

# Milan Commercial Pvt.Ltd vs Asian Healthcare Services Limited on 16 November, 2009

**Author: Anoop V. Mohta**

**Bench: Anoop V. Mohta**

This Order is modified/corrected by Speaking to Minutes Order  
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.1691 OF 2008  
in  
SUIT NO. 1452 OF 2008

Milan Commercial Pvt.Ltd.

.... Plainti

vs

1 Asian Healthcare Services Limited

2 Konkan Unnati Mitra Mandal (KUMM),  
3 Shristi Infrastructure Development  
Corporation Limited,  
4 Opulent Venture Capital Trust,  
5 I C Sancheti  
6 Sheo Shankar Chaturvedi

7 Rajesh Lihala  
8 Ram Naraqyan Yadav  
9 Abdul Rehman Antulay

10 Sami Khatib

11 Dr.Jayant Rao Patil  
12 Ayjaz Ahtesham Sayed,  
13 Mushtaq Antulay

14 Navid Antulay,  
15 Kamalakar Vichare  
16 Hariprasad Kanoria  
17 Hemant Kanoria

18 Sanjeev Kanoria  
19 Durga Prasad Vyas,  
20 Sukharanjan Dasgupta,  
21 Bisnu Kumar Goenka,  
22 Manipal Education & Medical Group

India Private Limited,  
23 Horizon Infrastructure Limited

... Defenda

Mr.S.H. Doctor, Sr.Counsel with Mr.Siddharth Mitra, Mr.Zal Andhyarujin  
Ms.Rupa Mitra and Ms.Nandini Khaitan, Mr.Chakrapani Misra, Mr.Devesh Juvekar,  
Mr.Vishal Maheshwari and Mr.Ameya Gokhale, Advocates i/b. M/s.Khaitan & Co.  
for the plaintiff.

Mr.Harish Pandya i/b. Mr.Aditya Khanna for defendant no.1.

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Mr.Rahul Chitnis i/b. Mr.Mustafa Banatwala for defendants 3, 4, 5 to 8, 16 to 21.

Mr.Fredum Divetre, Sr.Counsel with Mr.Akshay Patil, Mr.Vikram Trivedi, Mr.Rohan

Cama, Mr.Faisal Sayyed and Ms.S. Dadachanji i/b. M/s.Manilal Kher Ambalal & Co. for defendants 2, 9 to 15.

Mr.Narendra Walawalkar, Sr. Counsel and Mr.Gaurav Joshi with Ms.Anisha Shroff i/b. M/s.A.T. Agarwal for defendant no.22.

Mr. E. P. Bharucha, Sr. Counsel i/b. M/s.Vimadalal & Co. for defendant no.23.

CORAM: ANOOP V. MOHTA, J.

DATE : 16th November, 2009

ORAL JUDGMENT:

1 This Notice of Motion dated 30.04.2008 is taken out by the plaintiff in a pending Suit for declaration & specific performance & various interim reliefs/injunction.

2 It is necessary to note the basic prayers of the Suit, covering prayers for interim reliefs also, which are as under:

(a) that this Hon'ble Court be pleased to pass an order of declaration that the Defendant No.1 is lawfully entitled to remain in possession of the said land mentioned in paragraph 14 hereof and to develop and construct the said hospital on the said land and to use the said land for the purpose of building a super specialty hospital.

(b) that this Hon'ble Court be pleased to pass an order of Declaration that the purported letter of termination dated February 1, 2008 addressed by the Defendant No.2 to Defendant Nos. 3 & 4 is wrongful, illegal and not binding on the Defendant No.1 Company and its shareholders including the plaintiff.

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(c) that this Hon'ble Court be pleased to pass an order of Specific performance of the agreement dated April 23, 2007 (Ex. 'H' hereto) in favour of the Defendant No.1 by other Defendants and all

ancillary orders and directions for the implementation thereof.

(C 1) that this Hon'ble Court be pleased to order & restrain the Defendant Nos. 2, 9 to 15 by themselves, their servants, agents or assigns or otherwise whatsoever from disturbing or interfacing with the possession of the Defendant No.1 of the said land situated at Worli, Mumbai and from in any manner interfering with the right of the Defendant No.1 from using the said land.

(c-5) that this Hon'ble Court be pleased to order and declare

(i) that the said Memorandum of Understanding dated 14 April 2008 (Exhibit "Z1") hereto) is not a valid Agreement and creates no rights whatsoever in favour of the Defendant No.2, 22 and 23 and is null and void and is void ab-initio;

(ii) that the said Memorandum of Understanding dated 14 April, 2008 (exhibit Z1) hereto) does not in any manner whatsoever create any right or interest of whatsoever nature in favour of Defendant Nos. 2, 9 to 15 and/or Defendant Nos. 22 and/or Defendant No.23 in or over the suit land or any part thereof; and

(iii) that the said Memorandum of Understanding dated This Order is modified/corrected by Speaking to Minutes Order 14th April, 2008 (Exhibit Z hereto) is liable to be delivered up and cancelled and the Defendant Nos.2, 9 to 15, Defendant Nos.22 and 23 are jointly and severally liable to deliver the said Memorandum of Understanding dated 14th April, 2008 to the office of the Prothonotary and Senior Master, High Court, Bombay for the purposes of cancellation.

(c-6) that this Hon'ble Court be pleased to order and direct that the said Memorandum of Understanding dated 14th April, 2008 (Exhibit-

"Z1" hereto) be forthwith delivered up and cancelled and by the Defendants No.2, 33 and 23 to the Prothonotary & Senior Master, High Court, Bombay for the purposes of cancellation and that the Prothonotary & Senior Master do cancel and destroy the same.

(c-7) that this Hon'ble Court be pleased to pass an order of injunction restraining Defendant Nos. 2, 9 to 15, 22 and 23 jointly and/or severally by themselves, their servants, agents and assigns or otherwise whatsoever from in any manner creating any further third party rights and/or encumbrances of whatsoever nature by whatsoever named called pursuant to and/or in furtherance of and/or in implementation of the said Memorandum of Understanding dated 14 April 2008 (Exhibit - "Z1" hereto) and/or from acting in accordance with and/or in furtherance of the said Memorandum of Understanding dated 14 April 2008, or from in any manner implementing the terms of the said Memorandum of This Order is modified/corrected by Speaking to Minutes Order Understanding."

(c-8) that this Hon'ble Court be pleased to pass an order of injunction restraining Defendant Nos. 2, 9 to 15, 22 and 23 jointly and/or severally by themselves, their servants, agents and assigns or otherwise whatsoever from in any manner creating any further and/or any other third party rights and/or encumbrances of whatsoever nature by way of any transaction, document, understanding, deed, assignment etc. in or over or in respect of the said suit land and/or in or over or in respect of the said MOU dated 14th April 2008 and/or any other document and/or agreement in respect of the said suit land."

(d) that pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to pass an order of injunction restraining the Defendants nos. 2 and 9 to 15 by themselves, their servants, agents or assigns or otherwise whosoever from disturbing or interfering with the possession of the Defendant No.1 of the said land situated at plots nos. 73A, 74, 74A and 74B, admeasuring 7000.91 sq.mts. at Worli, Scheme No.52, Mumbai, Maharashtra, and from in any manner interfering with the right of the Defendant No.1 from using the said land for the purpose of setting up a hospital.

(e) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order of injunction restraining This Order is modified/corrected by Speaking to Minutes Order the Defendant Nos. 2 and 9 to 15 from themselves, their servants, agents or assigns or otherwise whosoever from from in any manner negotiating, disposing of, alienating, transferring, encumbering or creating any right, title or interest in favour of any third party in respect of the said land situated at plots nos. 73A, 74, 74A and 74B, admeasuring 7000.91 sq. mts. At Worli, Scheme No.52, Mumbai, Maharashtra.

(e-3) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order of injunction restraining Defendant Nos. 2, 9 to 15, 22 and 23 jointly and/or severally by themselves, their servants, agents or assigns or otherwise whatsoever from in any manner creating any further third party rights and/or encumbrances of whatsoever nature by whatsoever named called pursuant to and/or in furtherance of and/or in implementation of the saide Memorandum of Understanding dated 14 April 2008 (Exhibit - "Z1" hereto) and/or from acting in accordance with or in furtherance of the said Memorandum of Understanding dated 14 April 2008 (Exhibit "Z1" hereto) or from in any manner implementing the terms of the said Memorandum of Understanding."

(e-4) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order directing the defendant This Order is modified/corrected by Speaking to Minutes Order Nos.2, 9 to 15, 22 and 23 jointly and/or severally to deposit the original Memorandum of Understanding dated 14 April 2008 (Exhibit - "Z1" hereto) with the Ld. Prothonotary & Senior Master, High Court, Bombay."

(e-5) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order directing the Defendants No. 2, 9 to 15, 22 and 23 jointly and/or severally by themselves, their servants, agents and assigns or otherwise whatsoever from in any manner creating any further and/or any other third rights and/or encumbrances of whatsoever nature by way of any transaction, document, understanding, deed, assignment etc."

(f) that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to pass an order for appointment of a special officer or a chairman over and in respect of the affairs of the Defendant No.1 Company for the purpose of holding the board meetings and general meetings for implementation of the hospital project.

(g) that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to formulate

Scheme for the management and administration of the Defendant No.1.

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(h) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint Court Receiver, High Court, Bombay or some other fit and proper person be appointed Receiver of the land situated at plots nos. 73A, 74, 74A and 74B, admeasuring 7000.91 sq.mts. At Worli, Scheme No.52, Mumbai, Maharashtra, with all powers under Order XI, Rule 1 of the Code of Civil Procedure, 1908.

( i ) ad-interim reliefs in terms of prayers clause (d), (e), (f), (g) and (h) above.

(j) for the cost of this suit;

(k) for such other and other relief as this Hon'ble Co

deem fit and proper in the circumstances of the case."

3 The basic details of the parties are as under:

The plaintiff/MCPL is a shareholder of defendant No.1 and holds 21,50,000 shares which is about 10.21% of the issued share capital of defendant no.1. Defendant No.1/Asian Health Care Services Ltd. (AHCSL) is a company formed pursuant to an agreement between defendants 2 to 4 whereby it was agreed that a joint venture company would be formed for carrying on the business of health-care by building a hospital. Defendant no.2/Konkan Unnati Mitra This Order is modified/corrected by Speaking to Minutes Order Mandal (KUMM) is a public charitable trust under the

Bombay Public Trusts Act, 1950 and a society registered under the Societies Registration Act, 1860.

Defendant No.3/Shristi Infrastructure Development Corporation Ltd. (SIDCL) is a company and holds 21,50,000 shares in Defendant no.1. Defendant No. 4/Opulent Venture Capital Trust (OVCT) is a venture capital trust under the Indian Trust Act, 1882, and holds 62,50,000 shares of Defendant No.1. Defendant Nos. 5 to 8 are trustees of Defendant No.4. Defendant No.9 is the President of Defendant No.2 and Chairman of Defendant No.1. Defendants Nos. 10 to 14 are directors of Defendant No.1 nominated by Defendant No.2. Defendant No.15 is the Secretary of Defendant No.2. Defendants Nos. 16 to 21 are directors nominated by Defendants Nos. 3 and 4. Defendant No.22/Manipal Education & Medical Group India Private Ltd. (MEMG) & Defendant no.23/Horizon Infrastructure Limited (HIL) are third parties who have signed agreement with Defendant No.2.

4 The basic dates/events are as under:

On 28.04.1981 the Government of Maharashtra granted to Defendant No.2 a lease of land admeasuring 7000.91 sq.mts., being Plots Nos. 73A, 74, 74A and 74B at Worli in Mumbai for 99 years (said land). A Lease deed was executed on 8th September, 2000, which was amended subsequently for the purpose of setting up a campus for cultural, social and educational activities.

Clause 2(t) and 2(u) interalia provide that the Lessees shall not assign or part with possession or transfer or underlet the leased premises or the Lessees' This Order is modified/corrected by Speaking to Minutes Order interest therein in any manner without the prior/previous consent in writing of the State of Maharashtra. The Lease Deed was executed on behalf of Defendant No.2-Public Trust by 4 Trustees duly authorized by Trust Resolution dated 23 August 2000.

5 The Lease Deed was modified on 09.01.2001, 09.03.2001 and 18.05.2001.

By the modification new clause 8 has been added, to enable the Lessee to develop the land to its full potential and especially in regard to the Lessee's Constitution; the Lessee shall be at liberty to enter into joint ventures, collaborations and other arrangements (with or without equity participation) with any persons and/or parties of its choice and accordingly the Lessee shall not be bound and liable to obtain any further or other consents or permissions of the Lessor for the same ...."; the Lessee could construct a hospital and/or medical college on the said land.

6 On 03.02.2004, Defendants Nos. 2 to 4 entered into a Joint Venture Agreement (JVA) to participate in the shareholding and management of a joint venture company for the purposes of carrying on the business of healthcare by building a hospital. It was agreed that the group consisting of defendant nos. 3 and 4 ("Group A") would be given 50% share in the JV Company and defendant no.2 ("Group B"/"Defendant 2 Group") would be allotted 50% shares for use of its said land to

construct the hospital by JV Company. Each group will be equally represented on the Board of JV Co. i.e. Defendant no.1.

7 On 13.05.2004, defendant no.1-company was incorporated. Articles of This Order is modified/corrected by Speaking to Minutes Order Association of Defendant no.1 - clause 1 (bb) states that "land" means the said Leased land as mentioned in the JVA and that defendant no.2 has offered "use of Land" to the company for development and running of a hospital as per JVA.

Clause 4 provides for share capital to each Group 50%-50%. To defendant no.2, the 50% shares are "for use of land for hospital". The plaintiff admits that defendant no.2 Trust was entitled to issuance of 50% shares in defendant no.1 company for offering the use of the land for hospital.

8 On 6.09.2004, the Charity Commissioner granted permission under Section 36 of the Bombay Public Trusts Act, allowing defendant no.2 to develop the Trust property in collaboration with defendants 3 and 4 as per the JV A. 9 On 10.09.2004, in the meeting of the Board of Directors of defendant no.

1 it was resolved to allot and issue 50% shares to each of Group A and 50% to Group B and accordingly shares were issued and allotted. In 2004, an account was opened in the name of defendant no.1 with the ICICI Banks Rasoi Court Branch at Kolkata to the knowledge of the Nominee Directors of defendant no.2.

The opening of the account was discussed at a meeting of the board of defendant no.1 on 2nd June, 2004. The account was operated by defendants 16 and 17 to the knowledge of all directors.

10 On 15.10.2005, the shareholders of defendant no.1 approved the accounts of defendant no.1 at the Annual General Body Meeting for the year 2004-2005.

This Order is modified/corrected by Speaking to Minutes Order 11 On 23.12.2005, defendant no.1 had applied to HUDCO, a GOI body (Government of India), for loan assistance of Rs.7000 lakhs which was sanctioned subject to conditions set out in the sanction letter.

12 28.08.2006, the annual accounts and balance-sheets of defendant no.1 for the year 2005-2006 were approved by the Board of Directors. The said land is treated as an asset of defendant no.1 in the said Balance Sheet which was signed by defendant no.9.

On 11.11.2006, as alleged, defendant no.2 was in negotiation with the Trustees of the Hinduja Foundation for the constructions of a hospital.

14 On 28.11.2006, there was an addendum to the JVA (dated 03.02.04) which re-confirmed that the land provided by defendant no.2 was of high value and should be regarded as defendant no.2's contribution to the project. It provided for completion of project within stipulated period of time and required defendant no.3 to bring in quasi capital of Rs. 50 crores. Completion of project within stipulated period of time was a new condition which sought to be imposed as the same was not there



in JVA. Defendant no.2 group though seeks to justify termination of JVA on the ground that project was not completed in the fixed time frame as per the addendum of Nov/Dec 2006 they are also disputing the validity of this very addendum.

15 On 09.02.2007, Minutes of the Meeting of the Board of Directors at which This Order is modified/corrected by Speaking to Minutes Order various decisions including award of construction contract was discussed.

16 On 07.03.2007, Singhanian & Co. on behalf of the Hinduja Trust addressed a letter to defendant no.9 on the project to develop the hospital. On 03.04.07, Minutes of defendant no.1 at which various decisions taken regarding bank account etc. These MoM were confirmed at the next meeting on 16th July, 2008.

17 On 23.04.2007, defendant nos. 1 to 3 entered into an agreement which provided, inter alia, that the construction and development of the hospital would be undertaken by defendant no.1 and that the said land is to be assigned in favour of defendant no.1. The plaintiff is seeking specific performance of this Agreement. Defendant no.2's group is disputing the validity of this agreement on the ground that defendant no.1 had no authority to execute this agreement on their behalf.

18 As alleged on 02.05.2007, defendant no.1 acted upon the agreement and placed orders on Chorus, U.K. For the supply of approximately 2123 MT of steel value at US \$ 21,73,192. On 07.05.2007, defendant no.9 addressed a letter to Mrs.Chanda Kochhar, Deputy Managing Director of the ICICI Bank, asking that instructions should be issued that no cheque issued by defendant no.1 is honoured unless both groups have signed the same. On 16.05.2007 the ICICI Bank addressed a letter to defendant no.1 informing it that no cheque, unless it was signed by both groups would be honoured. On 16.05.2007 the ICICI Bank also confirmed the above position to defendant no.9. On 16.05.2007 and 21.05.2007 This Order is modified/corrected by Speaking to Minutes Order defendant no.1 informed the ICICI Bank that the cheques should be honoured or else defendant no.1 would suffer. On 25.05.2007 the Registrar of Companies addressed a letter to defendant no.1 that defendant no.3 was operating the ICICI Bank account to the exclusion of defendant no.2. On 28.05.2007, defendant no.

1 replied to the said letter. On 29.05.2007, the Registrar, under Section 234 of the Companies Act called upon defendant no.1 to furnish bank accounts. On 31.05.2007, defendant no.1 replied to the letter that the queries did not come within Section 234 of the Companies Act. Defendant No.1 instituted Writ Petition No.1335/2007 in this Hon'ble Court for the quashing of the above letters.

19 On 11.06.2007, defendant no.1 informed defendant no.9 of the financial details. On 14.06.2007, defendant no.1 informed the ICICI Bank that the cheques should be honoured or else defendant no.1 would suffer.

20 On 09.08.2007, the writ petition was disposed of and the Registrar of Companies was directed to provide a gist of the complaint. On 23.08.2007, the Registrar forwarded the gist as directed by the Order in the Writ Petition. On 20.09.2007 the Registrar of Companies caused an inspection of the

books of accounts under Section 209A. On 18.10.2007 defendant no.1 replied to the above letter. On 02.11.2007, the Registrar of Companies called upon the Company Secretary to furnish the Power of Attorney authorizing him to affirm the Writ Petition. On 07.11.2007, defendant no.1 addressed a reply to the Registrar.

On 16.11.2007, the Registrar of Companies called upon defendant no.1 to furnish the Minutes of the Meeting at which the Power of Attorney was authorized. On This Order is modified/corrected by Speaking to Minutes Order 28.11.2007, the Advocates of defendant no.1 addressed a reply to the above letter.

21 On 21.01.2008, the Registrar of Companies issued several show-cause notices to defendant no.1. On 29.01.2008, the Registrar of Companies issued another notice that a complaint had been received under Section 234 of the Companies Act wherein it was denied that any authority had been granted.

22 On 18.06.2007, the Executive Secretary of defendant no.2 informed defendant no.1 that the Police Commissioner had addressed a letter that incomplete construction work posed an imminent danger to the neighbouring buildings. The Group B as alleged by filing motivated false and frivolous complaints and instigating the authorities created several hurdles in the smooth functioning of the defendant no.1 and in completion of the project. On 26.06.2007, defendant no.1 replied to the above letter.

23 On 01.02.2008, defendant no.2 purported to terminate the agreement dated 1st February, 2004. On 14.02.2008, defendant no.3 replied to the above Notice of Termination. On 25.02.2008, defendant no.2 responded to the above letter from defendant no.3.

24 On 04.04.2008, defendant no.2 addressed a letter to Government of Maharashtra and forwarded premium. On 05.04.2008, defendant no.2 addressed a letter to Municipal Corporation of Greater Mumbai regarding the This Order is modified/corrected by Speaking to Minutes Order payment of premium for additional FSI. On 14.04.2008 a Memorandum of Understanding (MOU) between defendant no.2 and defendants nos. 22 and 23 as alleged signed to construct Hospital on the land which is the subject matter of the present suit. Group A has by this time as alleged, invested Rs.9,17,52,334/- into the project.

25 After termination of above agreement, KUMM has entered into a MOU dated 14.04.2008 with MEMG (defendant no.2) and HIL (defendant no.23) to develop, construct, operate and manage the scheduled property by setting up a new Joint Venture Company to be called "Manipal KUMM Health Services Private Limited". On 28/04/2008 the plaintiff has filed the Suit and the Notice of Motion.

26 On 05.05.2008, the Advocates for defendants Nos. 2, 9 to 15 handed over and disclosed the MOU. On 12.05.2008, defendant no.11 sought to explain why he signed the agreement. On 16.05.2008, a notice from the Registrar of companies was received.

27 Notice of Motion No.1691/08 in the Suit was heard and on 5 th May, 2008 this Court has passed the following order:

"1 Mr.Pandya waives service for defendant no.1. Mr.Iyer waives service for defendant nos. 2, 5 and 9 to 15 and Mr.Chitnis waives service for defendant nos. 3 to 8 and 16 to 21.

2 Heard for some time. After some hearing, the This Order is modified/corrected by Speaking to Minutes Order defendant nos. 2 and 9 to 15 through their counsel made the following statements.

i )The defendant nos. 2 and 9 to 15 have not entered into any agreement with Hindujas ii )The defendant no.2 has entered into an agreement with Manipal Education and Medical Group of India Pvt.Ltd. And Horizon Infrastructure Ltd.

iii) The defendant nos. 2 and 9 to 15 would maintain the status quo till the next date.

3 In view of this, no ad-interim relief is necessary at this stage.

4 At this stage Mr.Seervai states that since the names of the third parties have been disclosed plaintiffs may be granted leave to amend to join the parties. Leave to that extent is granted.

Amendment shall be carried out within two weeks and the plaintiffs shall serve the added defendants within three weeks hereof and file affidavit of service.

5 The parties shall file affidavits in reply and rejoinder, if any, on or before the next date. The defendants are directed to serve on the plaintiffs copies of their affidavits in reply on or before 2 nd June 2008. Plaintiff shall serve on the defendants rejoinder, if any, on or before 9th June 2008. List the motion for final hearing on 16 th June 2008 at the bottom of ad-interim board."

This Order is modified/corrected by Speaking to Minutes Order 28 The matter was thereafter adjourned from time to time, but it appears that there was no continuation of the order thereafter. The basic parties have filed reply, rejoinder, sur-rejoinder, additional affidavits, except the Company (defendant no.1).

29 As urgency is shown, therefore, by consent of the parties, the matter was listed and heard for finally on 26.08.2009/4.9.2009 and lastly closed for orders on 7.10.2009.

30 As noted, on 3.2.2004 "KUMM" entered into JVA with SIDCL and OVCT and thereby formed the Company "AHCSL" (defendant no.1). The title of the land of KUMM was never transferred upon anyone except for development/improvement as agreed. The project, however, could not be completed for various reasons including the stability of the finance. Time period was fixed and insisted to complete the project by February, 2009, but in vain.

The Memorandum and Articles of Association of Asian Health Care Services Limited, the company as formed pursuant to the JVA, itself refers various JVA clauses. Further agreement dated 23.04.2007 also alleged to have been entered into between the same parties to the JVA.

31 As there was no satisfactory and sufficient progress of the project apart from various notices from various Departments referring to various non-

compliances and inaction, KUMM by letter dated 1.2.2008 addressed to SIDCL This Order is modified/corrected by Speaking to Minutes Order and OVCT, terminated the JVA dated 3.2.2004 and also invoked arbitration clause of the JVA and appointed an Arbitrator.

32 It is clear from the pleadings, apart from the above referred documents/agreements, that the plaintiff was no-where concerned with the basic agreement between the parties. The SIDCL Group, at the most, may be affected party specially in view of JVA dated 3.2.2004, alleged agreement dated 27.04.2007 and termination notice dated 1.2.2008, besides MOU dated 14.04.2008 entered into by KUMM for setting up a new Company.

33 Therefore, at this stage and specially in this proceeding, unless the termination notice dated 1.2.2008 is declared null and void or bad in law, the JVA of 3.2.2004 just cannot be the foundation to consider the case at the instance of the plaintiff as sought. The Company/defendant no.1 is not seeking any specific performance of the contract dated 03.02.2004. The declarations are sought only by the plaintiff. The wording of JVA read with Memorandum of Articles, therefore, need to be read together for any kind of interpretation referring to any kind of dispute between the parties to the JVA. The Articles of Association cannot be read in isolation without referring to JVA clauses.

34 It is also clear that KUMM throughout proceeded with intention to construct and develop sub-plot for a specialised hospital. Accordingly, they entered into earlier JVA, but as the project could not be completed by the company and SIDCL and others though time was prescribed for various reasons This Order is modified/corrected by Speaking to Minutes Order including unstable finance. Having found this and to achieve the object and purpose of acquiring the land, they proceeded and terminated the first JVA and entered into a fresh one.

35 It appears from the record that defendant no.1-company never entered into any agreement with defendant no.2 for construction/development of the hospital.

Therefore, unable to raise finances also. Under what circumstances, the agreement dated 23.04.2007 was executed only by one of the Trustee of defendant no.2 on a specific representation by defendant no.16 on behalf of defendants 1 and 3, for the purposes of raising finances; and the agreement was neither duly stamped or registered and; what is the binding effect of the same on the parties, are again a matter of detail inquiry and trial. There was no permission of whatsoever nature sought from the Charity Commissioner and from the Government of Maharashtra (GoM) before and after entering into the agreement dated 24.04.2007. Therefore, unless the plaintiff gets Order of specific performance after due trial, then only the Court may consider the case of the plaintiff for interim reliefs based upon the same. As already noted, no such specific performance of development

and construction agreement is enforceability at the instance of the plaintiff in such circumstances. Even the right flows from addendum of November/December 2006, if any, unless decided, the plaintiff cannot claim any advantage or benefit from the same, because of failure to complete the the project by February 2008, though time was extended.

36 There is a serious dispute even to the alleged approval of the agreement This Order is modified/corrected by Speaking to Minutes Order dated 23.04.2007. There is a special denial to the assignment of the Lease rights of defendant no.2 to defendant no.1 in any manner. It is also averred that the said agreement was never approved by the President of defendant no.2 or defendant no.2-Trust itself.

37 The submission based upon Article 7.2 of the JVA that there was no time limit imposed on defendant no.3 for bringing Rs.50 crores, in the facts and circumstances of the case, as referred above, is unacceptable. The fact remained that the amount/finance of Rs.50 crores could not be brought on record of the company/project as and when required, as agreed. The submissions referring to the financial stability and related resolutions and documents on record read with the affidavits are also, in my view, in no way supported the case of the plaintiff.

38 It is not the case that Company was formed first and thereafter got the allotment of the land and/or land in question was allotted in the name of the company. The JVA itself was formed by defendants 2 to 4 for particular project on the land in question. It is basic dispute therefore between defendants 2 to 4, if any, who are parties to the JVA. In this background, the submission that the possession of the land was handed over to defendant no.1 pursuance to the JVA to enable defendant no.1 to construct a hospital at the site is also not acceptable, specially in view of the purpose and object for forming the JVA and non-

performance and inaction on the part of contesting defendants, besides unstable finance as referred above. It is difficult to accept the case of the plaintiff that the intention was to transfer the title and owner of the land without completing the This Order is modified/corrected by Speaking to Minutes Order legal formality of permission from the Joint Charity Commissioner, as well as, GOM, specially in view of the Lease Deed/grant in question in favour of defendant no.2.

39 Admittedly, defendant no.1/company has not filed reply affidavit to the Motion and any denial to the averments made by the contesting defendants. However, oral submissions are made in the court. From the above events, even as per the plaint, affidavit supporting the Notice of Motion and documents, at the most, the cause of action and the grievances may be of defendant no.1, there is nothing independent or separate cause of action for personal grievance of plaintiff in their capacity as the shareholder of the company. Any attempt, even if any, of defendant no.2 as alleged, to take away defendant no.1's right by Agreement of 14.04.2008, apart from the invocation of Agreement of 2004, to construct multi-speciality hospital building in the suit land cannot be stated to be personal grievance and/or cause of action of plaintiff, specially when the company and defendants 3 and 4 are not prevented or debarred from challenging the action or inaction of other defendants.

40 The Notice of Motion, therefore, at this stage, cannot be said to be bonafide as the company has its own agreement to resolve the dispute, but not chosen to do so and now supporting the plaintiff by avoiding to follow the above terms/clauses without filing any affidavit to support the case of This Order is modified/corrected by Speaking to Minutes Order the plaintiff or to oppose the positive averments against the company by the contesting defendants. I am not deciding the Suit at this stage. The plaintiff, therefore, cannot be permitted to defend the default or inaction committed by the company, as referred above, as the equitable interim reliefs so sought are only in favour of the company.

41 Admittedly, the alleged derivative action of the plaintiff and even of SIDCL Group have joint and common interest, but yet only the plaintiff has initiated the proceeding by challenging the agreement/MOU. There is no specific denial and/or challenge by the company except oral supporting arguments. There is nothing on record to show or even otherwise, whereby the company has authorised or resolved in any way in favour of the plaintiff to initiate such action.

42 The arbitration proceeding, in view of above, if available basically between the parties to the same, the company or the concerned parties could have invoked the arbitration proceeding for such reliefs. There is nothing to show why the company could not invoke such proceeding for such interim reliefs without delay. The company had in fact filed a Writ Petition against defendant no.2 for its right as recorded earlier. Defendant no.2 has already invoked arbitration proceedings under Section 11 of the Arbitration Act and is pending. The plaintiff is definitely not a party, but the other defendants (SIDCL) are parties to the said agreement. In this This Order is modified/corrected by Speaking to Minutes Order background also, the shareholder/plaintiff cannot be allowed to defend the company's action or inaction and the company's defaults or inactions in such fashion, basically by invoking an equitable, discretionary jurisdiction against the contesting defendants.

43 There are various defaults, as referred above, which are not denied, compelled the defendants to take such steps to achieve the object and the project. The objections have been raised to justify the same, but at this stage, those notices/inactions/defaults just cannot be overlooked while considering the reliefs so claimed by the plaintiff. All these need detail inquiry and trial. The reasons just cannot be accepted merely on the basis of averments specially when the company has not even denied those adverse averments. If that is so, it is difficult to accept the case of the plaintiff and even the defence referring to the company. Therefore, all these reliefs/claims/defences on behalf of the company cannot be the foundation for the plaintiff to claim the reliefs in favour of the company by contending it to be a derivative action.

44 The aspect which cannot be overlooked is that the shareholders/the plaintiff is claiming the equitable relief in favour of such company. The concept of derivative action even though invoked, in the present facts and circumstances, in my view, is not sufficient to grant relief in favour of the company by such indirect method.

This Order is modified/corrected by Speaking to Minutes Order 45 The plaintiff's share is 10% with the company. The detail material on record shows that defendants 3 and 4, the SIDCL Group is holding the majority shares of the company i.e. 50% of the shares. The company is in control and

incharge of SIDCL Group. The plaintiff, therefore, also cannot defend the alleged inaction on the part of SIDCL unable to bring requisite finance in time of Rs.50 crores as per the JVA. The defendant/company has not obtained a secured loan from the financial Bank though the time was extended. The whole project in this way was stalled for more than four years.

46 Admittedly, the plaintiff has challenged the termination of JVA dated 3.2.2004 but not specifically by defendants 3 and 4-SIDCL Group. The amount was never made available as agreed by defendants 3 and 4. The reason for withdrawal of such deposit/money cannot be sufficient to grant reliefs as claimed against the company and/or against the defendants or in favour of the plaintiff. The fact remains that they also failed to take effective and useful steps to start and complete the project, based upon the agreement between the parties.

47 It is clear that the company and the members are bound by the provisions contained in the Articles of Association. They have also established a contract between the company and the members and between This Order is modified/corrected by Speaking to Minutes Order the members interse. [Naresh Chandra Sanyal v. The Calcutta Stock Exchange Association Ltd., AIR 1971 SC 422 and V. B. Rangraj (supra). In the present case as noted, the said Articles itself refers to various JVA clauses. Therefore, it is necessary to read both these two documents together to consider the rival submissions of the parties. The JVA cannot be read in isolation. It has to be read with Company's Articles. These are interlinked and interwoven. There are various clauses of the Articles which have referred and dealt with JVA clauses. In fact, the formation of the company itself, based upon the JVA, to achieve the particular purpose and object. Therefore, it is difficult to dissect and interpret as contended at this stage & as submitted to grant relief as prayed. The purpose of any joint venture or a formation of such entity is nothing but a meeting of commercial mind to achieve particular purpose/object/project. [New Horizons Limited & anr. vs. Union of India & ors., (1995) 1 SCC 478.] In view of the present facts and clauses of JVA and Articles apart from the purpose for forming such company, the reliance on Ram Sarup Gupta (dead) by L.Rs. vs. Bishun Narain Inter College & ors., AIR 1987 SC 1242 is of no assistance.

48 To read commercial documents, I have already observed in Ispat Industries Ltd. vs. Shipping Corporation of India Ltd in Arbitration Petition No.343/2009, on 16.10.2009, as under :

"8 The Apex Court recently in Vimal Chand This Order is modified/corrected by Speaking to Minutes Order Ghevarchand Jain & ors. vs. Ramakant Eknath Jajoo, 2009 (5) SCALE 59 has observed while dealing with the construction of a commercial contract as under :

"A document, as is well known, must be construed in its entirety"

I have observed in Reliance Natural Resources Ltd.

v. Reliance Industries Limited, 2007 (Supp.) Bom. C.R. 925 as under:

"93 Apart from that the following extracts from Chitty on Contracts (27th Edition), 1994 in para 12.053 is also useful:

"Every contract is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated word or clause."

9 Recently, in *Durham V. BAI (Run Off) Ltd* (in scheme of arrangement) and other cases, [2009] 2 All ER, 26, the Queen's Bench Division while dealing with the construction of wordings in a commercial contract by referring to various other English Judgments has observed as under:-

(203)A summary of helpful principles, drawn largely from the words of Longmore LJ in *Absalom* (on behalf Lloyd's Syndicate 957) v *TCRU Ltd* (2005) EWCA Civ 1586 at (7), (2006) 1 All ER (Comm) 375 at (7), (2006) 2 Lloyd's Rep 129, and based upon submissions to me by counsel, which I had approved, in the recent case of *Reilly V. National Insurance \* Guarantee Corporation Ltd* (2008)EWHC 722 (Comm) at (13), (2008) 2 All ER (Comm) 612 at (13), was again the subject matter of agreement, and I repeat and incorporate it:

'(a) Ordinary Meaning. There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and This Order is modified/corrected by Speaking to Minutes Order phrases in their commonly understood and accepted sense. (See also para (7) (i)-(iii) in the judgment of Longmore LJ and in particular: "The object of the inquiry is not necessarily to probe the 'real' intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.")

(b) Businesslike Interpretation. It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. (See also the words of Lord Diplock in *Antaios Cia Navieras SA V Salen Rederierna AB*, *The Antaios* (1984) 3 All ER 229 at 233, (1985) AC 191 at 201 cited at (7)(iv) by Longmore LJ:

If a "detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".)

(c) Commercial Object. The commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording.



(d)Construction to avoid unreasonable results. If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract.'

10 The parties have made their respective interpretation of these various terms and clauses from their points of view in support of their submissions. The Court need to take into This Order is modified/corrected by Speaking to Minutes Order consideration all but within the frame of law. The contract/agreements need to be read as a whole considering the nature & the purpose of the business. The clause and the contract as a whole even if is clear and unambiguous, the court needs to consider the same in the facts and circumstances of the case. It is necessary to see relationship between words; sentences; clauses; chapters and the whole document. It cannot be read in isolation. The aspect of faith, trust, fiduciary relationship and understanding between the parties, just cannot be overlooked, while interpreting any such private commercial documents."

49 The above principles will apply here also. The fact remains that JVA is in existence even after incorporation of the company. All the basic elements and clauses pertaining to the plot/land of defendant no.2 are incorporated in detail. Both the parties are aware of the same. The isolated reading only of Articles will frustrate the whole scheme and the object. It is not possible to overlook the purpose and formation of the company. It was intended to construct and build the hospital. There is substantial material on record to show that defendant no.2 has title and right over the land throughout. It was never transferred or intended to This Order is modified/corrected by Speaking to Minutes Order transfer and basically in view of grant of land conditions itself. There is also no statutory permission or consent on record to show that any such transfer of tile or right. The land just cannot be utilised but only as per the original grants and agreements even by the company. Defendant no.2, in view of those terms and conditions cannot transfer the tile, ownership without prior due permission from the Department/Authorities. It is difficult to accept the contention on behalf of the plaintiff that the ownership/title of the land and has been transferred by the agreement.

50 If the company is established for a particular project, it need to be respected throughout. The document/agreements, main object and purpose just cannot be overlooked. If the defendant/company or concerned parties though agreed, but was not in a position to complete the project and in fact committed various defaults and suffering from Departmental notices for inaction or defaults, besides no consistent financial support and unless all these ingredients are answered in favour of the company or in favour of the plaintiff, and unless the main prayers so raised in the Suit are granted including the declaration of these two agreements being null and void, at this stage, I am not accepting the case of the plaintiffs who is seeking such reliefs in favour of defendant no.1 stating it to be the permissible derivative action.

51 The completion of the project is very important than waiting for final This Order is modified/corrected by Speaking to Minutes Order decision of the Suit. It will cause great injustice and harm, irreparable injury to all. It will defeat and frustrate the purpose of the project. The

plaintiff, even otherwise, is not entitled to any relief or even compensation or for damage as the prayers are only in favour of defendant no.1. The balance of convenience, equity also lies in favour of the defendants and basically against the plaintiff. The plaintiff must stand on his own legs to support his case.

The learned senior counsel appearing for the plaintiff has relied upon various judgments to support the respective contentions. Those judgments are distinct and distinguishable on facts itself. On the contrary, those judgments itself read and referred various clauses and facts and passed the appropriate order and judgments. Therefore, the facts and circumstances are very essential to consider the rival submissions of the parties, even in the present case. There is no dispute about the rights of the shareholders of the company. The point is whether the present action is bonafide and genuine. [Life Insurance Corporation of India vs. Escorts Ltd. & ors.,(1986) 1 SCC 264 and V. B. Rangaraj vs. V. B. Gopalakrishnan & ors., (1992) 1 SCC 160. ]. The petitioner has not instituted any action against the company for mis-management. The present alleged derivative action, [Wallersteiner vs. Moir (No.2) Moir vs. Wallersteiner & ors (No.2), (1975) 1 All ER 849], inspite of the fact that the plaintiff and defendants 3 and 4 have majority shareholding. Therefore, it is difficult to accept even the case This Order is modified/corrected by Speaking to Minutes Order of alleged oppression or derivative action by minority shareholders to maintain a claim on behalf of the company against a majority. [ Daniels and others vs. Daniels and others, (1978) 2 ALL ER 89. The aspect of fraud or oppression in the present case also need detained inquiry subject to proof and material. The case in Dr. K.A. Dhairyawan and others vs. J.R.Thakur and others, AIR 1958 SC 789 is not applicable on facts itself, in view of the specific clauses of JVA and Articles of the company, besides the facts as referred above. The plaintiff has not sought any injunction order against the defendants from taking steps pursuance and/or implementation of the resolutions in respect of allotment of rights shares or for appointing any additional Directors of the company. The prayers and the reliefs are totally different from Rolta India Ltd. & anr. vs. Venire Industries, 2000 (2) Bom. C.R. 241. There is no issue about giving any effect to the resolutions of the Board of Directors and/or acting upon the same as was the case in IL & FS Trust Company Limited & anr. vs. Birla Peruccinni Limited & ors., 2003(3) Bom.C.R. 334. This is not the case also whereby any injunction is sought against the purchaser of the property. It is also difficult to accept the case of the plaintiff, in view of the above, that the wrong doers are in control of the defendant/company and hence the company would be unable to maintain action and, therefore, the present derivative action. Therefore also Nirad Amilal Mehta v. Genelec Ltd., (2009) 1 Comp. LJ 361 (Bom) is of no assistance. Here is a case of completion of a project as early as possible as the company/defendant no.1 This Order is modified/corrected by Speaking to Minutes Order and other defendants were unable to complete the project though agreed.

As averred, it is not the case of the plaintiff that the Suit is filed by majority of the shareholders for the company, specially when the averments are that the Suit is based upon the derivative action. Therefore, the case of Dr.Satya Charan Law & ors. vs. Rameshwar Prosad Bajoria & ors., A.I.R. (37) 1950 Federal Court 133 is also not applicable. And if it is a case of majority shareholder, then in view of agreements itself, the remedy is elsewhere.

53 In view of the averments itself and as there is no arbitration agreement with the plaintiff, there is no question of invocation of Section 8 of the Arbitration Act as sought to be contended. It is basically for a dispute between the parties to the JVA dated 3.2.2004 and all actions arising therefrom.

54 Besides, the Suit is for specific performance of contract and for declaration and related reliefs/injunction. The relief of specific performance is a discretionary. The injunction or such interim reliefs in aid of specific purpose and/or declaration read with compensation/damages are two other important facets in such matters. It also depends upon the facts and circumstances of each case. The injunction or interim reliefs, in such situation, need to be based upon the various elements of Order 39, Rules 1 and 2, and Order 40, Rules 1 and 2 and Specific Relief Act. The This Order is modified/corrected by Speaking to Minutes Order principles as laid down in Gujarat Bottling Company Ltd. & ors. vs. Coco Cola Company & ors., (1995) 5 SCC 545 have been reiterated in many cases. The Apex Court in Seema Arshad Zaheer v. Municipal Corpn. Of Greater Mumbai, (2006) 5 SCC 282 has held thus:

"30 The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clear hands."

55 Admittedly, there was no concluded contract between the plaintiff and the other defendants. The plaintiff being not a party to such agreement cannot claim the specific performance in such fashion. The company's readiness and willingness to perform its part of the obligation just cannot be answered or defended by the plaintiff in such proceedings. The company has its own remedy available as per the agreement itself. The plaintiff cannot seek specific performance on behalf of third party like the company or defendants 3 and 4. Even if it is accepted that it is derivative action on behalf of the company, still in the present facts and circumstances of the case, specially when there is a specific clause of arbitration This Order is modified/corrected by Speaking to Minutes Order agreement. In my view the suit is not bonafide, specially when the material and evidence and the proof in support of the submissions, as noted above, are unclear and unanswered.

56 Once in a commercial contract like this, if parties have taken decision based upon the commercial wisdom and material available with them, and terminated the contract and entered into fresh contract, the Court cannot compel such party to continue with the work/project only through the debarred party. The facet and importance of completion of the project within the stipulated time just cannot be overlooked. The contract, as alleged, if terminated illegally and/or any breach of various clauses, the aspect of compensation/damages subject to proof and the evidence need to be kept in

mind while considering the case of the plaintiff or the supporting defendants. [Maytas Infra Limited vs. Utility Energytech and Engineers Pvt.Ltd. & ors., 2009 (4) Bom.C.R. 143.].

57 Timely completion of the project was the object of the company and the JVA. The plaintiff just cannot defend/ support company's defaults and financial un-stability and breaches of the obligations, to claim injunction, interim relief in such fashion. All these factors, in my view, goes against the plaintiff and other supporting defendants.

58 The aspect of conduct of the plaintiff is also material element to This Order is modified/corrected by Speaking to Minutes Order refuse the interim reliefs as sought in the present Notice of Motion, specially when the plaintiff has invoked discretionary and equitable reliefs, based upon the feeble & shaky foundation of material and evidence as referred above, without obtaining leave under Order 1, Rule 8 of Code of Civil Procedure and a leave under Clause XII of the Letter's Patent and further without joining all the Trustees of defendant no.2-Trust and even without obtaining permission from the Charity Commissioner under the Bombay Public Trust Act.

Admittedly, the present proceeding is not under the Companies Act.

The plaintiff has claimed reliefs for the company. The company has its own remedy available in view of the agreement.

60 Based upon the MOU dated 14.04.2008, the parties have proceeded & invested huge amounts after obtaining requisite permission to commence the construction of the proposed hospital. But in view of the Suit/Motion, it could not be proceeded further. This will certainly delay and frustrate the whole purpose and object of multi-speciality hospital which is of public importance.

From the affidavit and photographs and signboards on record, it is also clear that defendant no.2 has carried out certain civil work during July/August 2008 on the suit land to prevent seepage of the water. Defendant no.2, in view of above also, is and always was in de jure and de facto possession of the suit land. Even otherwise, in view of the grant of Lease in favour of defendant no.2 and even in view of the JVA and subsequent documents and the averments made in the various affidavits itself it is difficult to accept the case of the plaintiff that they are owner of the land and are in exclusive possession of the same. It was never This Order is modified/corrected by Speaking to Minutes Order handed over as contended by the plaintiff and other supporting defendants. It is difficult to accept the case of the plaintiff by overlooking the conjoint and interlinked and interwoven clauses read with subject and object of the JVA and its Articles, merely because defendant no.1/company and/or defendants 3 and 4 have paid and invested and incurred expenses till date of termination In the present facts and circumstances, that itself cannot be the reason to grant interim relief in favour of the plaintiff and against the defendant which will frustrate the purpose and object of the project itself. There is no specific interim reliefs as prayed was granted in favour of the plaintiff till this date. Defendant no.2, as averred and as recorded, made the payment/charges to Urban Development Department and has obtained all the approvals for construction of the proposed hospital. The personal allegation even if any made that itself cannot be the reason, unless proved, to overlook the other material on record which are against the plaintiff and other contesting defendants including

the company.

61 In view of the above, I am not inclined to grant any relief. The Notice of Motion is accordingly dismissed. No costs.

62 The learned counsel appearing for the plaintiff seeks stay of this judgment to prefer an Appeal. The learned senior counsel appearing for the defendants Mr. F.E. Devitre, has opposed the same. Considering the controversy, I am inclined to observe that this Judgment will take effect after two weeks from today.

Certified copy expedited.

(ANOOP V. MOHTA, J.)