Chatterjee Petrochem (Mauritius) ... vs Haldia Petrochemicals Ltd. And Ors. on 31 January, 2007

Equivalent citations: [2008]143COMPCAS726(CLB)

ORDER

S. Balasubramanian, Chairman

1. "The company is an unlisted company and was originally promoted by WBIDC, CPMC and Tatas to set up Haldia Petrochemical Complex, This project was massive in scale and was intended to be shining example of collaboration between public sector undertaking and private sector industries" (Para 13 of counter affidavit by 2nd and 3rd respondents). The said intention was carried through successfully to make Haldia Petrochemicals Limited (HPL) as one of the examples of a highly successful public private partnership culminating in implementing and commissioning of a green field mega project within a record time. However, unfortunately, due to differences between the private entrepreneur and the State, the private entrepreneur, through the petitioner companies claiming to hold 58% shares in HPL, has filed this petition under Sections 397/398 of the Companies Act alleging oppression and mismanagement.

2. Before I proceed further, it is necessary to note that the pleadings in the proceeding ran to a number of volumes and the documents referred to by the counsel were scattered in various volumes and a number of documents were also tendered across the Bar. The petition was heard for nearly 25 days spreading over 15 months. In view of this, when the counsel expressed their desire to file written submissions, I requested them to annex all the documents relied on by them with the written submissions and accordingly they have done so. Therefore, in this order, where ever relevant, I have referred to various documents as per the annexures to the written submissions. Since a large number of cases were also cited, I have referred to only important of those cases.

3. The facts of the case, in brief, are: M/S Haldia Petrochemicals Limited (HPL) was incorporated in the year 1985 for setting up of a green field petrochemical complex in Haldia (West Bengal). It was envisaged to be implemented by West Bengal Industrial Development Corporation,(WBIDC) and R.P. Goenka group. Their nominees were the subscribers to the Memorandum. In the year 1990 RPG Group left the company and Tatas were inducted to implement the project. However, Tatas also expressed their disinterest to continue with the project in 1993. In June, 1994, Dr. Pumendu Chatterjee (Dr.PC), an NRI industrialist/financier, showed interest in implementing the project. Accordingly, a Memorandum of Understanding (MOU) was entered into between WBIDC, the first petitioner (CPMC) and Tatas on 3rd May, 1994. Some of the important terms of the MOU are: (Annexure WS-23)

1. The cost of the project was estimated at Rs. 3600 crores to be funded with a debt of Rs. 2400 crores and equity of Rs. 1200 crores.

2. Initially, an equity capital of Rs. 700 crores was to be contributed in the ratio of 3:3:1 by WBIDC, CPMC and Tatas respectively.

3. It was also provided that the board of the company would comprise of 4 nominees each of WBIDC, CPMC and 2 of Tata group.

4. Memorandum and Articles were to be amended in line with the terms of the MOU.

4. Thereafter, a joint venture agreement (TVA) was entered into among the three groups on 20th August, 1994, the main recitals of which are: (Annexure WS-24)

1. The total cost of the project was estimated at Rs. 3600 crores. Towards equity, both WBIDC and CPMC would invest Rs. 300 crores each and Tatas Rs. 100 crores and Rs. 500 crores from public/NRI/FI/FII keeping the debt equity ratio at 2:1. The related percentage of equity would change if additional partners were inducted in consultation with all the three parties. None of the parties was to either increase or reduce its respective percentages without the written consent from the others.

2. JVA also provided that in case of disinvestment by WBIDC, the same would be offered to CPMC.

3. The board would consist of 11 members of which 4 each by WBIDC and CPMC and 2 by Tatas and each will have one non retiring director.

4. In case of any reduction in the percentage of shareholding as per this agreement, the special rights given in this agreement and also in the Articles shall stand rescinded.

5. First right of refusal will be vested in each of the groups in case of sale of their shares by any group and the price for the shares shall be determined by independent valuers.

6. The amount of expenditure incurred by WBIDC of Rs. 17.5 crores and of Tatas of Rs. 11.9 crores in relation to the project cost so far would be treated as interest free loans to the company.

7. Disputes in relation to the agreement to be resolved through arbitration before ICC.

8. The parties be entitled to seek for specific performance in terms of Specific Relief Act.

9. The JVA was to remain in force as long as the parties held the prescribed percentage of shares.

5. Thereafter, four side letters were exchanged dated 30th Sept. 1994, 6th Oct. 1994, 30th Sept. 1994 and 5th Jan. 1995. In terms of these letters, within 24 moths of commencement of commercial production or within 60 months from the date of JVA, whichever was later, at least 60% of the shareholding of WBIDC would be offered to CPMC at Rs. 14/- per share. The Government had agreed to grant several exemptions to the company as also to provide contingent financial support to the company on occurring of certain events. It was also provided that the role of the Government in

the company would be limited to promotion and guidance during the initial phases of the project and that the nominee of CPMC would be Managing Director. The Articles of Association of the company were altered in March, 1995 to bring it in line with the terms of the JVA.

6. An addendum to the JVA was entered into on 30.9.1996/4.10.1996 by which the project cost was revised to Rs. 5170 crores and the debt equity ratio was revised to 1.61:1. The equity participation was revised to Rs. 432.857 crores each by WBIDC and CPMC and Rs. 144.286 crores by Tatas and Rs. 969 crores by Public/NRJ/FI/FII and the debt to be raised was fixed at Rs. 3191 crores. All the three groups of shareholders invested the money as agreed to in this addendum.

7. The project started in 1997 and the commercial production commenced in August 2001. After commencement of commercial production, further agreements were entered into among the parties. The main recitals in the first agreement dated 12th January, 2002 among CPMC, GoWB, WBIDC and HPL are : (Annexure WS-2):

> 1. The purpose of the agreement was that HPL was in need of financial and managerial restructuring.
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> 2. CPMC had agreed to bring in further funds as may be required.
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> 3. WBIDC/GOWB agreed to hand over major shareholding and management of HPL to CPMC.
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> 4. CPMC would induct Rs. 107 crores as advance of which Rs. 53.5 crores would be paid within 5 working days.
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> 5. CPMC would arrange to induct a minimum of Rs. 500 crores (including Rs. 107 crores as above) as equity or like instrument. CPMC would produce a comfort letter within 30 days.
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> 6. Balance of Rs. 53.5 crores would be inducted by CPMC within 5 days of the acceptance of the letter of comfort
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> 7. WBIDC was to transfer its share in the company to CPMC up to Rs. 360 crores at par to ensure that CPMC controlled 51% of the paid up equity of the company. The said transfer would be effected within 10 days of acceptance of the comfort letter by WBIDC. Towards consideration CPMC will pay 5% and the balance shall be treated as paid to WBIDC and shall be treated as loan given by WBIDC to CPMC free of interest repayable at the rate of Rs. 10 crores during the first five years and at Rs. 20 crore thereafter.
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> 8. CPMC would have the first right to acquire remaining shares of WBIDC whenever it desired to disinvest subject to fair valuation;

9. Likewise, CPMC has the right to seek transfer of balance shares by WBIDC at any time.

10. CPMC was to have complete control over the day to day affairs of the company including the right to appoint key executives.

11. The composition of the board would be changed to reflect revised share structure and WBIDC would vote along with CPMC on all issues in the shareholders meeting and its nominee directors would vote along with the nominee directors of CPMC;

12. All the rights and obligations of CPMC in terms of the earlier agreement would remain till CPMC acquired majority shares in the company.

13. With this agreement, GOWB would be absolved of any responsibility for providing any further funds.

14. The terms of the agreement were to be implemented in entirety in sequential steps. Any failure on the part of either of the parties would give the right to the other party to terminate this agreement.

15. In case of failure on the part of WBIDC/GOWB, they will refund the entire money invested by CPMC.

16. CPMC will have the right to induct a strategic partner.

8. The main recitals of another agreement among the 1st, 4th petitioners and WBIDC on 8th March, 2002 are: (Annexure WS 3)

1. In terms of the agreement dated 12th January, 2002, 15,50,99,998 equity shares of WBIDC had been transferred and delivered to the 4th petitioner on 8th March, 2002.

2. WBIDC had been deemed to have granted to the 4th petitioner a secured loan of Rs. 147,34,49,980 treating as if the 4th petitioner had paid the full consideration for the shares transferred. This loan was to be repaid at Rs. 10 crores per year during the first five years and the balance at Rs. 20 crores per year thereafter.

3. All these shares shall be pledged with WBIDC and accordingly the shares had been lodged along with the share certificates with WBIDC and the pledge had been acknowledged.

4. On receipt of installments of repayment of loans, in each of the first five years, 25 lakhs shares shall be released to the 4th petitioner and thereafter 50 lakhs shares each year.

5. WBIDC would have the right to exercise voting right on all these shares, held in pledge.

9. A Supplemental Agreement was entered into among WBIDC, CPMC, GoWB and HPL on 30th July 2004. The main recitals in this agreement are: (Annex WS-4)

1. In terms of the principal agreement dated 12.1.2002, shares worth Rs. 155 crores had been transferred by WBIDC to 4th petitioner and it has become the beneficial owner thereof. However, the registration of the same is pending the approval of lenders.

2. In modification of the agreement dated 12.1.2002, CPMC has relinquished its right to acquire further shares of WBIDC except that it will have the pre-emption rights in case of WBIDC deciding to disinvest.

3. Instead of CPMC having the right to induct a portfolio investor as per the agreement dated 12.1.2002, GOWB/WBIDC will have that right.

10. A Share Subscription Agreement was entered into among HPL, 1st and 2nd petitioners and WBIDC on 30.7.2004 (Annexure Petition P-15). Some of the main recitals are:

> 1. In view of transfer of 155 million shares to CPMC, it is in management control of the company.
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> 2. The CDR package envisages infusion of Rs. 143 crores to effectuate the CDR package.
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> 3. For this purpose, the 2nd petitioner had been requested to induct Rs. 127.4 crores towards equity.
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> 4. The 2nd petitioner would be entitled to have a nominee director on the board.
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> 5. The company represents and warrants the details given in the agreement are true and correct.
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> 6. The company agrees to amend the Articles to reflect the terms of the agreement.
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> 7. In the agreement, the details of shareholding have been given in Schedule-I, both before and after allotment of shares as contemplated in this agreement. After allotment of shares to the 2nd petitioner, the collective shareholding of the petitioners is shown as 58.62% with a note that 155 million shares transferred by WBIDC to CPMC was subject to registration and lenders approval.

11. Another Agreement between Dr.PC and GoWB represented by the 8th respondent, on 14th January 2005 provided for: (Annexure WS-5)

1. Government of West Bengal shall sell its entire shareholding in HPL to CPMC.

2. The price of the shares shall be determined by an independent valuer selected by GOWB from amongst a panel of firms prepared by CPMC.

3. The recommendation of the valuer shall be binding on the GOWB and CPMC.

4. Both the parties shall endeavor to complete the process expeditiously.

12. In Janauary/February 2005, HPL had approved the issue and allotment of equity shares for Rs 150 crores at par to Indian Oil Corporation Ltd-the 6th respondent (IOC). Making various grievances on the proposed allotment of shares to IOC and also on the ground that WBIDC/GoWB had failed to comply with their commitment to transfer their balance 36% shares to the petitioners, the petitioners filed this petition seeking for restraining the company from allotting the impugned shares to IOC and also for a direction to WBIDC/GoWB to transfer 36% shares held by WBIDC to the petitioners. Thereafter, when it was revealed that shares had already been allotted to IOC, the petitioners filed an application seeking for amendment to the petition to impugn the allotment to IOC and also for seeking cancellation of the said allotment. During the proceedings, certain other grievances were also voiced and consequent reliefs sought.

13. The petitioners, who are associate companies of Dr.PC, collectively known as Chatterjee Group, claim that they collectively hold 58% of the equity shares of HPL. Dr.PC is the Vice Chairman of HPL. The 2nd respondent- WBIDC is a State Government company controlled by the WoGB-Government of West Bengal (GOWB). The 7th respondent Shri Tarun Das is the Chairman of HPL, 8th respondent, Shri Sabyasachi Sen, the Principal Secretary to GOWB represents GoWB on the Board of HPL, 9th respondent Shri Gopal Krishna, the MD of WBIDC represents WBIDC on the Board of HPL, 4th and 5th respondents are independent directors (5th respondent has since resigned), respondents 11 to 15 are nominees of the financial institutions, 16th respondent is the managing director of HPL, respondents 17 to 20 are the nominee directors of the petitioners.

14. Shri Sarkar, Senior Advocate, appearing for the petitioners submitted: Even though the company was incorporated in 1985, yet, even with the induction of two stalwart business groups like RPG and Tatas successively, the 2nd and 3rd respondents could not commence the project, till 1994. No local industrialist in West Bengal was interested in the project. Even though Dr.PC was residing abroad, being a Bengali, he had emotional attachment with West Bengal and since the company needed a lot of foreign exchange, when he was approached for associating with the company, he readily agreed and the first MOU was entered into on 3.5.1994 wherein Dr. PC was termed as a promoter. The company is nothing but a glorified quasi partnership, with each of the three groups having financial stake and management participation. At that time, no work had commenced in the project. This MOU not only provided for the petitioners holding 3/7 of the shares but also 2/5th of directorship in the company. WBIDC was to have only 3/7th share in the company so that the company did not become a Government company. In the JVA entered into on 20th August, 1994, pre-emption right was given to the petitioners to acquire the shares of WBIDC in the event of its disinvesting the shares. Therefore, when the petitioners entered the company, there was a clear understanding that the company would remain in the private sector. In addition to the JVA, 4 side letters were exchanged between the petitioners and WBIDC/GoWB providing for the petitioners acquiring at

least 60% of the shares held by the shares held by WBIDC at Rs. 14/- per share on occurrence of certain events within a particular time frame. Rs. 14/- per share was agreed to only because of the risk that was being taken by the petitioners in implementing the project. In one of the side letters sent by the petitioners, it was indicated that the role of the Government would be limited to promotion and guidance during the initial stages where after the control of management would be in the private sector and that the nominee of the petitioners would be the MD of the company. This was accepted by the Government. Thus, the management control of the company was agreed to be vested in the petitioners. Even the Articles of Association of the company were amended in line with the terms of the JVA on 15th March, 1995. Immediately after the JVA, the petitioners invested Rs. 433 crores in the equity capital of HPL and thereafter they inducted further Rs. 422 crores and that the total investment of the petitioners investment in HPL is Rs. 855 crores. Further, they have also paid Rs. 40 crores to WBIDC towards the shares transferred by it. They have pledged shares of the face value of Rs. 367 crores with the lenders under the CDR Scheme. Dr. PC has given personal guarantee up to hundred percent of the fresh debt taken by the company and has also pledged shares held by him in other companies worth Rs. 25 crores as security under the arrangement with creditors of the company. With the association of the petitioners, the project which commenced in January, 1997 started commercial production in August, 2001 one of the faster implementation of such a large scale project in the world, which could not have happened but for the whole hearted assistance both in terms of finance and technology given by the petitioners.

15. After commencement of the commercial production, several agreements were entered into. In the first agreement dated 12.1.2002 between the petitioners, 2nd and 3rd respondents and HPL, it was provided that the Government would hand over the majority shareholding and management of the company to the petitioners; that the petitioners would induct a sum of Rs. 107 crores; that the Government would cause the WBIDC to transfer its shares to the petitioners up to Rs. 360 crores to ensure that the petitioners held 51% of the paid up capital of the company; that the petitioners would have the first right to acquire the shares of the WBIDC whenever it desired to disinvest; that the petitioners would be at liberty to acquire other shares of the WBID Con a fair valuation to be made by an independent valuer; that the petitioners would have total control of the day to day affairs of the company with the right to appoint key officials; that the WBIDC would vote along with the petitioners both in the board meetings and in general meetings. This agreement would clearly indicate that the petitioners would not only have the majority shares in the company but also the management and thus the company would remain as a non government company.

16. Therefore it is evident that right from the time when the petitioners joined the company by entering into an MOU on 3rd May, 1994 and JVA dated 20.9.1994 an thereafter in terms of the other agreements, that the petitioners had some definite legitimate expectations in joining and continuing with the company. The petitioners are not referring to these agreements with the view to seek specific performance in the present proceeding but they rely on these agreements only to show the intention of the parties giving raise to legitimate expectations. A combined reading of the MOU, JVA, Agreement dated 12.1.2002, 8.3.2002, supplemental agreement dated 30.7.2004, share subscription agreement dated 30.7.2004 and agreements dated 14th January, 2005 would reveal that the petitioners had/have the following legitimate expectations:

1. The company would be controlled by private sector and it would not become a government company

2. The WBIDC would be a minority shareholder

3. The petitioners were to hold majority shares and management control.

4. The WoGBwould make available to the company exemptions and concessions and also contingent financial support

5. The WBIDC would divest its entire shareholding in the company in favour of the petitioners at a price to be determined by the valuer

6. The petitioners would have the right to nominate the managing director.

17. The learned counsel submitted: When these legitimate expectations have been denied either by the company or by the other shareholders, the petitioners have the right to move a petition under Section 397 alleging oppression. In Ebrahimi v. West Bourne Galleries Ltd. 1972 2 AER 492, the court has held "The just and equitable provision does not entitle one party to discard the obligation he assumes by entering a company nor the court to dispense him. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, i.e. of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal right, or to exercise them in a particular way". Similarly, in O'Neill v. Phillips 1999 2 AER 961, the House of Lords has said "In a quasi partnership company, they will usually be found in the understanding between the members when they enter into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another it would not be enforceable in law ". Thus this decision would indicate that not only the legitimate expectation arising at the time of entering into the company but those arising out of later contracts also have to be honoured. In Re: Elgindata Ltd. 1991 BCLC 959 Ch D., it has been held "In general members of a company have no legitimate expectations going beyond the legal rights conferred on them by the constitution of the company, i.e., to say its memorandum and articles of association. Nonetheless legitimate expectations superimposed on a member's legal rights may arise from agreements or understandings between the members". In Gurmeet Singh v. Polymer Papers Limited 123 CC 486, the CLB has taken the view that the legitimate expectations could form the basis for grant of relief.

18. The learned counsel submitted that the main grievances of the petitioners relate to:

1. Allotment of shares to IOC

2. Non registration of 155 million shares already transferred by WBIDC to the petitioners

3. Refusal of the WBIDC/GoWB to transfer the balance shares to the petitioners.

4. Non handing over of the management to the petitioners and

5. Appointment and continuance of the 16th respondent as the managing director

19. Allotment of Shares to IOC: The allotment of shares to IOC is vitiated on various grounds. First is the non disclosure to the petitioners and/or to the Board of HPL, of certain understandings between IOC and WBIDC/GoWb behind the back of the petitioners, the second is that the petitioners were induced to support allotment of shares to IOC on certain promises by GoWB without the intention of fulfilling the promise and the third is that the allotment is void as being in violation of the provisions of Article 47 of AoA of HPL and the fourth is the manner and mode of allotting the shares by a circular resolution. Right from the beginning, the petitioners had reservation about induction of IOC as a portfolio investor. As a matter of fact, by a letter 20th September, 2004 addressed to GoWB, the petitioners had indicated that even though there was no need to have an industrial portfolio investor, yet, in view of the desire of the Chief Minister, the petitioners had agreed for induction of IOC as a portfolio investor up to Rs. 150 crores. In the Board Meeting held on 2nd November, 2004 when the decision to call for an EOGM to approve allotment of shares to IOC was taken, the petitioners expressed their reservation but the same did not find place in the final approved minutes. Thereafter by a letter dated 10th December, 2004 (Annex P-15) addressed to the 7th respondent, Dr.PC again expressed his reservation on allotting shares to IOC at par value and also expressed his apprehension that by the said allotment, the understanding among the promoters that the company would remain a private sector company was likely to be defeated. In the letter dated 17.12.2004, of the WoGB addressed to the 7th respondent with a copy to Dr.PC, while insisting that shares should be allotted to IOC, it also conveyed the commitment of the WoGB to transfer the shares of WBIDC to the petitioners in terms of the agreements dated 12.1.2002, 8.3.2002 and 30.7.2004. By a letter dated 7th January, 2005 addressed to the 7th respondent, Dr.PC requested for postponement of the EGM convened on 14th January, 2005 with a view to discuss the matter in detail in a board meeting to be convened urgently. The same position was reiterated by Dr.PC by another letter dated 11th January, 2005. However, the meeting was not postponed as sought for by the petitioners. On the day of the meeting, that is on 14.1.2005, apprehending that the petitioners might not support the resolution, prior to the meeting, the 8th respondent representing the WBIDC, entered into an agreement with Dr.PC agreeing to transfer all the shares held by WBIDC to the petitioners on a valuation to be made by an independent valuer. On the basis of this agreement/assurance, even though the petitioners had reservations on allotment of shares to IOC, the petitioners supported the resolution in the EOGM. Thereafter, by a letter dated 17th January, 2005, the petitioners forwarded to GoWB a panel of 3 firms of Chartered Accountants for valuing the shares. Since there was no response, a reminder was sent on 31st January, 2005, 9th March, 2005, 1st April, 2005. Yet, there was no response.

20. The learned counsel further submitted: However, Dr.PC held discussions with WBIDC and GoWB regarding the purchase of the shares on a number of occasions between April, 2005 and 25th July, 2005, during which period he submitted 8 draft share purchase agreements to WBIDC/GoWB in terms of the discussions that took place during that period. By a letter dated 5th July, 2005

addressed to the GoWB, the petitioners expressed their readiness and willingness to purchase all the shares held by WBIDC provided the proposal to allot shares to IOC was abandoned. Similar letter was written on 15th July, 2005. During the discussion on 22nd July, 2005, WoGB indicated its desire to conclude share transfer transaction as soon as possible preferably by 25th July, 2005. Accordingly, by a letter dated 25th July, 2005 addressed to the 3rd respondent, the petitioners forwarded a confirmation letter from Deutsche Bank indicating their willingness to make available to the petitioners a sum of Rs. 11.10 Billion for purchase of the shares held by WBIDC. However, by a letter dated 27.7.2005, WoGB informed Dr.PC that GoWB had decided not to divest the shares in favour of the petitioners on the ground that to the Government, the petitioner did not appear to be in a position to conclude the matter. A copy of this letter was endorsed to the 7th respondent also. Thus, the written understanding under which the petitioners supported allotment of shares to IOC was breached and therefore the consent obtained by misrepresentation vitiates the resolution passed in the EOGM approving allotment of shares to IOC.

21. The learned counsel further submitted: In addition to getting the consent of the petitioners by misrepresentation/false assurance the consent of the petitioners was also obtained by suppression of material facts and also contrary to the intent of the parties Right through, the understanding of the parties was that IOC would become only an industrial portfolio investor restricted to Rs. 150 crores so that the character of the company could be retained as a private sector company. This understanding is evident from the supplementary agreement dated 30.7.2004, the record of the meeting with the Chief Minister held on 3.9.2004 (Annexure P-10), the letter dated 16th September 2004 (Annexure P-l1), from GOWB to Dr. PC; letter of Dr. PC to GOWB dated 20.9.2004 (Annexure P-l2), Confidentiality Agreement dated 24.9.2004 between HPL and IOC and Minutes of board meetings on 11.10.2004 and November 2, 2004 etc. It would also be evident not only from the above documents but also from the letter of offer given to IOC and the acceptance of IOC of the offer and the notice for the EOGM that the investment of IOC was to be restricted to Rs. 150 crores. This being the position, however, when the petitioners had authorized GoWB/WBIDC to negotiate with IOC, none of their discussions with IOC was disclosed to the petitioners. After IOC carried out due diligence exercise in terms of the Confidentiality Agreement, it never interacted either with the company or the petitioners, but was negotiating only with WBIDC and GoWB. They had entered into a clandestine/secret agreement with IOC as is evident from the letter of IOC dated 29.9.2004 (Annex P-l8) to the 8th respondent wherein it is stated that in the discussions between IOC and the GoWB, the shares of Tatas held by the WoGB would be transferred to IOC and that in due course WoGB would transfer all its remaining shares to IOC. Along with the letter, IOC had also enclosed a draft MOU on these lines. In reply to this, on 12.10.2004 (Annex P-l9) the 9th respondent wrote to IOC pointing out that the right of first refusal vested with the petitioners in terms of the Articles. It was also indicated that in case IOC could not get control of the company, the shares worth Rs. 150 crores proposed to be allotted to IOC would be purchased by the WBIDC at par. When IOC was informed of the pre-emption rights vested with the petitioners, by a letter dated 19th October, 2004 (Annex P-20) addressed to the 8th respondent, IOC desired that WBIDC should try to get the pre-emption rights vacated by the petitioners. This would indicate that the idea of IOC was not that of a portfolio investor but with a view to take full control of the shareholding in and management of HPL. In reply, by a letter dated 19th October, 2004, (Annex P-21) the 8th respondent informed IOC that even though the pre-emption rights cannot be vacated, yet, on going through the established

procedure, the WBIDC would be willing to transfer all its shares to IOC. This letter would indicate that even GoWB/WBIDC were in favour of handing over the entire shareholding and management of the company to IOC, even though, right from the beginning, the intention was that the company would remain in the private sector. Thereafter, by another letter dated 25.10.2004 (Annex P-22) addressed to the 8th respondent, IOC informed that it would make an offer to purchase the shares held by WBIDC at a price to be determined by an internationally reputed accounting firm to be selected on mutual consent and the WBIDC should offer the shares to the petitioners at that price and in case the petitioners did not acquire the shares at that price, IOC would acquire the shares at that price. In response, by a letter dated 29.10.2004 (Anne-24), the 9th respondent conveyed his concurrence to the proposal of the shares being valued by an internationally reputed accounting firm and that in case the petitioners did not acquire the shares at the price determined by the international firm, the shares would be offered to IOC at that price. This conduct of GoWB is highly oppressive to the petitioners in the sense that petitioners were not to be associated in the valuation etc. and the entire exercise had been given to IOC. The contents of that letter would indicate that GoWB had not only decided to give preferential treatment to IOC in the allotment of shares but also in respect of transfer of its holding in HPL to IOC. A portion of the letter is "As you would be aware, with the next two months, HPL will be a quoted company and it will not be legally possible for HPL to make a preferential allotment to IOC of Rs. 150 crores unless the valuation norms as laid down under SEBI law are observed.-If IOC is already a shareholder prior to the listing of the shares, it will be easier for WBIDC to offer its shares to IOC instead of dispersing such shares in the market. It will be easier for the Government to justify the transfer of shares to IOC if IOC is already in the company and has a sizeable stake". How can a shareholder, without the approval of the Board, could make a commitment in regard to allotment of shares. This would show that GoWB has treated IOC as a favoured party. All these correspondences took place before the board meeting on 2.11.2004 when allotment of shares to IOC was discussed. The 8th and 9th respondents who are directors of HPL and who have been in correspondence with IOC as above did not bring to the notice of the board the contents of these correspondences which, as directors of HPL, they were bound to disclose. In AES OPGC Hoilding (Mauritius) v. Orissa Power Corporation Ltd. 2005 3 CLJ 139, CLB has held that when Government nominees are directors in a joint venture company, they should act with utmost care with regard to the affairs of the JV company as they owe fiduciary duty to the same. In the present case, 8th and 9th respondents had failed to comply with this requirement by their non disclosure on the clandestine agreement with IOC. When the Chairman of HPL - the 7th respondent wrote to IOC on 2.11.2004 inviting it to subscribe to the shares for Rs. 150 crores, the 9th respondent wrote to IOC on 5th November, 2004 (Annex P-25) advising IOC to accept the offer as per the terms given by HPL without any modification giving an assurance that the shares held by WBIDC would be offered to the petitioners within two months (which was modified to 30 days by a subsequent letter) on a price to be determined by an internationally reputed accounting firm selected by IOC on the price mutually agreed by IOC and WBIDC on the basis of valuation and in case the petitioners did not accept to acquire the shares at that price, the same would be offered to IOC. The grievance of the petitioners is that IOC carried out due diligence in the guise of investing Rs. 150 crores but with the ulterior object of acquiring the entire shares. None of the letters exchanged between IOC and WBIDC/WoGB was placed before any board meeting nor in the explanatory statement attached with the notice for the EOGM on 14.1.2005 even though the 7th respondent was aware of the same. Non disclosure material particulars in the explanatory statement

is fatal not only to the meeting but also to the decision taken thereat. In Jadabpore Tea Co. Ltd. v. Bengal Dooars National Tea Co. Ltd. 55 CC 160 it is held that where the notice/explanatory statement for a general meeting does not give full particulars regarding allotment of shares, the resolution can be held to be invalid and the consequent allotment can be cancelled. In addition to suppression of the material facts relating to allotment of shares to IOC, both the 7th respondent and the 8th respondent misled the petitioners in their letters dated 10th Dec. 2004 and 17th Dec. 2004 respectively that the company would remain as a private sector company and that IOC was only a portfolio investor and that the WBIDC stood committed to transfer its shares to the petitioners as per the earlier agreements. Even IOC admitted the clandestine arrangement as is evident from the minutes of the meeting dated 18th March, 2005 held between the Company Secretary of IOC and officers of HPL. Para 4 of that minutes reads " Mr. Bose enquired if IOC had any agreement(s)/understanding(s) with Government of West Bengal or with any of the person(s) other than the letter of offer and the application form in respect of the above shares. He insisted that the words "which constitute the complete understanding about these shares " should be added at the end of Para 3 of the letter dated 17.2.2005 mentioned above. In spite of our repeated request to incorporate the above words in IOC letter dated 17.2.2005, Mr. Narayanan did not agree to incorporate these words in the above letter". The refusal to acknowledge that there was no other agreement would prove that there was, in fact, a secret agreement. Further, during the pendency of the proceedings, the Chairman of IOC had made various public statements indicating that IOC was in the process of acquiring the control of the company. Thus, it is not only evident that material information had been concealed from the petitioners, even the IOC's intention is not to remain only as a portfolio investor but to take control of the company. Therefore, even assuming that the petitioners had given their consent for allotment to IOC, yet, the consent being not a valid consent, the petitioners cannot be bound by the said consent. Once it is found that the consent was obtained by concealment of material facts, the meeting held could be declared as invalid and the allotment made pursuant to the decision in that meeting could be cancelled. This was done in Jadabpore Tea Co Ltd v. Bengal Dooars National Tea Co Ltd. 55 CC 160. Further, In terms of Section 10 of the Contract Act, free consent is necessary to bind one to his agreement. Petitioners consent to the allotment to IOC was on the premises that IOC would be a portfolio investor limited to Rs 150 crores and that WBIDC shares would be transferred to the petitioners. If either of the two is found to be flouted, there could be no free consent. It was only an inducement. When the basis of the consent is gone, the question of free consent does not exist. In equity and fairness , the petitioners should not be held to be bound by their consent as there is no legal consent in the eye of law.

22. The learned counsel further submitted: The arrangement between WBIDC/GOWB and IOC is also oppressive to the petitioners. IOC had proposed that the shares held by WBIDC would be valued by an independent valuer chosen by IOC and the shares should be offered at the price determined by IOC to the petitioners. Exclusion of the petitioners from the valuation especially when Article 33(b) of AOA has specifically provided that for valuation of shares, the valuer has to be jointly appointed by WBIDC, CPMC and Tatas. By involving a third party i.e., IOC in fixing the price and giving the first right of refusal to the petitioners would only mean that the price would be arbitrary and so high that the petitioners might have to reject the offer so that IOC could have the right to purchase the shares. Such an arrangement of involving a third party to determine the price is highly oppressive to the petitioners.

23. Having induced by suppression of material facts arid by giving a false promise/assurance to get the support of the petitioners in passing the resolution to allot shares to IOC, in the matter of issuing shares to IOC ultimately also, highly oppressive method of a circular resolution dated 28.7.2005 had been adopted. The company was not in need of funds at the time of allotment of shares to IOC as CDR package was already in place and the cheque given by IOC had not been encashed for over 5 months. By 31.12.2004, the company had repaid a loan of Rs 285 crores. Master Rescheduling of Debts which was approved on 16.12.2004 did not envisage the induction IOC and therefore, IOC chapter came to an end on that date. Further, the allotment would reduce/convert the petitioners from a majority into a minority and the character of the company would also be changed from a private sector company into a public sector company. Even though IOC had accepted the offer and remitted Rs. 150 crores by way of a cheque as early as in Feb./March, 2005, yet, shares were not issued because of the pendency of transfer of shares by the WBIDC to the petitioners so that the character of the company did not change. The justification given for issuance of circular resolution are that IOC had issued legal notices, that ROC has threatened initiating action under Section 234(A) of the Act and that legal opinion including that of former Additional Solicitor General of India favoured the allotment of shares to IOC immediately. It is on record that the legal notice and other reminders issued by IOC regarding allotment of shares were placed before the board in its meeting on 28th May, 2005 and board opined that the issue should be resolved expeditiously. Therefore, in the normal course, the matter should have been placed before the board before the final allotment. As a matter of fact, a board meeting had been fixed on 29th July, 2005 but the same was postponed on the ground of non availability of many board members. The legal opinion from the former ASG was obtained on 27th July, 2005 and on 28th July, 2005, the Chairman issued the circular resolution by fax to all directors. The resolution by circulation was initiated by the Chairman which is contrary to the practice in the company as, all through, circular resolutions were initiated by the company Secretary and from the registered office. However, in the present case, it was the Chairman, who sitting in Gurgaon, initiated the circular resolution under his own signature which is highly unusual. No satisfactory explanation has been given for doing so. The Chairman being non executive, his role is limited to chair board and general meetings and not to take decisions which have adverse effect on the shareholders interest especially when he was fully aware that allotment of shares to IOC was pending resolution of shareholders differences. In the history of the company, no circular resolution had gone under the signature of Chairman at any time. It is on record that when the ROC enquired about the allotment of shares, he was informed that the allotment was pending the amendment to Articles. This fact was known to the Chairman. The circular resolution did not accompany any of the documents on the basis of which the Chairman had felt the urgency of issuing the circular resolution. As a matter of fact, as late as on 30.6.2005, the Chairman had written to Dr.PC that the allotment of shares to IOC was delayed due to the promoters' disputes and he was also aware that the promoters disputes related only to the sale of WBIDC shares. Therefore, he was fully aware that pending resolution of the promoters' disputes, shares could not be allotted to IOC. The very fact that legal opinion from the former ASG was sought on 27.7.2005 and received on the same day and the next day, the Chairman issued the circular resolution would indicate that the action of the Chairman was not bonafide.

24. In terms of Section 289 of the Act, the resolution which is proposed to be passed by circulation has to accompany necessary papers. In the present case, no supporting documents for taking such

an important decision were enclosed with the resolution. The contention of the petitioners that all the required documents had already been circulated is of no substance as every circular resolution has to accompany necessary documents to enable the directors to take an informed view. Since the mandatory requirements of this Section have not been complied with, the resolution has not been validly passed.

25. The further steps taken for allotment and issue of shares to IOC are also clouded with suspicion. On the pretext of having obtained the approval of majority directors by 2nd August, 2005, the Chairman directed the Dy. Company Secretary who was camping at Delhi to proceed to Kolkata immediately with the directions to ensure that the cheque was encashed and shares allotted by the next day. The present petition was mentioned before this Board in the afternoon of 2nd August, 2005 at which time the counsel for the company submitted that the shares had been allotted in the morning on that day. In terms of the circular resolution, the shares were to be allotted on encashment of the cheque. The admitted fact is that the cheque was encashed only on 3.8.2005. The return of allotment was filed on 2.8.2005 showing as if the allotment had been made as fully paid up. In terms of proviso to Section 75(l)(a). no company can show in the return of allotment that shares had been allotted for cash if cash had not been actually received. In this case obviously, cash had not been received on the date of allotment and therefore the return of allotment showing as if cash had been received is invalid. The cases cited by the counsel for the respondents that receipt of cheque is equivalent to receipt of cash cannot be sustained in view of the provision of Section 75 according to which shares could be allotted only on receipt of actual cash. (Re Calcutta Stock Exchange AIR 1957 Cal 438). On this ground alone, the allotment made to IOC on 2.8.2005 has to be declared as invalid. Further, when the circular resolution was specific that the shares were to be allotted on encashment of the cheque, , even the allotment, before the cheque was encashed was contradictory to the mandate given by the board in the circular resolution. The reliance on the legal opinion is misplaced as the question of any criminal prosecution due to non allotment of shares could never arise in as much as IOC could have always cancelled the cheque as it had not been encashed. Therefore allotment of shares to IOC by way of the circular resolution is highly oppressive to the petitioners.

26. Shri Sarkar further argued: The allotment of shares to IOC ultravires the provisions of Article 47 and therefore is a nullity. In terms of Article 47, new shares have to be issued only to the existing members of the company. At the time of issue of allotment of shares to IOC, no part of the original authorized capital remained unsubscribed. The issue and allotment of shares to IOC was made out , of new shares created by increase in authorized capital. Therefore in terms of Article 47, without offering shares to the petitioners, no shares could have been allotted to IOC without amendment to the said Articles. As a matter of fact, even the company had taken the same stand while replying to ROC in the letter of the company dated 11.7.2005. Thus, the allotment to IOC is not only illegal and void, it is also oppressive to the petitioners as no shares had been offered to the petitioners. The claim of the 6th respondent that it is a bonafide purchaser of the shares and per the doctrine of indoor management, allotment of shares cannot be set aside is not sustainable as the doctrine is not applicable to void acts. Since the Articles of Association have the statutory- force and public documents, any third party dealing with the company should be aware of the restrictions contained in the Articles. Further, when IOC knew that the petitioners held majority shares, it should have

taken the petitioners into confidence. It also acquired shares at par, when it knew that the real value of the shares was much higher. Therefore, IOC is not a bonefide investor.

27. Transfer of 155 lakh shares held by WBIDC in favour of the 4th petitioner in terms of agreement dated 8th March, 2002:, In this regard the learned counsel submitted: The petitioners did not raise the issue relating to these shares in the petition as they had always proceeded on the basis that the said shares belonged to the petitioners and therefore did not seek any relief in regard to the same in the petition. Only when the respondents, in their replies, contested the factum of transfer of shares, the petitioners have sought a relief for a declaration that the shares stood transferred in the name of the 4th petitioner. Therefore the respondents cannot contend that without a prayer having been made in the petition, the same cannot be sought thereafter especially when in terms of Sections 397/398 of the Act, the CLB has powers to mould the relief taking all circumstances into consideration. Approving the judgment of Madras High Court in Syed Mohamad Ali v. R Sundaramurthy AIR 1958 Mad 587, in Gaekwad case , in paragraph 186, the Supreme Court has held " The jurisdiction of the Court to grant appropriate relief under Section 397 of the Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising it discretion is not bound by the terms contained in Section 402, if in a particular act situation a futher reliefer reliefs as the court may seem fit and proper". After the petitioners had invested Rs. 107 crores in pursuant to the agreement dated 12.1.2004, , another agreement was entered into on 8th March, 2002 between the petitioners and the 2nd respondent. In terms of this agreement, the WBIDC was to transfer 155 million shares of Rs. 10/- each to the petitioners of the total value of Rs. 155.10 crores. The arrangement was that the consideration for these shares would be treated as a loan from the WBIDC to the petitioners to be repaid over a period of 10 years and that as security for repayment of loan, the petitioners would pledge the share certificates with WBIDC. This was done with a view to ensure compliance with the terms of agreement dated 12th January, 2002 according to which the petitioners were to have majority shares in the company. WBDC executed blank transfer form , raised a bill on the petitioners for Rs. 155.099 crores on 8.3.2002 and the share certificates along with transfer -deeds were kept in escrow with M/S Kheitan & Co. (Annex P-4). The petitioners also executed a receipt for having received the loan amount from the 2nd respondent. These facts have been recorded in the agreement itself. Admittedly, the shares were pledged and voting rights of the petitioners on the shares was vested in WBDIC. Thus, on 8.3.2004, the transaction relating to transfer of shares had been completed and had become final, thus is binding on the petitioners and WBIDC. If the petitioners had not become owners of the shares, the question of pledging with and vesting the voting rights on WBIDC would not/have been possible. Likewise, if WBIDC were the owner, it cannot pledge its own shares with itself. In the supplemental agreement dated 30.7.2004, it is also recorded that the petitioners had become beneficial owners of these shares and registration was pending approval of lenders. The company is a party to this agreement. The registration of transfer had been discussed in the board meeting on 11.10.2004 and the board resolved to take urgent steps for giving effect to the transfer. The company itself wrote to the IDBI on 17.8.2004 seeking for its approval for registration of transfer and the WBIDC by a letter dated 11.11.2004 to IDBI also gave consent for the registration. While IDBI gave a conditional approval on 6.1.2005, its final unconditional approval was given on 27th May, 2005. Even the board of the company had noted the receipt of the approval from IDBI in the meeting held on 28.5.2005. Therefore, on the day of presentation of the petition, except for formal registration by the company,

all steps including approval from lenders had been received and therefore the petitioners have acquired indefeasible rights over the shares. In Vasudev v. Pranalal the Supreme Court has held that once share certificates with blank transfer forms is given to the transferee with the intention to confer upon him a right or title to become a shareholder, this right is enforceable. In Maneckji Pestonji Bhamcha v. Wadilal Sarabhai AIR 1926 PC 28 it has been held: "In cases of sale of shares, sale of share contract, as soon as the seller hands over the certificates and blank transfers and the buyer accepts them and gives the seller the cheque, the goods become ascertained good, the sale is complete and the property passes. From that time onwards, the seller can only sue the buyer on the cheque or the price of the shares unpaid in respect that the cheque had not been honoured". Therefore, on no account, WBIDC/GoWB could claim that they are the owners of the shares on the ground that they have repudiated the contracts.

28. The respondents have contended that the matter of transfer of shares is not in the affairs of the company and is between two shareholders. This contention cannot be accepted as the company was actually involved not only in seeking approval from IDBI but also considering a matter in its board meeting. Therefore, the transfer of the shares is definitely in the affairs of the company and the failure/refusal to effect registration is a gross act of oppression. Even the present stand of WBIDC/GOWB that shares belong to them is contrary to their own admitted stand all through. In the balance sheet of WBIDC as on 31st March, 2001, these 155 million shares have been shown as investment and in the Balance Sheet as on 31.3.2002, the same is not shown as investment as they had been transferred to the petitioners in terms of the agreement dated 8th March, 2002. In other words, from the total holding in HPL as on 31st March, 2001, these shares had been reduced from the investment as on 31st March, 2002. In addition, the consideration for the shares treated as a loan from WBIDC is also shown as recoverable from the 4th petitioner. The correspondence enclosed at Annexure P-7 would indicate that all the parties have treated that the transfers had been effected by WBIDC in favour of the petitioners. As a matter of fact, the 16th respondent wrote to IDBI on 12.1.2005 seeking for permission to allot shares to the lenders after registration of 155 million shares transferred from WBIDC to the petitioners so that HPL could exist from the purview of applicability of Section 619(B) of the Companies Act. This would indicate that the idea of the parties was that the company should retain its private character. The very fact that even if allotment of preferential share capital on 14.10.2004, in a board meeting held on 2nd November, 2004, the company appointed statutory auditors, would show that company has recognized that the petitioners had become owners of these shares. Only during the pendency of the proceedings, as grave act of oppression against the petitioners, the WBIDC has caused IDBI to withdraw its consent for the registration of transfer of these shares.

29. The learned counsel further submitted: The respondents have contended that non registration of shares and inter-se disputes between shareholders cannot be considered to be in the affairs of a company. The expression " affairs of a company" include interse rights between different shareholders groups and denial of rights regarding control of a company and denial of legitimate expectation of a shareholder are all affairs of a company.

1. Buckley on Companies Act: A shareholders agreement to give rise to expectations on the parties to it so that where the expectations are thwarted, this could constitute conduct relating to affairs of the

company

2. In Re: The Gread Outdoors Co. Ltd. (Law Reports of the Commonwealth 1986 549): While considering the allegations of oppression, it is appropriate that a dispute over the contractual rights should be dealt with in the context of the relevant section relating to oppression.

3. Dilip Kumar Chandra v. Chandra & Sons Pvt. Ltd. CP 32 of 2001 CLB: Non registration of transfer of shares is an act of oppression.

30. Appointment of R-16 as the Managing Director: He was allegedly appointed as the MD in the board meeting held on 29th March, 2005. In terms of Article 73 of AOA, there cannot be more than 15 directors. On 29.3.2005, the company already had 15 directors and therefore there was no vacancy to appoint the 6th respondent as the managing director who has to be necessarily a member of the board. As a matter of fact, the company had applied to the Central Government for increasing the number of directors to 20 and the approval was still awaited. Even though the respondents have contended that 16th respondent has been adjusted in a subsequent vacancy, the same cannot validate his initial appointment, which is void a-initio. It is on record that in terms of the share purchase agreement, the 2nd petitioner was to have a nominee on the board and IOC also had been promised a place on the board. However, instead of appointing one of these nominees, the vacancy could not have been adjusted for the 16th respondent. Further, as per the various agreements, it is the nominee of the petitioners who has to be the MD of the company. Even though the respondents have contended that Dr.PC was a party to the approval to appoint the 16th respondent as the MD and that Dr. PC had addressed a number of letters to the 16th respondent as MD of the company, the same cannot validate an appointment which is void a-initio. In Ram Avtar Jalan v. Coal Products Ltd 40 CC 715 the Supreme Court has held that a person who has not been validly appointed as a director, cannot claim to be a director. Even the conduct of the MD is oppressive to the petitioners as inspite of Dr.PC writing to him to remain neutral, yet, he has been siding with WBIDC/GoWB in the present proceeding and as such his continuance as MD would be prejudicial to the interests of the petitioners. Therefore, he should be removed as the MD of the company.

31. Conduct of IDBI: The learned counsel submitted: The conduct of IDBI, after the disputes had started between the petitioners, WBIDC and GOWB has been harsh against the petitioners. IDBI and other financial institutions collectively have 5 representatives on the board and therefore the acts of the financial institutions should be in the interest of the company and they cannot take a partisan attitude. IDBI approved the CDR package on the basis that the petitioners would be in control of the majority shareholding of the company and that HPL would never become a government company. IDBI was also aware of the promoters' issue subsisting as on 28th July, 2005 between the petitioners and GOWB with particular reference to the proposed disinvestments by GOWB in favour of the petitioners. CDR package did not envisage the entry of any third party as a shareholder, In spite of this, the IDBI nominee director voted in favour of allotment of shares to IOC as proposed in the circular resolution. But at the same time, having given the approval for transfer of 155 million shares of WBIDC to the petitioners, IDBI withdrew the same during the pendency of the present proceeding by a letter dated 10.1.2006. Thus, it is evident that IDBI has played an active role in the affairs of a company concerning promoter issues and has sided with GOWB

notwithstanding the fact that it was the petitioners who effectuated the CDR package by investing Rs 127 crores. Having denied the rights of a petitioner, IDBI is seeking to have shares worth Rs. 135 crores allotted to the lenders which allotment would alter the status of the company from private sector to public sector and would also concert the petitioners from majority into a minority. It is evident therefore that IDBI has over stepped its role as a lender and has sought to create a rift between the main promoters of the company instead of finding out a solution which would be not only in the interest of the company, shareholders but more particularly to the lenders. In Dr. Kamal Kumar Dutta v. Ruby General Hospital 108 CC 312, the CLB has observed that financial institutions should not normally take sides with any shareholder and should act only in the overall interest of the company with a view to protect the lenders investment.

32. Conduct of the company: The learned counsel submitted that even the conduct of the company in siding with WBIDC/GOWB is highly oppressive to the petitioners in as much as when there are only two promoters, the company should remain neutral and should not be siding with one of them. The very fact that the company has denied to Dr. PC his request for inspection of books of accounts and records of the company to which as a director he is legally entitled shows that it has sided with WBIDC/GoWB. Expending the funds of the company, making pleadings and using information for the benefit of one of the parties to the proceeding etc would go to show the partisan manner in which the company has conducted itself. Therefore, the expenses incurred by the company in the present proceedings should be recovered from/ reimbursed by the Chairman and the MD at whose instance the company is supporting GoWB/WBIDC. Further the stand of the company that it is a Government company is highly oppressive to the petitioners who had all along been assured that the company would be in the private sector. According to the company, it became a public sector company on allotment of preference shares to WBIDC/GoWB. The fact is that even after the preference shares were issued, the company only appointed M/S Price Waterhouse as statutory auditors for the year 2004-2005. The company did so only because it has treated 155 million shares as belonging to the petitioners. If that be the case, the private shareholding would be in excess of 52.95% shares. With the present contention of the company that the petitioners are not the owners of 155 million shares and with the allotment of shares worth Rs. 150 crores to IOC, the company is denying the legitimate expectation of the petitioners that the company would be a private sector company. Thus, this stand is highly oppressive particularly keeping in mind that IDBI itself had agreed to allotment worth Rs. 135 crores shares to the lenders under CDR package only after transfer of GOWB/WBDIC shares to the petitioners to ensure that the company does not become a Government company. Even, strict interpretation of Section 619B would indicate that to decide whether a company is a private or government company, only the equity share capital has to be taken into account and not the preference share capital.

33. The learned counsel sought for the following reliefs:

1. the EOGM held on 14.1.2005 should be declared as invalid and and the resolution passed thereat should be set aside.

2. The resolution passed by circulation dated 28.7.2005 should be set aside.

3. The allotment of shares worth Rs. 150 crores to IOC should be cancelled and the company should be directed to refund the money.

4. 155 million shares transferred by WBIDC to the 4th petitioner in terms of the agreement dated 8.3.2002 should be dematerialized and registered in favour of the 4th petitioner.

5. The 7th and 16th respondents should be removed from the board and the expenditure incurred by the company in the present proceedings should be recovered from them.

6. The Articles of Association should be amended to reflect the terms of the various agreements.

7. The lenders be allotted shares worth Rs. 128 crores (reduced from original Rs. 135 crores) as per the CDR package.

8. The balance shares held by GOWB/WBIDC should be directed to be sold to the petitioners on the basis of the valuation carried out by an independent valuer. as the petitioners are ready and willing to purchase those shares.

34. Dr. Singhvi. Sr. Advocate appearing for Dr. PC, supplementing the arguments of Shri Sarkar submitted: The motive of IOC acquiring shares worth Rs. 150 crores has to be looked into. It would have no interest to become a minuscule shareholder unless it was assured of controlling interest. This could be done only if WBIDC were to transfer its 36% shares in HPL. Therefore, if the petitioners were to acquire WBIDC shares, it would be contrary to GOWB's clear representation to IOC in this regard. That is why, to ensure that the petitioners do not acquire the shares of WBIDC, IOC was given the mandate to determine the price. Admittedly, IOC is a competitor to HPL and if the petitioners' group were to acquire the shares of WBIDC as per the various agreements, then, IOC being a shareholder of HPL would become a competitor to the petitioners' group. Even otherwise, a competitor could not have been made a shareholder. The main idea of IOC in acquiring shares worth Rs. 150 crores is only to use it as a vehicle to enable it to procure the controlling stake of 36% shareholding held by WBIDC. Therefore, all the discussions that took place and the correspondence exchanged between IOC and GOWB/WBIDC should have been disclosed not only to the petitioners but more so to the board of the company by the respondents 8 and 9 who were actively involved in the discussions and also by the 7th respondent who was in the know of the discussions. There have been complete conflict of interests. Three of the directors of the board, namely, the 7th, 8th and 9th respondents were aware of the correspondence with IOC but they did not disclose the same. It has been held in Boulting v. Association of Cinematograph Television 1963 1 AER 716 "A nominee director has to serve in the best interest of the company which he serves. But if he is put on terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful and if he agrees to subordinate the interest of the company to the interest of his patron , it is conduct oppressive to the other shareholders for which the patron can be brought to book" Likewise in El. Ajou v. Dollar Land Holdings 19942 AER 685 it has been held "

When a director has knowledge in relation to affairs of the company, his knowledge could be imputed to the company" Therefore, these respondents have breached their fiduciary duties in allotment of shares to IOC without disclosing material particulars. Even though the petitioners are in the majority, WBIDC/GOWB is trying to gain control over the company with the help of IOC. When two groups of shareholders have some disputes, the company cannot be used to settle scores and the company should not be used by one against the other and therefore, the expenses incurred by the company should be recovered from the 7th and 16th respondents. The learned counsel relied on the following cases:

> Re: A Company 1992 BCLC 701: In a petition under Section 459, the company is purely a nominal party since the substantive dispute is normally between the shareholders. Therefore, it would be misfeasance on the part of the directors to use the company's money to pay the legal expenses in connection with such proceeding.
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> Re: Crossmore Electrical & Civil Engineering Ltd. 1989 BCLC 137 ChD: It is a general principle of law that company's money should not be expended on disputes between shareholders and accordingly the costs in the Section 459 petition would not be in the ordinary course of business.
>
> Re: Kenyan Fwansea Ltd. 1987 BCLC 514 ChD: It is improper to use the funds of the company to enable the company to take part in a dispute which involve the issue of whether the court should order that the shares of the majority shareholders be acquired by another shareholder.

35. Shri Manmohan appearing for 2nd, 3rd and 4th petitioners submitted: The stand of the respondents that the 4th petitioner is not a shareholder is highly oppressive as in the agreement dated 8.3.2002, it is specifically recorded that 155 million shares had in fact been transferred by WBIDC to the 4th petitioner. In the guise of pendency of lenders approval, the company did not register the shares but even after the lenders approval was received, the company did not take further action on registration. The 2nd petitioner invested a substantial sum of Rs. 127 crores only on the basic premises that the company would be controlled by the petitioners. In the Share Subscription Agreement dated 30.7.2004 various warranties have been given by the company that petitioners would be in majority and the company would be under the control of the petitioners and that the 4th petitioner is a shareholder. The 2nd petitioner, therefore, has the legitimate expectation that the premises on which it invested funds is fulfilled. This being the case, the company cannot now, after the disputes have started between two shareholders, claim that the 4th petitioner is not a shareholder. Likewise, as per the Shared purchase agreement, the 2nd petitioner should have a nominee on the board, the right of which has been denied on the flimsy ground of non availability of a vacancy, but at the same time, 16th respondent was appointed as the MD even though there was no vacancy in the board. Therefore, the 155 million shares should be registered in the name of the 4th petitioner and a nominee of the 2nd petitioner should be appointed on the board.

36. Shri Sundaram, Senior Advocate, appearing for the WBIDC submitted: The claim of the petitioners that CPMC is a promoter is incorrect as the company was incorporated in 1985 by the

2nd and 3rd respondents and the petitioners came in only in 1994 through the MOU. Even the claim of the petitioners that they were majority, holding 58% equity shares in the company before IOC allotment is not correct. The collective holdings of the petitioners work out to only 48.9%. The claim of the petitioners that they are in majority arises out of their claim for shares worth Rs. 155 crores allegedly transferred by WBIDC. The transfer has not been registered by the company and the very fact that they are seeking relief in this regard, would indicate that the petitioners are obviously are not owners of these shares. By seeking the prayers to cancel the allotment of shares to IOC, and to direct the company to register the transfer of 155 million shares and to direct WBIDC to disinvest 36% shares in favour of the petitioners, they are trying to take complete control of the company, which cannot be permitted.

37. The learned counsel further submitted: Since, through the petition, the petitioners are seeking to enforce specific performance of various agreements, the petition itself is not maintainable. It is a settled law that only when the statutory rights of a shareholder are affected, he can allege oppression. Even in a suit for specific performance, the grant of relief is discretionary and order for specific performance need not necessarily be made and the court could award damages. Further in such cases, the claimant has to. prove that he is ready and willing to perform his obligations under the Contract. In the present case, as the facts would reveal, that the petitioners have not only breached many of the terms of the agreements, no where in the petition they have stated that they were/are willing to discharge their obligations under the various contracts. By seeking specific performance in the present proceedings, the petitioners are trying to override the jurisdiction of the civil court which should not be permitted. Further, there are a" number of triable issues in regard to the terms of the agreements which cannot be decided in the present summary proceeding as the determination of the issues require detailed evidence. He relied on the following cases in support of his submissions:

> Shri Lal Charamarya v. Hariram Goenka AIR 1926 Cal. 1981: The claim for a decree for specific performance of contract is not a matter of right Dependmg on the circumstances the court should grant such relief or grant damages in lieu thereof.
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> N.P. Trirugnanam v. Dr. R. Jaganmohan Rao : It is a settled law that remedy for specific performance is an equitable remedy and under Section 20 of the Specific Relief Act, the court is not bound to grant the relief just because there was a valid agreement for sale. Further in terms of Section 16 (c) of the said Act, the plaintiff must plead and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than those terms of the performance of which has been prevented or waived by the defendant. The continuance readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available.
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> Uma Bai v. Nilkanth Dhondiba Chavan : A conditional offer does not satisfy the requirement of Section 16 (c) of the Specific Relief Act.

Ardeshir H. Mama v. Flora Sassqon AIR 1928 PC 208: In case of suit for specific performance, the plaintiff has to prove continuance readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. Failure to make good that averment brought within the inevitable dismissal of the suit.

Prem Raj v. DLF and Latulal v. Phool Chand : In considering whether a person is willing to perform his part of the contract, the sequence in which the obligations under a contract are to be performed must be taken into account and if there is a failure in performance of the contract, the same cannot be enforced.

38. The learned counsel further submitted: The main complaint of the petitioners in the petition relate to the refusal of WBIDC to transfer 36% shares to the petitioners and that the allotment of shares to IOC is bad. It is a settled law that the alleged acts of oppression should be in the conduct of the affairs of the company and not in relation to interse disputes between two groups of shareholders. The entire petition deals only with the alleged default/failure of WBIDC/GoWB in discharging their obligations in terms of various agreements and not in the conduct of the affairs of the company. There is not even an averment as to how the company is concerned with these disputes. In other words, private disputes between shareholders cannot be a ground for filing a petition under Sections 397/398 of the Act. There is no averment in the petition as to how denial by WBIDC to transfer its shares could be considered to be in the affairs of the company. In Hillerest Reality Sdn. Bbhd v. Hotel Queen Pvt. Ltd. , this Board has held that to maintain a petition under Sections 397/398 of the Act, it is necessary that acts complained of should be related to the affairs of a company and that the company should be a party to the commission of the acts complained of. Similar decisions could be seen in the following cases.

1. Scottish Cooperative Wholesale Society Pvt. Ltd. v. Mayor 1958 3 AER 66: In case of oppression, it should be shown that it has been the affairs of the company which have been conducted in an oppressive manner.

2. Shanti Prasad v. Kalinga Tubes Ltd. : Mere loss of confidence between groups of shareholders would not come within Section 397 unless it is shown that the lack of confidence sprang from a desire to oppress the minority in the management of the company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his proprietary right as a shareholders.

3. Sangramsinh P. Gaekwad v. Shantidevi P. Gaekwad 123. CC 566: When a complaint is made as regards violation of statutory or contractual rights, the shareholders may initiate a proceeding in a civil court; but the proceedings under Sections 397/398 would be maintainable only when an extraordinary situation is brought to the notice of the court in view of the wide and far reaching power of the court in relation to the affairs of the company. (Para 162).

4. Re. Jermin Street Trukish Bath Ltd. 1971 AER 184: what is to be considered is whether the affairs of the company are being conducted in a manner oppressive to some part of members of the

company. Oppression occurs when shareholders having a dominant power in the company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat exercising of that power that something is not done in the conduct of the company affairs and such acts are burdensome, harsh and wrongful and lacks the degree of probity which they are entitle to expect in the conduct of company's affairs.

5. Alliance Securities Ltd. v. Regal Industries Ltd. 2000 37 CLA 250 CLB: Any dispute regarding private agreements for investment in shares has to be agitated in a civil suit.

6. Shoe Specialities Ltd. v. Standard Distilleries & Breweries Pvt. Ltd. 1997 1 CLJ 243 Mad.: While exercising the powers under Sections 397 and 402 of the Act, the court is considering not only the reliefs that is sought for but also considers as to what is the nature of the complaint and how the same has to be rectified. It is the interest of the company that is being considered and not the individual disputes between the petitioner and the respondent.

7. Hungerford Investment Trust Ltd. v. Turner Morrison Co. Ltd. ILR 1972 1 Cal. 286: (This judgment has been set aside by the Division Bench): Section 397 of the Companies Act is not intended to feed every private grudge or differences between shareholders and is not intended to be exploited for any difference of views between members which could be largely and substantially redressed by invoking specific provisions of the Companies Act dealing with such claim. The proceedings under Sections 398/398 of the Companies are intended to be in public interest largely or in the commercial interest of the company concerned and not a kind of provision to feed the private grudge between the warring groups of directors or individual shareholders.

8. R. Balakrishnan v. Vijaya Dairy & Farms Products Pvt. Ltd. 125 CC 661 CLB: When grievances and reliefs flow from private agreements, the same must be agitated in a competent civil court having jurisdiction over the matter as any remedy for the alleged breach of agreements and consequential reliefs do not lie before the Company Law Board in a proceedings under Sections 397/398.

Further, even if some actions of the company is prejudicial to the interests of the members, as long as they are in the interests of the company, shareholders cannot complain of oppression as held in Needles and Gaekwad cases.

39. The learned counsel submitted: The petitioners who have come to this Board on the guise of seeking equitable relief are guilty of suppression of material facts and therefore they have played a fraud on this Board. They have suppressed the minutes of the Empowered Committee Meeting chaired by Dr. PC himself wherein allotment of shares to IOC was approved. They have also suppressed the information relating to various draft agreements that they sent to GOWB/WBIDC regarding the purchase of their shares wherein they have put up a pre condition that IOC should not be allotted any share. Likewise, they have suppressed the letters of complaints by IOC regarding non allotment even though copies have been given to them. They have made a number of false averments with a view to mislead the Board to seek favourable orders. For instance, the contention

that IOC allotment would make the company a Government company is false to their knowledge as the circular resolution signed by a nominee of the petitioners sought approval of the Board authorizing C & AG to conduct the audit on the ground that the Government held more than 51% of the paid up capital of the company.

40. In regard to the stand of Shri Sarkar on legitimate expectations , Shri Sundaram pointed out that when there are written contracts, the question of legitimate expectation does not arise as the parties are bound by the contracts. Further, the doctrine of legitimate expectation has not been recognized for relief in a proceeding under Section 397. Only in English Law, under Section 459 of the English Companies Act, the courts there in, have recognized this Doctrine to decide whether a company has acted in an unfairly prejudicial manner against a shareholder, In terms of Section 397, one can complain only against oppression and not on the ground of denial of his legitimate expectations.: In Vaishnav Shorilal Puri v. Kishore Kundan Sippy 131 CC 690 Bom the Division Bench of Bombay High Court has held that the term "unfairly prejudicial" as in Section 459 of English Companies Act, is different from "oppression" in Section 397 of the Indian companies Act and has held that unless there is illegality in the conduct of the affairs of the company Section 397 can not be invoked. Therefore the question of legitimate expectation, which concept is applied under English Act. cannot be imported in a petition under Section 397. Therefore, no relief can be granted on the basis of legitimate expectations.

41. On merits, the learned counsel submitted: All the agreements relied on by the petitioners are linked to one and another and they all form a composite transaction arising out of the agreement dated 12th January, 2002. Due to changes in circumstances, the same was modified by other agreements dated 8th March, 2002, 30th 2004 and 14th January, 2005. The intention of the parties has to be gathered from the agreements and not from the pleadings or arguments. In Chitty on Contracts it is stated Every deed must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted to bring them in harmony with other clauses of the deed. In Raja Ram Jaiswal v. Ganesh Prasad : it has been held that for correct interpretation of a document, one has to look primarily to the document itself, but must also take into consideration for which it was written, the intention which the writing was to convey and how the parties acted under it.

42. The petitioners did not comply with many of their obligations resulting in the set back of the progress of the company and the entire efforts to ensure the growth of the company rested on the shoulders of the 2nd and 3rd respondents. When the second right issue was made, while WBIDC and Tatas subscribed to the shares, the petitioners did not do so in spite of the fact that the company was facing a financial crunch. Since they did not bring in the funds, even the allotment of rights shares to Tatas and WBIDC had to be delayed. As a matter of fact, as early as in 1996 itself, the petitioners delayed bringing in the stipulated funds as is evident from the correspondence between GOWB and DR.PC (Annexure WS-7 and 8). Further in terms of agreement dated 12.1.2002, the petitioners were to bring in Rs. 107 crores which they declined to bring in on the ground that before investing, the financial viability of HPL had to be established. During this period, WBIDC/GOWB had to grant a loan of Rs. 271 crores to keep the company going. In addition, the Government also gave various exemptions and concessions amounting to Rs. 647 crores in respect of sales tax etc. In

December, 2001, GOWB had to provide a further sum of Rs. 65 crores. The funding by GOWB would not have been necessary but for the default/failure of the petitioners in bringing the funds in relation to the second right issue. The first agreement on 12.2.2002 was entered into on the premises that the petitioners would bring in Rs. 500 crores either as equity or advances from other sources which the petitioners never did. Likewise in terms of that agreement, the petitioners were to take care of the then pending post dated cheque which the petitioners did not do resulting in bouncing of cheque. The petitioners also failed to induct funds by getting a strategic investor as provided in the agreement. In terms of JVA dated 12.1.2002, the petitioners were to bring in Rs. 107 crores as advance of which Rs. 53.5 crores were to be paid within 5 working days and thereafter they were to bring in further Rs. 393 crores. Instead, the petitioners only arranged a loan of Rs. 107 crores from HSBC over a period of one year from March, 2001 to Feb. 2002 in the name of the company and the interest of about Rs. 3.5 crores had to be borne by the company. Only in the month of Jan. 2004, the petitioners cleared the loan and in lieu thereof shares worth Rs. 107 crores were allotted to the 3rd petitioner. In terms of clause 2 of the agreement, the petitioners were to produce a letter of comfort within 30 days which was not produced at all. In terms of clause 5, WBIDC was to transfer further, shares up to Rs. 360 crores to make the petitioners as 51% shareholders only on production of the letter of comfort. In spite of the failure of the petitioners to comply with the terms of agreement, WBIDC transferred shares worth Rs 155 crores in good faith. It would be highly inequitable on the part of the petitioners now to seek registration of the transfer of shares when the petitioners have failed to comply with their obligations. WBIDC transferred the shares without any consideration only on the understanding that the petitioners would bring in Rs. 500 crores as per the agreement and now they want the registration of transfer without any investment. Thus it is evident from the foregoing that the very basis on which this agreement was entered into i.e. to strengthen the financial position of the company by induction of funds by the petitioners, but due to their failure/default, the financial position remained as it was. It is also evident from the conduct of the petitioners that they were never ready and willing to perform their obligations in terms of the agreements and therefore the question of specific performance by the 2nd and 3rd respondents does not arise. Ready and willingness to perform one's obligation is the foundation of seeking for specific performance. ,

43. ALLOTMENT OF SHARES TO IOC: The learned counsel submitted: In so far as the allotment of shares to IOC is concerned, it was neither a sudden nor a surprise decision. The allotment of shares to IOC was with the knowledge, consent and active participation of Dr. PC. In a letter dated 23.4.2000 addressed to the Chief Minister, DR.PC evinced interest to" induct Indian Oil Corporation for participating in the project. By a letter dated 26th March, 2000 addressed to the board, DR.PC had indicated "The initiative to induct IOC as an equity partner which I have long encouraged could have come earlier than it did but is welcome nevertheless". He had also indicated that shares worth Rs. 150 crores could be offered to IOC. This was noted by the board in the board meeting held on 6th September, 2000. Thereafter, in an interaction with IOC by a letter dated 20th October, 2001, IOC expressed its interest in investing up to at least 26% equity of HPL. In a board meeting held on 26th March, 2002, the proposal of IOC to invest in 26% equity with management control was discussed. Only by July, 2002, as is evident from the letter of GoWB dated 2nd July, 2002, the participation of IOC as a shareholder was dropped. Thereafter, IDBI started pressing for induction of a PSU and therefore discussion took place with GAIL. As a matter of fact, Dr.PC wrote

to MD, GAIL on 29th March, 2004 inviting him to infuse Rs. 200 crores with a representation on the board of HPL. However, in a meeting that Dr.PC had with the Chief Minister, Dr. PC preferred IOC in place of GAIL and accordingly he requested the State Government to take up the matter with Government of India (Annexure W-36). Dr. PC confirmed in writing by a letter dated 24.9.2004. (Annexure WS-37) that there was urgency in concluding the induction of funds. Thereafter, GoWB/WBIDC held discussions with IOC which according to the petitioners led to a clandestine agreement. In a board meeting held on 2nd November, 2004 (Annexure WS-43), it was decided to invite IOC to participate in the equity investment of Rs. 150 crores and it was also decided to convene an EOGM to pass a resolution in terms of Section 81(1)(A) of the Act. Accordingly, the Chairman issued a letter of invitation to IOC on 2nd November, 2004 (Annexure WS-44) and by a letter dated 10th November, 2004 (Annexure WS-45), IOC agreed to invest Rs. 150 crores. In the EOGM held on 14.1.2005, with the participation of the petitioners, a unanimous resolution was passed for offering, issuing, and allotting 150 million shares of Rs. 10/- each at par to IOC (Annexure WS-49). In an Empowered Committee Meeting on 20.1.2005 (WS-50) chaired by Dr.PC, the committee resolved to allot shares worth Rs. 150 crores, at par, on receipt of payment from IOC. It was also resolved that on receipt of payment, shares could be issued either in a physical form or in de-mat form and return of allotment could be filed with the ROC. Therefore, on this day the allotment was completed and only issuance shares after receipt of consideration remained. Accordingly, a letter of offer was sent to IOC on 28.1.2005 (Annexure WS-51) together with a prescribed application form. By a letter dated 17.2.2005 (Annexure WS-52), IOC accepted the offer and sent a cheque for Rs. 150 crores. Therefore the sequence of events would show that Dr.PC had been involved right from conception of induction of IOC as a shareholder and till the shares were allotted. Therefore, there is absolutely no ground for the petitioners to impugn the said allotment.

44. The learned counsel further submitted: Having been parties to the allotment, now the petitioners are challenging the allotment on two extraneous grounds. One is that the alleged clandestine agreement with IOC was not disclosed to the petitioners and the other is that they were induced to support the resolution in the EOGM on the promise of disinvesting shares held by WBIDC in favour of the petitioners. As far as the first ground is concerned, it is true that discussion took place with IOC pursuant to which IOC wrote a letter on 29.9.2004 seeking for entering into an MOU providing for divesting of all shares of WBIDC in favour of IOC. By a letter dated 12th Oct. 2004, IOC was informed that since the petitioners had the first right of refusal, only in case they declined to purchase the shares, then the same could be sold to IOC. The position was again reiterated by WBIDC in its letter dated 29.10.2004. Thus, it would be evident that WBIDC had always acted in accordance with the Articles and agreements in protecting the pre-emption rights of the petitioners. In regard to the contention of the petitioners, that WBIDC had agreed for valuation of shares by IOC is concerned, in case of sale to anyone other than the petitioners, WBIDC is free to determine the price and is not bound by Article 33. Further, in the EOGM 14.1.2005, the general body had unanimously approved allotment of shares to IOC on certain terms and therefore the IOC is bound by the terms of allotment and it cannot have any recourse to its earlier claims. Therefore, the allegation of the petitioners that there was a secret/clandestine agreement of IOC, the non disclosure of which is fatal to the general body resolution to allot shares to IOC has no basis. Even assuming that there was a secret agreement, it was a private agreement and it has nothing to do with the affairs of the company. In view of this, IOC allotment cannot be set aside on the basis of this

allegation. The petitioners' allegation that the discussion/correspondence with IOC should have been disclosed either to the board or to the petitioners concerned, as a shareholder, WBIDC did not owe any fiduciary duty to them nor there is any such stipulation in any of the agreements with the petitioners or in the Articles of Association. Section 173(2) of the Act does not require a shareholder to disclose reasons for either supporting or opposing or moving a resolution. (LIC v. Escorts Ltd. 1861 SCC 264 Therefore, everything ended at this stage and IOC subscribed to the shares only on the terms and conditions proposed by HPL with the active participation of Dr.PC. Therefore, the allegation of the petitioners that their consent was obtained by suppression of material facts has no basis.

45. In so far as the circular resolution is concerned, it is on record that even after IOC had remitted the consideration for the shares. Dr.PC was putting hurdles in the actual issuance of shares to IOC. In view of the delay, not only IOC sent several letters of complaints out also sent legal notices, all of which were either placed before the board or circulated to the directors. ROC also threatened initiation of action. The Chairman was trying to hold a board meeting and by an e-mail dated 7th July, 2005 (Annexure WS-59), the Chairman sought for the convenience of Dr. PC to hold a board meeting to decide this matter giving a few dates for Dr. PC to select. Again on 18th July, 2003, the Chairman reminded DR.PC. By an e-mail dated 21.7.2005, the Chairman advised DR.PC that he was convening a board meeting on 29.7.2005. However, since many of the directors were not available on 29.7.2005, by a notice dated 27.7.2005, the meeting was adjourned. From the sequence of events, it is quite evident that the efforts of Chairman to hold a board meeting to discuss the matter did not succeed. Therefore, it became necessary for the Chairman, when the legal opinion obtained from the former Additional Solicitor General indicating possible criminal and civil action against the company, directors and promoters, to get the approval of the directors for issuance of shares to IOC, by a circular resolution on 28.7.2005. On receipt of fax approvals from the majority directors on 2.8.2005, the Chairman directed the Deputy Co. Secretary to issue the shares in de-mat form. Accordingly, the cheque was encashed and 150 million shares were credited to IOC de-mat account and return of allotment was filed with the ROC. The petitioners have a complaint that since the circular resolution did not accompany necessary documents as provided in Section 289 of the Act, the resolution is liable to be held as void. This complaint has no merit. All the relevant documents that were available at the time of issue of notice for the board meeting on 29.7.2005 had been circulated along with the notice, while the documents that came in after that date were circulated individually to the directors. Some of these documents had already been placed before the board meeting on 28.5.2005. In terms of Article 102 of AOA, Circular resolution passed by the board is valid as if it had been passed in a meeting of the board. The petitioners have further contended that the WBIDC directors should have voted along with the petitioners in terms of Clause 6 of the Agreement dated 12.1.2002. In view of the fact that there is no such provision in the articles and since in terms of the judgment of Supreme Court in V.B. Rangaraj case AIR 1992 SC 453, the terms of private agreement nor incorporated in the Articles has no validity. In Rotla case 2002 2 Bom. Cr. 241, the Bombay High Court has held that directors in discharge of their fiduciary duties have to vote for the benefit of the company and are not bound by private agreements. The other contention that 10 days notice had not been given is also not sustainable as this requirement is only in respect of regular board meetings and not in case of circular resolutions which has been specifically permitted by Article 102. The petitioners have also claimed that shares could not have been allotted

without amendment to Article 47 especially when the company itself had informed the ROC by a letter 11.7.2005. The said letter only referred to the allotment made to the 2nd petitioner in terms of the share - purchase agreement dated 30.7.2004 and not of allotment to IOC. Allotment to IOC was made in terms of Article 3 (A) as was done in earlier allotments. Therefore, none of the allegations of the petitioners in allotment and issuance of shares to IOC can be entertained.

46. TRANSFER OF 155 MILLION SHARES: In this regard, Shri Sundaram submitted: It is true that an agreement was entered into with the petitioners on 8th March, 2002 for transfer of shares held by WBIDC to the 4th petitioner. As consideration for the shares, the 4th petitioner was to pay a sum of Rs. 7,75,50,000 by cash and the remaining amount was to be deemed as paid to WBIDC and the same amount would be deemed to have been given as a secured loan by WBIDC to the 4th petitioner and that this loan was to be repaid in 10 yearly installments. In addition, the 1st petitioner was also to pledge 3,87,75,000 shares with WBIDC. However, the transfer was never completed and these shares remained in the name of WBIDC in the register of members of HPL since registration of transfer had not been effected in the absence of lodgment of transfer instruments with HPL. Since the shares are in physical form, without complying with the provisions of Article 33(c) which mandates that registration of shares shall not be made without lodgment of instruments of transfer, registration of the impugned could not have been approved by the Board. Therefore, as far as the company is concerned, the shares still remain in the name of WBIDC. For registration of transfer, IDBI consent is necessary, which is not available as of date. Since IDBI is not a shareholder, its action of withdrawing its approval cannot be an act of oppression against the petitioners. Therefore, even under Section 402(e) of the Act, CLB cannot direct IDBI to accord approval, without its consent. Sale of shares is complete only when the transfer is registered by the company and till then WBIDC is the owner and the petitioners have only beneficial interests in the shares and not the ownership. Further, since the shares have to be lodged by WBIDC, it has decided not to lodge the same with the company. Even if such a decision amounts of WBIDC breaking its promise, CLB cannot question as to why WBIDC has changed its mind and therefore, the petitioners have to move only a civil court in this regard. Even otherwise, the original transfer instruments signed by WBIDC have become stale and therefore cannot now be lodged. Therefore, the question of the company either rejecting or approving the registration of transfer of shares does not arise. There are two parts in regard to the impugned Rs. 155 crores shares - one is the agreement to sell and the other is actual sale. Even though, the company was aware of the agreement to sell dated 30.7.2004, it was not aware of the actual sale as no transfer instruments had been lodged with the company. What the petitioner seeks through the petition is that WBIDC had promised to make the petitioner a majority and therefore direct WBIDC to comply with its commitment. Thus, on their own showing, the company is not concerned with the issue. Further, the petitioners have not paid any consideration for the shares. They have so far paid only Rs. 30 crores as against Rs. 155 crores and therefore even if it is assumed that CLB has the power to direct registration of transfer of shares, it could be only with reference to Rs. 30 crores and nothing beyond that. Even otherwise, the transfer of the said shares was an integral part of the earlier agreements dated 12.1.2002 and 8.3.2002 and therefore when the petitioners had breached the terms of this agreements, they cannot, claim that they are the owners of these shares. It has been held in a number of cases that even though transfer may be effective between the transferor and transferee, it becomes effective against the company only after the registration of transfer, Mathrubhumi Printing & Publishing Co. v. Vardhman Publishers 73 CC

80. Howrah Trading Ltd. v. CIT 1959 SC 775: In case of transfer of shares, till such time the transfer is registered by the company, no right as a shareholder accrues on the transferee. LIC v. Escorts Ltd. : While a transfer effective between the transferor and transferee is not effective as against the company and person without notice of the transfer until the transfer is registered in the company's register.

47. The learned counsel further submitted: No dispute between a transferor and transferee could be considered to be in the affairs of a company to be agitated in a petition under Sections 397/398 of the Act. Even assuming that WBIDC has partly performed its obligations, yet, to seek its complete performance, the petitioner has to move to a civil court and he cannot seek such specific performance in the present proceedings. Further, it is to be noted that the petitioner has not sought for rectification of the register of members to insert the name of the 4th petitioner in place of WBIDC. As a matter of fact, even such a prayer cannot be made as the company has not, at any time, refused registration as no instrument of transfers had ever been lodged with the company. Since the shares have not been registered in the name of the 4th petitioner, it has no locus standi to file this petition. Even assuming that non registration is an act of oppression, since the 4th petitioner is not a member of the company, it cannot allege oppression as oppression could be alleged only by a member. Further, a careful reading of the agreement dated 12.1.2002 would reveal that the agreement was to be implemented in its entirety in sequential steps and any failure on the part of either party will terminate the agreement. It is on record that in breach of the said agreement, the petitioner is yet to bring in Rs. 500 crores. If IOC allotment is cancelled and the registration in respect of 155 million is ordered, then even without purchasing the balance shares held by WBDIC, the petitioners would become majority shareholders, the position which was never envisaged. Therefore in terms of Section 52 read with Section 54 of the Contract Act, the petitioners cannot seek performance of WBIDC's obligation as they have not fulfilled their obligation. In view of this, even in a civil suit, they would not get any relief which definitely they cannot get under the equitable jurisdiction of this Board. Since in terms of the agreement between the lenders and the company, without their approval, company cannot register the transfer, even CLB cannot direct the company to register the transfer, as it would place the company to act in breach of its agreement with a third party viz;, the lenders. In terms of Section 39 of the Contract Act, when a party refuses to perform its/his obligations under the contract, the other party can rescind the contract as such a contract has become voidable. In such cases, the only course available is either to claim damages or seek for restitution in terms of Section 64 and 65 of the Contract Act. Since in the present case, due to the failure of the petitioners to comply with the terms of contracts dated 12.1.2005 and 8.3.2002, WBIDC and GOWB have effectively avoided the contract and therefore the parties should be restituted to their pre-contractual status as held in Murlidhar Chatterjee v. International Film Company Ltd. AIR 1943C 34: In terms of Section 39 of Contract Act, when one party to the contract refuse to perform his obligation there under, relieves the other party from other obligation under the contract. Similar decisions can be seen in Satgur Prasad v. Harnarayan Das AIR 1932 PC 89 at Page 91; S.N.R Sundarao & Sons v. CIT . It is a settled law that no one can seek specific performance of part of a contract. In the present case, since the petitioners have failed to discharge their obligations, they cannot seek to enforce performance of the obligations of WBIDC/GOWB (Subramani v. Kannappa Reddiar), Judingar Kumar Rai v. Manmohan Dey

48. In so far as the claim of the petitioners that WBIDC/GOWB should be directed to transfer the shares to the petitioners is concerned, the learned counsel submitted: Even though in the MOU dated 3.5.1994, WBIDC had agreed to reduce its shareholding to 11% or below in favour of the other promoters, the same was to be specified in the JVA. In the JVA, there is no such provision. As a matter of fact, in the JVA, it is specifically provided that as and when WBIDC decided to disinvest its shares, it would be offered to CPMC. Further, even though in terms of the agreement dated 12.1.2002, the petitioners had the right to require WBIDC to divest its shares in their favour, in the supplemental agreement dated 30.7.2004, CPMC had expressly relinquished this right. Therefore the question of the petitioners claiming the shares of WBIDC on the basis of legitimate expectation based on earlier agreements does not arise.

49. In regard to the agreement dated 14.1.2005 is concerned, the agreement was nothing but a statement of intent, incomplete in material particulars and did not amount to a complete agreement. It was only a record of discussions with a view to enter into a formal agreement subsequently. The fact that the alleged agreement dated 14.1.2005 was only a record of intention of the parties is clear from the fact that the price of the shares was negotiated later and a price of Rs. 28.80 per share was agreed upon by the parties. The agreed price is reflected in Deutsche Bank's letter dated 15th July, 2005 (Annexure WS-29). Now the petitioners' claim that no price had been agreed upon and the same has to be determined by a valuer. The claim of the petitioners that they had been induced to support the allotment of shares to IOC on the promise of disinvesting the shares of WBIDC in favour of the petitioners is wrong. It is evident from the letter of Dr.PC dated 6.7.2005 (Annexure WS-32) wherein he has specifically mentioned that as a pre condition for acquiring the shares of WBIDC, a confirmation should be obtained from IOC that it would not subscribe to the shares worth Rs. 150 crores. This stand, he has reiterated in subsequent letters also and also in the various draft agreements that Dr.PC had sent to GOWB/WBIDC and the Chief Minister. It would mean that if IOC were to continue, the petitioners are not willing to acquire the shares of WBIDC. Therefore it is crystal clear that induction of IOC and disinvestment by WBIDC are independent of each other. In view of this contradictory stand taken by Dr.PC , GoWB decided not to go in for disinvestment. A perusal of various agreements would indicate that WBIDC/GOWB agreed to transfer their shares to the petitioners on fulfillment of various obligations by the petitioners which they had failed to discharge. In so far as the demand of the petitioners for a direction to WBIDC to sell the balance shares to the petitioners is concerned, they cannot make such a claim under the guise of pre-emption rights. These rights would arise only when WBIDC decides, on its own accord, to sell its shares. Clause 12 of the agreement dated 12.1.2002 specifically stipulates that the terms of the agreement were to be implemented sequentially which means that the terms are not severable. In terms of clause 17 of that agreement, if the terms of the agreement could not be implemented, the only right vested with the petitioners is to demand the investments made by them. It is to be noted that no such claim of the refund of investment has so far been received on the ground of non compliance with the terms of the agreement by WBIDC or Government of West Bengal. It is to be noted as is expressly spelt out in clause 18 of the agreement that Government of West Bengal has agreed to enter into this agreement on the express understanding that the petitioners would run the company and strive for its consolidation and growth. The very fact that the petitioners have failed to bring in necessary funds would indicate that the object of handing over the control of the company to the petitioners has miserably failed. It is to

be noted that a Government cannot take decisions like a commercial enterprise. Whenever the Government enters into a joint venture with a private party, it has to take into consideration various aspects, like, public interest etc. When the Government had decided that participation of IOC in the company would be in the public interest, CLB cannot decide otherwise. Likewise, WBIDC is apprehensive about CPMC taking over the control of the company as he has not fulfilled many of his obligations. Therefore, the CLB cannot direct either the registration of 155 million shares nor disinvestment by WBIDC. Since the petitioners entered the company through the MOU dated 3.5.1994 , if at all they have any legitimate expectation, it could only be that they should hold 3/7th of the shares in the company, which admittedly they hold. There is nothing in the MOU that the petitioners should vested with the control of the company. The only other claim that the petitioners, can have is that whenever WBIDC decides to disinvest, in terms of the Articles the petitioners would have the pre-emption rights. Further, whether the agreement dated 14.1.2005 is capable of enforcement is a triable issue as the same is contrary to the previous agreements. Even assuming that it was an agreement, by his own conduct of stipulating various pre conditions thereafter, Dr. PC has repudiated the said agreement which has also been accepted by GOWB/WBIDC by a letter dated 27.7.2005 in terms of Section 39 of the Contract Act (Annexure WS-28). Thus, as of date, the petitioners have no right or legitimate expectations to require GoWB/WBIDC to divest their shares in the company. The leaned counsel relied on the following cases:

> Sikkim Subba Associates v. State of Sikkim : He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future could conduct and adherence to the promises of the defaulter, the so called waiver cannot be considered to be for ever and complete in itself so as to deprive the State in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the award in this case.
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> Universal Cargo Carriers Corporation v. Citati 1957 2 AER 70: A renunciation of contract can be made either by words or by conduct provided it is clearly made. The test of whether an intention is efficiently evinced by conduct is 'whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part of the contract.
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> Kurupamaya Ananga v. Seesil Kumar Lahi AIR 1919 Mad, 379: When there is a clear breach of contract, it amounts to revocation. A party is entitled to have his contract performed in its entirety and any breach of the part is a breach of the contract and unless the parties waive the breach, the contract is at an end. No party is bound to ask for performance when he has notice from the opposite party that performance would be refused.
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> Cehave NB v. Bremer 1975 3 AER 739: When a person declares that he will not perform his part of the contract or his conduct shows that he has no intention to perform, then, the other party may treat the same as a breach going to the root of the matter and to treat himself as discharged from further performance.

50. Shri Ganesh appearing for the 1st and 6th respondents submitted; The petitioners can never impugn the allotment of shares to IOC. Dr.PC was involved right from the beginning not only in the proposal of inviting IOC to invest but also participated in all decision making processes in this regard. Further, IOC is not a third party as claimed by the petitioners. Both HPL and IOC have very vital business relationship. IOC is the suppliers of Naptha to the company and has given credits of over Rs. 300 crores. The petitioners are guilty of suppression of relevant documents which were in their possession in regard to allotment of shares to IOC. From these documents, it is evident that the petitioners were party to the decision to allot shares to IOC but there is no avermentrelating to the documents in the petition. It is a well settled legal position that suppression of a material document constitutes fraud on the court and tantamounts to perjury and as such not only the petition deserves to be dismissed, penal action should also be taken. Even in the rejoinder, the petitioner has not even attempted to admit this suppression. The moment the offer was made to IOC and it accepted the offer by sending a cheque for consideration, the company was obligated to allot the shares. Since IOC had made complaints relating to non allotment and the ROC had also called for comments and the legal opinion also advocated allotment of shares to IOC at the earliest, to avoid impending legal action the allotment of shares to IOC was move through a circular resolution as a matter of abundant caution. As a matter of fact when the board had resolved to allot shares in 2004, even the circular resolution was unnecessary. The claim of the petitioners that the company could not have allotted the shares before encashment of cheque is not correct. It has been held that receipt of cheque is equivalent is receipt of cash and therefore time and date of encashment is irrelevant. The petitioners have alleged that prior to the encashment of the cheque, shares should not have been allotted as the same is in violation of Section 75. It has been judicially held that payment by cheque is equal to payment by cash. In K. Saraswati v. P.S.S. Somasundaram : it is held that unless it is specifically mentioned that payment must be in cash, there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course. Similar decisions can be found in CIT v. Ogale Glass Works Ltd. 25 ITR 529; and Turkey Red Dye Works Co. Ltd. v. CIT 55 ITR 532. The Department of Company Affairs have also issued a clarification dated 18.11.1969 that cash includes anything which can be regarded as an equivalent to cash including in particular a cheque. Therefore, the time of encashment of cheque is irrelevant especially when the cheque had been realized on the next day of allotment. In so far as issue of circular resolution is concerned, Shri Sundaram has elaborately dealt with the same.

51. Further, the consideration of Rs. 155 crores received from IOC has already been utilized by the company and therefore the cancellation of the allotment resulting in repayment of Rs. 150 crores to IOC would adversely affect the financial interest of the company. Assuming that the petitioners have a legitimate grievance regarding transfer and sale of shares of WBIDC, yet that grievance cannot be claimed to be the basis for seeking cancellation of the allotment made to IOC. The petitioners' demand that the 7th and 16th respondents should be directed to reimburse the expenses incurred on behalf of the company is frivolous. The main allegation in the petition relates to allotment of shares to IOC by the Board and also in relation to allotment of shares to FIs and in the normal course, it is the duty of the Board and the MD to defend against reliefs which might be against the interests of the company. Interests of the company and the shareholders is paramount in a proceeding under Sections 397/398. In Gaekwad case, the Supreme Court has held that the directors owe fiduciary duties to the company and not to the shareholders. Therefore, the MD has to take care of the

interests of the company. Further, neither the company nor the MD has taken any stand as far as the matters relating to 155 million shares and the disinvestment by WBIDC in favour of the petitioners and therefore, the petitioners cannot allege that either the company or the 16th respondent is taking sides in shareholders disputes.

52. Shri Ganesh further submitted: In so far as allotment of shares to IDBI is concerned, the company is bound to allot the shares in view of the terms of CDR package. The Empowered Committee constituted by the company to finalise the CDR package includes Dr. PC and another of his nominee. The Committee had passed a specific resolution for implementation of the CDR package which stipulates issuance of Rs. 140 crores equity shares at par to the lenders. The Master Restructuring Agreement dated 16.12.2004 signed by Dr. PC himself provides for allotment and issuance of shares worth Rs. 135 crores to the lenders and as such contractual right has been created in the lenders and as such the petitioners cannot oppose allotment to them. The CDR package has already been implemented by the lenders by sacrificing an amount of Rs. 289 crores and the rate of interest has been reduced from 14% to 10.5%, thus, resulting in enormous saving to the company. If the allotment of Rs. 135 crores is made to the lenders, the company would save about Rs. 15 crores per annum by way of interest. In addition, the lenders have also agreed to reduce the rate of interest from 10.5% to 8.75% once the shares are allotted and refinancing proposal submitted by the company to the lenders is approved. Therefore, it would be in the interest of the company that the earlier restraint order is vacated to enable the company to allot shares to IDBI.

53. In so far as the appointment of the 16th respondent as the MD is concerned, Shri Ganesh submitted that there is no pleading in the petition challenging his appointment. They challenged the appointment only in the reply filed to an application made by the company for postponement of the AGM scheduled on 14.10.2005. Since that application has already been disposed of, this issue no longer survives. The petitioners have not only consented to the appointment of 16th respondent as the MD but they had also been a party to his appointment in the board meeting on 29.3.2005. They were also parties to the fixation of remuneration package for the 16th respondent in the board meeting held on 28.5.2005. The minutes of these board meetings were circulated to all the board members including the nominees of the petitioners but at no point the petitioners challenged the said appointment. Thereafter also Dr. PC had addressed a number of letters to the 16th respondent in his capacity as the MD. Further, in terms of Section 269 of the Act, it is mandatory for the company to have a Managing Director and that is the reason why the board appointed him as such in the board meeting held on 29.3.2005. The petitioners have contended that without a vacancy in the board, the 16th respondent could not have been appointed as the MD. Even assuming that his appointment would not be legally valid, yet, in terms of the decision in Needle Industries case, mere violation of the statutory provision does not constitute oppression. Therefore, there is no substance in the allegation of the petitioners in regard to the appointment of 16th respondent as the MD.

54. In so far as the allegation of the petitioners that the company is actively pursuing audit by C&AG is concerned, the company had no option but to follow the provisions of the Companies Act. After the issue of preference shares, the company became a Government company in terms of Section 617 of the Companies Act as more than 51% of the paid up capital was held by State Government/WBIDC. Therefore in terms of Section 619 of the Act, the C & AG has not only

appointed three firms of Chartered Accountants to carry out the audit, they had also completed the audits for 2004-2005 and 2005 2006. C & AG has also appointed auditors for the year 2006-2007. Therefore, when the company has complied with the provisions of the Act, the question of alleging oppression in this regard does not arise. Further, in the petition, there is no allegation in this regard and as such even this allegation cannot be looked into by the Company Law Board.

55. Shri Chagla, Senior Advocate, appearing for the WoGB submitted: Private rights cannot be sought to be enforced through a petition under Sections 397/398 of the Act. The CLB is not concerned with manner of doing something but only to examine whether the act done is oppressive or detrimental. When Dr.PC had participated in the EOGM and voted for allotment of shares to IOC, he cannot impugn the resolution on the ground of misrepresentation for which the remedy by way of damages will have to be before a civil court. Misrepresentation of a private promise does not make the resolution of the General Meeting bad. A resolution can be set aside only if there is some infirmity in holding the meeting. The allotment to IOC and the sale of shares of WBIDC to the petitioners are two independent and unconnected actions. The challenge of the petitioners to allotment of shares to IOC is mainly on the ground that certain discussions that took place between WBIDC and IOC had not been disclosed to Dr.PC before the EOGM. Whatever might be the terms and conditions of discussions between WBIDC and IOC, ultimately IOC is bound by the terms of allotment. Even in the alleged clandestine agreement between IOC and WBIDC, the first right of refusal has been given only to the petitioners and therefore the petitioners are not in any way prejudice. IOC was not inducted without the knowledge of the petitioners. Originally the right of identifying a strategic investor was entrusted to the petitioners. Since they could not identify and decide on such a strategic partner, it was agreed that the Government of West Bengal would identify the strategic partner and with the consent and knowledge of Dr.PC, IOC was identified and approved. The allotment of shares to IOC was approved in the empowering Committee chaired by CPMC. The agreement dated 14.1.2005 did not go through only because in his letter dated 6.7.2005, Dr.PC made it a pre-condition that IOC should go out of the company. In other words, it is Dr. PC who has changed his mind in relation to allotment of shares to IOC. From the contents of letters at page 286/287 of the petition, it is evident that the petitioners have not sought for cancellation of allotment to IOC on the basis of the alleged clandestine agreement with IOC. Since the company was in need of funds, everyone agreed that IOC should be inducted as a strategic investor so that company could get benefit of Rs.150 crores. The company is not concerned with interse disputes between two shareholders and on the basis of the disputes once cannot seek for nullifying a valid resolution passed by the shareholders and the board. Any legal action which has affected a person acquiring majority cannot be considered to be oppressive in the absence of lack of probity or fairness. In the present case, everything has been done transparently in consultation with Dr.PC and therefore he cannot allege lack of probity or fairness. Further, the only allegation in the petition relates to allotment of shares to IOC, which being an isolated act cannot be agitated in a petition under Sections 397/398 of the Act. Once the company has established that allotment of shares to IOC is in the interest of the company, the manner of allotment is of no consequence. The learned counsel relied on the following cases in support of his arguments.

S.P.Chengalvaraya Naidu v. Jagannath ; Non disclosure of relevant and material documents with a view to obtain advantage amounts to fraud. Hence decree obtained by non disclosure amounts to

fraud on the court and hence decree is liable to be set aside.

S.P. Jain v. Kalinga Tubes Ltd. :The haste in the particular circumstances of the case in allotment of shares cannot therefore lead to any inference of oppression but arose out of the circumstances brought about by the appellant's conduct; When the real basis of the petition is not a case of oppression as a minority shareholder but on the feeling that the hope of getting control of the company on the basis of agreement had been thawarted, there is no cause of oppression.

Needle Industries case 1981 3 SCC 333; As isolated act cannot lead to a presumption of oppression and even a resolution in contravention of law may be in the, interest of shareholders and the company.

56. Shri Anil Diwan, Senior Advocate, appearing for the 7th respondent submitted: The main allegation against the 7th respondent is that even though he was in the knowledge of the alleged clandestine agreement with IOC, he had not disclosed the same to the petitioners/board of directors and that he had acted malafide in getting the circular resolution passed. The allegation of the petitioners that the 7th respondent had not acted is unfortunate. The Chairman has no financial stake in the company and he came into the company at the invitation both the petitioners and WBDIC when the company was in difficulties. The 7th respondent has always tried to ensure better performance of the company. As a matter of fact, Dr.PC himself has appreciated the contribution of the 7dth respondent as Chairman in his letters dated 10.12.2004 and 11.1.2005. There has been consistent increase in production, sales during the tenure of the 7th respondent. A perusal of the sequence of events leading to the allotment and issue of shares would indicate that the 7th respondent had acted with probity and fairness and not in a malafide manner as alleged by the petitioners. Further, in the petition there is no allegations against the Chairman and only in the rejoinder allegation of malafide has been made, which cannot be decided without leading oral evidence. It is admitted fact that the company was in need of funds. Therefore the company decided to formulate a debt restructuring proposal with the banks. Accordingly, a Committee was constituted with Dr.PC as a member to negotiate with the banks. The CDR package which was approved by the lenders envisaged induction of Rs. 200 crores by the promoters and one of the ways of induction of capital was through a strategic investor. Originally, GAIL was contemplated to be invited as a strategic investor which was thereafter changed to IOC with the knowledge and consent of Dr. PC as is evident from the minutes of the meeting held with the Chief Minister. The letter dated 20.9.2004 wherein Dr.PC had pointed out that there was maximum urgency in the induction of funds, was also endorsed to the 7th respondent and therefore he. was aware that the petitioners had consented to the induction of IOC as a strategic investor. In the board meeting held on 11.10.2004, which was attended by Dr.PC, it was noted that IOC had been identified as the PSU to invest Rs. 150 crores as Industrial Portfolio Investor. In a board meeting held on 2.11.2004, the board passed a unanimous resolution giving its consent subject to requisite approvals for issuing and allotting equity shares up to Rs. 150 crores. The board also approved constitution of a committee with Dr.PC as a member to finalise and issue the letter of offer to IOC. Thereafter, the 7th respondent sent an offer dated 2.11.2004 to IOC indicating the terms and conditions. The EOGM with the participation of all the petitioners, unanimously approved the allotment of shares to IOC on 14.1.2005. In the Empowered Committee meeting on 20.1.2005 chaired by CPMC, a resolution was passed to issue 15

crores shares to IOC and to allot the same on receipt of full payment from IOC. The resolution further authorized the company management to do all acts, deeds and other things necessary and incidental including filing of returns with ROC. Along with the letter of acceptance, IOC sent a cheque for Rs. 150 crores which was received on 18.2.2005. However, the company could not encash the cheque as CPMC somehow stalled the allotment of shares to IOC. Various reminders received from IOC including legal notices were placed before the board in its meeting on 20.8.2005 which was attended by Dr. PC wherein the board expressed its desire that the issue should be resolved expeditiously. Since no shares had been allotted by CPMC, IOC complained to ROC in response to which ROC issued a notice to the company dated 30.5.2005 seeking for the reasons for non issuance of shares to IOC. On receipt of this notice, the same was circulated to all the directors including CPMC. Upon receipt of the said notice, one of the directors representing WBIDC urged the company to expedite encashment of the cheque of IOC and also issuance of shares. By another notice dated 17.6.2005, ROC cautioned initiation of action under Section 234(3)(A) of the Companies Act. In addition, the 7th respondent received another letter from IOC dated 29.6.2005 complaining of inaction by the company in regard to issuance of shares. By a notice dated 30.6.2005 under Section 234(3)(A) of the Act, ROC directed the company to produce relevant books, papers, documents etc. on 11.7.2005. In response to that notice, the Deputy Company Secretary produced before the ROC all the relevant papers. All attempts of the 7th respondent to convene a board meeting to consider this issue in July, 2005 failed because CPMC did not give his consent. Finally, the 7th respondent convened a board meeting on 29.7.2005 after circulating the notices issued by IOC, its advocates and ROC. In the meanwhile, the 7th respondent also received a legal notice from ROC dated 19.7.2005 cautioning that if 150 million shares were not issued within 10 days, legal action would be initiated. In view of this threatened legal action, the 7th respondent sought legal opinion from Shri Mukul Rohatagi, Sr. Advocate on the matter of issuance of shares to IOC on 27.7.2005. In the meanwhile, since many of the board members expressed their inability to attend the board meeting on 27.7.2005, by a letter dated 27.7.2005, the 7th respondent adjourned the meeting to be held on a date convenient to all the board members. By an opinion dated 27.7.2005, Shri Rohatagi advised that to avoid civil and criminal action against the company, its directors and promoters, 150 million equity shares should be issued to IOC at the earliest. On receipt of the opinion , the 7th respondent circulated the same to all the members of the board. He also received copies of two letters written by GOWB addressed to Dr. PC and IDBI informing them of the Government's decision not to disinvest its shares in favour of CPMC. The 7th respondent circulated copies of these letters also to all the directors. In view of the legal notice received from IOC, notice from ROC and the legal opinion received, the 7th respondent had no option but to get board's approval for issuance of shares to IOC by a circular resolution and accordingly he did so on 28.7.2005. In terms of Article 102 of AOA, it is permissible to get approval of the board through circular resolutions. As far as the argument that necessary documents did not accompany the circular resolution is concerned, all the connected documents were sent to the members of the board even before the circular resolution was sent and therefore every board members is aware of the circumstances in which the circular resolution was proposed. On receipt of approval from all the directors except 4 from the petitioners' group, the 7th respondent by a letter dated 2.8.2005. directed the Deputy Company Secretary to take requisite action to implement the decision including encashing the IOC cheque by 3.8.2005 since 10 days time stipulated in the legal notice dated 19.7.2005 by IOC had expired on 29.7.2005. Thus, it will be evident that the 7th respondent had acted bonafide and in the interest of the company. Even

otherwise, in view of the earlier resolutions of the board and the Empowered Committee dated 2.11.2004 and 21.2.2005 approving allotment of shares to IOC, even getting the approval through the special resolution was unnecessary but was done as a measure of abundant caution. It is to be noted that none of the directors from the petitioners' group raised any objection nor had voiced their grievance to other 6 independent directors on the board before the approval was obtained on 2.8.2005. The petitioners have questioned as to how the Chairman could have issued the circular resolution from Gurgaon. The 7th respondent being the Chief Mentor of CII has a office in Gurgaon and therefore, in view of the urgency, he had issued the circular resolution by fax from that office. Therefore, the conduct of the of the 7th respondent, cannot, in any way impugned by the petitioners.

57. Shri Vahanwati, Solicitor General of India, appearing for IOC submitted: In so far as allotment of shares to IOC is concerned, the petitioners have made misleading and inaccurate statements suppressing material facts in the petition. It is on record that Dr PC was associated in every step in the decision making process in regard to allotment of shares to IOC right from the beginning. The entire case of the petitioner in seeking for cancellation of the allotment to IOC is based on the non disclosure of the alleged clandestine agreement between IOC and GOWB. No doubt IOC was interacting with GOWB but finally it accepted the terms of offer made by HPL. The petitioners had agreed in the supplemental agreement dated 30.7.2004 that Rs. 150 crores would be inducted through an industrial portfolio investor selected by WBIDC/GoWB. The petitioners have suppressed the letter dated 16th September, 2004 from GoWB wherein the Dr PC was informed that the Government of India had proposed induction of IOC as a portfolio investor. In his reply dated 20.9.2004, Dr.PC has mentioned about the meeting with the Chief Minister wherein it was agreed that IOC would be inducted. The factum of this meeting has been suppressed in the petition. Even though in paragraph 39 of the petition, the petitioners have averred that in the board meeting held on 2.11.2004 wherein the matter of allotment of shares to IOC was considered, the petitioners had objected to the same but in the minutes it had been recorded that the proposal was approved. This averment is false as there are no contemporaneous records that at any time thereafter the petitioners had questioned the correctness of the minutes. A perusal of the minutes of the board meeting on 2.11.2004 would show that the Chairman had been authorized to invite IOC for participation by way of equity investment of Rs. 150 crores and a Committee including CPMC was authorized to do the needful. Accordingly, the Chairman issued a letter on 2.11.2002 to IOC inviting it to subscribe to shares worth Rs 150 crores. The fact of issue of letter by the Chairman was to the knowledge of Dr PC as is evident from his letter dated 10.12.2004 wherein he has referred to the said letter. In the same resolution it was also proposed to call for an EOGM to approve the allotment of shares to IOC. The minutes of the meeting was circulated on 17th December, 2004. Even then, petitioners did not protest against the contents of the minutes. On 21st Dec. 2004, notices convening the EOGM on 14th January, 2005 were issued along with an Explanatory Statement as also a copy of letter of IOC dated 10.11.2004. Only by a letter dated 30th Dec. 2004, for the first time, Dr.PC contended that the minutes of the Board meeting on 2.11.2004 relating to allotment of shares to IOC did not reflect the various reservations expressed by the nominees of the petitioners in that meeting. The 7th respondent sent a detailed reply on 10th January, 2005 which has been suppressed by the petitioners in the petition. Thereafter, in the EOGM held on 14.1.2005, the petitioners were represented wherein the proposal to allot 150 million equity shares of Rs. 10/- each at par to IOC was approved unanimously. Thereafter, in an Empowered Committee meeting held on

20.1.2005 chaired by Dr. PC, allotment of 150 million shares to IOC was approved on certain terms and conditions and accordingly a letter of offer was issued on 28.1.2005 incorporating therein the terms of the offer specifying that the offer would expire on the 30th day from the date of the offer. By a letter dated 17th Feb. 2005, IOC accepted the offer and sent a cheque for Rs. 150 crores. Thus, it is quite evident that the petitioners were not only associated in the decision making process but also had consented to the allotment of shares to IOC. Thus the general body resolution had been completely given effect to and therefore the question of challenging the same at this stage does not arise. If at all the petitioners seek to impugn the general body resolution, it, could have been done by convening another general body meeting before the offer was made and payment received. Once IOC has accepted the offer and remitted the money, the contract stood concluded. Even IOC cannot now rescind the contract nor could claim that if subscription to the shares is governed by the terms of the alleged clandestine agreement. However, in the rejoinder, the petitioners have taken a stand that the consent given by them in the EOGM is vitiated on the ground that GOWB/WBDIC did not disclose the alleged clandestine agreement with IOC. Whatever might have been the discussion with IOC prior to the letter of offer, since IOC has accepted the terms of offer, only those terms are binding on the IOC and any earlier discussions or alleged agreements do not bind either IOC or the company. Further, when both the 2nd and 6th respondents have categorically asserted before this Board that no other agreement exists with IOC, the question of the petitioners harping on this issue is meaningless. When the correct facts were revealed in the reply, in the rejoinder, the petitioners took a different stand alleging that the WBIDC/GoWB had breached the terms of the agreement entered into on 14.1.2005 prior to the EOGM. IOC is not a party to the alleged agreement on 14.1.2005 nor it was aware of the same before it agreed to subscribe to the shares. The petitioners have impugned the circular resolution as being malafide etc. It is to be noted that in the Empowered Committee Meeting held on 20.1.2005, it was specifically resolved that on receipt of full consideration for the shares from IOC, shares could be issued either in physical form or dematerialised form. Therefore, there was no need to have followed the circular resolution route for issuance of shares as the same was unnecessary in view of the resolution passed in the Empowered Committee meeting.

58. The leaned counsel further submitted: The petitioners have raised another argument that in terms of Article 47 of AOA, the allotment to IOC was bad as it would alter the ratio of shareholding provided in the Articles. In this Article, it is specifically provided that the shares are to be issued in accordance with general body resolution. In the present case, in the EOGM held on 14.1.2005 the general body passed a resolution to allot shares to IOC and therefore it was in compliance with the provisions of Article 47 read with Article (3 A). The contention of the petitioners that allotment being in contravention to the provisions of Article 47 is ultravires and therefore even the shareholders cannot pass a resolution contrary to the provisions of Article 47, is misconceived. The settled law is that the doctrine of ultravires can apply only with reference to the Memorandum and not Articles. In Ashbury Railways Carriage etc. Co. v. Riche 1975 LR 7 HI 653, it has been held that a company cannot go beyond Memorandum and within the provisions of Memorandum, the shareholders can make regulations to govern the company. In A. Lakshmanaswami Mudilar v. LIC , it has been held that a company is competent to carry out its objects specified in the Memorandum and cannot travel beyond the objects and when a company does something beyond the memorandum, then, the same is ultravires and void and cannot be rectified even if all the

shareholders agree. These decisions would show that the concept of ultra-vires is applicable only in a case of doing something beyond the powers in the Memorandum and not in a case of violation of the provisions of Articles. Therefore, this ground of objection of the petitioner also fails. It is to be noted that the alleged violation of the Articles is not pleaded but was raised only during the arguments. In Kuppa Vishwapati v. Kuppa Venkata AIR 1963 AP 48, it has been held that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the ' previous pleading of the party pleading the same. Likewise, a rejoinder cannot make a departure from the plea put forward in the plaint. In PS Offshore v. Bombay Offshore 75 CC 583, it has been held that in a petition under Sections 397/398, all material facts must be set out in the petition itself and the allegations of fraud, coercions, malafide, if any, must be supported by particulars. The ground for challenge not found in the petition but evolved during the course of arguments will have to be ignored. In Raja Gopal v. Krishan Gopal , it has been held that where a claim has never been made with the defence presented, no amount of evidence can be looked into upon a plea which was never put forward. In Satyanarayan v. Virendre , it has been held that when an absolutely new case has been set up at the time of hearing, the same cannot be considered. In Trojan & Co. v. Nagappa Chetdar it has been held that decision of a case cannot be based on the grounds outside the pleadings of the party and it is the case pleaded that has to be found. Without any amendment to the plaint, the plaintiff is not entitled to grant any relief not asked for. In Deisein Pvt. Ltd. v. Elektrim India Ltd. 2001 3 CLJ 459- CLB, it has been held that in the exercise of the equitable jurisdiction, the CLB has to take into consideration the conduct of the parties and if a person who has been a party to the decisions, he cannot impugn those decisions later on, on the ground that such decisions amount to act of oppression. Finally, since IOC is a bonafide allottee of the shares for valuable consideration, without the knowledge of any alleged breach of terms of agreements between the petitioners and WDIDC/GoWB, the allotment made to it cannot be cancelled.

59. Shri Dave, Sr. Advocate appearing for IDBI submitted: In the order dated 5.8.2005, this Board has restrained the company from allotting shares worth Rs. 135 crores which should not have been done without notice to IDBI. IDBI, being the lead bank with other banks and financial institutions had given substantial loan to HPL. They are also the members of corporate debt restructuring system. Due to difficulties being faced by HPL in payment of its debts to the financial institutions/banks, a scheme for restructuring was approved by corporate debt restructuring empowered group in their meeting held on 22.1.2004 under CDR mechanism. As per the scheme , the lenders were to be allotted equity shares worth Rs. 135 crores. Accordingly, all the financial institutions had advised HPL to convert a part of their outstanding loans into equity within one month from the date of effectuation of the CDR package. The CDR package was made effective from 9th August, 2004 after infusion of Rs. 143 crores by the 2nd petitioner. In the meanwhile, the allotment of equity shares to the lenders was approved by HPL in a board meeting held on 23rd March, 2004 which was also duly approved in the EGM held on 15.6.2004. The Empowered Committee of the Board of HPL also passed a resolution on 3.9.2004 for issuing shares to lenders. Accordingly, the lenders had submitted applications for allotment of shares but the allotment did not take place in spite of repeated reminders. By a letter dated 22.4.2005, HPL submitted a proposal for refinancing of the existing debt which was approved by CDR Committee on 13.5.2005 subject to certain conditions which were conveyed to.HPL by a letter dated 27.5.2005. One of the prime

conditions of the refinancing terms was allotment of shares to the Even though initially the lenders had agreed for allotment of shares after transfer of 36% shares of WBIDC to the petitioners, since WBIDC has now decided not to disinvest, the restraint order should be vacated to enable the company to allot the shares to lenders. He relied on a number of decisions to state that interim order without notice to a third party should not have been passed etc, but I am not elaborating the same now as I am passing this final order.

60. In rejoinder, Shri Sarkar submitted: The respondents have contended that the petitioners have played a fraud on this Board by suppressing material documents and as such are not entitled to any relief. This contention is baseless. A person can be accused of playing a fraud on the court only if he had obtained any relief by suppressing material documents. In every one of the cases cited by the learned counsel for the respondents, the plaintiff therein had obtained a decree or award or a judgment in his favour either by suppression of material documents or by misrepresentation. In the present case, the petitioners have not obtained any favourable order from this Board by suppression of the alleged material documents. In Binod Kumar Aganval v. Ringtong Tea Co P Ltd. CLB has held that as long as no favourable order had been obtained by non disclosure of material documents, no fraud can be alleged. Now that all the documents, which according to the respondents are relevant, are available on record, the Board could consider all of them in deciding the issues raised in the proceeding. It has also been contended by the respondents that many of the allegations and the reliefs sought thereat do not form part of the petition and as such the same cannot be considered. In Ramashankar Prosad v. Sindri Iron Foundry (P) Ltd. , it has been held " It is true that there are no proper averments appropriate to the relief asked. However, what was lacking in the petition has been filled up by subsequent affidavits and the court must guide itself by all the evidence before it. Once all the evidence is before the court and the case of oppression clearly emerges from the facts disclosed, it would not be proper to measure the rights of the parties only in terms of the assertion made in the petition". Every allegation raised in the petition, even though did not form part of the petition, form part of subsequent affidavits filed by the petitioners to which the respondents have also filed their reply affidavits and therefore in terms of the Calcutta High Court judgment as above, the Company Law Board can and should examine the allegations and grant appropriate reliefs. In regard to the further contention of the respondents that issues relating to 155 million shares and the sale of shares by WBIDC are not in the affairs of the company has already been argued citing relevant cases.

61. The learned counsel further submitted: Shri Sundaram argued that WBIDC/GOWB have rescinded the contracts and as such no relief pursuant to the terms of the contracts could be considered. The stand of the petitioners, right through the proceedings, is that they are not seeking for enforcement of the contracts but are complaining of denial of their legitimate expectations. Even otherwise, the manner in which various agreements have been entered into would show that at no point of time either of the parties intended to repudiate or rescind the contracts. Even their conduct does not reflect any such intention. As per Chitti on Contracts 2004 Edition Vol. 1, the innocent party wishing to treat itself as discharged, where there is repudiatory breach of a contract, must make his decision known to the party in default, otherwise the contract continues. Likewise, according to Pollock & Mulla on Indian Contract & Specific Relief Act, the innocent party wishing to treat himself as discharged where there is a repudiatory breach of a contract making his decision

known to the party in default, otherwise, the contract continues, for "An unaccepted repudiation is a thing writ in water". Further, in the letter of 27.7.2005 by GOWB, the reason for the alleged repudiation was that according to GOWB it was not clear whether the petitioners were in position to conclude the matter relating to purchase of the shares of WBIDC. However, without any averment to this effect in the pleadings, Shri Sundaram argued that since GOWB has lost confidence in the petitioners and as a matter of Government policy, it has been decided not to divest the shares in favour of the petitioners. At no time, loss of confidence in the petitioners nor change of policy of the Government was communicated to the petitioners. As a matter of fact, right from January, 2005 to 25th July, 2005, discussions were going on between the petitioners and GOWB in this regard. If according to GOWB, till 25.7.2005, the petitioners were trustworthy, then the sudden change of mind on 27.7.2005 is inexplicable. Shri Sundaram pointed out that the petitioners had not brought in Rs 500 crores and had not produced a letter of comfort. Letter of comfort was not only produced and the same was accepted and thereafter only the transfer of 155 million shares was effected. At not time, the issue relating to Rs 500 crores was raised. Shri Sundaram also contended that since the petitioners were insisting, as a pre condition, that no shares should be allotted to IOC, the sale of shares to the petitioners could not fructify. This contention is not based on facts as after series of discussions between the petitioners and GoWB, it was mutually agreed that IOC would not subscribe to the shares. (Annex P 33/34). That is the reason, why, as late as on 25.5.2005(Annexure P-35), GOWB sought permission from IDBI for transfer of its shares to the petitioners and IDBI also conveyed its approval by a letter dated 27.5.2005. The petitioners also forwarded to GOWB a letter from Deutsche Bank on 6th July, 2005 confirming that it would make available a sum of Rs. 11.1 billion for acquiring the shares of WBIDC. This would show that the petitioners are financially sound and are capable of purchasing the shares held by WBIDC. It is a settled law as propounded by the Supreme Court in Mohinder Singh v. Chief Election Commissioner , "When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge get validated by additional grounds later brought out". Further, once a Government become a shareholder in a company, it assumes to itself the ordinary role of a shareholder and the question of applying any Government policy in the affairs of the company does not arise as observed by Supreme Court in LIC of India v. Escorts Ltd. Paragraph 102, In other words, GOWB does not have any special rights as a shareholder of HPL. If GOWB exercises its authority as a Government, then, the observation of the Supreme Court in UOI v. Anglo Afghan Agencies AIR 1968 SC 719, becomes relevant. " Under our jurisprudence, the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it nor claim to be the judge of its own obligation to the citizen on an ex-parte appraisement of the circumstances in which the obligation has arisen ". Likewise, in Century Spinning & Mfg. Co. Ltd. v. Ulhasnagar Municipal Council , the Supreme Court has held " If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice". The petitioners objected to induction of IOC only because in the guise subscribing to the shares are an industrial portfolio investor, it has tried to acquire the shares of WBIDC and thus gain control of

the company. As far as allotment to IDBI is concerned, the petitioners are aware that allotment of shares to IDBI and other lenders would be in the interest of the company and therefore on principle, they have no objection to the said allotment provided the shares of WBIDC are transferred to them including the registration of 155 million shares.

62. I have considered the pleadings, arguments and the written submissions of the parties. This petition was mentioned ex-parte at 10.30 AM on 3.8.2005 seeking for restraining the company from allotting shares worth Rs. 150 crores to IOC. I adjourned the matter to 4.00 PM with the direction to the petitioners to issue notices to the respondents to enable them to enter appearance. At 4.00 PM, the counsel appearing for the company submitted that shares had already been allotted to IOC and return of allotment had also been filed. In view of this, I directed the company to furnish details as to when the cheque from IOC was encashed and when the shares were allotted to IOC and adjourned the matter to 4.8.2005. After hearing the elaborate arguments of the parties on that day, keeping all the issues like whether the petitioners were seeking to enforce the contractual rights, whether the non disclosure of the alleged agreement with IOC would invalidate the EOGM resolution, whether the circular resolution was in full compliance with the statute and whether the petitioners were induced to approve the allotment of shares to IOC etc., open for final. determination, I passed the following order on 5.8.2005: " It is on record that IOC had handed over the cheque dated 17.2.2005 for Rs. 150 crores on 18th March, 2005 (as is seen from the note signed by Shri A. Bose). IOC has not been alleged to be a party either to the circular resolution or to the hurried allotment of shares on 3rd August, 2005, It appears to me, prima facie, that IOC is a bonafide allottee of the impugned shares for valuable consideration. Therefore, at this stage I do not propose to put any fetters on the right of IOC on the shares other than stipulating that impugned allotment shall be subject to the final order on the petition. While doing so, I have also taken note, as pointed out by me during the hearing, that even after this allotment, petitioners would continue to hold majority of about 53% shares in the company. However, taking into consideration the submissions of Shri Sarkar and Dr. Singhvi that with further allotment of shares to lenders of Rs. 135 crores in terms of the CDR package as directed by IDBI in its letter dated 2.8.2005, the petitioners would be reduced to a minority, I direct the company to defer allotment of any further shares till the disposal of the petition. In other words, there shall be no change in the issued/paid up capital of the company. I further direct that status quo of the shareholding of all the shareholders should be maintained as of today. Shri Sarkar sought for a direction to the company to keep the amount of Rs. 150 crores in a separate account, which I decline as keeping such a large amount without any use in deposit would not be in the interest of the company". Aggrieved with the directions to the company not to allot further shares, IDBI filed CA 236 of 2005 seeking for permission to intervene in the matter and also for seeking for varying/modifying order dated 5.8.2005 by allowing the company to allot shares to IDBI. This application was heard on 23.1.2006 and I passed the following order on 10.2.2006: "At the out set I record that in this order I have noted only a summary of the elaborate arguments advanced by the counsel for the parties, as at the conclusion of the hearing on the application, with a view to explore the possibility of resolving the disputes amicably, I gave a suggestion to the to the learned counsel for the petitioners. Since the main bone of contention between the parties is the allotment of shares to IOC, I suggested that the petitioners should write to the Govt. of West Bengal that in case the WBIDC was willing to transfer its shares to the petitioners in terms of the various agreements, the petitioners would not have any

objection to the allotment of shares to IDBI and IOC. In terms of the said suggestion, the petitioners have written to Government of West Bengal with a copy to this Board. In view of this, even though I fully agree with the contention of Shri Dave that any ex-parte order should be subject to review at the earliest, I am of the opinion that passing any order on this application either by granting or rejecting the prayer of the IDBI at this stage, is likely to hamper the process of negotiations. Therefore, in the interest of all the parties concerned, more particularly that of the company, I defer the decision on this application for the present. Should the present efforts of negotiations fail, since I have kept the final hearing on the petition itself during the month of March, 2006, the decision on this application will also be taken along with the decision on the petition". IDBI filed a writ before Delhi High Court challenging the above order, which was dismissed by an order dated 5th May, 2006. During the course of the proceedings, both the sides filed applications which were all disposed of.

63. I have begun the order with an extract of the averment of WBIDC/GOWB in their counter to the petition, only to indicate the intention of the parties to work together to succeed in their endeavor of setting up the project which they have successfully done. From the facts of the case, it is abundantly clear, notwithstanding the allegations and counter allegations against each other, that both the petitioners and GOWB/WBIDC have worked together for nearly 10 years, without highlighting any of the defaults/failures of either parties to ensure that the company became a master piece of a public and private joint endeavor. In this connection, it is worth extracting 4th paragraph of the letter of the Chairman of the company dated 15.1.2005 addressed to Dr. P.C. "As a result, HPL has evolved from a very sick company to a profitable company and a large part of the credit goes to both the promoters for their partnership, cooperation and working together for the best interest of HPL. We have been through many concerns and problems which have been solved through dialogue and discussion." However, when the disputes have started, both the parties have started highlighting the faults and failures of each other, however, without acknowledging the contribution/sacrifices made by both of them. This being the case, it will be highly inappropriate and inequitable at this stage to highlight and concentrate on the failures/default of the parties in molding the relief, which should, as Section 397 itself stipulates, put an end to the acts complained of.

64. Before dealing with the merits of the. case, it is necessary to deal with the various objections raised by the respondents on the maintainability of the petition. Their prime objection is that petitioners are trying to seek enforcement of private contracts through this petition which is not permissible. They further submitted that even assuming this Board has the power to consider the same, yet, it cannot override the provisions of Specific Relief Act under which grant of relief is discretionary. Shri Sundaram vehemently contended that since the petitioners had breached many of the terms of the contracts and had/have never expressed their readiness and willingness to perform their obligations, they cannot seek any relief as sought for in the petition. He further contended that in view of the failure/default of the petitioners in performing their obligations, WBIDC/GOWB have already rescinded the contracts and therefore even the question of considering the terms of the contract does not arise now. His further contention is that the matters of breach of contracts/recision etc require evidence and therefore, cannot be decided in a summary proceeding. On the above propositions, a number of cases were cited as recorded as a part of his argument in the earlier paragraphs. However, Shri Sarkar repeatedly submitted that through this petition, the

petitioners are not seeking for enforcement of their contractual rights but they are relying on these agreements only to point out the various legitimate expectations of the petitioners arising out of the terms of these contracts.

65. First, I would like to note that even though the petition has been filed under Sections 397 relating to oppression and Section 398 relating to mismanagement, yet, neither in the petition nor in any subsequent applications, any instance of mismanagement has been alleged and as such this petition is essentially one under Section 397. The provisions of Section 397 seeking relief against oppression can be invoked only when a shareholder feels aggrieved or oppressed that his rights as shareholder are being affected. A shareholder has certain rights conferred by the Companies Act which are statutory rights. Sometimes, certain rights are conferred by the Articles also like preemption rights in case of transfer of shares, non rotational directorship etc. In both these cases, if the shareholders rights are affected, they can allege oppression. Sometimes, certain rights accrue to a shareholder on the basis of agreements to which the company is a party and there are cases wherein, even though the company is not a party, it has acted upon the said agreement or has derived benefits out of the private agreements. There could be instances, wherein without any written documents, certain rights might have been enjoyed for a long time and when the same is subsequently denied, the affected shareholders may allege oppression. In the last three cases, whether the breach of the terms of the agreements or understandings could be considered to be an act of oppression will depend on the facts of each case.

66. At the out set, I would like record that I am in full agreement with the proposition that in a proceeding under Section 397, in the normal circumstances, this Board cannot and will not entertain the claim for specific performance of the contracts. Shri Sundaram referred to the decisions to that effect in Gaekwad, Regal Industries and Vijaya Dairy cases. While accepting this proposition, Shri Sarkar relied on the decision in The Great Outdoors Co Ltd in which it is held that disputes relating to contractual rights also could be considered in a petition against oppression. Even though over a dozen cases were cited by the counsel by the counsel for the respondents relating to the powers of civil courts in granting reliefs under the provisions of Specific Relief Act inter alia including judgments on readiness and willingness to perform, recession/avoidance of acts etc., I am not dealing with the same since, I will be examining, with reference to the conduct of the parties, only the issue whether the petitioners have established that they had and still have legitimate expectations while joining and continuing with the company. While doing so, inevitably, reference may have to be made to the terms of the agreements, not with the view to enforce the terms but only limited to see whether the terms have bearing on the claim of legitimate expectations. Even in Gaekwad case which was referred to by Shri Sundaram, in paragraph 162 of its judgment the Supreme Court while observing that in case of violation of contractual or statutory violation, one should approach a civil court, it also held that in extraordinary situation, the same can be considered in a petition under Section 397. Shri Sundaram vehemently argued that the doctrine of legitimate expectation has been applied only under English Law in terms of Section 459 of the English Companies Act, which deals with "unfairly prejudicial" conduct. On this contention, he relied on the Division Bench Judgment of Bombay High Court in Kundan Sippy case. In that case, the doctrine of "legitimate expectation " was not examined. The court only held that the concept of "unfairly prejudicial" as in Section 459 of the English Companies Act is different from "oppression"

as in Section 397 of Indian Companies Act. This Board has consistently applied the doctrine of "legitimate expectations" in a number of cases taking into consideration the nature of the companies involved viz. closely held companies, family companies and companies in the nature of quasi partnership, on the ground that limiting the interests of shareholders strictly to the legal rights under the constitution of the company would not be equitable as most of the times their association with certain types of companies is based on personal relationship or personal dealings. In the present case, Shri Sarkar pointed out that the company is in the nature of quasi partnership which contention was challenged by Shri Sundaram on the ground that the principles of quasi partnership can be applied only if certain pre-conditions like conversion of a partnership into a company etc are established. He also contended that since, even as per the MOU, public participation to the extent of 40% had been envisaged, the principles of quasi partnership cannot be applied; He also relied on Kilpesi case wherein the Supreme Court has held that principles of partnership cannot be easily applied to an incorporated company. In paragraph 245 of the judgment in Sangram Sink P. Gaekwad v. Shanta Devi P. Gaekwad , the Supreme Court has held "that the decision in Kilpest cannot be said to be an authority for the proposition that for no purpose whatsoever the principles of quasi partnership can be applied to an incorporated company. The real character of a company, for the purpose of judging the dealings between the parties and the transactions which are impugned may assume significance and in such an event, the principles of quasi partnership in a given case may be invoked". Thus, it is evident that whether or not the quasi partnership principles can be applied would depend on the facts of each case. In the present case, as per the own admission of GoWB/WBtDC, the petitioners, GOWB/WBIDC and Tatas were the promoters of the company. Tatas had not been active participants in the affairs of the company, leaving only the petitioners and GOWB/WBIDC to implement the project and manage the company. Till 2004, there were no other shareholders. Even though the petitioners are incorporated companies and WBIDC is a government company, the personal relationship and interaction of DR.PC with the Chief Minister and the officials of GoWB brought in their association with the company. These two collectively hold substantive shares viz of over 95% of the equity in the company (exclusive of IOC) and even though it was envisaged that 40% shares could be held by public, yet, as of date, there are the only two dominant groups of shareholders. Each has 4 nominees on the Board. All the major decisions are taken in consultation and with the consent of each other, and as a matter this is the main defense of GoWB/WBIDC in relation to various allegations made in the petition. Further, from the terms of the various agreements, it is apparent that these two groups of shareholders decide every aspect of the functioning of the company. Even though the company is a public company, yet, in Article 33 of the AOA, pre-emption rights have been vested in the three promoters and as a matter of fact, under this Article, WBIDC acquired the shares of Tatas. Therefore, in these circumstances, if HPL could not be considered to be a quasi partnership between the petitioners and WBIDC/GOWB, I do not think that any other company would qualify to be considered to be a quasi partnership. The doctrine of "legitimate expectation" applies, as I have pointed out earlier, aptly to closely held companies for the reasons that not only at the time of coming into association, even while continuing with such association, parties undertake obligations with certain legitimate expectations. In a petition filed under Sections 397/398, In Synchron Machine Tools v. U.M Suresh Rao 79 CC 868, the Division Bench of Karnatka High Court applied the doctrine of legitimate expectations. Similarly, in a number of closely held companies, this Board has applied the doctrine of legitimate expectation. In Thirthram Ahuja's case (supra) the petitioners therein held only 12% shares and when they were

completely excluded from the management after having been associated in the management for a long time, this Board held that their exclusion was an act of oppression. Some of the cases wherein this Board has taken a similar view are Gurnam Singh v. Polymer Papers Ltd. 123 CC 486, Arati Dutta v. Unit Construction Ltd. 124 CC 584 Asal Malbar Beedi 110-CC -0031 : Ultra Filter India Ltd. 112 CC 93 DSS Enterprises P. Ltd. 2001 4 CLJ 421. When this Board has consistently applied the doctrine of legitimate expectation in a proceeding under Section 397, no convincing arguments have been advanced as to why this doctrine should not applied in the present case other than stating that this doctrine could be applied only in a case of "unfairly prejudicial" conduct. In this connection, as rightly cited by Shri Sarkar, even under Section 210 of the English Act which is similar to Section 397, it has been held in Ebrahimi's case (supra) that "The just and equitable provision does not entitle one party to discard the obligation he assumes by entering a company nor the court to dispense him. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, i.e. of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal right, or to exercise them in a particular way ". In that case, even though the term "legitimate expectations" has not been specifically used, yet, the meaning conveyed is nothing but "legitimate expectations". Therefore, in dealing with the various claims of the petitioners on the basis of the agreements, I shall be only examining whether the conduct of the parties pursuant to the terms of the agreements, has caused creation of any legitimate expectation for the petitioners.

67. The next objection raised by the respondents is that the petitioners are guilty of suppression of material facts and as such they have played a fraud on the CLB and therefore they are not entitled for any equitable relief. On this proposition, certain cases have been relied on. The charge of commission of fraud by suppression of material facts can be made only when a person obtains certain benefits from a court of law by way of an award, judgment or decree and not otherwise as is evident from the cases cited by the counsel for the respondents. In S.P. Chengalvaraya Naidu 1994 1 SCC 1, the plaintiff therein obtained a decree in his favour by non disclosing relevant and material documents and therefore the Supreme Court held that he had obtained the decree by fraud. In United India Insurance Co. Ltd., the plaintiff therein got an award of compensation by misrepresentation of facts with a fraudulent intent and when the Insurance company came to know of it, it sought for recalling the award. The Tribunal dismissed the petition on the ground of want of power to review its own awards. The Supreme Court held that the Tribunal had the inherent power to recall its own award if it was convinced that the award was obtained by practicing fraud or misrepresentation. In Ram Preeti Yadav case 2003 8 SCC 311 also the Supreme Court held that once fraud is proved, it will deprive the person of all advantages or benefits obtained thereby. In Ram Chander Singh case 2003 SCC 319, it was held that the court has inherent jurisdiction to recall its order once it is established that the same was obtained by fraud. From these decisions, it is clear that one can be accused of committing a fraud in a proceeding only if he gets some benefits by suppression of material documents. Even this Board has taken a similar view in Binod Kumar Agarwal v. Ringtong Tea Co P. Ltd., where in it has held that as long as no favourable order had been obtained by non disclosure of material documents, no fraud can be alleged. In the present case, the respondents have complained that material documents relating to allotment of shares to IOC had not been disclosed in the petition. It is to be noted that in the interim order passed by this Board on 3.8.2005, this Board has not passed any order adverse to IOC or GoWB/WBIDC or the company

and therefore the petitioners have not obtained any benefit by the alleged suppression of material documents. Therefore, the question of. alleging fraud does not arise except that the respondents are justified in complaining of non disclosure of complete documents. Now that the respondents have produced all the relevant documents, all of them will be taken into consideration by this Board in deciding the allegations. Therefore, while I recognize and record that the complaints of the respondents that the petitioners have not disclosed material documents in the petition is fully justified, yet, I do not consider that the non disclosure, in any way, amounts to fraud. On the contrary, as I would be pointing out later in this order, GoWB/WBIDC might be held to be guilty of misrepresentation in getting the order dated 5.8.2005.

68. The respondents have further contended that only allegations which relate to the affairs of the company can be looked into by this Board in a petition under Section 397 of the Act. According to them, the issues relating to 155 million shares and the sale of rest of the shares by WBIDC/GOWB do not relate to the affairs of the company as they arise out of private agreements between two groups of shareholders. On this proposition, they relied on the decisions of this Board in Hotel Queen, Vijaya Dairy Farms, Regal Industries cases and also in Jermin Street Trukish Bath and Gaekwad cases. Whether, the matter of transfer of shares is in the affairs of the company or not, would again depend on facts of the case. I shall deal with this objection later on when I deal with the allegations connected with these issues, keeping in mind Buckley on Companies Act according to which when shareholders agreements give rise to expectations on the parties to it so that when the expectations are thwarted, this could constitute conduct relating to affairs of the company.

69. The next objection of the respondents is that many of the issues like violation of Article 47, appointment of the 16th respondent as the MD, issue relating to 155 million shares etc raised by the petitioners and reliefs sought thereat do not form part of the petition and as such they cannot be considered. On this proposition, they have relied on the decisions in AIR 1963 AP 481; 2003 10 SCC 563 and 2001 3 CLJ 459. On the contrary, Shri Sarkar relied on and AIR 1958 Mad. 587 to contend that under Section 397, CLB should take into consideration all allegations in moulding appropriate relief. He also referred to the following observation of the Division Bench of Calcutta High Court in Ramashankar Prosad v. Sindri Iron Foundry (P) Ltd AIR 1966 512 "It is true that there are no proper averments appropriate to the relief asked. However, what was lacking in the petition has been filled up by subsequent affidavits and the court must guide itself by all evidence before it. Once all the evidence is before the court and the case of oppression clearly emerges from the facts disclosed, it would not be proper to measure the rights of the parties only in terms of the assertion made in the petition". My considered view on this is that in a petition under Sections 397/398 of the Act, any allegation made in the petition could be substantiated by further affidavits and subsequent events could also be brought on record by suitable affidavits. However, if any new or fresh allegation relating to an act/decision or event prior to the date of petition, if the same was within the knowledge of the petitioners but not agitated in the petition, cannot be agitated by subsequent affidavits. Therefore, I shall decide on the issues on this basis. At the time when the petition was filed, the petitioners were not aware that shares had already been allotted to IOC and therefore in the petition they had sought for only restraining allotment of shares to IOC. On coming to know that shares had already been allotted, they filed an amendment application challenging the allotment and also consequent relief seeking for cancellation of the allotment. In so far as 155 million shares

are concerned, no doubt, there was no prayer in the petition as the petition itself had been filed on the basis that the petitioners were the owners of the impugned shares, which stand was not rebutted by the respondents when the interim reliefs were considered on 4.8.2005. When the respondents, however challenged the ownership of the petitioners of these 155 million shares in the replies to the petition, this issue automatically becomes a matter to be decided by this Board. As far as other allegations which are not pleaded, I shall be dealing with them subsequently.

70. Having given my findings on the preliminary issues, I shall now deal with the merits of this case. Allotment of shares to IOC: At the outset, I have to record, as is revealed from various documents, the petitioners cannot question the allotment of shares to IOC per-se. The allotment of shares to IOC, as rightly pointed out by the learned counsel for the respondents was not sudden, surreptitious or with any ulterior motive. The allotment of shares to IOC was under the contemplation of the shareholders right from 2000. As a matter of fact, it appears that the idea of inducting IOC was initiated by Dr. PC himself as is seen from his letter dated 24.3.2000 addressed to the Chief Minister wherein, while expressing that IOC had shown interest in participating in the project, he had sought for a meeting to discuss how best IOC could be inducted into the company. By a circular letter dated 26.5.2000 addressed to the board members, Dr. PC had expressed " The initiative to induct IOC as an equity partner, which I have long encouraged, could have come earlier than it did but is welcome nevertheless ". The participation of IOC was discussed in a board meeting held on 6.9.2000. IOC sent a proposal on 29.1.2001 suggesting that it would take a minimum of 26% equity with management control subject to the condition that equity holding of IOC and WBIDC should not exceed 50%. In a board meeting held on 28.9.2001 in which Dr. PC participated, the board recorded that ICICI was involved in the proposed collaboration with IOC and debt restructuring. By a letter dated 9th October, 2001, IOC, while reiterating its interest of acquiring at least 26% equity shares gave an elaborate proposal. In the letter of GOWB dated 30.11.2001 to Dr. PC, while recording the suggestion of Dr. PC that IOC should have only 26% equity compared to 51% to be held by the petitioners' group and that management control should not be given to IOC, he was informed that the said suggestion might not be acceptable to IOC and that GOWB was further negotiating with IOC. Thereafter, in a board meeting held on 26.3.2002, which was attended by Dr. PC, the Chairman informed the board that IOC was willing to participate with 26% equity and management control and that IOC was likely to nominate an MD for the company shortly in place of the then existing MD who had expressed his desire to step down. There is no indication in the minutes that Dr.PC had either opposed the proposal or expressed any reservation on the same. In the letter dated 2nd July, 2002, GOWB informed IOC that due to changes in the circumstances on account of the agreement dated 12.2.2002 between GOWB and the petitioners, IOC could consider entering into a long term Naphtha supply arrangement with the company without linking its entry as a strategic investor. Perhaps, at this stage, the participation of IOC as a shareholder was abandoned. In the letter dated 20th March, 2004 of Dr. PC to CMD, GAIL, he has mentioned that since February, 2002 (perhaps after negotiations with IOC failed) there had been discussions with GAIL regarding its participation. In the supplemental agreement dated 30th July, 2004, the petitioners agreed that GOWB/WBIDC shall be entitled to cause induction of Rs. 150 crores of equity through an industrial portfolio investor. On 3rd September, 2004, Dr. PC met the Chief Minister when he had agreed for induction of IOC, which he also confirmed by his letter dated 20th September, 2004. Thereafter on 24.9.2004, a confidentiality agreement was entered into with IOC to enable IOC to carry out due

diligence.

71. However, according to the petitioners when the matter came up for discussion in the board meeting on 2nd November, 2004, many directors including their nominees had voiced their reservations on the IOC allotment but, even though the same were reflected in the draft minutes sent to the petitioners, they did not find a place in the final approved minutes. I do not propose to get into the controversy as to whether the approved minutes reflect the correct deliberations in the board in view of subsequent events. In the letter of Dr. PC dated 10.12.2004 to the Chairman wherein, after referring to the board meeting on 2nd November, 2004 and the letter of the Chairman to IOC on that date inviting IOC to join as a portfolio investor for Rs. 150 crores, he had expressed his apprehension "Newspaper reports of this investment has given cause for the articulation of issues and concerns which would have important bearing on the mode and manner in which further action should be chartered out in this regard'. The contents thereafter in the letter indicate that Dr. PC was apprehensive of the company becoming a Government company consequent on allotment of shares to IOC and as such he had suggested that a firm schedule for IPO should be adopted and necessary consents from concerned parties should be obtained prior to any IOC investment. Thus, from this letter also, it is seen that Dr P.C had not objected to the allotment of shares to IOC but had only expressed his views that allotment should be made after adopting a firm schedule for the IPO so that the company did not become a Government company. No doubt, thereafter, he sought for adjournment of the EOGM pending further discussions in a board meeting on this issue. From the sequence of events as noted above, it is quite clear that, on principle, the petitioners never had any objection in the induction of IOC as a portfolio investor.

72. Now, the petitioners challenge the allotment as being illegal, oppressive and based on inducement by misrepresentation. Oppressive in the sense that the 7th, 8th and 9th respondents did not disclose to the board their discussions and secret agreement with IOC; the Chairman got the approval of the directors by a circular resolution knowing fully well that promoters' issues had not been resolved; that the allotment is contrary to the legitimate expectations of the petitioners that the company would remain as a private sector company. Illegal in the sense that full disclosure had not been made in the explanatory statement; circular resolution allotting the shares did not accompany relevant documents and the allotment is in violation of Article 47; shares were allotted before encashment of the cheque. Misrepresentation in the sense that the consent of the petitioners to support the allotment in the EOGM was obtained by inducement that WBIDC shares would be divested in favour of the petitioners and that IOC would only be a portfolio investor.

73. In so far as the alleged secret agreement is concerned, I am of the view that the petitioners have tried to magnify a non issue. It is quite common that before entering into any agreement, discussions take place between the parties, drafts on the terms are exchanged but at the end the parties are bound by the final agreement. This is what exactly happened in this case also. As of today, irrespective of what transpired between WBIDC and IOC before the EOGM approval, IOC and the company are bound only by the terms approved by the EOGM and accepted by IOC. The only question is whether non disclosure of the discussion by the 7th, 8th and 9th respondents, would affect the allotment. Shri Sundaram argued that a shareholder is not bound or expected to disclose discussions with a third party. I would have accepted this contention if the discussions were

restricted only in relation to the shares of WBIDC. In terms of the agreement dated 30.7.2004, to which the company was a party, GoWB/WBIDC had been given the authority to induct a portfolio investor and the main discussion with IOC was in relation to participation in the equity of the company. Therefore, even as shareholders, when they have acted as per the authority vested in them, WBIDC/GoWB were bound to keep the Board of the company informed about the deliberations with IOC even assuming that the discussion on disinvestment by WBIDC in favour of IOC was only incidental or secondary. Further, those who participated in the discussion, even though they represented as shareholders, were the 8th and 9th respondents who were are the directors of the company. Therefore, it was incumbent upon them, when the issue relating to allotment of shares to IOC was discussed in the board meeting on 2.11.2004, to brief the board about their discussions with IOC. If the deliberation was restricted only to WBIDC shares and not connected with the allotment of shares, perhaps there would have been no obligation on the part of GoWB/WBIDC to disclose the discussions to the Board. Recently, in a case filed under Section 111A of the Act, this Board examined the nature of the duties of a director to the company. In that case, the Board of the company approved the registration of transmission in favour of the executor of the will, who happened to be the chairman of the company. When he sent an indemnity bond to the company, he was aware that the probate application filed by him was likely to be challenged, but he did not inform the company. The company took a plea that the chairman was not present in the meeting in which the transmission was approved. This Board observed " Thus, on the day when he sent the indemnity bond, he was aware that the Will was likely to be challenged and therefore he filed the caveat. This being the case, it was his bounden duty to inform the company of the said fact when he sent the indemnity bond. I am mentioning "bounden duty" only because, RSL is not only the executor of the Will but also the Chairman of the company and in law, the knowledge of a director is the knowledge of the company. Being the Chairman of the company, his duty is to ensure that the Board acts in accordance with Articles. His absence from the Board meeting is of no consequence". Smt. Laxmi Devi Newar(since deceased) and Anr. v. East India Investment Company Private Limited. Similar observation has been made by this Board in Orissa Power Corporation case 2003 3 CLJ 139. Dr Singhvi also relevantly referred to a similar decision in Dollar Land Holding Co case 1994 2 AER 685 Therefore, the petitioners are justified in complaining that the 7th, 8th and 9th respondents, being directors, should have kept the Board informed of the discussions with IOC. Nonetheless, the petitioners have not asserted any where in the pleadings or during the arguments, that if the disclosure had been made, their nominees would have prevented the passing of the resolution. Further, since allotment to IOC was on the terms proposed by the company only, the alleged secret agreement has no bearing, as far as the company is concerned. In view of this even the allegations of the petitioners that WBIDC/GOWB should not have entrusted the valuation exercise to IOC etc. do not survive. Further, when in terms of Article 33 (b) of the AOA, it has been specifically provided that in case of exercising pre-emptive rights, the valuer would be appointed jointly by WBIDC and the petitioners, even WBIDC cannot insist on the petitioners to accept the valuation done by IOC. Therefore, on this account, the petitioners can have no grievance. Regarding the expectation of the petitioners that IOC would only remain as a portfolio investor is concerned, the fact is that, as of date it remains so and without the consent of the petitioners, no special resolution can be passed for allotting further shares to IOC nor it can acquire the shares of WBIDC till the petitioners either waive their pre-emption rights or they fail to acquire the shares when offered by WBIDC. Therefore, on this account also, the petitioners can have no grievance. Shri

Sarkar referred to the note by Shri A. Bose dated 18.3.2005 to contend that the reluctance of IOC to confirm that there was no other agreement with WBIDC would indicate that there must be some agreement. Now that both WBIDC and IOC have confirmed before me that there is no such agreement, the matter ends.

74. In so far as full disclosure of material facts in the explanatory statement is concerned, the settled law is that any resolution passed without full disclosure can be set aside. However, in the present case, in regard to the allegation that explanatory statement did not disclose the alleged discussions, I do not find any merit in the contention as, when the matter came up before the general body, the terms proposed to IOC and agreed to by IOC alone came up for approval. As I have earlier pointed out, while the Board was entitled to be kept informed of the discussions with IOC, no such requirement of disclosure to the members is necessary as they are considering only the terms approved by the Board. In B. A. Mendonca v. Phylips (India) Ltd. 106 CC 526 CLB), a general body resolution was challenged on the ground of insufficiency of disclosure in the explanatory statement. While examining the scope of Section 173(2) of the Act which deals with explanatory statements, this Board observed: "This Section reads "Where any items of business to be transacted at the meeting or deemed be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business including in particular the nature of the concern or interest, if any, therein, of even director, and the manager, if any. " From a reading of this section it is clear that what is needed to be disclosed in the explanatory statement are the 'material facts', the idea being that the shareholders should be in a position to form an independent opinion on the basis of the facts placed before them to take an appropriate decision. It is difficult, if not impossible to lay down any standard/guideline as to what constitute material facts as the same would vary from case to case depending on the proposal under consideration. The very fact that the section uses the words 'material facts', it is clear that facts which are not material need not be furnished. As long as the explanatory statement is fair and gives, as far as possible, all information reasonably necessary for the shareholders to understand and appraise the proposal, then, such a statement would satisfy the requirements of Section 173(2) provided it does not conceal or suppress or withhold relevant information or facts and does not make any false suggestion. As long as the explanatory statement contains sufficient, true and correct information to enable the general body to intelligently appraise the proposal, then, the explanatory statement should be considered to be fulfilling the requirements of Section 173(2) of the Act". In that case, the proposal was for the sale of a unit of the company. Therefore, this Board held that, the material facts could comprise of the reasons for the sale, whether sale would affect the interest of the company, to whom the sale was being effected, the consideration for the sale, how and by whom the consideration was assessed, whether the directors had any interest in the sale, whether all statutory clearances had been obtained, etc. Finding that, these information were disclosed in the explanatory statement, this Board held that the same met with the requirements of Section 173. In the present case, the only issue was allotment of shares to IOC and therefore the shareholders were entitled to know the terms of the allotment, the price at which the shares were proposed to be allotted, what would be the shareholding pattern after the allotment and whether the allotment would result in change in management and control of the company etc. These are the basic information to enable the shareholders to take an informed decision. I find from the explanatory statement that all these information have been furnished. The discussions of WBIDC/GOWB with IOC prior in time, had no

bearing on the resolution placed before the general body. Even though in the earlier paragraph, I have held that 7th, 8th and 9th respondents being the directors of the company were obligated to disclose the discussions with IOC to the board, non disclosure of the same to the shareholders cannot be fatal to the resolution. Therefore, the ratio of the decision in Jadabpore Tea case 55 CC 160 is not applicable to the present case.

75. Next regarding the circular resolution dated 28.7.2005. The resolution reads "Allotment of shares to IOC: I hope you have received and read carefully the legal opinion on the above issue which I circulated yesterday. It is clear that the board are legally liable to civil and criminal action. In the circumstances, I suggest that we adopt the following resolution through circulation".

RESOLVED that pursuant to consent received from shareholders of the company Under Section 81(1A) of the Companies Act, 1956 and in line with decision taken by the Board of Directors of the company on the matter at the meeting held on 2nd November, 2004, subject to encashment of cheque towards subscription, the Board do hereby allot to Indian Oil Corporation Limited 15,00,00,000 equity shares of the company as fully paid at par and the Dy. Company Secretary be and is hereby authorized and instructed to do the needful in the manner forthwith, including encashment of cheque, issue of equity share in dematerialized form, filing of Return of Allotment and to do all such acts, deeds and things which may be necessary or incidental to give effect to the above allotment of equity shares" " In keeping with usual practice please sign the resolution". " Please fax this document back to me, duly signed, as a token of your approval. Thereafter, further action would be taken by the company in keeping with the wishes of the Board

76. First, I shall deal with the contention of the petitioners with reference to Section 289 of the Act. They have challenged the circular resolution on the ground of non compliance with the provisions of Section 286 according to which necessary papers should accompany a circular resolution. In the present case, even though the respondents have taken the stand that all the documents like letters from IOC, legal notices by their advocates etc had already been circulated or placed before the Board in its earlier meetings, yet, the only document on which the circular resolution was based, was the legal opinion from the former ASG, which had been circulated on 27.7.2005 and all the directors were aware of the contents of the same. (I must note that only a portion of the opinion was circulated and not the full one, and this had been pointed out by one of the directors also by a letter dated 30.7.2005). As I have observed in relation to the explanatory statement, one has to look into the spirit of the statute and not rely only on the letter of the same. The spirit of Section 289 is that to enable the directors to take an informed decision, necessary papers connected with the proposal, should accompany the circular resolution. In the present case, the legal opinion was already available with the directors. Therefore, I do not consider that the circular resolution was vitiated on account absence of necessary papers along with the resolution.

77. Shri Sarkar voiced certain grievances on the conduct of the Chairman. He argued that the Chairman's role is limited to chairing Board and General meetings only, that he issued the circular resolution from Gurgaon and that in the history of the company, no circular resolution had gone under the signature of the Chairman etc. As I have seen from the documents, both the petitioners and GoWB/WBIDC seem to have so much faith and confidence in the Chairman, that his

advice/intervention has been sought in most of the affairs of the company, more particularly, in the interaction between the two major shareholders. Even the lenders have been in correspondence with him. He appears to have been treated more as a mentor by the two major shareholders than a mere Chairman only to chair meetings. As pointed out by Shri Anil Diwan, Dr.PC himself has appreciated the role and contribution of the Chairman, more than once. Further, the decision/act of a person has to be examined with reference to the circumstances under which he had taken the decision/acted. If he were to act in a particular manner under compulsive circumstances, his action cannot be impugned as malafide on the sole ground that he could have acted differently. In the present case, as the documents reveal, in the circumstances in which the Chairman has been placed, his action of issuing the circular resolution cannot be termed as malafide. Having thus observed that no malafide can be attributed to the Chairman, I must also record that in the factual circumstances of the case as indicated below, circular resolution route should have been avoided and the matter should have been discussed in a regularly convened meeting of the Board. The main reason, as I see from the circular resolution is that the legal opinion obtained on 27.7.2005, favoured the allotment of shares to avoid criminal and civil action. It is on record that the company had obtained legal opinions from two reputed corporate lawyers in the month of February, 2005 to the effect that shares should be allotted to IOC. The board had considered the delay in allotment of shares to IOC in its board meeting held on 29.3.2005 wherein while considering the letter of IOC dated 17.3.2005, the board noted that the allotment was pending resolution of transfer of 155 million shares to the petitioners, completion of adjourned AGM subsequent to the said transfer, appointment of auditors and refinancing of loans. Again in the board meeting held on 28.5.2005, the board considered further letters from IOC and notices from its advocates and noted "While taking note of the above letters from IOC and its advocates, the board felt that the issue should be resolved expeditiously". This is in spite of the fact that in the legal notice dated 21st April, 2005, IOC has threatened taking legal proceedings, and by a letter dated 5th May, 2005, again IOC threatened to file necessary suits in appropriate courts, by another legal notice dated 17.5.2005, there was a further threat that if allotment was not made within 7 days, IOC would be constrained to take such proceedings against the company and directors as considered appropriate and in its letter dated 25th May, 2005 IOC intimated that it had already initiated legal proceedings against the company and every officer of the company who was at fault. Thus, on the day when the Board considered the matter, all types of threats including initiation of legal proceeding within 7 days were before the Board, but the Board did not consider it necessary to take immediate action on the allotment. It is on record that during that period, the petitioners were interacting with GOWB/WBIDC regarding the balance shares and therefore, even though the minutes of 28.5.2005 do not record anything about the discussions between the petitioners and GOWB/WBIDC, the very fact that the board had observed that the issue should be resolved expeditiously, in spite of letters and notices threatening to take legal action, it leads to a presumption that the board was aware of the discussions between the two and that could be the reason why the board did not take any final decision with the obvious view of not to precipitate the matter. This being the position, the Board was entitled to know the reasons for the failure of the negotiations and both the petitioners and WBIDC/GOWB were also obligated to disclose to the board the same. This would have been possible only if a board meeting had been convened. Even otherwise, when the board had noted in its meeting held on 29.3.2005 that the allotment to IOC was pending resolution of other issues, the board was entitled to know whether these issues had been resolved.

78. It was contended by the learned counsel for the respondents that with the resolution passed by the Empowered Committee, the allotment stood completed and circular resolution was only by way of abundant caution and that petitioners having consented to the allotment cannot complain of the same. It is not a question as to whether the allotment stood completed earlier or not as no shares had in fact been delivered till the circular resolution was passed. It is to be noted that pursuant to the decision in the Board meeting on 2.11.2004, by a letter of the same date, IOC was only invited to subscribe to the shares and IOC responded that it was willing to subscribe to the shares. Therefore, at that time, there was no offer or acceptance. Only after the Empowered Committee meeting on 20.1.2005, a formal offer was made on 28.1.2005 asking IOC to send a formal application along with remittance and IOC tendered a formal application dated 17.2.2005 along with a cheque for 150 crores. In terms of Section 41 of the Act, an application to become a member has to be in writing and no allotment could have been made without such an application, which was received only after 17.2.2005. Therefore, whatever might be the wordings of the resolutions, the resolution of the Board on 2.11.2005 was only to invite IOC to subscribe to the shares, and the resolution of the Empowered Committee on 20.1.2005 was only to enable the company to make an offer. Therefore, neither of the resolutions could be considered to be a resolution allotting the shares, which was not legally possible without a formal application by IOC and also remittance of the consideration. In terms of Article 3(A)(4) of the AOA, the shares are under the control of the Board and it has the power to issue and allot shares. Therefore, since the power to allot shares is with the Board, it should have passed a resolution after IOC had applied for membership accepting the offer and remitted the consideration. Viewing in this context, shares were actually allotted only through the circular resolution as is evident from the wordings of the circular resolution itself which specifically mentioned that shares were being allotted by the said resolution. This resolution does not refer to the Empowered Committee meeting but refers only to the decision taken in the meeting held on 2nd November, 2004 which, actually, was prior to the approval obtained in the EOGM and the decision of the EOGM. In this connection I may also refer to the letter of the Chairman addressed to Dr PC on 15.12.2004 wherein the Chairman has stated "As a significant shareholder in HPL, you are absolutely entitled to demand a meeting of the board of directors to discuss matters relating to the company and inter-se promoters issues". Thus the Chairman was fully conscious of the right of the petitioners to have the matter discussed in a regular Board meeting. Under these circumstances and also of the reason that the Chairman was aware that allotment was getting delayed pending resolution of the promoters issues, I am of the considered view that the Chairman could have avoided getting the allotment approved by a circular resolution and instead should have placed the matter before a regular Board meeting. It was argued that inspite of the efforts of the Chairman to hold a Board meeting, it could not be done as Dr.PC did not cooperate. It is on record that a Board meeting was convened on 29.7.2005 in which the allotment of shares to IOC was on the agenda but was adjourned, not because of the nominees of the petitioners but due to non availability of others. Further, in its letter dated 25.5.2005, IOC had also threatened that it would initiate action for specific performance. In this connection, I may refer to the arguments of Shri Sundaram that even in a case of a suit for specific performance, the court has the discretion to award damages instead of directing specific performance.

79. During the course of the hearings I expressed my feeing that perhaps, the circular resolution route was adopted apprehending the possibility of the petitioners instituting a proceeding to

challenge the allotment and from the facts revealed in the proceeding, it appears to be so. On 27.7.2005, GoWB sent a letter to Dr.PC with a copy to the Chairman deferring its decision to transfer its shares to the petitioners. The Board meeting convened on 29.7.2005 was adjourned on 27.5.2005, on the ground that majority of the directors had expressed their non availability on 29.7.2005. No details have been furnished as to the names of such directors and how they had communicated their non availability. Legal opinion was sought and obtained on the same day, that is on 27.7.2005. The circular resolution was sent the next day and on getting the majority approval, shares were directed to be issued immediately not withstanding the fact that one of the nominees of the petitioners Shri Vasudevan had written to the Chairman on 30.7.2005 suggesting that the matter should be considered in a Board meeting. Another nominee of the petitioners had also written to the Company Secretary on 31.7.2005 not to take any further action in regard to the allotment. One of the reasons adduced during the hearing for the speedy allotment was that the time given by IOC of 10 days had expired and therefore urgent action was necessary. As I have pointed out earlier, even the Board collectively did not recognize the 7 days notice given earlier.

80. Therefore, the speed with which the entire exercise was completed, leads me to the only inevitable conclusion that it was done only with the view to pre-empt any efforts of the petitioners to stall the allotment through a legal process. I must however add, such an act to pre-empt a legal restraint need not be considered to be illegal or malafide, but in the present case, for the reasons stated in the earlier paragraph, as a measure of good corporate governance, the matter of allotment should have been decided in a regular Board meeting. Therefore, even though I do not subscribe to the view of the petitioners that the Chairman had acted malafide, yet, I am of the firm view, considering the facts of this case, that the circular resolution route should not have been adopted and even the approval given by the directors for the circular resolution need not have been implemented with such a speed by issuing the shares the next day. Shri Chagla argued that the CLB is not concerned with the manner of doing something but has to only examine whether the act done is oppressive or detrimental. In a proceeding under Section 397, the manner of doing a particular act is as important as the final decision itself. It cannot be claimed that even if a Board meeting had been held, majority directors would have approved the allotment of shares to IOC. If it had happened so, since the allotment would have been transparent after discussion, the petitioners would have no reason to impugn the allotment as being malafide. In this connection, I may also refer to the proposal for issue of shares to the existing shareholders, which was considered in the Board meeting held on 28.9.2001 wherein, inspite of the proposal being objected to by the nominees of the petitioners, majority of the directors approved the same and as such the petitioners could not complain.

81. The petitioners have contended that shares were allotted/issued before realization of the cheque. From the return of allotment, it is seen that the shares were shown as allotted on 2.8.2005 while the fact is that the cheque was encashed only on 3.8.2005. Shri Ganesh cited a number of cases like P.S.S. Somasundaram 1987 4 SCC 527 and similar cases wherein it has been held that receipt of a cheque is equivalent to receipt of cash. He also relied on the Departmental Circular to the same effect. However, Shri Sarkar relied on the proviso to Section 75(l)(a) of the Act. While the cases relied on by Shri Ganesh relate to Income Tax matters, the proviso relied on by Shri Sarkar is specific to allotment of shares. This proviso reads " Provided that company shall not show in such

return any shares having been allotted for cash if cash has not actually been received in respect of such allotment". This proviso was inserted in 1965. In terms of the Notes on Clauses, the object of this proviso is to impose a duty on the directors/promoters to ensure that the share capital reflects cash or valuable assets and not supported by merely book adjustments. This being the object of the proviso, I do not find any fault in the allotment as the same was against cash, even though subsequently realized. However, I must also add that normally the allotment is complete once the Board approves the allotment and issuance of shares scripts is subsequent. But in the present case, the allotment would have become complete, in terms of the circular resolution itself, only when the cheque was realized as the resolution specifically states "Subject to encashment of cheque towards subscription, the board do hereby allot...". Further, in his letter to the Dy. Company Secretary dated 2.8.2005, while informing him of the approval of the circular resolution by the board, the Chairman greeted "You are therefore instructed to encash the IOC cheque and issue shares to them in keeping with the resolution. This should be done on 3rd August morning at the earliest". From this, even the Chairman had not considered that the allotment had been completed with the approval given by the directors but would be complete only after the encashment of the cheque and therefore, the earliest date of allotment could be only 3.8.2005. This being the case, the allotment of shares should have followed the encashment of the cheque and the return of allotment should have shown the date of allotment as 3.8.2005 and not as 2.8.2005.

82. The petitioners have challenged the allotment, as ultravires on the ground of its being in violation of Article 47. This Article reads " ALTERATION OF CAPITAL: The company may by Ordinary Resolution from time to time alter the conditions of the Memorandum of Association as follows:

> (a) Increase the Share Capital by which amount to be divided into shares of such amount as may be specified I the resolution.
>
> (b) Consolidate and divide all or any of its Share Capital into shares of larger amount than its existing shares.
>
> (c) Subdivide its existing shares or any. of them into shares of smaller amount than is fixed by the Memorandum, so however that in the subdivision the proportion between the amount paid the amount, if any unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived, and
>
> (d) Cancel any shares which at the date of the passing of the resolution have not been taken or agreed to be taken by any person and diminish the amount of its share Capital by the amount of the shares cancelled.

Subject to the provisions of the Act, the new shares shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof shall direct and if no direction is given by the general meeting as the Board shall determine and in particular such shares may be issued with a preferential or qualified right to

dividends and in the distribution of the assets of the company provided that the rights and privileges attached to the preference shares in the capital for the time being of the company shall not be modified except in the manner hereinafter provided and provided further that any such new shares (whether equity or preference)shall always be offered to the existing members of the company in proportion to the shares held by them in the company to the end and intent that WBIDC and/or its nominees, CPC and/or its nominees and TATAs and/or nomimes shall at all times continue to hold 25%, 25% and 8.1/3% respectively of the share capital of the company". According to Shri Sarkar, since the allotment to IOC was out of new shares created by increasing the authorized capital, the existing shareholders should have been offered the shares first in terms of Article 47 and failure to do so amounts to ultravires. The respondents contended that in terms of Article 3 A of AOA, which is practically the reproduction of Section 81(1)(A) of the Act, shareholders approval had been obtained for allotment of shares to IOC and Article 47 is not applicable. Shri Sarkar relied on the decision of the CLB in Binod Kumar Aggarwal v. Rington Tea Co. Pvt. Ltd. 85 CC 289. In that case, Article 7 of AOA of the company vested with the directors the discretion to allot shares to any person as they deemed fit. However, in terms of Article 31, newly created shares have to be offered to existing shareholders. By a harmonious construction, this Board held that allotment of existing un-issued shares would be covered by Article 7 and allotment of newly created shares by increasing the authorized capital would be subject to Article 31. Similarly, in the present case also while allotment of un-issued shares would be covered by Article 3(A), allotment of newly created shares by increasing authorized capital would be subject to the provisions of Article 47. All the senior counsel argued on this point on the basis that the allotment to IOC was out of newly created shares. From a perusal of the documents, it appears to me that the allotment to IOC was not out of newly created shares, but was out of the existing un-issued shares only. The original authorized share capital of the company was Rs 10 crores. It was increased to Rs 2000 crores on 15.3.1995, comprising of Rs 1700 crores of equity and Rs 300 crores of preference shares and the Articles were also amended on the same day. In the amended Articles, Article 47 was inserted. Therefore, on the day when the Articles were amended, the authorized equity capital was Rs 1700 crores and therefore on that day all the equity shares within Rs 1700 crores were existing shares. The authorized capital of equity shares was increased to Rs 2200 crores in March 2004. Even after allotment of shares to IOC, the present equity capital is only Rs 1560 crores, indicating clearly that the allotment is of the then existing un-issued shares and not out of newly created shares in March 2004. Thus, it appears to me that the provisions of Article 47 are not attracted at all in the allotment of shares to IOC.

83. Assuming however, that the shares to IOC was out of newly created shares, the doctrine of ultravires would apply only when a company acts beyond the powers vested in it by its Memorandum or by the provisions of the Act. Even unanimous rectification of the said act by all the shareholders cannot validate the ultravires act. Shri Vahanwati pointed out referring to the decisions in Ashbury Railways (1975 LR 653) and A.L.Mudaliar v. LIC AIR 1963 SC that only when a company acts beyond the powers specified in the Memorandum, then such acts would be ultra-vires. I am in full agreement with the said proposition. However, if an act which is within the power of the company but beyond the power of directors, then, the act of the directors can be rectified by an ordinary resolution. In the present case, as Article 47 would indicate, the directors have the powers to allot shares in accordance with the said Article. Assuming for argument sake, that shares could not have been allotted to IOC without offering the same to the existing shareholders, the admitted

fact in this case is that, allotment of shares to IOC was approved in the EOGM on 14.1.2005 wherein all the petitioners were, represented and voted in favour of the allotment of shares to IOC. In other words, prior approval of the shareholders was available to allot shares to IOC. I note that many allotments of sharers had taken place during the last 10 years. The allotments made in 1996,1997,2002 and 2003 were all only to the promoters viz WBIDC, the petitioners and Tatas. On 31.7.2004 shares were allotted to the 2nd and 3rd petitioners along with outsiders without any offer to WBIDC and Tatas. Again shares were allotted to the outsides on 11.10.2004, but without any offer to petitioners or WBIDC or Tatas. It is because, the shareholders had passed special resolutions in terms of Article 3(A) of the AoA as happened in relation to the allotment of shares to IOC. Since the petitioners were parties to the said resolution, they cannot now complain that the allotment violates Article 47 about which they must have had the knowledge at the time of the EOGM. Further, while interpreting an Article, its spirit should also be taken into account. Whenever new shares are created and allotted, the paid up capital goes up. Therefore, if the new shares are not allotted to the existing members in proportion to their existing holdings, their percentage shareholding in the enhanced paid up capital would come down. That is why, Article 47 stipulates that new shares should be offered to WBIDC, CPMC and TATAs first so that their respective existing percentage holding does not come below 25%, 25%, 8.1/3%. It is an admitted fact that by the allotment to IOC, the holding of petitioners has not come down below to 25%. Therefore, the allotment to IOC not being ultravires and the consent of the shareholders through a special resolution was obtained in this regard, the question of impugning the allotment as being in violation of Article 47 does not arise. In view of this, it is not necessary to examine the doctrine of indoor management etc. as advanced by IOC in this regard.

84. Even though I have given a finding that the circular resolution route should not have been adopted and that in terms of the mandate in the circular resolution, the allotment would have become effective only after encashment of the cheque, and also assuming that all other objections raised by the petitioners in regard to this allotment are also valid, even then I would not have held that the allotment of shares to IOC is in any way prejudicial to the interest of the petitioners by affecting their legitimate expectations since the stand of the petitioners in the petition is that even after allotment of shares to IOC, the petitioners held/hold over 53% shares in the company i.e. their legitimate expectations of being in majority and the company being in the private sector had not been in any way affected. The stand of the petitioners that they were in majority at the time of filing the petition was also confirmed by GoWB/WBIDC as is evident from the submission of Shri Shanti Bhushan who appeared for them in the hearing held on 4.8.2005. In paragraph 7 of the order dated 4.8.2005, I have recorded the submissions of Shri Shanti Bhushan:" This allotment to IOC has not reduced the petitioners from a majority into minority". On the basis of that statement, I also gave a finding in paragraph 10 of that order : "While doing so, I have also taken a note as pointed out by me during the hearing, that even after this allotment, the petitioners would continue to hold majority of about 53% shares in the company". Having so observed, I also noted that if shares of Rs. 135 crores were to be allotted to the lenders, the petitioners would be reduced to a minority and accordingly I directed the company to defer allotment of further shares. If the position as of that date remains so today, the petitioners would have no justification in seeking for cancellation of allotment to IOC as it has not in any way prejudicially affected their legitimate expectations.

85. But with the stand now taken by WBIDC/GOWB and the company with regard to 155 million shares, the entire scenario has changed. If WBIDC/GOWB and the company were to challenge the transfer of these 155 million shares to the petitioners, whether they are right or not being examined hereinafter, petitioners could definitely allege oppression in regard to the allotment to IOC, since with the allotment of shares to IOC, the petitioners would be converted from a majority into a minority and the settled law is that such a conversion is an act of oppression, not withstanding the fact that the petitioners had given their consent for the allotment, as with the present stand of WBDIC/GoWB, their consent was definitely obtained by misrepresentation that the petitioners were the owners of 155 million shares.

86. TRANSFER OF 155 MILLION SHARES. First I shall examine whether the issue is in the affairs of the company. The admitted fact is that the company was not a party to the agreement dated 8th March, 2002 in which it is recorded that WBIDC had transferred 155 million shares to the 4th petitioner. The main recital in the agreement reads "And whereas the corporation has entered into an agreement with the guarantor on 12th January, 2002 to transfer a part of the said shares to the guarantor on certain terms and conditions and due to certain pending necessary approvals, such shares instead of being transferred to the guarantor have been transferred and delivered to the borrower vide the letter dated 8th March, 2002 of the guarantor in order to comply with the said agreement". The guarantor is the 1st petitioner and the borrower is the 4th petitioner. The company was a party to the agreement dated 12.1.2002 and the agreement dated 8th March, 2002 is nothing but a follow up agreement of the earlier one and as such the company is concerned with the agreement dated 8.3.2002. In the Share Subscription Agreement dated 30.7.2004 to which the company is a party, there is a recital about this transfer and in the statement of shareholding, these shares have been shown as a part of the petitioners' holding with a note that the same was subject to registration pending approval from the lenders. The company had also warranted the shareholding position indicated in the agreement as true and correct. Shri Sundaram argued "All the agreements relied on by the petitioners are linked with one another and they all form a composite transaction arising out the agreement dated 12th January, 2002. Due to changes in the circumstances, the same was modified by another agreements dated 8.3.2002, 30.7.2004 and 14.1.2005"(Para 41 ante). In addition to this, the involvement of the company in the matter relating to 155 million shares is all pervasive. For instance, the company itself wrote to IDBI on 12.1.2005, that is two days prior to the EOGM, seeking for expediting its approval for registration of transfer, in the board meetings, the delay in getting the approval from IDBI was noted and when the IDBI approval was received, the same was again noted. More than these, during the arguments, Shri Sundaram contended, as noted by me in paragraph 47 ante that "Further, the registration of transfer was subject to lenders' approval, which no longer is available as of date. Since in terms of the agreement between the lenders and the company, without their approval, company cannot register the transfer even CLB cannot direct the company to register the transfer, as it would place the company to act in breach of its agreement with a third party viz, the lenders". This argument clearly shows that the company is concerned with the matter of transfer of the impugned shares in view of its agreement with the lenders and therefore it has to be held that the transfer of 155 million shares is in the affairs of the company.

87. Having held that the transfer of 155 million shares is in the affairs of the company, the next issue for consideration is whether the stand of the company, GOWB/WBIDC is sustainable. As far as the company is concerned, it is justified in claiming that since the shares have not been registered in the name of the 4th petitioner, the shares still remain in the name of WBIDC/GOWB. Shri Sundaram relevantly relied on the decisions in Vardhman Publishers Ltd., Howrah Trading Limited and Escorts Limited in this regard. As per these decisions, a company could recognize a transferee as a member only when the transfer in his favour is registered/recorded in the register of members. However, it is also a settled law that between a transferor and transferee, a transfer is complete the moment the transfer instruments together with share certificates are handed over to the transferee on receipt of consideration. (Vasudev v. Pranalal; Maneckji Pestonji Barucha cases cited by Shri Sarkar). In the present case, the agreement dated 8.3.2002 itself makes it clear that 155 million shares had been transferred and delivered to the 4th petitioner on 8th March, 2002. The consideration was in the form of a loan granted by WBIDC to which the 4th petitioner tendered a receipt as if loan had been received. Thus, on this day, the transfer stood concluded. I specifically asked Shri Sarkar the significance of transferring the odd number of 15,50,99,998 equity shares and he responded that this would take the holding of the petitioners to 51% of the equity shares on that day. This statement appears to be correct. In Schedule-I to the Share Subscription Agreement dated 30.7.2004, the total number of equity shares on that day was shown as 1152 million shares. Before the transfer of the impugned 155 million shares from WBIDC to the 4th petitioner, WBIDC held 540 million shares constituting 46.9%, TATAs holding 180 million shares constituted 15.6% and the petitioners holding of 433 million shares constituted 37.5%. After the transfer of 155 million shares to the petitioners, the holding of WBIDC came down to 385 million shares constituting 33.4% and the petitioners holding of 588 million shares increased the percentage to 51% and TATAs continued to hold 15.6%. It is on record that either at that time or subsequently, the petitioners brought in Rs. 107 crores, thus, making it abundantly clear that it was the legitimate expectation of the petitioners to hold 51% shares in the company. The factum of sale of shares having been not only recorded in the agreement, has also been acknowledged by WBIDC in the balance sheet as on 31st March, 2002 as pointed out by Shri Sarkar. In addition, immediately after the agreement dated 8.3.2002, by a letter dated 13.3.2002, WBIDC informed GoWB "As the majority shareholders have agreed to the cancellation of the contingency support assumed by GoWB to HPL, we as a minority shareholders of HPL now confirm that we have no objection to the cancellation of the said contingency support arrangement". This shows that WBIDC has recognized the petitioners as the majority shareholders and the petitioners also, in that capacity, waived the contingent support assumed by GoWB as per the earlier agreements. This matter was discussed in a number of board meetings when WBIDC/GOWB never questioned the factum of transfer. Further, WBIDC had also accepted three annual installments of Rs 10 crores each towards the repayment of the loan, but without lodging for registration, 30 million shares in favour of the petitioners. As a matter of fact, as I have pointed out in an earlier paragraph, when the petition was mentioned, it was the stand of WBIDC/GOWB that the petitioners were the owners of 155 million shares and that is why they took a stand that even after the allotment of shares to IOC, the petitioners continued to be in the majority. Shri Sundaram argued that the instruments of transfer having become stale, WBIDC would not lodge with the company fresh instruments of transfer and the Company Law Board cannot question the change of mind of WBIDC. I am of the view that this stand of WBIDC is not only highly oppressive to the petitioners, but would also amount to having made a misrepresentation/misstatement before this

Board when interim reliefs were being considered. With the present stand of WBIDC, if I were to take into account the arguments of the counsel for the respondents that by suppression of material documents, the petitioners have played a fraud on this Board, then, WBIDC could also be considered to have obtained a favourable order by misrepresentation. Perhaps, WBIDC did not consider the consequences of taking the present stand. It is to be noted that when the respondents disclosed about the allotment of shares to IOC in the hearing on 3/4.8.2005, the petitioners filed an amendment application to impugn the allotment, but they did not include anything about these 155 million shares in the application, as the respondents did not challenge the transfer of these shares to the petitioners at that time. Therefore, the petitioners do have the legitimate expectations of seeking for registration of the shares in their names as the transaction relating to transfer had been concluded as early as on 8.3.2002 and on that basis they invested further sums of Rs 107 and Rs 127 crores thereafter. Shri Sundaram forcefully argued that the petitioners cannot seek for registration of the 155 million shares as they had not paid the consideration for the same except Rs. 30 crores and therefore if at all they are entitled for registration, it could be only for 30 million shares. One important aspect I would like to note in this regard is that, during the discussions after 14.1.2005 between the petitioners and GOWB/WBIDC, as revealed from the various draft agreements, the entire discussion was limited to the price for 385 million shares held by WBIDC and 135 million shares purchased by WBIDC from TATAs. No discussion took place regarding the price for these 155 million shares transferred to the 4th petitioner by the agreement dated 8th March, 2002. This would show that WBIDC stood by the terms of said agreement wherein the consideration for the 155 million shares was treated as a loan to be repaid in accordance with the said agreement. Therefore, I do not accept the contention of Shri Sundaram that the petitioners have not paid the consideration for the shares. Thus, in so far as the 155 million shares are concerned, the petitioners are entitled to have the registration of transfer effected in favour of the 4th petitioner. As far as the price for these shares is concerned, since the transfer had been concluded at par value, and that WBIDC has already accepted Rs 30 crores on that basis, asking the petitioner to pay more than the par value would be highly inequitable to the petitioners. However, not only with the to put an end to this controversy, but also to ensure that WBIDC gets the balance consideration, I shall be directing the petitioners to pay the balance consideration of Rs 125 crores in one go, instead of paying in installments as earlier agreed to. It was further contended by Shri Sundaram that at present IDBI consent is not available for registration of these shares. While I shall be separately dealing with the conduct of IDBI in this regard, a perusal of the letter of IDBI dated 10.1.2006 shows that IDBI had only kept the earlier approval in abeyance up to 31.5.2006 or up to the resolution of the issue at CLB, if earlier. From this letter it has to be presumed, in the absence of any further communication from IDBI in this regard, that the approval given earlier, stood restored on 1.6.2006. Even otherwise, since this matter is getting resolved by this order, the approval given by IDBI would stand restored from the date of this order.

88. TRANSFER OF BALANCE 36% (presently 33.33%) SHARES HELD BY WBIDC: In so far as the remaining 36% shares of WBIDC which the petitioners seek for transfer in their favour is concerned, it is also in the affairs of the company as is evident from the circumstances of the case. Before the allotment of shares to IOC, WBIDC held 36.81% (exclusive of 155 million shares). Post allotment of shares to IOC, the holding of WBIDC is 33.33%. When such a large percentage of shares is involved in a transfer, which would also convert a joint sector company into a private sector company, the

board of the company would definitely be concerned with the transfer, which in fact, has been the case. By a letter dated 17.12.2004 addressed to the Chairman of the company with a copy to Dr. PC, GOWB conveyed its commitment to transfer its shares to the petitioners. Thereafter, on 14.1.2005, 8th respondent, a director of the company, signed the agreement on behalf of GoWB for transfer of the balance shares to the petitioners and the same was in the knowledge of both, the 7th and 9th respondents in whose presence the agreement was signed. Thus, 4 of the directors including Dr. PC were aware of the proposed transfer. As I have pointed out earlier, the knowledge of the directors is the knowledge of the company. From the minutes of the meetings dated 29.3.2005 and 28.5.2005, it is also apparent that other directors were also aware of the proposal of WBIDC to transfer the shares held by it to the petitioners. The very fact that the board withheld the actual allotment of shares to IOC pending resolution of these matters indicates that the board itself considered that this matter was in the affairs of the company. The initial idea of WBIDC disinvesting its entire shares in favour of the petitioners was proposed in the agreement dated 12.1.2002 to which the company was a party. In terms of this, the petitioners had the right to seek WBIDC/GoWB to divest its shares in favour of the petitioners. Thereafter, in the supplemental agreement dated 30.7,2004, to which the company was again a party, the petitioners relinquished their said right. Further, even the Chairman by his letter dated 30.6.2005 informed Dr. PC that the allotment to IOC was pending in view of resolution of the promoters issues. The matter of transfer of shares held by WBIDC is in the knowledge of the board is also evident from the circular letter issued by the Chairman on 28th July, 2005 wherein he has stated "In recent board meeting we have been briefed by the Government of West Bengal and the Chatterjee group on inter-se promoter issues, with particular reference to the proposed disinvestments by the State Government in favour of the Chatterjee group". Thus, even though it would appear that the transfer of the balance shares of WBIDC in favour of the petitioners is an issue between two groups of shareholders, yet, the company is directly involved in this issue and as such it has to be held that this issue is also in the affairs of the company.

89. Having held that the transfer of the balance shares of WBIDC to the petitioners is in the affairs of the company, the claim of the petitioners in this regard has to be examined. Whatever legitimate expectations that the petitioners had in regard to the transfer of WBIDC shares in the past, came to an end with the signing of the supplemental agreement dated 30.7.2004 by which they gave up their right to seek for transfer of shares held by WBIDC. In other words, they had abandoned their right to seek the transfer of the shares by WBIDC. Only when they approved the allotment of shares to IOC on 14.1.2005, they could claim that by their consenting to the proposal to allot shares to IOC in view of the commitment given by GOWB in its letter dated 17.12.2004 and the agreement dated 14.1.2005, their legitimate expectations to seek WBIDC to transfer its shares got revived consequent to their approving the allotment of shares to IOC. Shri Sundaram contended that the agreement dated 14.1.2005 was not an agreement but it was only a statement of intent incomplete in material particulars and was only a record of discussions to enter into a formal agreement. But from the subsequent conduct of the GoWB/WBIDC it is apparently clear that GoWB never treated the agreement dated 14.1.2005 as a mere intention but it actually treated it as a commitment. The manner in which GOWB/WBIDC have gone about the matter deserves to be commended. Whatever might be the present stand of GoWB/WBIDC, the bonafide and exemplary manner in which GoWB/WBIDC conducted themselves subsequent to the agreement dated 14.1.2005 indicate their commitment to honour the agreement. Otherwise, they would not have held discussions with Dr.PC

for a long period of 6 months. Their bonafide was completely established when GoWB sought for the approval of IDBI by a letter dated 25.5.2005 which reads " The Government of West Bengal wishes to purchase 519900002 shares of Haldia Petrochemicals Limited, presently held by WBIDC, at par. It is requested that the lenders may kindly permit this transfer to the Government of West Bengal at the earliest. The State Government thereafter proposes to transfer their shares to CP(M)C and also to Essex Development Investment (Mauritius) Limited, a nominee of Chattel-jee Petro Chem(India) Private Limited. It is requested that the lenders may kindly permit these transfers also ". IDBI also conveyed its approval. Further, as is seen from the letter of Dr. PC dated 25th July, 2005, GOWB had indicated their desire to conclude the share transfer transaction as soon as possible. The bonafide manner in which GoWB had dealt with the commitment is also evident from its letter dated 27.7.2005 addressed to Dr. PC. In that letter it is stated " It is in this context that the State Government entered into discussions with you since January, 2005 to disinvest in your favour. These discussions have continued over 7 months and as you are aware, the State Government took several steps in the direction including application to IDBI for approval to sell shares ". However, when the petitioners had indicated the availability of funds to the tune of Rs. 11.10 billion towards purchase of the shares, it is not clear as to why and how GOWB informed the petitioners on 27.7.2005 in the following terms "However, the negotiations have not been concluded and the documentation you have sent with your letter of 25th July is unclear in several respects. It is not clear to the State Government from the papers whether you are in a position to conclude the matters. It appears not. Accordingly, in the best interest of HPL and to reflect our continued commitment to the company, we have decided to defer the proposal to disinvest and shall remain in HPL to extend full support to the company. We do so because a state of flux is not in the interests of the company".

90. Shri Sundaram submitted that by stipulating certain preconditions, which were not envisaged in the alleged agreement dated 14.1.2005, the petitioners had lost their right to seek implementation of the same. He not only referred to various letters written by DR PC, but also the draft Share Purchase Agreements forwarded by the petitioners, wherein, as a pre-condition, the petitioners had sought that no shares should be allotted to IOC. Shri Sarkar submitted that in course of the negotiations with GoWB/WBIDC during the period January to July, it was agreed that IOC would not be allotted any shares. I find force in the submissions of Shri Sundaram. When the petitioners rely on legitimate expectation, they should also keep in mind that the legitimate expectation can never be one sided. Their claim for legitimate expectation has arisen out of their having consented to allotment of shares to IOC and therefore, WBIDC/GoWB would also have the legitimate expectation for transfer of their shares, that IOC should be allotted shares. From the draft agreements, I find that GoWB/WBIDC had gone out of the way to conclude the transfer transaction, without putting too much of pressure on the finances of the petitioners. The holding of WBIDC comprises of two sets of shares. One of 385 million shares originally held by it and the other of 135 million shares acquired from Tatas. While the petitioners were to pay for 385 million shares in cash within a certain period, the consideration for 135 million shares was to be treated as a loan from WBIDC repayable over a period of time. Thus, even while WBIDC/GoWB were to exit the company, yet they had agreed to accommodate the petitioners by deferring the receipt of substantial consideration. Perhaps, the petitioners were apprehensive of the alleged secret agreement with IOC that it would take control of the company. Even then, there was no need for the petitioners to be apprehensive, as once the

petitioners acquired the shares of WBIDC, they would be holding nearly 79% of the equity shares post allotment to IOC and the lenders.

91. Shri Sundaram submitted that GoWB had lost confidence in the petitioners as they did not bring in the funds as undertaken by them and that considering the public interest GoWB had decided not to divest the shares in favour of the petitioners. He pointed out that even though in terms of the agreement dated 12.1.2002, the petitioners were to produce a letter of comfort and also to bring in Rs. 500 crores, they failed to do so. On the production of comfort letter, I find that Shri Sundaram was not factually correct. By a letter dated 25th January, 2002, Citi Bank, New York had given a letter of comfort. The same was confirmed by another letter dated 8.2.2002 by Citi Bank. These letters of comfort were accepted by GOWB by a letter dated 15.2.2002. As a matter of fact, the agreement transferring 155 million shares was entered into subsequent to these comfort letters, on 8th March, 2002. In so far as Rs. 500 crores is concerned, I do not find any document by which the petitioners were sought to comply with this undertaking and considering the fact that further agreements do not refer to this amount of Rs. 500 crores, WBIDC/GOWB cannot make any grievance in this regard. Further, as I have indicated in the earlier paragraph, the very fact that GoWB/WBIDC had taken steps to honour their commitments, they do not appear to have attached any importance to the alleged failures of the petitioners or that they had considered that the transfer of shares to the petitioners would be against public interests. Shri Sarkar invoked the principle of promissory estopple relying on the decisions in Mohinder Singh v. CEC ; LIC v. Escorts Ltd.) and UOI v. Anglo Afgan Agencies AIR 1968 SC 719. I do not propose to apply or examine the applicability of these decisions to the present case in view of the following. First, there is no averment in the reply or in any of the affidavits of GOWB invoking the concept of public interest. Secondly, even the continued conduct of GoWB/WBIDC does not indicate that on the basis of public interest, it had deferred the disinvestment. As a matter of fact, it was going ahead with disinvestment. It appears to me that the decision of WBIDC/GoWB to defer the disinvestment was principally, if not squarely, due to the stand taken by Dr.PC in relation to the allotment of shares to IOC. This being the case, the petitioners can never invoke the doctrine of promissory estopple. The deal could not, obviously, go through because of the insistence of the petitioners that no shares should be allotted to IOC. Therefore, I do not find any substance in the allegation of the petitioners that their consent to support the resolution for allotment of shares to IOC was obtained by inducement or false promise as GoWB appears to have been forced to defer the disinvestment in view of the petitioners refusal to honour their commitment. Now that it has been established that there is no secret agreement between IOC and GoWB/WBIDC and also that I have held that the allotment of shares to IOC cannot be cancelled, there would be no impediment in the transfer of shares held by WBIDC to the petitioners. At this stage, it would be futile to debate as to who was right or wrong but the focus should be on what would be the right decision in facts of this case. This will be dealt with later.

92. Appointment of 16th respondent as the MD: In so far as the objection of the petitioners regarding the appointment of the 16th respondent as the MD is concerned, I do not find any scope to interfere in this matter. Firstly, his appointment was not challenged in the petition even though the said appointment was prior to the date of the petition. Secondly, the nominees of the petitioners were present in the board meeting held on 29.3.2005 when the board unanimously approved his

appointment. Thirdly, when his remuneration was fixed in a board meeting held on 28.5.2005, Dr. PC was present. His functioning as the MD and discharging various functions in that capacity had not been objected to by the petitioners for a long time. The petitioners took objection to his appointment only in September, 2005 after he had filed his counter to the petition, perhaps, because he has defended the allotment of shares to IOC. The main contention of the petitioners is that there was no vacancy in the board to appoint Shri Bhowmik as the MD. On the day when he was appointed, the petitioners were aware that there was no vacancy but yet their nominees on the board approved the appointment. This Board has taken a consistent view that a person who is a party to a decision cannot, when the relationship becomes sour, seek to impugn the said decision as being illegal or void in a petition under Sections 397/398 of the Act. As a matter of fact, during the hearing Shri Sarkar mentioned that Shri Bhowmik was a nominee of the petitioner but he had turned against them after the disputes between the shareholders. Shri Sarkar relied on the decision of the Supreme Court in Coal Products Limited 40 CC 715 to state that a person who has not been validly appointed as a director cannot claim to be a director. In that case, the court prima facie found that the appellant therein was not shown as a shareholder and that he had not been appointed as a director as claimed by him. But in the present case, the fact of appointment of Shri Bhowmik is not in doubt but the allegation is that there was no vacancy to appoint him and therefore the decision of the Supreme Court is not applicable in the present case.

93. Dr. Singhvi argued that since the disputes raised in the petition relate to the shareholders, and therefore, the company should not incur any expenditure in relation to the proceedings and expenditure incurred by the company should be recovered from the 7th and 16th respondents. He cited the decisions in 1989 BCLC 137, 1987 BCLC 514 and 1992 BCLC 701. The petitioners cannot approbate and reprobate or blow hot and cold at the same time. When the respondents questioned the maintainability of the various issues raised in the petition on the ground of being shareholders disputes, the petitioners asserted that the disputes were in the affairs of the company, which assertion, I have also upheld. If these issues are in the affairs of the company, naturally the company has to be a party to the proceedings through its MD and/or Chairman and it has to incur expenditure in connection with the same. Further, the admitted fact is that the main allegation in the petition relates to allotment of shares to IOC and naturally the company and other officers connected with the allotment have to defend themselves and the company has to bear the cost of defense. Therefore, I do not find any justification in the demand of the petitioners that the 7th and 16th respondents should reimburse the expenditure incurred by the company in defending the proceedings.

94. Conduct of the company: The petitioners have voiced their grievance relating to the conduct of the 16th respondent and the company that they are siding with one group of shareholders, namely, WBIDC/GOWB. They have also complained that the company is not giving inspection of records/documents sought for by Dr. PC even though he is entitled for the same in his capacity as director. Another grievance of the petitioners relates to C&AG audit. In so far as the allegation that the 16th respondent and the company are siding with WBIDC/GoWB is concerned, I find that they have only brought on record the material available with them in regard to the allotment of shares to IOC and relating to 155 million shares, and they have defended the appointment of the 16th respondent as the MD as per the available records. Therefore, it cannot be construed that they are

siding with once group of share holders. In so far denial of inspection is concerned, the MD should not have taken the stand that since Dr.PC is a party to the present proceeding, he cannot inspect the statutory records as , not only as a director, but also as a major shareholder Dr.PC is entitled to inspect the records. According to the petitioners, as on 2.11.2004, the private holding in the total paid up capital inclusive of preference shares constituted 52.95% shares and the Government holding was only 47.05% and therefore, CAG Audit was not attracted. For this computation, the petitioners have treated 155 million shares as belonging to them. However, as long as the 155 million shares continue in the name of WBIDC in the members register, for application of Section 519B of the Act, the shareholding as per the register of members alone can be taken into account. Therefore, when the company has complied with the statutory provisions, the question of alleging that the company is taking sides does not arise.

95. Allotment of Shares to IDBI/Lenders: In so far as allotment of shares to IDBI is concerned, its grievance is that the order dated 5.8.2005 restraining allotment of shares to IDBI was passed without notice to IDBI. Its further contention is that in terms of CDR package, it was entitled to be allotted shares worth Rs. 135 crores. As far as the interim order is concerned, it is to be noted that in most of the proceedings under Section 397 when the contemplated allotment is likely to reduce a majority into a minority, this Board has always restrained the company from allotting further shares to avoid the matter becoming a fait accompli. As the facts that stood on 4.8.2005, after the allotment of shares to IOC which I allowed to stand, if any further allotments were to be made, the holding of the petitioners would have come down to below 50%. That is why, I directed the company to defer allotment of any further shares till disposal of the petition so that there would be no change in the issued/paid up capital of the company. Further, my restraint order has not in any way affected IDBI prejudicially in the sense it has not been deprived of any dividend as no dividend has been declared by the company and on the contrary IDBI continued to get interest on the amount of Rs. 135 crores, which if had been converted into shares, would have been without any returns. Further, it is to be noted that shares to the lenders were offered as per the Empowered Committee decision in September 2004, with 12.9.2004 as the closing date. Till the petition was filed on 3.8.2005, that is in the intervening 11 months, the sharers had not been allotted to IDBI and lenders for whatever might be the reason. One other important aspect I would like to note is that the right of IDBI/lenders to the shares accrued only after the petitioners had invested Rs 127 crores (143 crores) to effectuate the CDR package. Further, the petitioners never objected to the allotment of shares to IDBI, as, according to them it would be in the interests of the company to allot shares to IDBI. They were only concerned about the timing of the allotment, which according to them, should be after the registration of 155 million shares in their favour and transfer of the balance shares of WBIDC to the petitioners so that the company continues to be a company in the private sector. Regarding the allotment of shares to IDBI/lenders, I find that they had originally agreed for allotment of shares three days after the petitioners had acquired the shares held by WBIDC and once the transfer was deferred by GoWB/WBIDC by their letter dated 27.7.2005, IDBI demanded allotment immediately by its letter dated 2.8.2005. Taking note of this fact, I shall be issuing suitable directions for allotment of shares to IDBI.

96. IDBI has intervened in the matter and as such it was aware that the petitioners have relied on the approval of IDBI for seeking registration of 155 million shares in their favour. Therefore, while

IDBI may have a grievance, rightly or wrongly, about the restraint order, yet, its action during the pendency of the proceedings in sending the letter dated 10.1.2006 by which it has kept in abeyance the earlier approval, does not augur well with its status as a leading financial institution. When the claim of the petitioners for majority on the day of filing of the petition was on the basis that with the approval given by IDBI there was no impediment in the registration of 155 million shares in their favour, such a position could have never been altered during the pendency of the proceedings unilaterally by IDBI. Further, by doing so it has also provided an excuse to the company to take a stand that, as of now, there is no approval from IDBI/lenders for registration of transfer of these 155 million shares in favour of the 4th petitioner.

97. IOC: In so far as IOC is concerned, the main grievances of the petitioners are that IOC had not kept the petitioners informed of its discussion with WBIDC/GOWB, that in the guise of being a portfolio investor, it had entered into a secret agreement to gain control of the company etc. I have already held that whatever might be the earlier discussions/agreements between IOC and WBIDC/GOWB, the terms of allotment alone would bind the company and that without the consent of the petitioners, IOC could neither get further shares allotted or get the shares held by WBIDC transferred in its favour. I have also held that the allotment is not in violation of Article 47. In view of these findings, there is no scope for canceling the allotment made to IOC. However, I consider it necessary to observe and record, as indicated by me in the course of hearings, that during the pendency of the proceedings, the Chairman of IOC should not have made public statements that IOC was contemplating to take control of HPL, especially when the counsel for IOC and other respondents were vehemently arguing before me that IOC was only a portfolio investor. His public statements gave an ammunition to the counsel for the petitioners to urge before me the existence of a secret agreement between IOC and GoWB/WBIDC to enable IOC to take control of the company.

98. Reliefs: Having given having given my findings on all the allegations, I have to consider the nature of the reliefs to be granted. Considering the long and fruitful association of the parties, with the view that they should also try to resolve the disputes amicably, in the month of November, 2006, I suggested to the petitioners to interact with GoWB/WBIDC to arrive at an amicable settlement. Even though it appears that some discussions took place, yet, no fruitful result emerged. Thereafter, in the hearing held on 9.3.2006, I gave certain proposals for the consideration of GoWB/WBIDC with a view to resolve the disputes amicably. Since there was no favourable response to my suggestion, in the hearing held on 30.3.2006, I enquired from GoWB/WBIDC as to whether they would be willing to exist from HPL and if so on what terms. On 31.3.2006, they gave a without prejudice proposal indicating therein that they would offer a particular price for their shares which the petitioners should accept within a certain time frame failing which the petitioners should sell their shares to WBIDC/GoWB at that price. When this suggestion was made, Shri Sarkar submitted that the petitioners were not insisting to purchase the shares of WBIDC nor the petitioners were willing to sell their shares to WBIDC and their only prayers were that the 155 million shares should be registered in the name of the petitioners and IOC allotment should be cancelled. Only at this time, pointing out that if the reliefs sought for by the petitioners were granted, they would be in the majority, Shri Sundaram argued that GOWB/WBIDC had lost faith in the petitioners and that in public interest they cannot allow the petitioners to take control and manage the company.

99. Taking into consideration this back ground, the reliefs have to be moulded. During the course of the proceeding, it became apparently clear that the long and fruitful association of the petitioners and WBIDC/GOWB, unfortunately, cannot continue any further due to complete loss of mutual trust and confidence between the parties, which had otherwise been the hall mark of their continued successful association for over ten years. As a matter of fact, board meetings have been deferred as also the annual general meetings because of the disputes. From the without prejudice proposal of GoWB/WBIDC, their intention also appears to be that only one of either the petitioners or GOWB/WBIDC could remain in the company. Therefore, instead of considering any other reliefs, I have to perforce, only decide as to who should continue with the company. To do so, it is necessary to go through the chronology of events, and the intention and conduct of the parties all these years.

100. The admitted fact is that, till the petitioners entered the company, the project had not seen the light of the day as is evident from the fact that the total expenditure incurred for nearly 10 years upto 1994 was only about Rs 30 crores. (as indicated in the JVA). Only after the association of the petitioners, the project got completed in a record time. Even though in terms of the JVA, both WBIDC and the petitioners were to hold equal percentage of shares, in terms of one of the side letters, WBIDC agreed to offer 60% of its holding to the petitioners at Rs 14 per share. From the terms of further agreements entered into after the commencement of commercial production, it appears to me that GoWB had decided to reward the petitioners for the successful completion of the project by making them the majority shareholders. In the agreement dated 12.1.2002, WBIDC/GoWB agreed to hand over major shareholding and the management to the petitioners by transferring shares upto Rs 360 crores at par to the petitioners so that they would hold 51% of the equity, with the right to the petitioners to seek for transfer of the balance shares held by WBIDC. WBIDC, in fact transferred 155 million shares, by which the petitioners came to hold 51% of the then paid up capital. Thereafter, with further allotment of shares to the 2nd and 3rd petitioners, the collective holding of the petitioners went up to 58.34%. Thereafter, even though by the Supplemental agreement dated 30.7.2004, the petitioners gave up their right vested in them by the agreement dated 12.1.2002 to require WBIDC to transfer their shares held by it at any time, GoWB committed to transfer its shares by a letter dated 17.12.2004 and also by the agreement dated 14.1.2005. It is to be noted that this agreement was entered into, not withstanding the earlier discussions with IOC and the alleged secret agreement. Further, thereafter, GoWB/WBIDC took further steps in this regard, culminating in seeking the approval of IDBI for the transfer of its shares to the petitioners by a letter dated 25.5.2005 and IDBI also "gave its approval. Even in its letter dated 27.7.2005, GOWB had only deferred disinvestment and had not said that it would not disinvest. Thus, it is evident, that right from the beginning, the intention of GoWB/WBIDC has been to remain either as minority shareholders or dis-engage themselves as shareholders of the company, not withstanding the enormous sacrifice that GoWB has made in the form of tax concessions, timely financial assistance in the time of needs and also by giving up enormous amount of interest on loans granted by them to the company, by accepting preference shares. At no time, WBIDC/GoWB expressed their intention, either in writing or by conduct, to acquire the shares of the petitioners till they made the without prejudice proposal before this Board. On the contrary, the petitioners have been repeatedly seeking for majority shareholding and control of management of the company for a long time. Therefore, I am of the considered view that the petitioners should have the right/ have the legitimate expectation to require WBIDC/GoWB to disinvest their 520 million shares in favour

of the petitioners, especially when I am upholding the IOC allotment.

101. Having held that the petitioners have the right to purchase the shares held by WBIDC/GOWB, the next issue is in regard to the consideration for the shares. Whenever this Board has decided in a petition under Section 397/398, that one of the parties should sell its shares to the other, with the view to ensure that the outgoing party gets a fair price for its shares, it has always appointed an independent valuer to determine the fair price. That is what the petitioners also seek by relying on Article 33 (a) of AOA. In the without prejudice proposal of GOWB/WBIDC, it was indicated that they would submit the price per share which would not be less than Rs. 28.80 per share, in a sealed cover at which they would be prepared to sell their shares or purchase the shares held by the petitioners. The price per share of Rs. 28.80 is the one apparently decided during the discussions earlier between the petitioners and GoWB/WBIDC. Even though the petitioners have claimed that no such price was agreed to, they appear to have accepted this price as is evident that only if this price is taken, the total consideration for 385 million shares would work out to Rs. 11.10 billion. In the earlier paragraph, I have already indicated that there are two sets of shares with WBIDC - one of 385 million shares held by WBIDC for long and another of 135 million shares acquired by WBIDC from TATAs. Considering the fact that Rs. 28.80 per share had already been agreed to, in all fairness, as I have decided in the case of 155 million shares that the agreed price of Rs 10 per share cannot be varied, I am of the view that the price per share for these 520 million shares cannot be less than Rs 28.80 per shares. But at the same time, to ensure that if a higher price is determined by the valuer, WBIDC/GoWB should get the benefit of the same, I am of the view that the fair price should be determined by an independent valuer, as demanded by the petitioners also, however, with the stipulation that the price payable by the petitioners would be either the fair price to be determined by the valuer or Rs. 28.80 per share, which is higher. In so far as 155 million shares already transferred to the petitioners are concerned, I have already held that the price per share shall be Rs 10. Further, since WBIDC/GoWB would be going out of the company, the petitioners should also purchase the preference shares held by GoWB/WBIDC within a stipulated period or they should ensure that the company redeems these shares within the same period.

102. Accordingly, in terms of Section 402 of the Act, I declare/direct as follows:

1. The allotment of 150 million shares to IOC is upheld and it is at liberty to deal with these shares in any manner.

2. Likewise, the transfer of 155 million share by WBIDC to the petitioners at Rs 10 per shares is confirmed.

3. WBIDC/GoWB shall transfer 520 million shares held by them in HPL to the petitioners.

4. The price payable for the 520 million shares shall be the fair price determined by the valuer to be appointed by this Board or Rs 28.80 per share, whichever is higher.

5. The petitioners shall purchase the 271 million preference shares held by GoWB/WBIDC at par.

6. The 4th petitioner shall pay a sum of Rs 125 crores to WBIDC towards the balance consideration for the 155 million shares on or before 28th February 2007.

7. On payment of the said amount, without any further deed or act or approval from anyone or production of any instrument of transfer, these shares shall be deemed to have been dematerialized and transferred in the name of the 4 petitioner and the share certificates shall be deemed to have been cancelled. The company shall initiate and complete other legal formalities in this regard immediately thereafter.

8. For determination of the fair price for the 520 million shares, the parties will appear before me on 20.2.2007 at 11.30 AM to suggest a mutually acceptable valuer whose valuation shall be binding on the parties. In case, WBIDC/GoWB do not desire valuation, they are at liberty to inform this Board accordingly and the price per share will be Rs 28.80 per share.

9. By 28th February 2007, the petitioners shall lodge with WBIDC, an irrevocable bank guarantee in favour of WBIDC for a sum of Rs 50 crores.

10. Simultaneously, the petitioners shall also lodge with GoWB, with a copy to this Board, a comfort letter for an amount of Rs 1500 crores.

11. The consideration for the 520 million shares shall be paid within 45 days of the date of report of valuation or within 60 days if GoWB/WBIDC report to this Board on 20.2.2007 that they do not desire valuation.

12. On receipt of this consideration, WBIDC/GoWB shall transfer these 520 million shares to the petitioners. IDBI had already given the approval for the transfer and subsequently withdrew the same only because of the letter of GoWB dated 27.7.2005, and not for any other reason. Now that the transfer would be in terms of this order, IDBI cannot have any objection to the registration of transfer and as such, on payment of consideration, and production of necessary transfer documents etc, the company shall register the transfer in the names of the petitioners, subject to approval by RBI if any.

13. The consideration for the preference shares shall be paid within a period of 60 days of payment of consideration for 520 million shares.

14. Immediately after acquisition of the shares, the petitioners will comply with all the stipulations in the CDR package in relation to the shares.

15. There shall be a lock in period of 3 years in respect of all shares, except in case of public offering in line with SEBI guidelines. The petitioners shall continue to hold majority shares and be in control of the company for a minimum period of 3 years from the date of acquisition of the shares held by WBIDC. I am stipulating this lock in period and continuity of majority shareholding and control of the company with the view to ensure, that after acquiring the shares from a promoter of ten years association, the company is not handed over to a third party.

16. As far as allotment to IDBI and other lenders is concerned, it is on record that they had agreed for allotment of shares 3 days after the petitioners had acquired the shares held by WBIDC. Accordingly, they will be issued sharers as per the CDR package simultaneously with the registration of 520 million shares in favour of the petitioners.

17. The petitioners are at liberty, as soon as they pay the consideration for the 155 million shares to take control of the day to day management of the company, (as they would be holding majority equity shares of 52%) with the stipulation that no major decisions shall be taken without the approval of the Board.

18. The composition of the Board shall remain without any change till the petitioners acquire 520 million shares and thereafter, they are at liberty to change the composition, subject to the condition, that GoWB shall always have a nominee director in the non retiring category. Likewise, if IOC continues to hold shares at that time, its nominee will be appointed as a director.

19. Should the petitioners fail to pay the consideration and acquire 520 million shares held by WBIDC within 45/60 days as stipulated in Clause 11 above, WBIDC shall be at liberty to encash the Bank guarantee for Rs 50 crores and forfeit the same. Thereafter, WBIDC/GoWB shall also have the option to purchase the shares held by the petitioners at the rate of Rs 28.80 per share or the fair price determined by the valuer which ever is higher. This will not apply to 155 million shares, the price of which will be only Rs 10 per share.

20. In case GoWB/WBIDC exercise the option as above to acquire the shares of the petitioners, the petitioners shall be bound to sell their shares and WBIDC/GoWB shall pay the consideration within 45 days of exercise of option and shall be bound by the stipulation in clause 15 above.

21. Liberty is given to apply in case of any difficulty in implementing the above terms.

103. Before parting with this order, I must place on record the excellent manner in which the Senior Counsel appearing for the parties assisted me with their cogent and erudite arguments referring to various documents scattered in various volumes and also by referring to various decided cases.

104. The petition is disposed of in the above terms, reserving the right to appoint a valuer and giving consequential directions.