as is evident from the aforesaid correspondence detailed above and the oppression and mismanagement was a mere ruse and the real object of the company petition was securing the payment of interest due to

the appellant. That as per the arbitration clause which formed para 12 of the MOU between the parties, the arbitrator, Mr. Justice P.K. Bahri(Retd.) had been appointed and in so far as the claim for interest was concerned, a counter-claim had been led by the appellants and the disputes were under adjudication.

13. He has also highlighted the fact that the company petition was in fact an oppression of the majority by the minority and not as alleged vice versa. He has also referred to the Clause 9 of the MOU to submit that the balance sheets of the respondent company were always available and the grievance of the appellant emanated from alleged non-compliance of Clause 8 providing for payment of interest. The appellant itself was guilty of not making payment of the balance of Rs. 12 crores towards security and not carrying on the public issue of Rs. 85 crores as was mandated by the MOU. Even the sum of Rs. 8 crores minus the balance sum of Rs. 2 crores was paid only in June, 1996. He has also highlighted the fact that the clear finding of fact has been arrived at by the CLB in favor of the respondent to the effect that relationship and the dues payable to the respondent No. 2 were always within the knowledge of the appellant and in view of this matter the winding up petition was not maintainable.

14. Mr A.N. Haksar who appeared on behalf of the respondent No. 2 M/s Sun Aero and respondent Nos.5-11 who are the members of the family of Shri S.P. Gupta contended that it was factually evident that the Sun Aero held all development rights till they were transferred without consideration to respondent No. 2 Sun Aero in October, 1993. This was done after the incorporation of Sun Aero. Furthermore it was submitted that as per the Memorandum of Understanding dated 10th March, 1995 the VLS appellants as shareholders were to get share worth Rs. 7 crores. Since such shares were admittedly received by the appellants whether or not the shares were issued by Sun Aero or Sunair is wholly immaterial in so far as the allegation of oppression and mismanagement under Section 397-398 is concerned.

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15. He has also relied upon the paragraphs 14-17 of the winding up petition to contend that the appellant has contended that he came to know about the jugglery of Rs. 21 crores. Paragraphs 14-17 of the winding up petition reads as follows:-

> "14. The respondent nos. 3, 4 and 5 represented to and assured the petitioner that as per the terms of the said Agreement they had contributed Rs. 22 crores in cash by subscribing to 2,20,00,000 shares of the respondent No. 1 company and that construction activity of the hotel was progressing satisfactorily. The petitioner had full faith in the respondent nos. 3, 4 and 5 and bonafide believed their said representations and assurances. The petitioner continued to repose trust and faith on the said respondents and did not in any way interfere with the operation and management of the respondent No. 1 company by the respondent nos. 3 to 5. On occasions when the petitioner sought information with regard to the progress of the project, representatives of the petitionere were taken to the hotel site where some construction activity was in progress. Whenever the petitioner sought details of the

accounts and the balance-sheet of the respondent No. 1 company, they were informed that the same were under preparation and would be made available to the petitioner. At all times, the petitioner was assured by the respondent nos. 1, 3, 4 and 5 that the hotel project was progressing satisfactorily and its interests as a financial collaborator/promoter were secure. At that stage the petitioner had no reason or occasion to doubt the assurances and representations of the respondent nos. 1,3, 4 and 5 and in the bonafide belief that its interest and investment was secure and would not be in any way jeopardised by the respondents, the petitioner did not question or ask for details of the conduct of the affairs of the respondent No. 1 company by the respondent nos. 3 to 5.

15. Some time in October 1997, the petitioner received information that the respondent nos. 3 to 5 had allotted further 15,30,000 equity shares of the respondent No. 1 company worth Rs. 1,53,00,000 in their own name and in the name of their family members so as to increase their percentage holding in the respondent No. 1 company. This was in violation of the Agreement dated 11th March 1995 wherein it had been agreed that the ratio of the shareholding set out in the said Agreement would not be altered unless mutually agreed by the parties in writing. On receiving this information, the petitioner company contacted respondent No. 3 and sought details of the said allotment of further shares. The respondent No. 3 tried to evade the issue and refused to divulge any information. In the meanwhile the Respondent nos. 2 to 4 represented to the Petitioner that there was sortage of funds and asked the Petitioner for more funds for the project. The petitioner was surprised at this representation and demand since the records showed that Rs. 28,99,15,000 was the paid up equity capital of the Respondent No. 1 company and only a small amount had been spent so far towards the project. The large contribution towards the share capital was more than adequate to meet the needs and requirements of the respondent No. 1 company. The petitioner asked for the Balance Sheet and Profit & Loss Account of the respondent No. 1 company for the previous years but the respondent No. 3 refused to give the same to the petitioner. Page 2620 The petitioner also asked for inspection of the books of accounts and the accounting statements of the respondent No. 1 and other information pertaining to the project but the respondent No. 3 did not allow inspection of the books and refused to divulge any information. This conduct and action on the part of the respondent No. 3 aroused the suspicion of the petitioner and the petitioner then deputed its officers to inspect the records of the respondent No. 1 company filed with the Registrar of Companies. After repeated visits to the office of the Registrar of companies, during October, November & December 1997, the officers of the petitioner were able to collect the Balance-Sheets and other relevant records of the respondent No. 1 company from the said office and from other sources. A scrutiny of the records revealed that the respondent nos. 3 to 5 had committed fraud on the petitioner and had manipulated and fabricated accounts by creating fictitious assets and passing mere book entries and that its conduct and dealing towards the petitioner had throughout lacked probity. The said records also revealed that the respondent nos. 3 to 5 were

mismanaging and conducting the affairs of the respondent No. 1 company in the manner prejudicial to the interest of the respondent No. 1 company and the public interest and in a manner oppressive to the petitioner.

16. The records with the Registrar of Companies, Delhi and Haryana, showed that the respondent No. 1 company had allotted on 15th December 1995 against cash 2,09,91,600 shares of Rs. 10 each fully paid up to the respondent nos. 3 to 27 as under:

Name	No. Of shares
S.P.Gupta (Respondent No. 3)	1541600
Kaveen Gupta (Respondent no 4)	2800000
Vipul Gupta (Respondent no 5)	2800000
Sheel Gupta (Respondent No. 6)	1500000
Babita Gupta (Respondent No. 7)	1250000
Ananya Gupta Respondent No. 8 and	
Kaveen Gupta (Respondent No. 4)	450000
Monisha Gupta (Respondent No. 9)	1250000
S.P.Gupta HUF(Respondent No. 10)	1541600
Kaveen Gupta HUF(Respondent 11)	400000
K.C. Gupta (Respondent No. 12)	150000
Lalita Gupta (Respondent No. 13)	150000
Praveen Gupta (Respondent No. 14)	125000
Tusha Gupta (Respondent No. 15)	125000

Naveen Gupta (Respondent No. 16) 150000

Smriti Gupta (Respondent No. 17) 150000

Vidur Gupta (Respondent No. 18) and

Praveen Gupta (Respondent No. 14) 50000

Veni Gupta (Respondent No. 19) 150000

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Varad Gupta (Respondent No. 20)and

Veni Gupta (Respondent No. 19) 150000

B.C. Gupta (Respondent No. 21) 300000

Rajani Gupta (Respondent No. 22) 300000

Robin Gupta (Respondent No. 23) 300000

Sudhir Gupta (Respondent No. 24) 225000

Suman Gupta (Respondent No. 25) 225000

Salil Gupta (Respondent No. 26) 225000

Sumrit Gupta (Respondent No. 27) and

Sudhir Gupta (Respondent No. 24) 225000

20991600

The Form No. 2 dated 15th December 1995 filed with the Registrar of Companies, Delhi & Haryana for the said allotment of shares is annexed hereto and marked Annexure-G.

17. The Form No. 2 dated 15th December 1995 (Annexure-G hereto) filed with the Registrar of Companies, Delhi & Haryana records that the said 2,09,91,600 equity shares of Rs. 10 each were issued to the respondent nos. 3 to 27 against an amount of Rs. 20,99,16,000 received in cash for the said shares from the said respondents. From Balance Sheet of the respondent nos. 1 and 2 companies and other documents obtained by the petitioner, the Petitioner verily believes that the said 2,09,91,600 equity shares have been fraudulently issued to the respondent nos. 3 to 27 without any cash consideration whatsoever. The amount of Rs. 20,99,16000 for the said 2,09,91,600 equity shares has not been paid by the respondent nos. 3 to 27 to the respondent No. 1 company. The respondent No. 1 company has only received Rs. 7,99,99,000 in cash (Rs.7 crore paid by the petitioner and Rs. 99,99,000 against 10,08,400 shares issued prior to 11th March 1995) in its share capital account against which the respondent nos. 3 to 5 have issued 2,90,00,000 shares of the value of Rs. 29,00,00,000 (less calls in arrear of Rs. 85,000). The 2,09,91,600 shares of the value of Rs. 20,99,16,000 issued to the respondent nos. 3 to 27 have been issued without any consideration whatsoever."

16. Mr. Haksar contended further that on the contrary document at C/216 clearly shows that the appellant was aware as this document enclosing the balance sheets and profit and loss account along with a letter to the Punjab National Bank. He has also relied upon a letter dated 23rd December, 1995 written by the appellant to the respondent seeking the fund flow statement. He has also relied upon a letter of 25th April, 1995 written by the appellant acknowledging the receipt of fund flow statement from the respondent. After having received the fund flow statement in April, 1995 the winding up petition was filed in August, 1998 thus demonstrating laches vitiating the plea of oppression and mismanagement.

17. Mr. Keswani, the learned counsel, appearing on behalf of respondents 21-23 has submitted that Shri B.C. Gupta elder brother of Shri S.P. Gupta and the original founder, promoter, director and his wife and son, namely, Page 2622 respondents 22-23 of the respondent company founded by SP Gupta in 1980 along with SP Aggarwal his brother-in-law. The license and and land was secured by Shri SP Gupta along with Shri S.K. Aggarwal and as is evident from the license deed which bears the signature of S.K. Aggarwal. There is a violation of agreement from both the sides and the prayer of VLS to become majority shareholder ought not to be granted. He has further submitted that in view of the fact that both the sides have violated the Memorandum of Understanding dated 10th March, 1995(in short the `MOU'), the whole MOU should be set aside and B.C. Gupta should be introduced as a Director since he was instrumental in bringing the valuable land enjoyed by the company and he should accordingly now have a say in the allotment of shares.

18. It is first necessary to deal with the preliminary plea raised by the respondent No. 1's Senior counsel, Shri Sudhir Chandra that under Section 10F of the Act it is not open to the Court to go into

the varied questions of facts sought to be raised by the appellant in challenging the impugned judgment of the Company Law Board as the jurisdiction of this Court under Section 10F is confined to the questions of law alone. Section 10F on which reliance has been placed by the respondent reads as under:-

> "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."

19. The learned senior counsel for the appellant, Shri Manmohan has countered this plea by relying on the judgment of the Hon'ble Supreme Court in Dale & Carrington Invt.(P) Ltd. and Anr. v. P.K. Prathapan and Ors. reported as wherein it was held that if the findings are perverse, the very perversity of the findings becomes a question of law and in fact this Court in an appeal under Section 10-F can look into such findings if the CLB has not delved into the real issue which was germane to the controversy in question. Consequently it is necessary to consider the main plea of the appellant is that the impugned judgment, notwithstanding the fact that the entire transaction between the parties flowed from the Memorandum of Understanding dated 11th March, 1995, refers to the said memorandum only fleetingly and the terms and effect of the MOU has not been considered or taken into account by the CLB. The CLB itself has summarized the main allegation of the company petitioner/appellant herein to be that the respondents were allotted the shares worth Rs. 21 crores and were required to contribute their cash component and they have without performing their Page 2623 part of the MOU dated 11th March, 1995 have in fact rotated a sum of Rs. 1 crore 21 times so as to purportedly carry out their obligation under the MOU and have thus duped the appellant. The MOU dated 11th March, 1995 which records the terms of the contract between the parties reads as under:-

> "Memorandum Of Understanding Agreement For Financial Assistance This Memorandum Of Understanding (M.O.U.)/Agreement is made at New Delhi this 11th day of March, 1995 between and amongst VLS FINANCE LTD. (hereinafter referred to as "VLS"), a Company incorporated under the Companies Act, 1956, and having its Registered Office at C-489, defense Colony, New Delhi-110 024(which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors and assigns) of the First Part, Sunair Hotels Ltd. (hereinafter referred to as "Sunair"), a Company incorporated under the Companies Act, 1956, and having its Registered Office at 302, Akash Deep Building, 26, Barakhamba Road, New Delhi-110 001 (which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors and assigns) through its Directors Shri Satya Pal Gupta, S/o. Late Shri Hari Ram Gupta, Shri Kaveen Gupta, S/o. Shri S.P. Gupta & Shri Vipul Gupta, S/o. Shri S.P. Gupta, all resident of K-115, Kauz Khas, New

Delhi-110 016, of the Second Part Shri Satya Pal Gupta, S/o Late Shri Hari Ram Gupta, Shri Kaveen Gupta, S/o. Shri S.P. Gupta & Shri Vipul Gupta, S/o. Shri S.P. Gupta, all resident of K-115, Hauz Khas, New Delhi-110 016, the main promoters and Directors of Sunair (hereinafter referred to as "Promoters") of the Third Part;

Whereas, the Promoters have incorporated Sunair Hotels Ltd., for the purpose of constructing and running a Five Star Hotel in Delhi and are also Directors thereof;

And Whereas, the Promoters & Sunair have acquired on license a plot of land admeasuring 80,000 Sq. Ft. from New Delhi Municipal Committee, Sansad Marg, New Delhi, in Gole Market area on Baird Road, Sub District Centre, New Videsh Sanchar Bhawan, New Dlehi, and have taken the possession of that plot for the construction of a Five Star Hotel and Commercial Complex (hereinafter referred to as the "Project") as per the approved plans by the New Delhi Municipal Committee. (The license deed dated 08.12.82 and supplementary agreement dated 01.02.88 and the approved revalidated plans for construction are enclosed with this agreement and form part and parcel thereof);

And Whereas, Sunair & Promoters have entered into a Management Contract dated 09.09.94 with AAPC Asia Pte. Ltd., a Limited Company organized under the laws of Singapore and having its Registered Office at 16, Riffles Quay, 23/01, Hong Loon Building, Singapore (hereinafter referred to as "ACCOR") for a period of 15 (fifteen) years on the terms and conditions enumerated therein. (The said agreement is enclosed herewith and forms part and parcel of this agreement).

Page 2624 And Whereas, for the purposes of constructing the hotel part of the project, and running it on profitable basis, the Promoters & Sunair have to make arrangement for the finances and other related matters;

And Whereas, VLS is a Non-Banking Finance Company with sufficient funds and infrastructure available for arranging finances, has given its consent to join the Promoters and Sunair as Financial Collaborators. The parties hereto have agreed to enter into this M.O.U./Agreement for the purposes of joining together to manage the "Project" and complete it successfully in the interests of all concerned.

Now This Memorandum Of Understanding/Agreement Witnesseth As Under:

1) That the Promoters & SUNAIR have agreed to take VLS as Financial Promoters of their proposed hotel project in Gole Marked on the land admeasuring about 80,000 sq. ft. allotted to them by the New Delhi Municipal Committee and whereas VLS has agreed to join as Financial Collaborators for the hotel project of Sunair.

2) That the Authorised Share Capital of the company shall be Rs. 40 crore (Rupees Forty crore only) and out of which, the initial Paid Up Capital shall be Rs. 30 crore

(Rupees Thirty crore only) dividend into 300 lacs equity shares of Rs. 10/- each and the Promoters shall take all necessary steps to make the capital structure accordingly.

3) That the initial Paid Up Share Capital in Equity Shares shall be held/subscribed in the following manner by the parties:-

i) Rs. 22 crore (Rupees Twenty-two crore only) shall be subscribed by the Promoters or their nominated companies by way of subscribing to 2,20,00,000 shares of Rs. 10/- each for cash at par.

ii) Rs. 7 crore (Rupees Seven Crore only) shall be subscribed by VLS by way of subscribing to 70,00,000 shares of Rs. 10/- each for cash at par.

iii) VLS agrees to contribute Rs. 7 crore (Rupees Seven crore only) being the amount payable on the said shares to SUNAIR, on receipt of a communication/notice received from SUNAIR towards (i) application money of Re. 1/- per share on the date of signing of this, M.O.U./Agreement. (ii) allotment money of Rs. 4/- per share within two days from getting allotment notice and (iii) first call of Rs. 5 per share on or before 15th April, 1995.

iv) ACCOR shall contribute Rs. 10 crore (Rupees Ten crore only) as Application Money towards 10 lacs equity shares to be allotted to them at Rs. 100/- (Rupees One hundred only) per share at the time of initial public offering to be made later as provided hereinafter.

v) The balance capital of Rs. 10 crore (Rupees Ten Crore only) shall be issued to the Public as specified in clause 5 hereinabelow:

vi) The above-said ratio of shareholding shall not be altered during the currency of this M.O.U./ Agreement unless mutually agreed by the parties to this M.O.U./Agreement in writing.

4) All the respective parties shall pay the amount to the extent of Rs. 30 crore as provided (supra) on or before 30th April, 1995.

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5) i) That a Public Offering of 10 lacs equity shares of Rs. 10/- each at a price not less than Rs. 100/- per share shall be made by the company and for which complete responsibility vests on VLS for organising the Public Issue and raising the required funds through this Public Issue.

ii) The Public Issue expenses shall be borne by SUNAIR. However, VLS would ensure that the costs of raising funds from the Public will not exceed 8% of the Public Issue amount.

6) Vls Hereby Covenants and Undertakes to do:

a) Full mobilisation of funds to the extent of Rs. 85 crores (Rupees Eighty-five crores only) for the project, arranging/organising term loans and working capital facilities;

b) Ensuring the availability of funds to the extent of minimum Rs. 85 crores (Rupees Eighty-five crores only) to the company for smooth implementation of the project. The Project would not be delayed because shortfall in financial resources. In case of shortfall/delay, temporary loans would be arranged by VLS even by providing personal/corporate guarantees for the same;

c) To make Public Offer of Rs. 10 crore of capital to the Public at a price not less than Rs. 100/- per shares;

d) Providing managerial advices whenever required by SUNAIR and/or the Promoters on specific requests;

e) To provide interest-bearing security deposit of Rs 10 crore to SUNAIR for the project at an interest rate not exceeding 20% p.a. The interest in respect of which is required to be paid on quarterly basis. The security deposit would be paid on or before 15th May, 1995 provided the share capital has been fully allotted and share certificates delivered to VLS. The said security deposit shall be refunded back to VLS immediately on closing of the Public Issue of SUNAIR and a lien to the extent of security deposit amount will be made against the proceeds of Public Issue at the time.

f) The security deposit to be forfeited by SUNAIR in case VLS fails to organise the funds required for the project and/or does not fulfilll its obligation to sell the Public Offering of SUNAIR at a price not less than Rs. 100/- per share. The same is however subject to the timely implementation and the fulfillment of the Project by SUNAIR in terms of clause 7 of this Agreement.

g) VLS also agrees and undertakes to give in advance proxies with regard to its shareholding in favor of the Promoters for all shareholders meetings.

h) That VLS is solely responsible for arranging loans, including term loans from TFCI, in the time stipulated. Any delay in loan and/or investments coming from TFCI/AAPC, VLS agrees to match the shortfall by arranging these funds. Time given is one month from the date of signing of this M.O.U./Agreement by the Promoters to VLS provided all information required by VLS from SUNAIR and Promoters is given to VLS on time and without delay.

i) VLS also agrees that in no case it shall sell shares held by it to any party before the same has been offered to the Promoters at the market price. If the Promoters do not accept the offer, then VLS would be free to sell them to individuals/groups to ensure that any private individual or group companies do not get more than 5% holding of the total paid up capital of the company. VLS would ensure wide distribution of their holding at the time of sale.

7) Sunair & the Promoters, do hereby Covenants and undertakes the following Obligations:-

a) It will be the prime responsibility of SUNAIR and/or the Promoters to do the project planning and its implementation according to the various sanctions obtained by the government and other authorities and this will be their sole responsibility to obtain statutory and legal clearances from all the concerned government, semi/government and other local authorities, start the construction of the Project, complete it and commence operations.

b) To see that the day-to-day management of affairs of the hotel is properly done through ACCOR and there should not be any dispute with respect thereto and if, for one reason or the other, the day-to-day management is affected, it would be the sole responsibility of SUNAIR and the Promoters and they will be liable for any damages to VLS.

c) VLS is aware that the SUNAIR has already awarded management contract and technical knowhow contract to ACCOR for development/running of the hotel wherein interference of the Promoters is limited and duly defined. Therefore, no damages shall be payable in case of failure of ACCOR to perform as per the said Agreement. The damages payable on amount of failure of the Promoters as specified in Clause 7(b) shall not exceed a sum of Rs. 17 crore (Rupees Seventeen Crore only).

8) SUNAIR, through its Directors and the Promoters, hereby agree and undertake to ensure the implementation of the project within TWO-AND-A-HALF years from the date of payment of Equity Capital or the date of disbursement of first Installment of loan from Financial Institutions i.e. TFCI/other Financial Institutions, whichever is later. This is provided VLS arranges all funding requirements on time without letting the Project suffer because of lack of financial resources.

9) SUNAIR and the Promoters also agree and undertake to send periodically financial details and statements to VLS and on the request of VLS, SUNAIR shall produce the books of accounts and all financial and accounting statements or any other information pertaining to the project which VLS may desire.

10) Any changes in the terms and conditions of this M.O.U./Agreement would be made by mutual consent in writing only.

11) All parties hereto agree to keep everything mentioned herein and any information about the Project strictly confidential.

12) In the event of any dispute of difference of opinion in the matter of interpretation, execution of carrying out the subjects and functions, as enumerated in this M.O.U./Agreement, the same shall be referred for Page 2627 settlement/award in terms of the provisions of the Indian Arbitration Act, 1940 with modifications therein. The award of the Arbitrator/Unique shall be final and binding upon all concerned."

In Witness Whereof The Parties Hereto Have Executed This Memorandum Of Understanding/ Agreement As Of The Date First Set Forth Written.

For Vls Finance Ltd. For sunair ltd.

Somesh Mehrotra Satya Pal Gupta

Director Director

For Promoters

Satya Pal Gupta

Kaveen Gupta

Vipul Gupta"

20. After noticing the appellant's case as set above which squarely arose from the appellants' reliance on the MOU, the CLB has in my view erroneously construed the appellant's case to be the transfer of development rights to the second respondent and re-transfer of the same to the company for Rs. 21 crores without first considering the said plea by taking into account the said MOU dated 11th March, 1995 and thus the impugned judgment of the CLB discloses an error apparent on the face of the judgment of the CLB. The CLB ought not to have arrived at such a finding without considering the rights and obligations flowing from the said MOU.

21. The impugned judgment in detail refers to the events which took place before the MOU dated 11th March, 1995 was entered into. However, in my view the CLB does not deal with the terms and the effect of the MOU dated 11th March, 1995 at all. The CLB has also recorded the finding that right from the beginning the intention of the promoters was to put a value on the land and get shares allotted to the respondents against that value. This finding has not been arrived at after considering

the impact and effect of the MOU. Indeed the CLB refers to another MOU dated 29th August, 1994 entered into between the respondent No. 1 and the ACCOR. The CLB has also ascribed the knowledge of the said Memorandum dated 29th August, 1994 to the appellant but for inexplicable reasons did not consider the effect of such knowledge on the basis of terms and conditions enshrined in the said MOU of 11th March, 1995.

22. The CLB has also deduced the intention of the promoters as well as the collaborators to be that shares were to be allotted to the promoters against the value of the land. The impugned judgment also finds that the appellant was not an ordinary shareholder but a specialist in financial matters and was fully aware of the entitlement of the second respondent and the payment of Rs. 21 crores by company to the second respondent. Without going into the terms of the MOU dated 11th March, 1995 the CLB also finds that the liability of the company was in the knowledge of the company petitioner/appellant herein and since it was having such knowledge, the method of payment of Rs. 21 crores by the rotation utilized by the respondents in discharging the company's liability could not be questioned by the appellant. Such findings could have only been arrived at after taking into account the effect of the terms of the said MOU dated 11th March, 1995.

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23. The main plea of the appellant in respect of the rotation of Rs. 21 crores has been, that by payment by the respondent company to HJ Consultants which was closely related to the respondent No. 1 a sum of Rs. 1 crore was rotated 21 times and this was also found to be reflected in the accounts of both the respondent No. 1 company and the HJ Consultants. The CLB directed the respondents to take steps to recover the amount of Rs. 21 crores paid to HJ Consultants either in cash or by way of property valued at Rs. 21 crores presumably as a relief to the appellant/company petitioner.

24. The CLB has also recorded the following findings against the company petitioner/appellant herein:-

> (a) that the appellant did not come with clean hands and had without minding the interest of the company, even took steps to put blocks on the progress of the project. These prejudicial acts took place during the pendency of the company petition and the process of amicable settlement.
>
> (b) that the withdrawal by the appellant from the terms of settlement has also been found not to be bona fide as the Resolution dated 9th March, 2000 passed by the appellant company was not disclosed to the Court and the said resolution showed that the company had decided not to go on with the settlement.
>
> (c) that based on the above findings the conduct of the appellant was not found to be bona fide.

(d) that the relief to the company was declined on the ground that even if the method of clearing the debt and the allocation of shares was questionable, since the respondent No. 2 has been directed to recover the money paid to HJ International within a said time frame, there was no scope to grant any relief to the appellant particularly when the company petition was a motivated one and the company petitioner's conduct disentitled the company petitioner from being granted equitable reliefs under Section 397-398.

I am clearly of the view that in the absence of the consideration of the terms of the contract between the parties as reflected in the MOU dated 11th March, 1995 the above findings cannot be sustained.

25. I am of the view that by disregarding the vital piece of evidence and indeed the entire fulcrum of the contract between the parties recorded by the MOU dated 11th March, 1995 entered into between the parties, the CLB's order dated 13th June, 2001 cannot be sustained. The entire approach of the CLB was flawed as it went into detail into the pre-MOU transactions and the events, considered the post-MOU conduct of the parties also, but did not take into account the terms of the MOU and did not even discuss let alone deal with the terms of the MOU. This clearly shows that the CLB's order dated 13th June, 2001 could be looked at under the jurisdiction of this Court under Section 10-F of the Act as held by the Hon'ble Supreme Court in Dale & Carrington's case (supra) as a vital piece of evidence, i.e., the MOU dated 11th March, 1995, Page 2629 indeed the foundation and the substratum of the appellant's case has been ignored by the CLB. Accordingly the order of the CLB is liable to be set aside. I am mindful of the fact that the respondents and the promoters have also raised the plea as to the lack of bona fides of the appellant and findings have been returned in their favor by the impugned order. The respondents' plea is that the appellant itself not completing its part of transaction as the respondents did not fully comply with the terms of the MOU dated 11th March, 1995 as the obligation to proceed with the rights issue and the securing of finances was not met by the appellant as they had only paid the sum of Rs. 7 crores and made a deposit of Rs. 8 crores. This plea of the respondents is also required to be considered by the CLB. However whether this conduct of the respondents breached the MOU are issues of fact which are required to be determined by the CLB after taking into account the pleas of both counsel.

26. Mr. Chandra, the respondent No. 1's counsel had placed reliance on several documents which are mentioned in paras 10 & 11 of this judgment to contend:

(a) that the conduct of the appellant was not bona fide

(b) the appellant was fully aware of the transactions of the respondent No. 2 with Sun Aero and HJ Consultants

(c) The aim of the company petition was to cash in on the goodwill of the Nikko Hotel due to its success

(d) As the alleged fraud occurred in April, 1995 the company petition suffered from laches.

27. The appellant had vehemently pressed that the entire allocation of shares in favor of the respondents by virtue of the MOU dated 11th March, 1995 ought to be cancelled and in the process the appellant were to become the majority shareholders holding 87% of the equity. This plea also can not be granted at this stage to the appellant as the respondent No. 2 is a running company. The appellant's counsel Shri Manmohan in the alternative has also prayed that the impugned order of the CLB be set aside and the matter be remanded to CLB for fresh consideration in the light of the pleas of the appellant.

28. The impact of the MOU dated 11th March, 1995 has to be considered in the light of the evidence on record. This requires a fresh investigation of facts. I am of the view that since the CLB has not gone into the entire genesis of the dispute originating from the Memorandum dated 11th March, 1995, this Court in an appeal under Section 10F of the Act, cannot delve into the facts to record findings either in favor or against the pleas of the appellant or the respondent. The appropriate course in my view would be to set aside the impugned order of the CLB challenged in this appeal under Section 10F of the Act and direct the CLB to consider the entire dispute afresh by taking into account the observations made in this judgment. The CLB is required to consider the pleas of the appellant in the light of the Memorandum of Understanding dated 11th March, 1995. Before arriving at its findings, the CLB has also to consider the pleas of the respondents about the non-fulfilment of the appellant's part of the obligations entailed by the terms of the Memorandum of Understanding dated 11th March, 1995 between the parties and the other transactions which took place between the appellant and the respondents and other obligations of the appellant. This Court is not expressing any views on any other plea of either of the counsel for the parties in Page 2630 respect of the findings arrived at by the CLB but has found the order of the CLB to be fundamentally flawed as it has failed to take into account the Memorandum dated 11th March, 1995 which was the contract between the parties. However, this judgment need not be taken as an expression of any opinion on merits of the pleas of either side by this Court and the appellant's pleas and indeed the respondents' plea would be fully considered by the CLB which will be free to arrive at its own findings and the mere fact that the CLB's order dated 13th June, 2001 has been set aside for non-consideration of the Memorandum dated 11th March, 1995 will not come in the way of the CLB arriving at its own findings in case such findings, have been arrived at after considering the terms and the impact of MOU dated 11th March, 1995. In light of these findings it is not necessary to consider the pleas of Shri A.N. Haksar the learned senior counsel appearing for respondents 2, 5 & 11 and Shri Keswani appearing for respondent Nos.21 to 23 at this stage.

29. Accordingly the CLB's order dated 13th June, 2001 is set aside. The appeal is allowed in the above terms. The company petition will be listed before the CLB on 18th January, 2006. The CLB is directed to ensure that, since the company petition No. 45 is of the year 1998, the matter be decided as expeditiously as possible and in any case not later than 30th June, 2006.

28. With the aforesaid observations, the appeal stands disposed of accordingly.