

D. Srinivasan, Gautham S. Varad, Shruti ... vs H.S. Viswanath, Mohan Reddy And ... on 4 September, 2006

Equivalent citations: [2007]75SCL59(CLB)

ORDER

K.K. Balu, Vice-Chairman

1. The petitioners reportedly holding in excess of one-tenth of the issued share capital of M/s Daksha Projects Private Limited ("the Company") and aggrieved on account of certain acts of commission and omission in the affairs of the Company namely, (a) illegal transfer of the Company's landed property by entering into a cancellation deed; (b) misappropriation of the amounts realised by way of cancelling the sale deed; (c) holding of annual general meeting without issuance of notices to members ; and (d) illegal shifting of the registered office of the Company, have invoked in the first company petition (CP.No. 13 of 2005), the provisions of Sections 397 and 398 of the Companies Act ("the Act") seeking the following reliefs:

i) to set aside the deed of cancellation dated 02.02.2005;

ii) to declare that the resolution passed at the annual general meeting held on 11.01.2005, without appointing the first petitioner as a director of the Company, is null and void; and

iii) to direct the second respondent to compensate the Company on account of the damages sustained by wrongful acts of the respondents.

2. The second company petition (C.P. No. 67 of 2005) has been filed for declaration -

i) that the acts of the respondent Nos. 2 & 3 claiming to be directors of the Company are illegal and void;

ii) that the cancellation deed dated 10.08.2005 executed by the respondent Nos. 2 & 3 without authority of law is null and void; and

iii) that acts of the respondents pursuant to the cancellation deed dated 10.08.2005 are illegal and not binding on the Company.

3. The petitioner in C.P. No. 67 of 2005 is the second petitioner in C.P.No. 13 of 2005. The respondent Nos. 1 & 2 in C.P.No. 13 of 2005 are the respondent Nos. 2 & 3 in the C.P. No. 67 of 2005. While M/s Keystone Constructions is the third respondent in C.P.No. 13 of 2005, three of its partners are the respondent Nos. 4 to 6 in C.P. No. 67 of 2005. The acts of oppression and mismanagement complained of in these petitions are in relation to one and the same Company.

Hence, both the petitions were heard together and are being disposed of by this common order.

4. Shri S.M. Chandrashekar, learned Counsel, while initiating his arguments submitted:

- While the petitioner Nos. 1 & 2 and the respondent Nos. 1 & 2 are promoters of the Company, the first petitioner and the respondent Nos. 1 & 2 are subscribers to the Memorandum of Association and first directors of the Company. The Company is engaged in acquiring and developing lands and converting them into residential/commercial apartments. The promoters identified 9 acres of land comprised in survey Nos. 53 & 54 situated at Kasavanahalli village, Varthur Hobli, Bangalore ("the property") belonging to the third respondent, a partnership firm, constituted by four partners, for acquisition and development, prior to incorporation of the Company. The second petitioner met all costs, charges and expenses including registration charges incurred prior to and in anticipation of the formation of the Company and paid a sum of Rs. 1.72 crores to the partners of the third respondent in advance, pending registration of the property in the name of the Company, which was incorporated on 11.06.2004.

- The board of directors at its first meeting held immediately after incorporation of the Company, on 12.06.2004 (a) approved the opening of bank account; (b) approved the pre-incorporation arrangement; (c) decided to reduce the pre-incorporation agreement in writing with the second petitioner and K. Madhu; (d) decided to register the property in the name of the Company; (e) authorised the respondent Nos. 1 & 2 to complete the formalities in connection with execution of the sale deed concerning the property; and (f) appointed the auditor. Accordingly, a Memorandum of Understanding came to be executed on 20.06.2004, between the parties, wherein the Company acknowledged the payment of monies by the second petitioner in favour of the third respondent for purchase of the property, pending registration in the name of the Company. This was followed by a deed of sale executed on 28.06.2004 in favour of the Company by the third respondent, represented by V. Srinivasa Raju, one of the partners of the firm. By virtue of Sections 19 & 21 of the Indian Partnership Act, 1932 an individual partner can carry on the business of the firm and his acts are binding on the firm and its partners. Therefore, the execution of the sale deed by V. Srinivasa Raju, one of the partners is binding on the firm and other partners. However, the validity of the execution of the sale deed does not arise for adjudication in the present proceedings. If the sale deed is void, as claimed by the third respondent, it should have got the same declared as void by a competent civil court. Any declaration by way of the cancellation deed that the sale deed is void, is not permitted under law. Furthermore, if the cancellation deed is not supported by any consideration, such cancellation deed will be void ab initio. Therefore the execution of the cancellation deed by the respondent nos. 1 & 2, assuming the power of the civil court is untenable in law. At the board meeting held on 12.10.2004, (a) the petitioner Nos. 2 & 3 were appointed as additional directors of the Company; and (b) the petitioner Nos. 2 & 3 were allotted 2,50,000 equity shares and 50,000 equity

shares of Rs. 10/-each respectively. The respondent Nos. 1 & 2 are parties to the resolutions passed at the board meeting held on 12.10.2004. One Dorarajulu Naidu, Advocate & Notary Public, participated as an invitee in the board meeting and signed the minutes of the board meeting. Form No. 2 and Form No. 32 have been filed establishing the allotment of shares in favour of the petitioner Nos. 2 & 3 and their appointment as additional directors of the Company. The appointment of the petitioner Nos. 2 & 3 as additional directors and allotment of shares made in their favour at the board meeting held on 12.10.2004 are not challenged by the respondent Nos. 2 & 3 in any forum. Hence, the respondent Nos. 2 & 3 cannot question the allotment of shares in favour of the respondent Nos. 2 & 3 and their appointment as additional directors of the Company. The letters dated 14.10.2004 addressed to the petitioner Nos. 2 & 3 by the first respondent confirm the appointment of the petitioner Nos. 2 & 3 as additional directors at the board meeting held on 12.10.2004. The petitioner Nos. 2 & 3 assumed charge as directors at the board meeting held on 25.11.2004. At the subsequent board meeting held on 15.12.2004, H.M. Venkatesh and K.V.R. Charan were appointed as additional directors. The respondent Nos. 1 & 2 conspicuously did not attend these board meetings, but subsequently started disputing the appointment of additional directors and allotment of shares in favour of the petitioner Nos. 2 & 3. When the original minutes book containing the board resolutions produced, it was vehemently opposed by the respondents on 14.10.2005 and therefore, the petitioners cannot now be found fault for non-production of the minutes book.

- At the annual general meeting reportedly held on 11.01.2005, the first petitioner was made to retire from the office of director, without re-appointing him, in terms of a communication received by the first petitioner on 11.01.2005, which was sent to the address of the registered office of the Company at Super Market Complex, East Trinity Woods, Sarjapur Road, Koramangala, Bangalore-560 034. The shifting of the registered office was never approved at any meeting of the board of directors of the Company. The notice of the annual general meeting was purportedly sent on 01.01.2005 by certificate of posting, but the date of certificate of posting is not visible and no original certificate of posting has been produced before the CLB. The petitioners did not receive any notice for the alleged annual general meeting. There is no material to establish that the retirement of the first director at the first annual general meeting is in accordance with Article 10. Article 10 provides for the retirement of directors in every annual general meeting and prescribes the procedure for retirement of directors, which has not been complied with in the case of the first petitioner. The first petitioner is the third subscriber to the memorandum of association, in which case there was no requirement for the retirement of the first petitioner, especially when the respondent Nos. 1 & 2 are the first two subscribers to the memorandum of association. The Company was incorporated on 11.06.2004 and the annual general meeting was held on 11.01.2005, before completion of one year and the accounts for the relevant year were not adopted at the annual general meeting. The only purpose of convening the annual general meeting was to remove the first

petitioner from the office of director.

- The Memorandum of Association shows that the first respondent subscribed to 4000 equity shares, but according to the respondents he holds only 1000 equity shares. Similarly, the second respondent subscribed to 3000 shares, but the counter statement discloses that shares have been allotted to the respondents group namely, second respondent -990000; J.R. Venu - 3000 shares and Arun Kumar Chordia - 2000 shares. These shares are not supported by any consideration and the issue of further shares is beyond the authorised capital of the Company and therefore must be set aside. While shares have been purportedly allotted to the respondent Nos. 1 & 2, the first petitioner has not been allotted any shares. The allotments in favour of these respondents are not supported by any material. This shows the extent of manipulation indulged by the respondent Nos. 1 & 2. In the event of two contending parties filing conflicting returns, the Registrar of Companies can only take the returns on record, but cannot adjudicate the validity of the transactions borne out by the relevant returns.

- At the extra ordinary general meeting held on 03.03.2005, pursuant to the notice issued by the second petitioner under Section 284 of the Act, for removal of the second respondent from the office of director, he was removed from directorship in accordance with due process of law. The first respondent, inspite of receipt of notices of the board meeting not only absented continuously for the three board meetings namely, 12.01.2005, 04.02.2005 and 05.03.2005, but also failed to seek leave of absence for these meetings, thereby he ceased to be a director in terms of Section 283(1)(g) of the Act. This factor was discussed and taken on record by the Company at its board meeting held on 15.03.2005. The respondent Nos. 1 & 2 have not challenged the action of the petitioners in removing them from office of director by filing any petition before the CLB and therefore, no relief can be claimed in this behalf, in these proceedings. The respondent Nos. 1 & 2 ceased to be directors, yet they falsely claim to be directors of the Company in terms of a public notice caused in the newspaper published on 11.08.2005, which is absolutely a false claim. The respondents 1 & 2 must be (a) restrained from claiming to be the directors of the Company; and (b) prohibited them from acting as the directors, as claimed in C.A.No. 128/2005.

- In the meanwhile, a Memorandum of Understanding dated 07.02.2001 was entered into between the partners of the third respondent and the second respondent, by which the second respondent had agreed to pay to the partners of the third respondent an amount of Rs. 3.40 crores for induction of the second respondent and his nominees to the third respondent firm as well as for retirement of the partners of the third respondent, to enable the second respondent and his nominees to enjoy the assets of the third respondent. The second respondent paid a sum of Rs. 4.25 lakhs to each of the partners of the third respondent and agreed to pay the balance consideration of Rs. 3.23 crores, on fulfillment of certain obligations stipulated in the

MOU, by the third respondent. While the second respondent was ready and willing to perform his part of the contract, in the matter of payment, the third respondent was not performing its part of the contract in furnishing the requisite documents concerning the property, compelling the second respondent to file civil suit in O.S. No. 184 of 2002 for an order of permanent injunction restraining the third respondent herein, from alienating or encumbering the property in favour of third parties. This civil suit came to be compromised between the parties, as borne out by the terms of compromise entered on 27.09.2003, which admits the MOU dated 07.02.2001 as well as the receipt of amounts both prior to and subsequent to filing of the civil suit. The second respondent agreed to pay the remaining sale consideration in conformity with the MOU and the third respondent undertook not to encumber the property in any manner in favour of third parties. In this context, it is not material for the third respondent whether the purchaser should be inducted as a partner or the property must be registered in his favour, especially when this makes no difference to the out going partners either by way of retirement or sale of the property. In pursuance of the compromise decree in O.S.No. 184/2002, the second respondent advised the third respondent, by his letter dated 12.05.2004, to register the property in favour of the Company, since he did not have funds to meet the commitment in terms of the MOU. The Company was incorporated on 11.06.2004, but the name of the Company was approved prior to 12.05.2004, when the second respondent advised the third respondent to register the property in favour of the Company. The, second petitioner only paid the sale consideration, for the property and met the registration fee for incorporation of the Company as borne out by the demand draft issued in favour of the Registrar of Companies, Karnataka. The sale consideration of Rs. 1,76,42,000 for the property was paid to the partners of the third respondent by the second petitioner (Rs. 1,54,25,000 by way of demand drafts and Rs. 22,17,000/- by cash), as found reflected in the sale deed dated 28.06.2004. These would show that the second petitioner would also be a promoter of the Company. There is ample evidence to show that a major part of sale consideration has been paid by demand drafts, which were encashed by the respective payees. M/s Tuscan Properties Private Limited, through its director S. Vasudevan got a demand draft of Rs. 4.25 lakhs, under the MOU dated 0,7.02.2001 towards part of the sale consideration and the demand draft was encashed by M/s Tuscan Properties Private Limited. Similarly, other partners of the third respondent were paid a portion of the sale consideration. All demand drafts issued in favour of the partners of the third respondent were encashed by the respective payees as borne by the bank statements and communications of the banker addressed to the Police Inspector; which are forming part of the records before the CLB. The two of the partners namely, M/s Gogri Developers Private Limited and M/s Vaswani Trading Private Limited by affidavits affirmed that they have retired from the partnership firm and therefore, they have nothing to do with the transaction. It is only the third partner namely M/s Tuscan Properties Private Limited is disputing the sale transaction entered into with the Company. S. Vasudevan, filed a police complaint in July, 2004 alleging that (a) sale deed dated 28.06.2004 has been concocted; (b) no consideration has been paid

for the sale transaction; and (c) the respondent Nos. 1 & 2 and Srinivasa Raju committed breach of trust, fraud, forgery and cheating. However, the police after investigation filed 'B' report stating that the complaint is false and untrue. It is observed from 'B' report dated 07.02.2005 that the partners of the third respondent have all received a total sum of Rs. 1,76,42,000/- as full sale consideration. The criminal complaint given by the second respondent against the petitioner Nos. 1 & 3 and V. Srinivasa Raju for sale of the property without authority of the partners of the third respondent is found to be false as borne out by 'B' report dated 01.10.2005. The police authorities concluded that the complainant has joined hands with S. Vasudevan with an intention to knock off the property and made false complaint against directors of the Company. The payments made by the second petitioner towards sale consideration by demand drafts and realisation, thereof have been confirmed in the 'B' report.

- After execution of the sale deed in favour of the Company by the vendors represented by its partner V. Srinivasa Raju, S. Vasudevan, representing M/s Tuscan Properties Private Limited, one of the partners of the third respondent lodged a police complaint on 19.07.2004 against V. Srinivasa Raju and the respondent Nos. 1 & 2 herein for executing the sale deed in favour of the Company, without obtaining any authorisation from the remaining three partners. The third respondent along with three of its partners filed civil suit in O.S. No. 5462 of 2004 before the Court of Additional City Civil Judge, Bangalore on 24.07.2004 against V. Srinivasa Raju and the Company for cancellation of the sale deed dated 28.06.2004 registered in the name of the Company and obtained an order of injunction on 29.07.2004 restraining the Company from alienating the property, which was later dismissed as withdrawn by the third respondent. In the civil suit filed by the third respondent, the second respondent has taken pleas, which are contrary to his defence raised before the CLB as well as the recitals contained in the sale deed. The specific contention of the second respondent raised in the civil suit is that V. Srinivasa Raju has not executed the sale deed in favour of the Company in his individual capacity, but as a partner of the third respondent firm with the consent of all the partners. V. Srinivasa Raju has alienated the property to the Company for a valuable consideration, as a partner of the third respondent and all the partners of the third respondent have received the consideration amount by way of demand drafts as well as by cash. The partners of the third respondent have encashed the demand drafts paid towards consideration amount, which indicates their consent for sale of the property. The consideration amount in respect of the property has been paid by the second respondent to the partners of the third respondent. The second respondent instead of acquiring the property in his name absolutely, after retirement of the partners of the third respondent under the MOU, purchased the property in the name of the Company. The third respondent claims that the value of the property shown in the sale deed is inadequate and does not represent the real consideration amount, but the recitals contained in the cancellation deed are entirely different which are untrue. The third respondent has not filed any reply or rejoinder in response to the written statement

filed in O.S.No.5462 of 2004 and therefore, it cannot re-agitate the very same issue after withdrawal of civil suit. After filing the written statement by Company, the respondent Nos. 1 & 2 colluded with the vendors of the property and entered into a cancellation deed on 02.02.2005 on the ground that the sale deed has been executed by V. Srinivasa Raju, without any authority of the third respondent and its partners. These respondents cannot question the power of the executant of the sale deed. After cancellation of the sale deed, sale consideration ought to have been returned, of which no reference has been made in the cancellation deed. The cancellation deed does not convey title in respect of the property in favour of the third respondent.

- The act of the respondents compelled V. Srinivasa Raju to execute the rectification deed dated 07.07.2005, thereby cancelling the cancellation deed dated 02.02.2005 and reaffirming the conveyance of the property in favour of the Company. This was followed by the cancellation deed dated 10.08.2005 executed by three of the partners of the third respondent and the respondent Nos. 1 & 2 during the present proceedings with a malafide intention to deny the right, title and interest of the Company in respect of the property. Therefore, applying the principles of doctrine of *Us pen dence* as enunciated in a decision, the said cancellation deed is liable to be set aside so as to give effect to the Memorandum of Understanding dated 07.02.2001 reached between the parties. These respondents misused the authorisation given to them by the Company and acted against the interest of the Company and other members. The respondent Nos. 2 & 3, being individual directors have no authority to sell the only asset of the Company and therefore they have no power to execute the cancellation deed dated 02.02.2005. Even though the cancellation deed cannot divest title of the Company, no individual director without approval of the board of directors can execute any such cancellation deed. The board of directors have not authorised the respondent Nos. 1 & 2 to execute any cancellation deed and they cannot assume any authority to execute such cancellation deeds. The articles do not empower the directors to sell the assets of the Company. Section 292 stipulates the powers of board of directors. Any power exercised by the board other than those mentioned in Section 292 must be placed before the general body for approval by the members. This legal position is quite clear in the light of the provisions of Section 293 of the Act which no doubt contemplates the convening of meeting of both the holding and subsidiary companies for the purpose of dealing with the matters enumerated therein. Thus, the execution of the cancellation deed by the respondent Nos. 1 & 2 is without any authority and consequently the cancellation deed is not binding on the Company. The cancellation deed executed without the authority of the board of directors cannot confer any title upon the third respondent. Furthermore, the cancellation deed is not supported by any consideration. By virtue of Section 25 of the Indian contract Act, 1872 any agreement without consideration is void. The exceptions to this rule are inapplicable to the present transactions. The cancellation deed is hit by the provisions of Section 25 of the Indian Contract Act. By means of the cancellation deed, the property has been conveyed by the Company to the third respondent. Any sale deed without supported by consideration is not valid, as

envisaged in Section 54 of the Transfer of Property Act. No instrument can be mutually cancelled by the parties, without resorting to the procedure or without obtaining an order of a competent civil court, as prescribed in Section 31 of the Specific Relief Act. The powers which are exercisable under Section 31 of the Specific Relief Act can be exercised by the CLB, invoking the provisions of Section 402(f) of the Act. The CLB is a Court as envisaged in Regulation 44 of the Company Law Board Regulations, 1991. Any order of the CLB can be executed, as if it is a decree, under the provisions of Section 634A of the Act. These deliberate acts of commission and omission on the part of the respondent Nos. 1 & 2 are highly oppressive of the petitioners, causing huge losses to the Company and its members, who must be appropriately remedied, with a view to bringing to an end the acts complained of by the petitioners. It has to be seen in the present proceedings whether the respondent Nos. 1 & 2 have acted lawfully or fraudulently in collusion with the third respondent, in execution of the cancellation deed, which is pure and simple, without involving complicated question of facts. The execution of sale deed and its validity are not to be entertained in the present proceedings and the petitioners are neither seeking to enforce the sale deed. The CLB has wide powers to grant the reliefs in exercise of the powers under Section 402 of the Act, regulating the affairs of the Company in future. The reliefs in respect of the contentious issues concerning illegal (a) execution of cancellation deeds; (b) convening of the general meeting on 11.01.2005; (c) assumption of powers by the respondent Nos. 1 & 2 as directors of the Company; (d) transfer of shares by the respondent Nos. 1 & 2 in favour of the petitioners etc. can only be granted under Section 402 and 403 of the Act. The cancellation deed has been executed on behalf of the third respondent represented by S. Vasudevan, as its Managing Partner. The partnership deed dated 21.07.1995 executed between four partners of the third respondent firm does not disclose anyone as its Managing Partner. S. Vasudevan, ought to have been authorised by the board of directors of M/s Tuscan Properties Private Limited, a partner of the third respondent before executing the cancellation deed, apart from the authority of the three remaining partners, which is absolutely lacking in the present case before the CLB. The case laws cited by the respondents are in relation to enforcement of agreements. In the present case, the petitioners are challenging the execution of cancellation deeds without the authority of the board of directors and they are neither seeking to enforce of any agreement nor complaining of breach of any agreement and therefore, these case laws are not applicable to the facts of the present case. The civil suit filed by the Company and the first petitioner is a bare injunction suit, which would not amount to forum shopping. No prayer for cancellation of the sale deed has made in the civil suit. The criminal complaint lodged by the first respondent and S. Vasudevan would show the harassment meted out to the petitioners. V. Srinivasa Raju has filed criminal complaints against the remaining partners of the third respondent, which are at present stayed by the High Court.

- The third respondent being a party to the cancellation deed dated 02.02.2005 has been impleaded as party to the present proceedings with a view to afford an

opportunity of hearing, while dealing with the disputed issue of execution of the cancellation deeds and it has no locus standi to deal with any of the affairs of the Company, which are left to the internal management of the board of directors of the Company. The adoption of arguments of the third respondent by the respondent nos.1 & 2 will indicate the collusive course of action adopted by the respondent Nos. 1 & 2.

- The arbitration application namely, A.A. No. 63 of 2005 is between the partners of the third respondent and therefore any order or observation made in the said arbitration application will not bind the petitioners and the Company. Similarly, the orders passed by the High Court in appeals namely MFA No. 10491 of 2005 and MFA No. 10800 of 2005 will have no bearing on the present proceedings, more so when the proceedings under Section 9 of the arbitration Act are interlocutory in nature and the High Court has only recorded the contentions of the parties.

- The petitioners, with a view to prevent further acts of oppression, are prepared to buy the shares of the respondent Nos. 2 & 3. In view of this the respondents 1 & 2 must be directed to transfer their shares in the Company to the second petitioner as prayed for in C.A.No. 127/2005. The price for the shares held by the second respondent will be paid to him. The first respondent has not contributed any money towards his share capital and therefore the price for the shares held by the first respondent will be remitted in favour of the Company.

- Shri Chandrasekaran, learned Counsel, while arguing the contempt applications pointed out that this Bench by an order dated 18.03.2005 restrained the respondents from alienating or selling the fixed assets of the Company. The petitioners have only brought to the notice of Bangalore Development Authority regarding the pendency of the dispute before the CLB and forwarded a copy of the order dated 18.03.2005, which does not amount to any abuse of process of law by the petitioners. During the currency of the order dated 18.03.2005 restraining the respondents from alienating or encumbering or selling the fixed assets of the Company, ownership of the property was reaffirmed in favour of the Company by executing the cancellation/rectification deed dated 07.07.2005. The right, title or interest in the property shall always remain with the Company and there is no question of title in the property transferred by the cancellation deed dated 02.02.2005 or 10.08.2005. The respondents have committed the offence of contempt of the order of the CLB by executing the cancellation deed dated 10.08.2005, thereby these respondents have cancelled the cancellation deed dated 07.07.2005. They have no regard for the orders of the CLB and therefore, contempt proceedings must be initiated against the respondents for violating the order dated 18.03.2005.

5. Shri T.K. Seshadri, learned Senior Counsel, representing the third respondent, while opposing the company petition submitted:

- In the first company petition, the short cause title shows that there are only four petitioners, but the petition has been signed by six of the petitioners. There is no proper presentation of the petitioners. The petitioner has, sworn to an affidavit on 15.03.2005 for and on behalf of the Company and not for any of the other petitioners. The affidavit has not been notarised by any Notary public and is not drawn as prescribed in the Company Law Board Regulations, 1991. A Memorandum of Appearance has been filed on behalf of the Company and not for other petitioners. One M.S.L. Nathan, designated Company Secretary authorised by the Company, has empowered one P.K. Pande, a Company Secretary in Practice to represent the petitioners before the Company Law Board. The attorney, who derived the authority from M.S.L. Nathan, cannot appear for and on behalf of the petitioners. There is yet another power of attorney executed on 15.03.2005, but not notarized, by the petitioner Nos. 1 to 3 and three others, authorising P.K. Pande to appear before the CLB. This a joint power of attorney, in which case, the petitioner Nos. 1 to 3 cannot alone be represented by the attorney in the present proceedings. The Company not being a member cannot file any application under Section 397/398 of the Act.

- The main prayer for setting aside the cancellation deeds is a civil dispute between the Company and the third respondent, which falls outside the scope of the provisions of the Act. The third respondent not having any privity of contract with the petitioners is neither necessary nor a proper party to the present proceedings. The petitioners have no cause of action against the third respondent. The CLB is not investigating the affairs of the third respondent. The petitioners, therefore, can only invoke the civil remedy by way of civil suit against the third respondent.

- The petitioner Nos. 2 & 3 are son and daughter of V. Srinivasa Raju, who is one of the partners of the third respondent firm. The property has been absolutely held by the third respondent and is in its enjoyment. While the second petitioner is party to the MOU dated 20.06.2004 the respondent Nos. 2 & 3 are not parties to the MOU. The MOU not having been approved by the board of directors is not binding on the Company or the respondent Nos. 1 & 2.

- The MOU is a self-serving document and no such MOU has been executed between the parties acknowledging receipt of the payments purportedly made by the second petitioner for purchase of the property in the name of the Company. The second petitioner has not paid any amount to the third respondent pending registration of the sale deed. There was no arrangement to register the property in the name of the Company, as and when incorporated in future. The consideration by way of demand drafts and cash referred to in the sale deed dated 28.06.2004 was paid to the individual partners and not in favour of the third respondent firm and therefore, there was no occasion to misappropriate the sale consideration by the third respondent. The consideration disclosed in the sale deed is sham and nominal. Any contract without consideration in terms of Section 25 of the Indian Contract Act is not valid. The sale deed does not reveal any authority given in favour of V. Srinivasa

Raju by the remaining partners of the third respondent firm for registering the property in favour of the Company. The sale of the property is a collusive transaction between the Company and V. Srinivasa Raju, who has no, either express or implied authority to transfer the property of the firm as contemplated under the provisions of the Indian Partnership Act to execute any sale deed in favour of the Company. The partnership deed provides that all partners must jointly carry on the affairs of the third respondent partnership. Hence, V. Srinivasa Raju cannot convey any valid title in respect of the property in favour of the Company. The valuable asset of the third respondent has been hijacked by Srinivasa Raju in collusion with his children and other directors of the Company. The sale deed executed by V. Srinivasa Raju is a nullity in law and not binding on the third respondent, forcing the third respondent to execute the cancellation deed dated 02.02.2005, in accordance with law and the established procedures and systems. If an instrument is void, it need not be cancelled. The sale deed executed by V. Srinivasa Raju in favour of the Company, being void abinitio, the CLB cannot adjudicate the validity of the sale deed and can only be challenged in a competent civil court. The CLB has no jurisdiction under Section 402 to grant any relief affecting the right of the third respondent, being a third party in relation to the affairs of the Company. The allegation of collusion, fraud and other improper conduct with reference to the third party cannot be raised before this forum. The grievances in relation to the cancellation deeds are past transactions and not amenable to the jurisdiction of Sections 397 & 398.

- The suit in O.S.No.184 of 2002 has been filed by the second respondent in his personal capacity restraining the third respondent firm from alienating or encumbering the property. The impact of the suit is that - (a) The property must always be property of the third respondent; (b) The second petitioner is nothing to do with the property; and (c) consideration reportedly paid by the second petitioner stands belied. The compromise entered into between the parties in O.S.No.184 of 2002 recognises the MOU dated 07.02.2001 and the payments made towards sale consideration by the second respondent. The compromise has been entered into by V. Srinivasa Raju with express authority of the other partners of the third respondent firm. The source of funds in respect of the payments made by the second respondent is not relevant in the present proceedings. The claim of the second petitioner that he paid the sale consideration for the property cannot be adjudicated by the CLB. The MOU dated 07.02.2001 and the civil suit in O.S.No. 184 of 2002 do not contemplate either sale of the property in favour of the Company or pre-incorporation arrangement reportedly entered into by the second petitioner. The letter dated 12.05.2004 allegedly written by the second respondent requesting the third respondent to register the property in favour of the Company is a fabricated one. The petitioners, while replying in their letter dated 16.02.2005, to the Registrar of Companies have forwarded a number of documents but failed to enclose copy of the letter dated 12.05.2004, reportedly written by the second respondent to the third respondent. This letter is neither referred to in the company petition (C.P.No. 13 of 2005) or rejoinder nor produced alongwith the company petition. The letter dated

12.05.2004 being concocted one cannot be relied on by the petitioners. Hence, the Company cannot be the nominee of the second respondent. There is no material to show that any such letter has been delivered to the third respondent. Furthermore, the Company came to be incorporated only on 11.06.2004, whereas the request for registering the property in favour of the Company has been made as early as on 12.05.2004, which is highly improbable. The petitioners have not established whether the name of the Company has been approved by the Registrar of Companies prior to the purported letter dated 12.05.2004 of the second respondent. The MOU dated 07.02.2001 shows that the second respondent agreed to pay to the third respondent an amount of Rs. 3.40 crores, but consideration of Rs. 1,76,42,000/- has only been fixed under the sale deed for sale of the property. The entire sale consideration has been paid to the vendors prior to incorporation of the Company and therefore, the Company could not have paid any part of the sale consideration. The sale deed does not make any reference either to the MOU or the pre-incorporation contracts.

- S. Vasudevan filed a police complaint on 19.07.2004 against V. Srinivasa Raju and the respondent Nos. 1 & 2 for illegally executing the sale deed in favour of the Company. The police filed 'B' Report, but it has not become final in view of the fact that S. Vasudevan has filed objections to the 'B' report and hence no value can be attached to it. Furthermore, statements forming part of 'B' report, by virtue of law of criminal procedure, are not admissible in evidence and no support can be drawn from the 'B' report. The civil suit filed in O.S.No. 5462 of 2004 on 24.07.2004 by the third respondent and three of its partners for cancellation of the sale deed dated 28.08.2004 would establish the fact that there was no consensus in executing the sale deed on 28.06.2004 by V. Srinivasa Raju. The civil court restrained by an order dated 29.07.2004, the Company from alienating the property and therefore the execution of the cancellation on 02.02.2005 is not violative of the order of the civil court and no contempt proceedings have either been initiated by the civil court. Moreover, none challenged the withdrawal of the suit in O.S.No.5462 of 2004 by the third respondent and three of its partners.

- V. Srinivasa Raju has filed a civil suit against the other partners for rendition of accounts,. but the Company is not a party to the said proceeding. In the meanwhile, Vasudevan filed before the Court of Additional City Civil Judge, Bangalore, an arbitral application under Section 9 of the Arbitration and Conciliation Act, 1996, seeking for interim prayer against V. Srinivasa Raju. by contending that there is an arbitral dispute. All disputes in relation to execution of the sale deed 28.06.2004 and various cancellation deeds, agitated before the CLB have been raised before the City Civil Judge Court, wherein an order directing both the parties not to alienate the property has been passed. Both the parties filed first appeal in MFA No. 10491 of 2005 and MFA No. 10800 of 2005 before the High court of Karnataka. V. Srinivasa Raju's appeal was rejected and the order of the City Civil Judge Court is confirmedjo the extent of interim order against V. Srinivasa Raju. V. Srinivasa Raju has filed a special

leave petition before the Supreme Court and obtained an order of stay. Shri T.K. Seshadri, learned senior Counsel pointed out that the High Court held that the sale deed dated 28.06.2004 in favour of the Company is void. Hence, the plea of the petitioners in regard to execution of the sale deed and various cancellation deeds must be rejected in limine. The proceedings in MFA No. 10491 of 2005 and MFA No. 10800 of 2005 before the High Court and the reliefs claimed therein are the same as in the second petition and therefore, the CLB cannot deal with the disputes relating to the property as well as the intense disputes between the partners.

- At the time of moving the company petition, this Bench by an order dated 18.03.2005 restrained the respondents from alienating or encumbering or selling the fixed assets of the Company. The property in dispute does not belong to the Company. When the petitioners failed to secure any interim reliefs, they have approached the Civil Court for certain reliefs in respect of the property, being subject matter of the present proceedings. When the petitioners could not succeed before the Civil Court, they have again sought to modify the order of the CLB, upon which by an order dated 10.06.2005 it was directed that any developments in the property will be subject to final outcome of the company petition. Thus, there is no prohibitory order against the respondents in respect of the property. In this context, the respondents have not committed any contempt of the order dated 18.03.2005 by executing the cancellation deed dated 10.08.2005 and the application for the alleged contempt is nothing but abuse of process and liable to be dismissed.

Shri T.K. Seshadri, learned senior Counsel in support of his legal submissions relied upon the following decisions:

- Sakkarathayammal and Ors. v. Shanmugavel Chettiar and Ors. (1990) MLJ 175 to show that if a transaction is an ab initio void transaction, the party involved in the transaction can simply avoid it. There is no need to execute a cancellation deed or to institute any suit to declare that such transaction is void transaction.
- Bina Muralidhar Hemdev and Ors. v. Kanhaiyalal Lokram Hemdev and Ors. to show that under Section 19(1) the Partnership Act, the acts of a partner which are done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Under Section 19(2), in the absence of any usage or custom of trade to the contrary, the above implied authority does not prima facie empower the partner to "transfer immovable property belonging to the firm" as stated in Clause (g) of Section 19(1) of the Partnership Act. Such a power to transfer property of the firm must be expressly given to the transferring partner so far as immovable property is concerned there is no such authority to show.
- Weavers Mills Ltd. v. Balkis Animal and Ors. to show that (a) a promoter is a compendious term given to a person who undertakes, does and goes through all the necessary and incidental preliminary which shall include commencement of the

business within a reasonable time, purchase of movable and immovable assets, entering into contracts involving rights and obligations and applying to authorities for a variety of things on behalf of the Company to be formed; (b) a contract entered into a promoter could not be ratified by a company after its incorporation; (c) a Company could not by adoption or ratification obtained the benefit of a contract purporting to have been made on its behalf before the company came into existence and that in order to do so a new contract must be made with it after its incorporation on the terms of the old one; (d) In the case of purchase of immovable properties by a promoter on behalf of the Company under incorporation the benefit of purchase will pass on to the company when incorporated.

- Seth Sobhag Mal Lodha and Ors. v. Edward Mills Co.Ltd. Beawar, and Ors. 1972 (Vol.42 CC1) to show that a contract entered into on behalf of a company before its incorporation is not binding on the company. After the company comes into existence the company cannot ratify contract entered into prior to its incorporation. It can, however, enter into a new contract upon the same terms.

- Dwarka Prasad Agarwal (D) by Lrs. and Anr. v. Ramesh Chander Agarwal and Ors.) to show that the dispute between the parties is eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 CPC confers jurisdiction upon the civil courts to determine all dispute of civil nature unless the same is barred under a statute either expressly or by necessary implications.

- Chetak Construction Ltd. v. Omprakash and Ors. to show that a litigant cannot be permitted to "choice" of the "forum" and every attempt at "forum shopping" must be crushed with a heavy hand.

- Bhanu Construction Co. Pvt. Ltd. and Ors. v. Andhra Bank, etc. and Ors. 2006-1 L.W.56 to show that the High Court of Andhra Pradesh has not permitted the parties in indulging in forum shopping, in view of the fact the parties lacks bonafides.

- Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad (D) by Lrs. And Ors. (2005) 3 Comp LJ 385(SC) to show that the question of title is alien to an application under Section 397 of the Act where for the lack of probity is the only test. Furthermore, it is now well settled that the jurisdiction of the civil court is not completely ousted by the provisions of the Companies Act, 1956.

- Srikanta Datta Narasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises (Pvt.) Ltd. and Ors. 1991 Kar.Vol.72 to show that a mere proof of allegations would not entitle the petitioners under Section 397/398 to the reliefs sought for when these reliefs are discretionary reliefs which will be granted only to persons who approach the court with a clean record.

6. Shri R. Murari, learned Counsel appearing for the respondent Nos. 1 & 2 submitted:

- The respondent Nos. 1 & 2 adopted the arguments of the third respondent on the issues of forum shopping and malafide motives of the petitioners and in all other aspects arguments have been advanced independently on behalf of these respondents. These respondents are in no way colluding with the third respondent.
- The petitioner Nos. 2 & 3 are neither shareholders nor directors. Similarly, the third petitioner is not a director of the Company. These petitioners, therefore, cannot represent the Company and join as petitioners in the first company petition. The subject matter of the present proceedings can be agitated only in a competent civil court, in the light of the issues relating to the validity of the purchase of the property involved for adjudication by the CLB, in respect of which several civil proceedings initiated by the petitioners are still pending. The petitioners are indulging in forum shopping and in multiplicity of proceedings in respect of the same subject matter. The primary issue raised by the petitioners relates to the execution of the cancellation deed dated 02.02.2005 by these respondents. This contentious issue involves an elaborate enquiry, which would require the determination of several issues namely, (a) validity of the sale deed; (b) authority of V. Srinivasa Raju to execute the sale deed; (c) pre-incorporation arrangement; (d) payment of sale consideration much prior to the incorporation of the Company etc. The enquiry in relation to these issues would lead to letting in of substantive oral evidence, which is beyond the scope of the present summary proceedings. The parties, therefore, must be relegated to a competent civil court for agitating their rights in the matter.
- V. Srinivasa Raju, had no authority to represent the third respondent firm and therefore, was not empowered to execute the sale deed in respect of the property in favour of the Company. The partnership deed of the third respondent provides that the partners therein would jointly manage the affairs of the firm and its administration. The provisions of Section 19 of the Indian Partnership Act do not authorise him to represent the partners. Therefore, V. Srinivasa Raju, could not act on behalf of the third respondent firm while registering the property in favour of the Company. This necessitated the execution of the deed of cancellation by these respondents, in the bonafide interest of the Company and its directors. The Company has not paid any consideration for the property to the third respondent and therefore, the question of the third respondent paying back any consideration under the deed of cancellation to the Company would not arise. There is also, no scope for misappropriating any funds by these respondents.
- The petitioner Nos. 2 & 3 are not promoters. The second petitioner did not pay Rs. 1.76 crores to the vendors pending registration of the Company. It was never agreed that the property would be registered in the name of the Company at a future date. There was no pre-incorporation arrangement, as contended by the petitioners. The Memorandum of Association of the Company does not make any reference to any such pre-incorporation contract. The sale consideration was reportedly paid between the years 2001 and 20Q3, but the Company was incorporated only in June, 2004.

There could not be any decision in 2001 to incorporate a Company after three years of purchasing the property and pay consideration three years prior to incorporation of the Company. The second petitioner categorically contends that he had paid a sum of Rs. 1.76 crores by way of advance to the vendors for purchase of the property. But in the communication addressed to the Assistant Registrar of Companies, it is reported that the second petitioner and one K. Madhu had paid the sale consideration. At the same time, in the civil suit in O.S.No. 184 of 2002, filed by the second respondent herein, it has been clearly admitted by V. Srinivasa Raju that the sale consideration of Rs. 1.76 Crores was paid by the second respondent in favour of the third respondent. These contradictions would belie the theory that the second petitioner paid the advance sale consideration and that it was decided to get the property registered in the name of the Company in future as and when incorporated. Though there are admissions by the second respondent in the written statement filed in O.S.No.5462 of 2004, no reliance can be placed, in view of the compromise reached between the parties. Furthermore, pleadings in other proceedings cannot be of any assistance to the petitioners. There are no pleadings in the first company petition for sale of the shares of the respondent Nos. 1 & 2 in favour of the petitioner and therefore no such relief can be claimed by the petitioners.

- At the board meeting purportedly held on 12.06.2004, neither the pre-incorporation arrangement nor the proposal for allotment of shares in favour of the second petitioner in respect of the money spent before incorporation of the Company was approved by the directors. No pre-incorporation expenses were incurred by the second petitioner and no pre-incorporation agreement existed, in which case, the question of allotment of shares to the second petitioner would not arise. No decision was either taken at the meeting to enter into any MOU or register the property in favour of the Company. At the said board meeting the proposals were confined to the formalities in relation to opening of bank account, appointment of statutory auditor etc. However, the Memorandum of Understanding dated 20.06.2004 was engineered by the petitioners with ulterior motive to make unlawful gain at the cost of the respondents. The minutes of the board meeting are reportedly dated 12.06.2004. However, the minutes of second board meeting held on 12.10.2004 would show that the minutes of the first board meeting were signed only on 12.10.2004 and hence the minutes of the board meeting dated 12.06.2004 are not valid. No meeting of the board of directors was held on 12.10.2004 and these respondents did not receive any notice and did not participate at any such board meeting. The first respondent never proposed in his letter dated 01.10.2004 to the board of directors the names of the petitioner Nos. 2 & 3 for the office of directors. The signature contained in the said letter is not signature of the first respondent. The petitioners have not produced the attendance register or any other material to show that the first respondent attended the purported board meeting held on 12.10.2004, wherein 2,50,000 shares of Rs. 10/- each were allotted to the second petitioner. No premium has been fixed for the impugned shares. The value of shares allotted to the second petitioner does not correspond to the value of the property. Nevertheless,

the petitioners have created records to make it appear as if the petitioner Nos. 2 & 3 were co-opted as additional directors and shares were allotted to them at the board meeting held on 12.10.2004. Form No. 32 and Form No. 2 filed with the ROC will not in any manner confer the status of directors or shareholders on the petitioner Nos. 1 & 2. The letters dated 14.10.2004 reportedly sent by the first respondent advising the petitioner Nos. 2 & 3 of their appointment as additional directors are seriously disputed. These letters, which are fabricated ones, do not contain the signature of the first respondent. On the other hand, the respondent Nos. 1 & 2, in their letters dated 07.01.2005 addressed to the first petitioner, has challenged the appointment of the petitioner Nos. 2 & 3 as directors of the Company. This letter contains the genuine signature of the first respondent. The endorsement made by the banker would confirm that the signatures in three letters dated 01.10.2004 and 14.10.2004 stated supra do not contain the signature of the first respondent. Therefore, the resolutions passed at the purported board meeting held on 12.10.2004 are invalid and must be set aside. The first respondent has sworn to an affidavit on 13.02.2006 to the effect he has neither signed the letter dated 01.10.2004 purportedly written to the board of directors and nor the letters dated 14.10.2004 alleged to have been sent by him to the petitioner Nos. 2 & 3 and that his signatures on those letters have been forged in an attempt to create records for the purpose of present petition. The first petitioner has shown to an affidavit in O.S. No. 469 of 2005 that the Company has increased the number of additional directors with an intention to stabilize the economic status of the Company to buy the property. Whereas, the property has already been purchased as early as on 28.06.2004. The registered office of the Company is located at the residence of the first respondent and the statutory registers are with the respondent Nos. 1 & 2, as found reflected in the plaint in O.S. No. 469 of 2005 before the Court of City Civil Judge, Bangalore filed by the Company. However, the petitioners have produced copies of the minutes of the board meetings dated 12.06.2004, on 12.10.2005, long after filing counter and rejoinder by the parties. It is impossible for the petitioners to produce the minutes of the meeting of the board of directors, when the statutory records are in the custody of the respondent Nos. 1 & 2.

- The first petitioner one of the promoter directors retired by rotation and he was not re-appointed as a director at the annual general meeting held on 11.01.2005 and therefore, he is no longer director of the Company. The notice dated 01.01.2005 of the annual general meeting was sent to the first petitioner by certificate of positing, but he did not attend the meeting. The petitioner Nos. 2 & 3 are not shareholders and hence no notice of the annual general meeting of the Company was sent to them. At the annual general meeting held on 11.01.2005, (a) the balance sheet as at 31.12.2004 was adopted; (b) the first petitioner was not re-appointed and (c) J.R. Venu and Arun Kumar Chordia were appointed as directors of the Company. The Company followed the established secretarial practices in application of Section 256 of the Act and Article 10. The first petitioner was duly intimated of his non-appointment as a director at the annual general meeting, as borne out by the communication dated 11.01.2005, acknowledged by him.

- The notice dated 03.02.2005 purportedly caused by the second petitioner, being a non-member and a non-director, to convene an extra ordinary general meeting for removal of the second respondent is ex-facie invalid. Furthermore, no such notice was received by the second respondent and his removal from the office of director is totally invalid. No minutes of the extra ordinary general meeting was either produced by the petitioners. There is no primary document other than Form No. 32 to establish the removal of the second respondent from the office of director. The second respondent in his communication dated 09.02.2005 addressed to the Company absolutely made clear that the extra ordinary general meeting proposed on 03.03.2005 to remove him from the office of director is illegal and that any resolution which, may be passed at such meeting will not be binding on the Company. The petitioners are attempting to usurp control of the Company by such dubious and illegal methods.

- The first respondent never received notices for any of the board meetings held on 12.01.2005, 04.02.2005 or 05.03.2005 and therefore, the question of his attending those board meetings or requesting the grant of leave of absence did not arise. The Company has not produced any proof, including the minutes to show that the board meetings were held on 12.01.2005, 04.02.2005 and 05.03.2005. Moreover, the petitioner Nos. 2 & 3 are not directors and the first petitioner ceased to be a director on 11.01.2005 and therefore, no such board meetings could have been held, as contended by the petitioners. By virtue of Section 283(1)(g), a director would vacate office only if he absents himself from three consecutive meetings of the board or from all meetings of the board for a continuous period of three months whichever is longer, without obtaining leave of absence. In view of this legal position, mere non-attending the board meetings by the first respondent on 12.01.2005, 04.02.2005 and 05.03.2005, will not attract the disqualification under Section 283(1)(g) of the Act. The first petitioner agreed to subscribe for 3000 shares, but there is no material to show that he subscribed to 3000 shares. The registered office of the Company has been shifted in due compliance with the provisions of law, in this behalf. Nevertheless, non-compliance of any legal provision would not by itself constitute an act of mismanagement. The first company petition has been filed on 17.03.2005 seeking to cancel the deed of cancellation dated 02.02.2005. In the meanwhile, the Company and the first petitioner have filed a civil suit in O.S. No. 469 of 2005 for an order of injunction restraining the respondent Nos. 1 & 2 from alienating or encumbering the property. However, a Memo dated 21.04.2005 was filed withdrawing the said civil suit, upon which the suit in O.S. No. 469 of 2005 was permitted to be withdrawn on 24.05.2005, as prayed for in the Memo. Similarly, the petitioners filed a memo dated 05.07.2005 seeking permission of this Bench to withdraw the first company petition. In the meantime, a deed of cancellation dated 07.07.2005 came to be executed between the third respondent represented by V. Srinivasa Raju and the Company, through one H.M. Venkatesh, cancelling the deed of cancellation dated 02.02.2005. Thereafter on 18.08.2005, the petitioners filed an application to withdraw the Memo dated 05.07.2005 for withdrawing the company

petition. In the meanwhile, the petitioners in collusion with V. Srinivasa Raju executed a deed of cancellation dated 07.07.2005 negating the cancellation deed, which is invalid and illegal. Srinivasa Raju was not authorised to represent the firm and H.M. Venkatesh, not being a director was not empowered to represent the Company. Therefore, the deed of cancellation dated 07.07.2005 is null and void. This act would not amount to contempt of the order made by this Bench. The restraint order dated 18.03.2005 is applicable to the fixed assets of the Company. The property in question did not belong to the Company on the date when the order was passed by the Bench. Furthermore, the subsequent order dated 10.06.2005 only provides that any developments in the property or encumbrance, if any, created would be subject to the result of the company petition. Thus, there is no prohibition against dealing with the property and consequently the execution of the deed of cancellation could never be said to be contempt of the CLB order. Shri R. Murari learned Counsel appeared for the respondents 1 & 2 relied upon the following decisions:

- Sangramsinh P.Gaekwad and Ors. v. Shantadevi P.Gaekwad (D) by Lrs. And Ors. (2005) Vol.123 CC 566 to show that (a) when a complaint is made as regards violation of statutory or contractual right, the shareholder may initiate a proceeding in a civil court, but a proceeding under Section 397 of the Act would be maintainable only when an extra ordinary situation is brought to the notice of the court in relation to the affairs of the Company; and (b) Unless a case is made out in the petition itself under Section 397 and 398 no relief can be granted by the court and the defects contained therein cannot be cured nor the lacuna filled up by other evidence oral or documentary.
- Parmeshwari Prasad Gupta v. Union of India to show that notice to all the directors of a meeting of the board of directors is essential for the validity of any resolution passed at the meeting. Where no notice is given to one of the directors of the company, the resolution passed at the meeting of the board of directors is invalid.
- R. Balakrishnan v. Vijay Dairy and Farm Products (P) Ltd. (2005) 59 SCL 667 to show that no relief for breach of the agreement and consequential reliefs will lie before the CLB under Sections 397 and 398.
- Col. Dalip Singh Sachar v. Maa Kami Coal Carriers (P) Ltd. (2005) 62 SCL 207 to show that by virtue of Section 283 disqualification as envisaged therein would arise after completion of a period of three months from the date of first meeting when a director absents himself from three consecutive meetings of the board of directors, or from all meetings of the board for a continuous period of three months whichever is longer without obtaining leave of absence from the board.
- Gautam Kapur and Ors. v. Limrose Engineering Works (P) Ltd. and Ors. (2005) 6 Comp LJ 323 to show that mere production of photo copies of the certificates of posting to prove the service of notice for the board meetings will not be adequate to

disqualify any director for not attending the board meeting as envisaged in Section 283(1)(g).

7. I have considered the elaborate arguments - oral and written - advanced on behalf of the parties. The issues, which rise for my consideration, are whether the acts complained of in these company petitions do warrant interference of this Bench and if so, what are the appropriate remedies to regulate the future affairs of the Company. The main grievances, according to the petitioners, are on account of the execution of (a) deed of cancellation dated 02.02.2005 executed by the Company represented by the respondent Nos. 1 & 2; (b) deed of cancellation/rectification dated 07.07.2005 executed by the third respondent represented by V.Srinivasa Raju and the Company through one H.M. Venkatesh; and (c) deed of cancellation dated 10.08.2005 entered into between the third respondent and the Company represented by the respondent Nos. 1 & 2. A lot of controversies have been raised on the validity or otherwise of the sale deed as well as the various cancellation deeds discussed supra. By virtue of the memorandum of understanding dated 07.02.2001, executed between the partners of the third respondent firm and the second respondent, it has been agreed that the latter would pay to the partners of the third respondent an amount of Rs. 3.40 crores to induct himself and his nominees to the third respondent and further paid an amount of Rs. 4.25 lakhs by way of demand drafts to each of the partners of the third respondent, receipt of which has been acknowledged by them. The balance consideration of Rs. 3.23 crores, was agreed to be paid by the second respondent as specified in Clause 7 of the memorandum of understanding, upon which the partners shall execute necessary documents to induct the second respondent and his nominees to the third respondent firm as partners and shall immediately thereafter retire from the third respondent firm to enable the second respondent and his nominees to enjoy exclusively the properties of the third respondent. It is explicitly agreed that the second respondent and his nominees must be inducted to the third respondent as partners on complying with his obligations of making payment of an amount of Rs. 3.40 crores, in terms of Clause 5 of the memorandum of understanding. The third respondent allegedly failed to act in strict compliance with the memorandum of understanding, compelling the second respondent to file civil suit in O.S. No. 184 of 2002 on the file of the court of Civil Judge, Bangalore restraining the third respondent from alienating or: encumbering the property in any manner in favour of third parties. However the respondent Nos. 2 & 3 reached a memorandum of understanding whereby the third respondent acknowledged receipt of the further payment of Rs. 1.76 crores made by the second respondent who in turn further agreed to pay the balance of sale consideration in conformity with the memorandum of understanding dated 07.02.2001. Accordingly a compromise decree came to be passed in O.S.No. 184 of 2002 on 27.09.2003 pursuant to which, it is reported that the third respondent delivered possession of the property to the second respondent and further undertook not to encumber the property in any manner in favour of any third parties. The petitioners have produced a letter dated 12.05.2004 purportedly written by the second respondent requesting the third respondent to register the property in favour of the Company. The genuineness of this letter is seriously disputed by the second respondent by pointing out the fact that the Company was not in existence on 12.05.2004, but it was incorporated only on 11.06.2004. In the meanwhile, the Company represented by the first petitioner entered into a memorandum of understanding dated 20.06.2004 with the second petitioner setting out certain terms and conditions essentials of which are- (a) The Company acknowledged that a sum of Rs. 1.50 crores was paid by the second petitioner to the

partners of the third respondent on 06.02.2003 by way of fifteen demand drafts and further a sum of Rs. 22.17 lakhs by cash to the third respondent on various dates; (b) The aforesaid payment made by the second petitioner shall be treated as payment made on behalf of the Company as sale consideration to the owners of the property; (c) The Company shall allot equity shares in favour of the second petitioner and or its nominees in consideration of the aforesaid amount by the second petitioner to the owners of the property, as per clause III(B) 10 of the memorandum of association of the Company. Thereafter, the third respondent represented by V. Srinivasa Raju executed the sale deed on 28.06.2004 in respect of the property for Rs. 1,76,42,000/- in favour of the Company represented by the respondent Nos. 1 & 2. The sale deed acknowledges receipt of a total payment of Rs. 1,76,42,000/- (Rs. 1,54,25,000/- by way of demand drafts and Rs. 22,17,000/- by way of cash), which are found reflected in the compromise decree in O.S. No. 184 of 2002 reached between the respondent Nos. 2 & 3. S. Vasudevan, representing the third respondent lodged on 19.07.2004 a police complaint on among other grounds that three of the partners of the third respondents never authorised V. Srinivasa Raju to execute any sale deed in favour of the Company and that the Company did not pay any consideration towards purchase of the property and it could not have paid the amount in the year 2001 or 2003, when the Company itself was formed only in June, 2004. The third respondent firm and three of its partners filed civil suit in O.S. No. 5462 of 2004 before the Court of City Civil Judge, Bangalore for declaration that the sale deed dated 28.06.2004 registered in the name of the Company is illegal, null and void and not binding on the third respondent firm. The Company contended in the civil suit that V. Srinivasa Raju executed the sale deed, as a partner of the third respondent firm with the consent of all partners. The partners of the third respondent received the sale consideration by way of demand drafts and cash from the second respondent, who instead of acquiring the property in his name absolutely, after retirement of each partner, as agreed under the memorandum of understanding, got the property registered in the name of the Company. In the meanwhile, the Company represented by the respondent Nos. 1 & 2 executed a deed of cancellation dated 02.02.2005 cancelling the sale deed dated 28.06.2004, upon which, the civil suit in O.S. No. 5462 of 2004 came to be dismissed on 07.02.2005 as withdrawn by the third respondent. Thereafter, the Company represented by the first petitioner along with the first petitioner filed civil suit in O.S. No. 469 of 2005 before the Court of City Civil Judge, Bangalore challenging the cancellation deed dated 02.02.2005 executed by the respondent Nos. 1 & 2 and sought for an order of permanent injunction restraining the respondent Nos. 1 to 3 from interfering in peaceful possession and enjoyment of the property. However, this civil suit also came to be withdrawn on 24.05.2005. A careful consideration of the sequence of events leading to the execution as well as the cancellation of the sale deed in respect of the property reveals serious controversies in terms of the claim and counterclaim of the parties. The first memorandum of understanding dated 07.02.2001 does not speak about the role of the petitioner Nos. 2 & 3 in extending financial assistance for purchase of the property, or pre-incorporation arrangement, or purchase of the property in the name of the Company on its incorporation, or the allotment of shares in favour of the petitioner Nos. 2 & 3 in lieu of their contribution towards purchase of the property. The petitioner Nos. 2 & 3 are neither parties to the memorandum of understanding. The memorandum of understanding on the other hand envisages that the second respondent and his nominees will be inducted to the third respondent firm on payment of a sum of Rs. 3.40 crores, upon which the partners of the third respondent shall retire from the firm. The memorandum of understanding further evidences payment of 5 % of the agreed amount by the second respondent. This

memorandum of understanding and the payments made by the second respondent to the partners of the third respondent are found recognised in the civil proceedings initiated by the second respondent. At this juncture, it may be observed that the payments covered under the memorandum of understanding have been, prima facie, met by the second petitioner as borne out by the bank statements and 'B' reports filed by the police authorities. It is immaterial whether the statements made in the 'B' reports do have any evidentiary value or not. The second memorandum of understanding dated 20.06.2004 between the Company represented by the first petitioner and the second petitioner acknowledging the payments reportedly made by the second petitioner for purchase of the property and agreeing to allot shares in favour of the second petitioner, apart from the memorandum of understanding and copies of the board meeting 12.06.2004 and 12.10.2004, which are not free from doubt, is not supported by any primary material. There is no authority produced empowering the first petitioner to execute the memorandum of understanding dated 20.06.2004. There is either no document to show that the terms of the memorandum of understanding have been duly approved by the board of directors of the Company. The memorandum of understanding dated 20.06.2004 while speaks of the allotment of shares in favour of the second petitioner, is silent in regard to the proposal to induct the petitioner Nos. 2 & 3 on the board of the Company. The memorandum of understanding dated 20.06.2004 does not make any reference to the memorandum of understanding dated 07.02.2001. The second petitioner claims to be a promoter, but the essential requirements to constitute a promoter as laid down in *Weavers Mills Limited v. Balkis Ammal and Ors.* (supra) are found lacking in the case of the second petitioner. In this context the execution of the sale deed dated 28.06.2004 assumes utmost relevance. The sale deed does not make any reference to any of the memorandum of understandings. The memorandum of understanding dated 07.02.2001 envisages consideration of Rs. 3.40 crores, but sale consideration agreed and fixed under the sale deed account for only Rs. 1,76,42,000/-. Whereas, in the civil suit filed by the third respondent challenging the execution of the sale deed by V. Srinivasa Raju, the second respondent categorically contended that sale consideration namely, Rs. 1,76,42,000/- by way of demand drafts and an amount of Rs. 1,63,58,000/- by way of cash were paid by him to the partners of the third respondent. There are no answers for these contradictions, which cannot be resolved on the strength of the affidavits and reply affidavits of the parties defeating the very purpose of summary procedure prescribed by Section 397/398. While the partnership deed of the third respondent stipulates that the partnership affairs must be carried on jointly by the partners, the sale deed is executed only by V. Srinivasa Raju. The authority of V. Srinivasa Raju to execute the sale deed without the consent of other partners is under serious dispute. Under Section 19(2) of the Indian Partnership Act, the implied authority of a partner does not, prima facie, empower him to transfer any immovable property belonging to the firm as conclusively held in *Bina Muralidhar Hemdev and Ors. v. Kanhiyalal Lokram Hemdev and Ors.* (supra). In the present proceedings whether V. Srinivasa Raju had the authority to execute the sale deed in favour of the Company and if not, whether the sale transaction is void do not arise for consideration. The disputes in relation to the property between the parties are eminently civil disputes, in which case such controversies do not fall within the purview of the provisions of the Act as held in *Dwarka Prasad Agarwal (D) by Lrs and Anr. v. Ramesh Chander Agarwal and Ors.* (supra). The prayer for setting aside the cancellation deeds would very much depend upon the validity or otherwise of the sale transaction effected by V. Srinivasa Raju in favour of the Company. According to learned Counsel appearing for the petitioners the sale deed dated 28.06.2004 cannot

be mutually cancelled by the parties without resorting to an order of civil court as prescribed in Section 31 of the specific relief act, 1963. However, this power of the civil court cannot be exercised by the CLB, invoking the provisions of Section 402(f) of the Act, in view of the nature of civil disputes involved in the cancellation of the sale deed. Any order of the CLB can be executed under Section 634A, as if it is a decree, but the CLB cannot assume the jurisdiction of the civil court in cancelling an instrument invoking the provisions of Section 31 of the Specific Relief Act. It is on record the sale deed dated 28.06.2004 has been cancelled by a deed of cancellation dated 02.02.2005 by the Company represented by the respondents 1 & 2 in favour of the third respondent represented by S. Vasudevan. I do not see any authority of the board of directors of the Company authorising the respondent Nos. 1 & 2 to cancel the sale deed dated 28.06.2004. Similarly, when the cancellation deed dated 02.02.2005 has been cancelled on 07.07.2005, the Company has been represented by one H.M. Venkatesh, whose authority to execute the cancellation deed dated 07.07.2005 has not been produced. There is no material substantiating the authority of the respondent Nos. 1 & 2 to execute the cancellation deed dated 10.08.2005 thereby cancelling the deed of cancellation dated 07.07.2005. The validity and the controversies in relation to these cancellation deeds are of civil disputes, which do not fall within the jurisdiction of the CLB. The object of Section 397/398 is to provide remedy in non-controversial matters and is not intended for adjudicating serious disputes. The proper course in such cases of complexity necessitating investigation is to relegate the parties to a civil suit. In the present backdrop of facts, the grievances of the petitioners in regard to the various cancellation deeds in the light of several of the civil and criminal proceedings, could not be looked into in the present proceedings. This is not possible without detailed examination of complicated questions of facts, requiring extensive oral and documentary evidence in this behalf. Similarly, the plea that the cancellation deeds, not having been supported by any consideration, is hit by the provision of Section 25 of the Indian Contract as well as Section 54 of the Transfer of Property Act, cannot be entertained in the present proceedings. Furthermore, any title to the property is alien to an application under Section 397, as held in *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad* (supra). In these circumstances, I have to proceed with the other acts of commission and omission surfaced in the course of the present proceedings. At the annual general meeting held on 11.01.2005 the matters relating to adoption of balance sheet as at 31.12.2004, appointment of directors, etc were reportedly considered by the members of the Company. It is reported that the first petitioner who retired by rotation at the annual general meeting was not re-appointed as a director, which is seriously disputed by the first petitioner. The respondents have produced the certificate of posting to establish service of notice on the first petitioner. It may be noted that they have not chosen to produce the certificate of posting to prove service of notice on other shareholders. The despatch register or the books of account showing the expenses incurred by the Company for posting the notices have not been produced by the respondents. The certificate of posting will only show that certain postal envelopes have been put into the post office and will not by itself necessarily mean that there has been proper service on the addressee concerned. Therefore, mere production of certificate of posting will not necessarily mean that there was service of notice of the meeting on the first petitioner. Article 10 provides for the retirement of directors in every annual general meeting and prescribes the procedure for retirement of director the Bench. The second order dated 10.06.2005 provides that any development of the property and encumbering the same will be subject to the final outcome of the company petition. In this background, mere sending of copies of either of these orders by the petitioners to Bangalore

Development Authority will not amount to contempt of the orders passed by this Bench. Similarly, when the validity of the sale deed registered in the name of the Company as well as the various cancellation deeds is yet to be adjudicated, the respondents cannot be charged with contempt of the order dated 18.03.2005 of CLB in executing the cancellation deed dated 10.08.2005, more so, when any such act has been subject to the outcome of the company petition. In view of my foregoing conclusions and (i) in exercise of the powers vested in Section 402; and (ii) to regulate the conduct of the affairs of the Company, I deem it fit that (a) allotment of shares allegedly made in favour of the petitioner Nos. 2 & 3 and the respondents group must be set aside, meaning thereby the first petitioner and the respondent Nos. 1 & 2 will only hold shares that they had agreed to subscribe in the Memorandum; (b) appointment of the petitioner Nos. 2 & 3, J.R. Venu and Arun Kumar Chordia as directors must be declared as null and void; and (c) the board of directors comprising of the first petitioner and the respondent Nos. 1 & 2 as per Article 6 will conduct the Company's affairs in future. The Registrar of Companies will ignore the statutory returns, which are contrary to these directions, filed by the parties before him in relation to the allotment of shares and the appointment of directors. Towards this end, the Bench Officer will forward a copy of the order in favour of the Registrar of Companies, for appropriate action in this behalf. Ordered accordingly. With these directions, the company petition and the connected applications stand disposed of. In view of this, the interim orders are vacated. No order as to costs.