Suzuki Motor Corporation vs Union Of India on 22 September, 1997

Equivalent citations: 1997VIAD(DELHI)1, 1997(2)ARBLR477(DELHI), [1998]93COMPCAS771(DELHI), 68(1997)DLT827, 1997(43)DRJ253

JUDGMENT

C.M.Nayar, J.

(1) The present petition is filed under Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996 for interim measures of protection by the petitioner against the respondents as specified in the prayer clause.

(2) The petitioner entered into Joint Venture Agreement with respondents 1 and 2 on October 2, 1982. This Agreement was amended on June 2, 1992. The controversy between the parties arose as a consequence of the Board Resolution allegedly passed in its meeting held on August 27, 1997 to nominate Mr. R.S.S.L.N. Bhaskarudu, Joint Managing Director as Managing Director of the Board of Directors of respondent No. 2, Maruti Udyog Limited with effect from the same date. The Communication in this regard reads as follows:

> "GOVERNMENTOF India Ministry Of Industry Department Of Heavy Industry No. 2(8)/89-PE.VI Dated 27.8.1997 To, Shri Abhijit Mukhopadhyay, Company Secretary, Maruti Udyog Limited, 25, K.G. Marg, New Delhi Subject : Appointment of Managing Director in Maruti Udyog Ltd.(MUL) on behalf of Government of India. Sir, In pursuance of Article 88(4) of the Articles of Association of Maruti Udyog Ltd. (MUL), the Government has appointed Sh..RSSLN Bhaskaradu, Jmd, Mul as Managing Director on the Board of Directors of Mul w.e.f. 27.8.1997 and till further orders. Yours faithfully, sd/- (SANJAY BHATIA) Deputy SECRETARY"

(3) The learned Counsel for the petitioner has vehemently argued that in the above said Board meeting this decision could not have been taken as nominees of the petitioner-Company were in majority and they had protested against the appointment of R.S.S.L.N. Bhaskarudu. The Board, therefore, could not have passed this Resolution. The following grounds of attack have been reiterated :

> (A)The appointment is illegal, void, invalid and ultra vires. The Restitution was never passed and could not have been passed as the nominess of the petitioner Company had rejected the appointment; (b) The Resolution passed, in any case, on August 27, 1997 if put to vote would have been defeated by a margin of 5 to 4; (c) The respondents failed to comply with the provisions of Article 5.4 which lays down "that all major corporate decisions with respect to Maruti Udyog Limited will be made only after consultation with Suzuki Motor Corporation and with the concurrence of Suzuki

Motor Corporation. The major corporate decisions with respect to Maruti Udyog Limited shall mean and action requiring shareholders' approval under the Companies Act, 1956." The concurrence of the nominees of the petitioner was not obtained and the purported Resolution dated August 27, 1997 could not be given effect to; (d) There was no vacancy as on August 27, 1997 as the previous Managing Director took over on August 28, 1997 and he would only be deemed to have vacated the office at the close of 5th Annual General Meeting of Shareholders which is now fixed to be held on September 22, 1997. Therefore, there was no vacancy as on August 27, 1997 when the Board allegedly approved the appointment of Mr. Bhaskarudu.

(4) On the other hand the learned Attorney General has argued that the present petition under Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996 for interim measures is not maintainable in law. Mr. R.S.S.L.N. Bhaskarudu acted as Managing Director of respondent No. 2 since August 27, 1997 for the last three weeks and to impugn his appointment at the belated stage on the even of the Annual General Meeting in the present proceedings is not permissible in law. It will not be in the interest of justice to stop a meeting as no restraint order can be passed in the facts and circumstances of the case. There is no balance of convenience or prima facie case in favour of the petitioner-Company. The new Managing Director was earlier the Joint Managing Director of the Company and he is fully qualified to hold the present post. The concurrence of the petitioner-Company was not required in terms of the Joint Venture Agreement. The learned Attorney General has made reference to the amended Joint Venture Agreement dated June 2, 1992, particularly to the provisions of Article 5.2 to show that the word "Consultation is missing in the amended provisions. Therefore, it was not imperative on the part of the respondent-Company to have consultations before appointment of the Managing Director. The only condition which was applicable was that the petitioner and the Government shall have the right to designate the Managing Director by turns provided that the party which nominates the Managing Director shall be entitled to remove such Managing Director and nominate the new Managing Director for the term of the office upto the expiry of term of office of the Predecessor. It is submitted that presently it is the turn of the Government to nominate the Managing Director and the petitioner-Company should have no grievance on that account. Lastly, in answer to the plea of the petitioner that the appointment of the Managing Director could only take place at the Annual General Meeting and the meeting of the Board held on August 27, 1997 nominating the Managing Director was bad in law, the learned Attorney General has cited the provision of Section 317 of the Companies Act, 1956 which lays down that "no company shall, after the commencement of this Act, appoint or employ any individual as its Managing Director for the term exceeding 5 years at a time." The period of the previous Managing Director as nominated by the petitioner-Company having expired on August 27, 1997 it was imperative in law to appoint a new Managing Director.

(5) The Clauses which are relevant for deciding the present controversy between the parties may be reproduced as follows:

"5.1Confirmation of the Provisions of the Joint Venture Agreement and Maruti's Articles of Association.--All agreements, promises, representations, warranties and/or provisions set forth in the Joint Venture Agreement, as amended by this Article 5 shall remain in full force and effect in accordance with their respective terms as so amended. 5.2 Board of Directors and Management.--Notwithstanding the provisions of Article 5 of the Joint Venture Agreement, the parties hereto hereby agree as set forth below with respect to the Board of Directors, Officers and management of Maruti;

(A)Article 5.1 of the Joint Venture Agreement shall be amended to read as follows: "5.1 Board of Directors.--The Board of Directors of Maruti will consist of not more than twelve (12) persons. The Board of Directors will have the right to manage and responsibility for the management of Maruti. All Directors of Maruti shall be nominees of Suzuki and the Government. So long as Suzuki and/or its subsidiary or subsidiaries and the Government (and/or any financial institution wholly owned by the Government) together with shares held by Maruti Udyog Limited Employees Mutual Benefit Fund hold 50% each in the issued share capital of Maruti, both Suzuki and the Government shall be entitled to nominate an equal number of Directors on the Board of Maruti. Suzuki and the Government, as the case may be, shall be entitled to remove the Directors nominated by each of them.

The government and Maruti shall take and cause Directors of Maruti to take any and all steps required for any purpose contained in this Clause 5.1 under the Articles of Association and other regulations of Maruti and the laws of India. The term of office of the chairman of the Board of Directors shall expire at the close of the fifth annual general meeting of shareholders to be held following his assumption of office. The Chairman of the Board of Directors shall be nominated by Suzuki and the Government by turns; provided that the party which nominates the Chairman of the Board of Directors shall be entitled to remove such Chairman and nominate the new Chairman of the Board of Directors for the term of office upto the expiration of the term of office of the Predecessor. The Government shall cause the Chairman of the Board of Directors in office as of the date of this Agreement to retire at the close of the annual general meeting of shareholders to be held first following the date of this agreement (such meeting currently scheduled to be held on or before July 31, 1992) and the Government shall have the right to designate the next Chairman of the Board of Directors to be appointed at such annual general meeting of shareholders. Chairman shall be a part-time Director of MARUTI.

(B)Article 5.2 of the Joint Venture Agreement shall be amended to read as follows: "5.2 Officers.--The Managing Director shall be the Chief Executive Officer of Maruti, who will have the power and authority to represent MARUTI. The term of office of the Managing Director shall expire at the close of the fifth annual general meeting of shareholders to be held following his assumption of office. Suzuki and the Government shall have the right to designate the Managing Director by

turns; provided that the party which nominates the Managing Director shall be entitled to remove such Managing Director and nominate the new Managing Director for the term of office upto the expiration of the term of office of the Predecessor. The Government shall cause the Managing Director in office as of the date of this Agreement to retire at the close of the annual general meeting of share holders to be held first following the date of this Agreement (such meeting currently scheduled to be held on or before July 31, 1992 and Suzuki shall have the right to nominate the next Managing Director to be appointed at such annual general meeting of shareholders. Any nominee as Managing Director shall be the person who has an experience of work for Maruti as employee and/or full time Officer for not less than three consecutive years before the nomination and is well acquainted with matters of MARUTI. The aforesaid qualifications for nominee as Managing Director may be waived or modified in a particular case when Suzuki and the Government so agreed for such case. Notwithstanding any provision herein contained to the contrary, in case the Government and Suzuki so agree, the Managing Director can concurrently be the Chairman of the Board of Directors. Suzuki and Government and Maruti shall take any and all steps required for any purpose set forth in this Clause 5.1 under the Articles of Association and other regulations of Maruit and the laws of India. The Officers of Maruti will perform such duties as are required by law and as are authorised by resolution of the Board of Directors. When the Managing Director proposes any agenda concerning a matter important for operation or management of Maruti, such proposal shall be made after consultation with the Chairman of the Board." The above provisions are also incorporated in Article 88 of the Articles of Association of Maruti Udyog Limited, respondent No. 2-Company, as framed in pursuance to the provisions of the Companies Act.

(6) Article 10 of the Agreement dated October 2, 1982 provided the Arbitration Agreement. The amended Agreement dated June 2, 1997 also contained an arbitration clause in Article 7.7 which may be reproduced as follows:

> "7.7Arbitration.--Any and all claims, disputes, controversies, disagreements or differences between the parties arising out of or in relation to or in connection with this agreement or a breach hereof, which cannot be satisfactorily settled by correspondence or mutual conference between the parties hereto, shall be determined by arbitration in accordance with the then prevailing Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with such Rules upon written request of any party hereto. The site of such arbitration shall be London, United Kingdom. The decision of such Arbitrator or Arbitrators shall be final and binding upon the parties hereto and judgment thereon may be entered in any Court having jurisdiction thereon or application may be made to such Court for judicial acceptance of the Award and/or order of enforcement, as the case may be."

(7) The short question in the present facts which arises for consideration in this petition is as to whether it will be open for the Court to pass restraint orders and stop Annual General Meeting of the Company which is scheduled to be held on September 22, 1997 at 3 p.m. The parties, admittedly, have equal stakes in the Joint Venture and it cannot be categorically said that views of each other can be by-passed, ignored and considered irrelevant. The term of the previous Managing Director

who was the nominee of the petitioner-Company was approved in the Annual General Meeting held on August 28, 1992 when the following Resolution was passed:

> "ITEMNo. 3. To approve the appointment of Sh. R.C.Bhargava, as Managing Director With the consent of all members present in the meeting Shri Rssln Bhaskarudu Director (Materials), chaired the meeting for this item of business as it concerned Shri R.C. Bhargava, Chairman of the meeting. Smt. Abha Anand Kishore, Authorised Representative of the President of India proposed the following motion to be passed as Special Resolution: "RESOLVED that in terms of Article 88 of the Articles of Association of the Company Shri R.C. Bhargava be and is hereby elected and appointed as Managing Director of the Company for a period of five years w.e.f. 28th August, 1992 on the existing salary, allowances and perquisites as indicated hereunder....."

The above Resolution would indicate that Mr.Bhargava was appointed for a period of five years with effect from August 28, 1992 and the period of five years obviously had expired on August 27, 1997 when the Board took upon the matter to appoint his successor. The relevant portions of the Minutes of the Board meeting which took place on August 27, 1997 read as under: "The Board examined the position and concluded that the tenure of Shri Ravindra Chandra Bhargava as Managing Director expired on 27.8.1997. Mr. Yoshio Saito, Director, stated that the could not accept Government's nominee as Managing Director and that there was no need for a Managing Director till the next Annual General Meeting. Chairman and Shri Anup Mukerji pointed out that it was necessary to have a Managing Director for a Company with operations of the size of Mul and that substantial powers of management stand delegated to the Managing Director. Hence, there was a need for the Managing Director.

The Board thereafter taking all this into account, passed the following resolutions subject to the approval of the shareholders at the ensuing Annual General Meeting of the Company; 1. Resolved That in terms of Article 88(4) of the Articles of Association and subject to the provisions of Sections 198, 309, 310, 311, Schedule Xiii and other applicable provisions, if any, of the companies Act, 1956, Mr.RSSLN Bhaskarudu be and is hereby appointed as Managing Director of the Company w.e.f. 27.8.1997 till the conclusion of the fifth Annual General Meeting of the Company to be held following his assumption of office subject to the approval of the shareholders in the Annual General Meeting on the following terms and conditions....."

The Board in view of the above approved the appointment of Mr. Rssln Bhaskarudu as Managing Director of the Company w.e.f. August 27, 1997 till be conclusion of the 5th Annual General Meeting of the Company to be following his assumption of office subject to the approval of the shareholders. The learned Attorney General is quite right to contend that in view of the provisions of Section 317 of the Act an embargo is placed on the Company that the term of the Managing Director cannot exceed five years at a time. Section 317 of the Act reads as follows:

> "Managing Director not to be appointed for more than five years at a time. (1) No company shall, after the commencement of this Act, appoint or employ any

> individual as its Managing Director for a term exceeding five years at a time. (2) Any individual holding at the commencement of this Act the office of Managing Director in a Company shall, unless his term, expires earlier, be deemed to have vacated his office immediately on the expiry of five years from the commencement of this Act. (3) Nothing contained in Sub-section (1) shall be deemed to prohibit the reappointment, re-employment, or the extension of the term of office, of any person by further periods not exceeding five years on each occasion; Provided that any such reappointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force. (4) This section shall not apply to a private company unless it is a subsidiary of a public Company."

Therefore, on the above basis, the appointment of Managing Director cannot be said to be outside the framework of the statutory provisions as well as of the Joint Venture Agreement.

(8) The judgments as reported in Bentley-Stevens v. Jones and Others, 1974(2) All England Law Reports 653; United Commercial Bank v. Bank of India and Others, ; Life Insurance Corporation of India v. Escorts Ltd. & Others, ; Dalpat Kumar and Another v. Prahlad Singh and Others, and Gujarat Bottling Co. Ltd. & Others v. Coca Cola Co. and Others, have been cited by learned Counsel for the respondents to reiterate the proposition that the Court would not grant an interlocutory injunction in respect of irregularities which could be cured by going through a proper process.

(9) In Bentley-Stevens v. Jones and Others (supra) the notice of motion which was before the Court asked for an order on behalf of the plaintiff restraining the defendants and each of them until the trial of the action or further order from acting upon the resolution purported to have been passed by the defendant-Company at a purported Extraordinary General Meeting thereof held at 9.30 a.m. on the 26th February, 1974 removing the plaintiff as a Director of the defendant-Company. The following passage from the judgment may be reproduced as follows:

> "THEplaintiff's case is first of all that proper notice of the Board meeting of holdings on Monday, 28th January, 1974, was not given, with the consequence that the proceedings of that meeting, and everything that flowed from them, were invalid. Secondly, it was submitted on behalf of the plaintiff that even if sufficient notice of the meeting was given, a Board meeting of the defendant-Company was necessary before an extraordinary general meeting of that company could be validly convened, and no such meeting was ever held, with the consequence that the extraordinary general meeting was not properly convened and its proceedings were therefore a nullity. Alternatively, Counsel for the plaintiff submitted that this is what is popularly known as a `quasi-partnership' case and that on the principles enunciated by the house of Lords in Ebrahimi v. Westbourne Galleries Ltd., the Court should restrain the first and second defendants, as two of the three partners in the quasi-partnership, from expelling the third partner, namely, the plaintiff.
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> I will deal with the first and second submissions together. In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in

which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitable be the same. In Browne. v. La Trinidad Lindley Lj said:

"I think it is most important that the Court should hold fast to be rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment. It seems to me that the motion which is before me falls within the principle stated by Lindley LJ."

(10) The case as reported in United Commercial Bank v. Bank of India and Others (supra) is not of great relevance when it is co-related to the facts of the present case. It is only said by the Supreme Court that the Court usually refrains from granting injunction to restrain the performance of the contractual obligations arising out of Letter of Credit or a Bank guarantee between one Bank and another. In Life Insurance Corporation of India v. Escorts Ltd. and Others (supra) the case of Bentley-Stevens v. Jones and Others (supra) was referred to by the Supreme Court. Paragraph 99 of this judgment reads as under:

"99. Again in Bentley-Stevens v. Jones, (1974) All Er 653, it was held that a shareholder had a statutory right to move a resolution to remove a Director and that the Court was not entitled to grant an injunction restraining him from calling a meeting to consider such a resolution. A proper remedy of the Director was to apply for a winding-up order on the ground that it was `just and equitable' for the Court to make such an order. The case of Ebrahimi v. Westbourne Galleries Ltd., (1972) 2 All Er 492 was explained as a case where a winding-up of order was sought. In the case of Ebrahimi v. Westbourne Galleries Ltd. (supra), the absolute right of the general meeting to remove the directors was recognised and it was pointed out that it would be open to the Director sought to be removed to ask the Company Court for an order for winding-up on the ground that it would be "just and equitable" to do so. The House of Lords said, "MY Lords, this is an expulsion case, and I must briefly justify the application in such case of the just and equitable clause...The law of companies recognises the right, in many ways, to remove a Director from the Board. Section 184 of the Companies Act, 1948 confers this right on the Company in general meeting whatever the articles may say. Some articles may prescribe other methods, for example, a governing director may have the power to remove (of Rewondoflex Textiles Pvt. Ltd.), (1951) Vlr 758. And quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The jut and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so

> long as the business continues he shall be entitled to management participation, an obligation so basic that if broken, the conclusion must be that the association must be dissolved."

(11) In Dalpat Kumar and Another v. Prahlad Singh and Others (supra) the principle that existence of a prima facie case must be shown that no grant of injunction must result in irreparable injury to the parties seeking relief. Paragraph 5 of the judgment may be reproduced as follows:

> "5.Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury, or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If one weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus, the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad-interim injunction pending the suit."

(12) Similarly in Gujarat Bottling Co. Ltd. and Others v. Coca Cola Co. and Others (supra) the Court considered relevant tests for exercise of discretion. Paragraph 43 of this judgment makes the following reading:

> "43.The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests--(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right

> assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weight one need against another and determine where the "balance of convenience" lies. [See: Wander Ltd. v. Antox India (P) Ltd., (SCC at pp. 731-32.] In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

(13) In view of the settled position of law, as referred to above, the facts of the present case may now be briefly examined. The term of the previous Managing Director had come to an end after the expiry of five years from the date of his appointment. The Board resolved in its meeting held on August 27, 1997 that the Government has appointed Mr. R.S.S.L.N. Bhaskarudu, Joint Managing Director (MUL) as Managing Director on the Board of Directors of Mul with effect from August 27, 1997 and till further orders. The appointment of Managing Director has to be in compliance with the provisions of law and as contained in the agreement entered into between the parties and must be ratified at the Annual General Meeting of shareholders which is scheduled to be held on September 22, 1997. It is also not denied that it is the turn of the respondent-Company (MUL) to nominate its Managing Director. The main grievance of the petitioner-Corporation is that there has been no concurrence and no effective consultation and its nominees had opposed the appointment of Mr. Bhaskarudu. The present petition has been filed under Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996 for urgent interim measures. The following relief is prayed for in the application:

> "(A)stay the operation of the purported resolution of the Board meeting of 27th August, 1997 purportedly appointing Mr.R.S.S.L.N. Bhaskarudu as the Managing Director of respondent 2; (b) restrain the holding of the Annual General Meeting proposed to be held on 22nd September, 1997; (c) alternatively restrain Respondents 1 and 2 from considering at the 16th Agm to be held on 22nd September, 1997 the item No. 11 of the agenda, being the resolution for the appointment of Mr. R.S.S.L.N. Bhaskarudu, as the Managing Director of respondent 2. (d) alternatively appoint a senior Court official or the Registrar or a Senior Advocate of this Hon'ble Court to act as the Chairman of the 16th Agm of Maruti to be held on 22nd September, 1997 and suspend the effect of the resolutions, if any, passed at the 16th Annual General Meeting pending the adjudication of the disputes in the International Commercial Arbitration initiated by the applicant;

(14) Paragraph 9 of the application states that the request of arbitration has been forwarded to the International Court of Arbitration of the International Chamber of Commerce and the applicant/petitioner has requested Lord Mustill to be appointed as a Sole Arbitrator to adjudicate upon the disputes, differences and claims arising out of the Jva on a fast track route.

(15) Mr. Bhaskarudu is functioning as a Managing Director of respondent No. 2 w.e.f. August 27, 1997 till date (for about three weeks) and it will note be appropriate to set aside or hold his appointment in abeyance and stay the operation of the resolution appointing him or to restrain the holding of Annual General Meeting proposed to be held on September 22, 1997. The appointment, in any case, has to be ratified at the Annual General Meeting wherein the petitioner-Corporation will be at liberty to raise objections.

(16) The question which has been highlighted and agitated is that the consent, concurrence and opinion of the petitioner-Corporation was not taken into consideration before nominating Mr. Bhaskarudu. This question as to whether it was incumbent on the respondent-Company to take the decision in consultation and concurrence with the petitioner will have now to be determined by the Arbitrator as the petitioner has chosen to taken recourse to that remedy as provided by Article 7.7 of the Joint Venture Agreement. As, admittedly, disputes and differences have arisen between the parties out of or in relation to or in connection with the agreement. The petitioner-Corporation has taken recourse to arbitration and approached an Appropriate Authority in this regard. Articles 3 and 4 of the Icc Rules of Conciliation and Arbitration may be read as follows:

ARTICLE3 Request for Arbitration 1. ..... A party wishing to have recourse to arbitration by the International Chamber of Commerce shall submit its Request for Arbitration to the Secretariat of the International Court of Arbitration, through its National Committee or directly. In this latter case the Secretariat shall bring the request to the notice of the National Committee concerned. The date when the Request is received by the Secretariat of the Court shall, for all purposes, be deemed to be the date of commencement of the arbitral proceedings. 2. ..... The Request for Arbitration shall inter alia contain the following information: (a) names in full, description, and addresses of the parties, (b) a statement of the claimant's case, (c) the relevant agreements, and in particular the agreement to arbitrate, and such documentation or information as will serve clearly to establish the circumstances of the case. (d) all relevant particulars concerning the number of Arbitrators and their choice in accordance with the provisions of Article 2 above. 3. The Secretariat shall send a copy of the Request and the documents annexed thereto to the defendant for his Answer.

ARTICLE4 Answer to the Request 1. ..... The defendant shall within 30 days from the receipt of the documents referred to in paragraph 3 of

> Articles 3 comment on the proposals made concerning the number of Arbitrators and their choice and, where appropriate, nominate an Arbitrator. He shall at the same time set out his defense and supply relevant documents. In exceptional circumstances the defendant may apply to the Secretariat for an extension of time for the filing of his defense and his documents. The application must, however, include the defendant's comments on the proposals made with regard to the number of Arbitrators and their choice and also, where appropriate, the nomination of an Arbitrator. If the defendant fails so to do, the Secretariat shall report to the International Court of Arbitration, which shall proceed with the arbitration in accordance with these Rules." An affidavit has also been filed in Court by Director and General Manager of Asia and Oceanza, Automobiles Department, Overseas Automobile Marketing Division, Suzuki Motor Corporation which reads as under: "AFFIDAVIT I, J.Sugimori, son of Shri Yuri Sugimori, aged 55 years resident of 1-406, 2640 Tomitsuka, Hamamastu, Japan and temporarily resident in New Delhi do herby solemnly affirm and declare as under: 1. I state that I am the Director and General Manager of Asia and Oceanza, Automobiles Department, Overseas Automobile Marketing Division, Suzuki Motor Corporation. 2. I state that Suzuki Motor Corporation commenced the arbitration proceedings before the commencement of the Section 9 proceedings in the Hon'ble Delhi High Court. 3. I State that M/s. Amar Chand and Mangal Das and Suresh, A. Shroff and Co., the Solicitors and Advocates of Suzuki Corporation, by their communication dated 18th September, 1997 bearing No. D-AB/6-A 00-01-02-03-sent out the requests to arbitrate to the International Chamber of Commerce (International Court of Arbitration) by Fax No. 003349532933) and 10.35 a.m. 4. The same request was also couriered by them at 14-50 hours on the 18th of September. 5. I also state that a sum of Us Dollars 2000 was also telex paid to the account of the International Court of Justice in Switzerland (Bank Sarasin and Co.). A copy of the courier slip and fax despatch sheet is enclosed herewith as Annexures A and B respectively. Solemnly affirm at New Delhi on this the 19th day of September, 1997."

(17) The question as to whether the consultation and concurrence of the petitioner-Corporation was required in the Board meeting which was held on August 27, 1997 will have to be determined by the Arbitrator and the proceedings in this regard have since been commenced by the petitioner. It is established from record that the consent and concurrence of the petitioner was not taken while nominating the present Managing Director of the respondent-Company. In any case, his appointment has to be concurred and approved at the Annual General Meeting and it will not be in the interest of justice to restrain holding of such a meeting. the petitioner will not suffer any irreparable injury which cannot be cured at a subsequent stage when the proceedings in arbitration are concluded. In view of the above, the present petition is disposed of with the following directions:

> The proposed Annual General Meeting of the Company shall be held on September 22, 1997 as scheduled as no prima facie ground is made out for restraining the holding of such meeting in the facts and circumstances of the present case: B. the appointment of Mr. R.S.S.L.N. Bhaskarudu in the Board Meeting held on August 27,

1997, in case it is finally approved by the shareholders in the Annual General Meeting shall be subject to the decision/award as may be rendered by the Arbitrator in the arbitration proceedings which have since commenced.

(18) During the course of arguments it was put to learned Counsel for the parties to sit across the table and find an amicable solution to the controversy which has been raised. They have very fairly stated that the matter is still open and they will examine the pleas and talk to each other to find out whether the disputes can be resolved. However, it has now been stated that there is no progress in this regard to resolve the same.

(19) Regretfully, I am constrained to say that the respondent-Government in the Press as well as on Television made certain statements which cannot be said to be in the best interests of the parties and should have been avoided when the matter was sub-judice before the Court. The following paragraph which appeared in the daily newspaper. "The Economic Times" dated September 29, 1997 may be reproduced:

"MARAN calls Suzuki's bluff, says suitors a dozen.--The face off between the Government and Suzuki Motor Corporation worsened today with industry Minister Murosoli Maran cocking a snook at Suzuki saying other candidates were ready to step in if the Japanese carmaker pulled out of the joint car venture-Maruti Udyog Ltd. "There are thousands of people waiting," he said, "The Americans are there, the Germans are there, and there is no dearth of technology. There are several people better than Suzuki, he told newsmen today.

SUZUKI and the Government, which jointly own Mul, are at loggerheads over the nomination of the venture's new Managing Director. But Mr. Maran added the Government was not averse to a dialogue with Suzuki to sort out the crisis. The interests of Maruti would not be allowed to suffer at any cost. "We are waiting for the High Court's decision. It is not going to affect foreign investment at all if Suzuki backs out. "Toyota is there. All the automobile majors are waiting to jump to this opportunity." he said."

Similarly, Headlines in `The Times of India' of the same date read as follows: "Suzuki is welcome to step out of Maruti : Maran Says other foreign automobile majors are ready to invest New Delhi : Industry Minister Murasoli Maran on Friday said Suzuki Motor Corporation (SMC) was welcome to withdraw from Maruti Udyog Ltd. (MUL) if it so desired, adding there were other automobile majors waiting to step in. "We welcome it if Suzuki decides to step out, let them go," he said when asked what would happen if the Japanese Company decided to step out owing to differences between the two parties. Even if Suzuki backed out, it would not affect foreign investment inflow into India, he added. "Why should it, every foreign major is in India? he said."

(20) Similar news items have appeared in other newspapers as well as on television. These are most unfortunate when the proceedings have been pending in Court. The Government must realise that it

is dealing with such situations on behalf of the country as well as the people. The matters of public importance may have to be ratified by the Parliament which is supreme and is representative of people. There cannot be any absolute discretion with one individual. The concept of "discretion" has been defined by a recent judgment of the Division Bench of this Court in Centre for Public Interest Litigation v. Union of India and Others . Paragraph 3 from the judgment reads as under:

> "In these cases where the allotments of petrol pumps etc. made by the Minister under his discretionary quota have been called in question, it is necessary to lay down as to what is the concept of `discretion'. `Discretion' implies good faith in discharging public duties. The exercise of `discretion' has to be based on relevant considerations. When it is exercised by taking into extraneous considerations, such action has to be quashed. The concept of absolute, untrammeled or unfettered `discretion' is wholly inappropriate to a public authority. When given power to exercise `discretion' it has to be used for public good. The concept of unfettered `discretion'is appropriate only when dealing with a private property and not when dealing with public property. `Discretion' does not empower a person to do what he likes. He has to act reasonably. When it is found that no right thinking or conscientious person would have exercised the `discretion' in the manner it was exercised, the action will have to be quashed. The power is to use the `discretion' and not abuse it. The authority granted `discretion' has to exercise power in a fiduciary capacity. If the Court finds that there were illegitimate motives in exercise of the `discretion', the action would not be sustained. While going into individual cases, we have kept in view that it is not for this Court to usurp the `discretion', of public authority. If the decision to make discretionary allotment is within the confines of reasonableness, this Court will not go into the merits, even if two views are possible. But at the same time, arbitrary exercise of `discretion' cannot be legitimated by this Court. The Court may overlook certain aberrations and allow considerable freedom of `discretion' on being satisfied that the public authority was acting bona fide but at the same time when it is found that by exercising discretionary powers allotments were given only as benevolence to those who do not deserve it, and the grant of such benevolence was for illegitimate motives, the Court is duty bound to set right the wrong....."

Further it is said in paragraph 17: "What is given away by way of exercise of discretionary power is not the personal property of an individual. It is the property of the people of this country. The personal property can be given away at one's whim and fancy. That cannot be the standard while parting with the property of the others, namely, the Nation. We may note that most of these petrol pumps particularly in big cities like Delhi, Bombay, Bangalore, Calcutta and Madras are worth huge amounts if put to auction. If a person has to acquire a petrol pump in a city like Delhi he would have to spend lakhs of rupees. We are not suggesting that ignoring these financial aspects or loss of revenue which may result on grant of discretionary allotment, the Government cannot make allotment for the benefit of certain persons or class of persons to carry out its welfare objects. Such allotments, however, have to be made on rational basis and on consideration of relevant factors whether there exists or not any written guidelines. If there are no written guidelines governing such discretionary allotments, the yardstick has to be reasonableness and fairness of action. If the

procedure is not laid down it only means a reasonable and just procedure from the view point of a reasonable average man. This has to be the standard while considering the exercise of discretionary power of the Government in the matter of grant of allotments concerning the public property. Non-adherence to these principles has necessarily to result in quashing of impugned action. We are unable to accept the plea urged by some Counsel equating these allotments with that of favour for a bed in a Government hospital or a Railway ticket or a domestic gas connection or alike."

(21) In view of the above, it will not be correct to make sweeping statements as to who should step out and who should come in. I will not say anything more on this question except to reiterate that exercising restraint has its own advantages and indiscretion must be avoided.