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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on:17.10.2012

Judgment delivered on:01.11.2012

+ CO.PET. 62/2008 and CO. APPL. NOS. 263-264/2008, 405/2008, 455/2008, 662/2008, 1176/2008, 1274/2008, 968/2009, 1089- 1090/2009, 237/2011, 385/2011

LAGUNA HOLDINGS PVT. LTD. & ORS Petitioners
Through Mr. Rajiv Sahwahney, Sr. Adv.
with Mr.Vivek Kohli and Mr.
Karn Gupta, Advs.

versus

EDEN PARK HOTELS PVT. LTD. & ORS Respondents
Through Mr P.V. Kapur, Sr Advocate with
Ms. Anuradha Dutt , Mr.Pawan
Sharma, Ms. Ekta Kapil,
Mr.Siddharth Aggarwal, Mr.
Aman Anand, Ms.Anubha Singh
& Ms.Divya Bhalla, Advocates.

INDERMEET KAUR, J.

1 The petitioners (hereinafter referred to as the DKG Group) seek winding up of the respondent company (Eden Park Hotels Pvt. Ltd.) under Section 433 (c) & (f) of the Companies Act. There are four petitioners before this Court. Petitioner no.2 (Davinder Kumar Jain) had special relations with respondent no.3 (Sushil Kumar Gupta); they were

close family friends. The relationship of the two families dates back to the pre-independence period; over the years a relationship of trust and confidence was established between the members of both the families who were in constant touch with each other. The two family groups had entered into two different business ventures. Petitioners (hereafter referred to as the DKG Group) were doing the business of real estate and exports; whereas the Gupta family (hereinafter referred to as the SKG Group) had ventured into the hotel business. Business of both the family groups flourished over time. The SKG Group knowing the financial viability and credibility of the DKG Group invited them to jointly set up a chain of hotels. At that time respondent no.3 was a partner in a hotel property in Delhi.

2 On 20.3.2001 the petitioner no.2 and respondent no.3 agreed to start a business in equal partnership with an equal shareholding and accordingly they incorporated a new company under the name and style of 'M/s Luxor Hotels and Resorts Private Ltd.' (which later came to be known as Eden Park Hotels Pvt. Ltd. vide order dated 27.11.2002) The company was on the lookout for the properties to start a hotel business.

An application was submitted to the government in the name of a

Consortium (comprising of the DKG group, the SKG group as also the respondent company). Bids were submitted for the acquisition of three hotels; the Consortium qualified as a successful bidder for the acquisition of Hotel Qutub. The sale of the Qutub Hotel was effected by the Government of India and the Indian Hotels Company Limited by selling their holding of 99.97% of the issued equity share capital of Edenpark Hotels Pvt. Ltd. which owned the said hotel property. It was agreed and understood between the petitioner no.2 and respondent no.3 that share of the Edenpark Hotels Pvt. Ltd. was to be transferred entirely to the respondent company. On 19.03.2002, parties entered into a shareholder agreement (SHA) pursuant to which the Articles of Association of the company (AOA) were amended on 20.03.2002.

Preliminary Submission

3 At the outset before proceeding with the arguments a proposal for a settlement was mooted between the parties. On 02.5.2012, both the parties had agreed to make efforts to explore the possibility that if the plot owned by the company could be divided into two lots for use and occupation of the respective parties on fair and equitable terms. The

parties had agreed to examine if the FSI/FAR could be equitably divided between the two groups; SKG group has submitted that the offer would be acceptable to it only if he gets the lot with the existing hotel. However, on the next date, a case of non-settlement was reported. The parties appear to be at a deadlock over this proposal. Learned counsel for the respondent insists that FSI/FAR is still available and the construction of another hotel is possible but the petitioner disputes this submission. His submission being that the property admittedly being a lease hold property; no further construction may be permissible; hurdle of the Archeological Survey of India (ASI) would also creates a blockade; this proposal cannot materialize. It is thus accepted that no useful purpose would be served in taking up the matter any further. The Court has thus proceeded to decide the controversy between the parties on its merits.

Arguments of the petitioner

4 Submission of the petitioner is that Section 433 of the Companies Act gives wide powers to the Company Judge to wind up a company; there is a complete deadlock between the two groups; petitioner has no

other alternate efficacious remedy but to seek a winding up. Attention has been drawn to the various clauses in the AOA of the company; submission being that after the SHA had been signed on 19.3.2002 a Board meeting was held between the SKG Group and DKG Group pursuant to which the AOA of the company were amended on 20.3.2012. Clause 6.2.1 which relates to the allotment of 5000 shares by each group in favour of Mr.V.Lakshmi Kumaran has been given a complete goby; it has been ignored; it was never the intention of both the participating groups to resort to this clause; that is why it does not find mention in the amended AOA (dated 20.3.2002). Further submission being that both parties had equal rights to participate in the operation and the management of the company; although admittedly the Chairman and the Managing Director of the Company had to be appointed by the SKG Group yet the Vice-President and the Executive Director were to be nominated from the DKG Group. Attention has been drawn to the definition of “Business Plan” as contained in Article 2(n); submission being that the “Business Plan” has not been adhered to by the SKG Group. Article 43A specifically postulates that an affirmative vote of at least one ‘A’ Director (SKG group) and one ‘B’

Director (DKG group) is essential for the matters enumerated therein including the “approval of the accounts” of the Company. The Company Secretary, Auditor, and Internal Auditor who are the key appointees in the company could only be appointed by the Board of Directors and these decisions had to be ratified by each A’ & ‘B’ group director. Further submission being that admittedly this was a joint venture between the DKG Group and SKG Group. Reliance has been placed upon a judgment of Apex Court reported in (1995) 1 SCCC 478 New Horizons Ltd. Vs. Union of India as also a subsequent judgment reported in (2008) 10 SCC 345 Faqir Chand Gulati Vs. Uppal Agencies Private Limited & Anr. to support an argument that joint ventures are in general governed by the rules of partnership; the relationship of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties and liabilities are generally tested by rules which are closely analogous to and substantially the same; if not exactly the same as those which govern partnerships. Attention has been drawn to the definition of a “joint venture” as defined in *Corpus Juris Secundum* as also the definition as contained in *Black-s Law Dictionary* (7th edition, P.843). Submission

being that on all counts the parties are to be governed by the principles of a partnership. Learned senior counsel for the petitioner fairly points out that although Article 14.1 in the SHA (dated 19.3.2001) does state that this agreement would not be deemed to constitute a partnership yet the terms contained therein clearly evidence it to be in the nature of a partnership; further attendant submission being that although the SHA also contains Clause 15.2 that in the event of a deadlock the alternate remedy of Arbitration is available to the parties yet an Arbitration can at best only resolve a dispute but the Arbitrator will have no power to wind up the company which power vests exclusively with the Company Judge. Submission being that the parties have reached a deadlock, in these circumstances, the very foundation and basis of their joint venture which was based on a foundation of trust and faith having been destroyed; it would be just and equitable that the company be wound up. Submission being reiterated that all important decisions have to be taken by a positive and affirmative action of one group A director and one group B director; the business of the company as on date is being conducted exclusively by the SKG group; the DKG group has been excluded totally from all participation; the statutory auditor who was

initially appointed for one year at the time of the incorporation of the company (on 20.3.2001) has ceased to exist as his terms has not been renewed; the statutory record which includes the balance sheets and annul returns have not been filed before the Registrar of Companies (ROC) since the year after 2002 for which prosecution has been launched by the ROC; the deadlock in the company is complete. Attention has been drawn to the definition of “just and equitable” as contained in Section 433(f). Submission being that the powers of this Court under this sub clause are not to be circumscribed on any count. Attention has also been drawn to Section 443 (1)(d); submission being that the powers of this Court to deal with a winding up petition are contained therein and the words appearing “*or any other order that it thinks fit*” are not to be read *ejusdem generis* to the preceding words and this has been held by a Division Bench of the Bombay High Court in 2002(1) BCR 357 Nilesh Lalit Parekh Vs. Pratibha Inderjit Kapur. Reliance has also been placed upon 1988 Vol. 64 Company Cases 575 Shakuntala Rajpal Vs. Mckenzie Philip (India) P. Ltd. & Ors. to support the same argument. Learned Senior Counsel for the petitioner points out that this was a case where the claim of winding up had

initially been given up; the petition had been admitted only to the limited extent on the sale price to be paid by the contesting respondent to the petitioner; argument for the dismissal of the company petition had been rejected; Court had noted in this judgment that irrespective of the powers available under Sections 397 and 398 of the Companies Act where a winding up petition has been filed, the Company Court has ample powers to examine whether winding up is the proper relief which can be given; the Court can also consider the question whether some relief short of winding up can meet the situation; powers of the Court in this regard are plenary and are expressed in wide terms in Section 443(1)(d); the relief has to be moulded as per the circumstances of each case. Reliance has been placed upon AIR 1976 SC 565 Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwalla & Anr. to support a submission that when there is a complete dead lock in the administration of the company and there is a state of animosity which precludes all reasonable hope of reconciliation and friendly co-operation it is just and equitable that the company should be wound up. To support the same submission reliance has also been placed upon 1974 Vol.44 Company Cases 390 Shrimati Abnash Kaur Vs. Lord Krishna Sugar Mills Ltd. &

Anr.; submission being that the powers of the Company Court under the “just and equitable” clause are not limited and the Court will be guided by the rules of equity and will do what justice demands keeping in view the facts and circumstances of the each case. Reliance has also been placed upon 1983 Vol.54 CC 856 Moti Films Pvt. Ltd. Vs. Harish Bansal, 122(2005) DLT 20 International Caterers Pvt. Ltd. & Anr. Vs. M/s Manor Hotel Pvt. Ltd. as also another judgment of this Court reported as 136(2007) DLT 355 Draeger Werk Aktiengesellschaft Vs. Usha Drager Pvt. Ltd.; submission being that a deadlock in the management of the company is clearly a ground for winding up of the company under the “just and equitable” clause; further submission being that the profitability of a company is not by itself a ground to hold that there is no deadlock in the company; when the equal participators in the joint venture have fallen out and Group B had ousted Group A it does amount to a deadlock. Reliance has also been placed upon 1984 Vol.55 462 Company Cases Eastern Linkers Pvt. Ltd. Vs. Dina Nath Sodhi ; submission being that where the shareholding is more or less equal and there is a complete deadlock in the company on account of lack of probity in the management of the company and there is no hope

or possibility of a smooth and efficient continuance of the company as a commercial concern it is a fit ground to invoke jurisdiction under the “just and equitable” ground; submission being reiterated that even if the company is making a profit this fact is not relevant; if otherwise it is a fit case to wind up the company. It is pointed out that the provisions of Sections 397 and 398 operate in separate and distinct parameters; this is not an alternate remedy available to the petitioner as there is no hope left that the company can be re-structured; this is a fit case the winding petition must be admitted and only then the court can take a final call as to whether the petition is to proceed on its merits or is liable to be dismissed; at this preliminary stage only a prima facie case has to be made out by the petitioner. Submission being that the parties had in fact agreed to separate way back in the year 2005 as the parties could not pull along. Attention has been drawn to the correspondences exchanged between the two groups; first of which is a letter dated 02.12.2005 addressed by the SKG Group to the petitioner (DKG Group) wherein the SKG Group (respondent) had themselves suggested that dividing of the company and its properties is a better alternate as the functioning of the company is not working out. Attention has also been drawn to the

correspondences dated 13.12.2005, 20.01.2006, addressed by the DKG Group to Sushil Gupta where again it has been reiterated that the offer made by Sushil Gupta to divide the properties and the business of the company has been accepted by the DKG Group. Attention has been drawn to the further correspondences exchanged between the parties i.e. letters dated 08.5.2006, 05.6.2006 and 09.6.2006 written by Sushil Gupta to D.K.Jain; submission being that all along efforts were being made between the parties to separate the properties and business of the company at it was no longer possible for the parties to run this joint venture. Attention has been drawn to the terms of the settlement drafted by the two mediators Mr.Jagdish Khanna and Mr.Ashok Kumar Mehra on 13.10.2007 wherein a first option had been given to the respondent to purchase the shares of the petitioner at Rs.190 crores for which advance payment of Rs.30 crores had been made by the respondent by way of separate demand drafts dated 30.10.2007; submission being that if the entire purchase money was not paid by the respondent the second option would be available to the petitioner to purchase the shares of the respondent at the aforementioned value of Rs.190 crores which amount was accordingly deposited by the petitioner with the Mediator as the

respondent had failed to honour his commitment; this was on 04.11.2007; however disputes arose thereafter and the terms of settlement could not fructify. It is contended that the petitioners have been denied inspection and verification of the accounts of the company and the respondent has also prevented the internal Auditor M/s S.Kalra & Associates (appointed by the Board) from seeing the accounts; attention having been brought to the letter dated 04.1.2003 and 21.3.2003 wherein it has been reiterated that the internal auditors are not being allowed to function; further in terms of the letter of Sandeep Gupta dated 29.7.2003 their powers have been curtailed which is against the spirit and intent of the AOA. No business plan has been submitted to the Board or approved which is in derogation of the Article 48(B) of the AOA of the Company and in fact there is no resolution of the Company approving any business plan; attention has been drawn to the minutes of the meetings of the company drawn up on 06.9.2002. Attention has also been drawn to the minutes of the Board meetings for the financial year 2004-05, 2005-06; submission being that in the minutes of the Board meeting recorded on 27.4.2004 there is no mention of approval of any business plan. Mr.D.K.Jain in his letter dated

23.9.2004 has reiterated his protest that no business plan has been submitted by him in the year 2004-05 which has again been reaffirmed in his subsequent letter dated 15.2.2005 as also on 27.9.2005; the minutes of the Board meeting held on 29.9.2005 show that the agenda with respect to the business plan was deferred and thereafter the consideration of the approval of the business plan has not been recorded in any other subsequent meeting. So also is the position for the financial year 2006-07. In the minutes of the Board meeting held on 29.8.2006 it has been noted that the business plan for the financial year 2006-07 was discussed and approved which is clearly a false and incorrect statement as in the letter dated 28.8.2006 Mr.D.K.Jain has specifically stated that no business plan for the year 2006-07 has been received and as such no comments can be made. All these documents clearly show that there has been a falsification of the minutes of the Annual General Meeting (AGM) as also of the Board meetings; there has been a total non-compliance of the provisions of Section 224 of the Companies Act. The AGM scheduled for 29.11.2003, 30.9.2004, 29.9.2005, 29.9.2006 and 28.7.2007 were all adjourned; in terms of Article 31 of the AOA of the Company the Chairman alone had no authority to adjourn the meetings

except with the consent of the members and no such consent was ever taken; meetings have been concluded without transacting any business. This amply evidences that the record of the company has been falsified by the SKG group to obtain an unfair and unlawful advantage and a gain for themselves. There has been no progress in the company. The joint venture initially established by the two groups of 65 rooms and 32 apartments has not been expanded as Board meetings have not taken place; this is primarily for the reason that the respondent has not allowed the petitioner to participate; all Board meetings in fact require a veto vote from Group A i.e. the Group of the petitioner in the absence of which no Board meeting can be conducted; all these facts are clearly evident of the fact that there is a complete deadlock in the company. The Company has necessarily to be wound up.

Arguments of the respondent

5 Arguments have been countered by the learned senior counsel for the respondent. Submission is that the provisions of Section 443 (2) clearly mandate that if an alternate remedy is available to the petitioner and the demand made by the petitioner is unreasonable, the Company

Judge shall refuse to make an order for winding up of the company on the just and equitable ground. Submission is that alternate remedies are available with the petitioner and the invocation of Section 433 (f) is only with a view to harass and coerce the respondent. The parties have not explored the domestic forum; Article 6.2.1 of the SHA enables the parties to resolve their alleged deadlock by resorting to the domestic forum which on one pretext or the other, the petitioner is not allowing to be given a go-ahead. The so called dead lock alleged by the petitioner is not justifiable; it is at the behest of the petitioner himself. Even otherwise, it is clearly resolvable. The second alternate remedy under Sections 397 & 398 of the Companies Act which is a jurisdiction vested exclusively in Company Law Board (after the amendment of 1988) has also not been explored; if any interference is warranted in the internal management of the company, it would only lie within the domain of the CLB. The allegations made in the petition only relate to misunderstandings and squabbles generated by the petitioner himself for which the Court ought not to resort to the winding up procedure which is only a last resort after all possibility of a resolution of disputes through other mediums comes to a dead end. Even otherwise, admittedly

the company is a healthy company; it is profiteering; this is a fit case where the petition should be dismissed at the threshold itself.

Maintainability

6 Submission of the petitioner that the petition should first be admitted and only thereafter the submissions of the party be considered was vehemently countered by the learned counsel for the respondent. Submission being that the admission of the petition itself causes a loss and damage to the reputation of the company and in such a case before the petition is admitted, the parties must be allowed to address arguments at the admission stage itself as valuable rights of the parties are involved.

7 In Hind Overseas this Court had approved this argument as propounded by the respondent. This was a petition under Section 433 (f) of the Companies Act. The Supreme Court had inter-alia noted as under:-

“In an application of this type allegations in the petition are of primary importance. A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is

not of predominant consideration. The interests of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition”.

8 A Bench of this Court in Naresh Kumar Aggarwal and Others Vs. Davender Kumar Mittal & Others 2001 (107) Comp Cas 527 in this context had noted as under:-

“Admission of a petition under Section 433 of the Act has very wide and serious ramifications including appointment of provisional liquidator, publication of citation etc. The admission of a winding up petition cannot be as a matter of course. The Company Court is bound to examine the maintainability, both in law and on the facts, of the case. The powers of the Company Court are wide under the just and equitable grounds but in the present case the learned Company Judge, after consideration of the facts and circumstances of the case, refused to exercise the said jurisdiction.”.

9 This is also the view taken by an earlier Bench of this Court in 1996 (87) Comp Cas 223 Suresh Kumar Bansal Vs. U.P. Mineral Products Ltd. reiterating the view of 1985 (58) Comp Cas 442 Mridula Bhaskar Vs. Ishwar Industries Ltd..

10 It is thus clear that the admission of the petition itself and the public advertisement which has to be effected being a necessary

corollary of its admission would cause an irreparable harm to the company if the petition ultimately fails. This is especially so if it is a solvent company. This argument of the learned counsel for the petitioner that unless the petition is admitted, arguments of the parties cannot be considered is thus an argument bereft of force and is accordingly rejected.

Section 433 (f) of the Companies Act.

11 The moot question that arises for consideration is whether a case under Section 433 (f) of the Companies Act is attracted. Section 433 (f) reads as under:-

“^d[433. Circumstances in which company may be wound up by Court.—A company may be wound up by the Court,—

(a) XXXXX

(b) XXXXX

(c) XXXXX

(d) XXXXX

(e) XXXXX

(f) if the Court is of the opinion that it is just and equitable that the company should be wound up;”

12 In this context the observations made by the House of Lords in *Ebrahimi Vs. Westbourne Galleries Ltd (1972) 2 All ER 492* which have

been endorsed by the Supreme Court in Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwalla (1976) 2 SCR 226 would be relevant.

Lord Wilberforce had observed as follows:-

The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own : that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act, 1948, and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way".

Section 443 (2) of the Companies Act

13 Section 433 (f) has necessarily to be read along with Section 443 (2) of the Companies Act.

14 Section 443 (2) reads as under:-

443. Powers of Tribunal on hearing petition.—

(1) xxxxxxxx

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

15 Thus the second question which arises for decision is whether if an alternate remedy is available to the petitioner, can he press for the winding up of the company on the ‘just and equitable’ ground.

16 This provision stipulates that the Court may refuse to make an order for winding up where the ‘just and equitable’ ground is being pressed if there is an alternate remedy available to the petitioner and the Court prima-facie holds that the petition seeking winding up of the company on this ‘just and equitable’ clause is an unreasonable demand made by the petitioner.

17 In Hind Overseas (Supra), the Apex Court after culling out the principles and the law laid down by the English Courts as also the Indian Courts and after making reference to the judgments in re

Cuthbert Cooper & Sons Ltd. (1937) Ch. 392, in re Yenidja Tobacco Company Ltd. (1916)2 Ch. 426, in re Ebrahimi Vs. Westbourne Galleries Ltd. (1973) AC 360, 379 (HL) in Davis (D.) and Co. Ltd. Vs. Brunswick (Australia) Ltd. (1936) 6 Comp Cas 227 and Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao (1955) 2 SCR 1066, had inter-alia noted as follows:-

“Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Again under Sub-section 397 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief under Section 433(f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests, of the company.”

18 The word ‘may’ appearing in Section 443 (2) has been construed by the Gujarat High Court in Kapil N. Mehta Vs. Shree Laxmi Motors Ltd. 2001 (103) Comp Cases 498 to read as ‘shall’ making it mandatory

for the Court not to pass an order for winding up if there is an alternate remedy available to the petitioner. Where the two conditions i.e. (i) there is an alternate remedy available to the petitioner and (ii) the petitioner is acting unreasonably are satisfied the Court shall not make an order of winding up on the ground that it is 'just and equitable. The Apex Court in Hind Overseas had further gone to note that if the parties could resolve their dispute within the domestic forum in terms of an alternate remedy which is available to them, a winding up petition should not be encouraged. The conscience of the Court must be shocked to such an extent that it draws a conclusion that there is no other remedy available to the petitioner except to ask for the winding up of the company.

19 In this context, certain provisions of the AOA become relevant.

Article 3.A (ii) of the AOA reads as under:-

“3A (ii) The parties agree that their rights and obligations in relation to the Company including those in relation to (i) the shareholding in the capital of the Company (ii) the operation, control and management of the Company, and (iii) exercise of rights by the Party in relation to their respective shareholding in the Company shall be interpreted, acted upon and governed in accordance with the terms and conditions of the Agreement

It is agreed that as between the Parties, the Agreement shall prevail and have an overriding effect in so far as the contractual relationship between the

Parties is concerned in respect of the subject matter contained herein. Further the Agreement shall prevail as between the Parties in case of any ambiguity or inconsistency between the Agreement and the Memorandum of Association and Articles of Association of D.S.O. INVESTMENTS LTD. and/or LAGUNA HOLDINGS PRIVATE LTD. And /or the Company, and it is agreed that any such ambiguity and/or inconsistency will be removed (and the Parties will so endeavour and support any resolution) to the extent permissible under applicable law, by carrying out necessary modifications and/or amendments. ”

20 This Article postulates that the parties shall be governed by the terms and conditions of the SHA. The SHA will prevail and have an overriding effect in case of any inconsistency between the SHA and the AOA.

21 Clause 6.2.1 of the SHA is relevant. It reads as under:-

“Out of the shares as are to be allotted to each of the respective groups, 5000 shares (herein called ‘TRUSTEE SHARES’) out of each Group, which shall be paid for by the respective groups, shall be allotted in the name of Mr. V. LAKSHMI KUMARAN (herein called ‘TRUSTEE’). The voting rights in respect of the TRUSTEE SHARES shall be exercised by the TRUSTEE in his personal capacity at his absolute discretion to remove an impasse under this agreement. The beneficial ownership in respect of these TRUSTEE SHARES shall reside with the respective GROUPS.”

22 Article 6.2.1 incorporated in the SHA was specifically with an intent to resolve any deadlock which would arise within the company; it was in this context that 5000 shares of each group was to be transferred

to the “trustee” who would exercise his voting rights to remove any impasse arising under this agreement (SHA). In fact this clause specifically states that the voting right qua these trustee shares would be exercised by the trustee in his personal capacity to remove any impasse which has arisen under the SHA. The impasse contemplated by the company was with regard to Article 43-A of the SHA. In all other matters, the casting vote was with the Chairman i.e. with the Sushil Gupta.

23 The judgment of the English Court reported in Barron Vs. Potter (1914) Chancery Division 1 Cha. 895 which is good law till date reportedly states that if there is a deadlock at the Board level, the powers of the Board become exercisable by the members of the company at its general meeting. These impasses could thus be resolved even in the shareholder meetings.

24 In Barron Vs. Potter (supra), the Chancery Division of the English Court had in this context inter-alia noted as under:-

“If directors having certain powers are unable or unwell to exercise them are in fact a non-existent body for the purse-there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors

under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment.”

25 This principle has been quoted with approval by Ramayya in his 10th edition of the Companies Act, 2010 noting that if there is a deadlock at the Board level for one reason or the other, the powers of the Court become exercisable by a member in a general meeting. Article 35 of the AOA of the Company gives powers to the company to appoint a director in a general meeting which read with Section 255 (2) of the Companies Act recognizes this power.

26 Thus the 10,000 trustee shares to be allotted to Laxmi Kumaran would enable the shareholders at their meeting to appoint Laxmi Kumaran as a director and he belonging to neither of the two groups i.e. group ‘A’ or group ‘B’ would be then in a position to resolve all disputes which would include the matters enumerated in Article 43-A. The rule of commonsense and logic which can be deduced from the ratio laid down in Barron Vs. Potter (supra) thus shows that where the Board has become non-functional even in matters where a veto vote of each group is required (including the approval of accounts), the shareholders

in a meeting can unlock this impasse.

27 Under Section 215 of the Companies Act the profit and loss account of the Company shall be signed by the Board in its meeting. However, if the Board has become non-functional as is so in the instant case, to prevent criminal prosecution which is a necessary consequence of a company not getting its accounts approved yearly (Section 217 (5) of the Companies Act), the logical conclusion would be that in such a scenario, the shareholders would be competent to approve the accounts of the company. Alternatively the appointment of Laxmi Kumaran as a third director (equal holder of trustee shares of group 'A' and group 'B') would enable him to vote in the Board meeting in terms of the matters enumerated in Article 43 A of the AOA.

28 The Division Bench of Madras in AIR 1953 Madras 520 B.N. Viswanathan and Another Vs. Tiffin's Baryt Asbestos and Paints Ltd. had quoted with approval this proposition laid down by the English Court (as way back in 1914) in Barron Vs. Potter. It had noted as under:-

"A company has inherent power to take all steps to ensure its proper working and that, of course, includes the power to appoint directors to the board of

directors and such delegation will be binding upon it but if there is no legally constituted board which could function or if there is a board but that is unable or unwilling to act then the authority delegated to the board lapses and the members can exercise the right inherent in them of appointing directors.”

29 Further submission of the respondent that the deliberate and intentional attempt of the DKG group to fasten a criminal liability on the SKG group (for non-compliance of Section 215) for no fault of theirs is also a submission which carries force.

30 The correspondences exchanged between the parties also show that all efforts made by the respondent to get these shares allotted in favour of Laxmi Kumaran have been scuttled by the petitioner. The letters dated 15.02.2005, 01.07.2005 and 30.08.2006 exchanged between the DKG group and SKG group reflect the reluctance bordering on an almost refusal on the part of the DKJ group in not agreeing to allot these trustee shares to Laxmi Kumaran. The minutes of the Board meetings held on 25.09.2003, 23.09.2004, 11.01.2005 and 15.02.2005 in fact all contained an agenda for the issuance of these shares in the name of Laxmi Kumarn but this item was continuously deferred. This is a clear case where the petitioner was making all efforts to prevent this alternate

remedy to come into effect by not permitting the allotment of these trustee shares in favour of Laxmi Kumaran. These were concentrated and willful attempts on their part to give a go bye to Clause 6.2.1 of the SHA.

31 The submission of the petitioner that Clause 6.2.1 stood abandoned is also negated by the aforementioned documentary evidence (supra). The minutes of Board meetings between 21.09.2003 up to 15.02.2005 show that in all these meetings there was an agenda for the allotment of shares to the trustee. The letters exchanged between the parties (dated 15.02.2005, 01.07.2005 and 30.08.2006) also evidence that time and again it had been brought to the notice of the DKJ group that the refusal to allot nominee shares to Laxmi Kumaran in terms of the SHA was only because of the non-cooperation of the DKJ group. It is thus clear that even after the amended AOA, the parties were at all times contemplating the implementation of clause 6.2.1 of the SHA.

32 Clause 6.2.1 which was an essential part of the SHA was thus never abandoned. In fact this objection about the abandonment of Clause 6.2.1 was taken up for the first time by the petitioner only when he had filed his reply to C.A. No. 385/2011. To put the record straight,

C.A. No. 385/2011 was an application filed by the respondent seeking the implementation of Clause 6.2.1 of the SHA. Reply was filed on 18.10.2011. It was never the case of the petitioner that the SHA was not a governing factor between the parties; it was only on 18.10.2011 that for the first time this defence was set up by the petitioner that Clause 6.2.1 stood abandoned. At the cost of repetition, the minutes of the Board meeting recorded between September, 2003 to February, 2005 and the correspondences exchanged between the parties in the year 2005-2006 clearly show that SKG group was at all time pressing for the implementation of Clause 6.2.1 but for one reason or the other, the DKJ group was not in favour of the same and was evading this proposal. Thus in this background, the submission of the petitioner that Clause 6.2.1 of the SHA stood abandoned on 20.03.2002 is an argument wholly without any merit.

33 Clause 6.2.1 was the domestic forum available to the parties to resolve any impasse including the impasse contemplated under Article 43A of the AOA. This was the first alternate and efficacious remedy available to the petitioner. The bar of Section 443 (2) of the Companies Act comes into operation. If an alternate remedy is available to a party,

it would bar the present petition.

34 In this context, the following observations of the Apex Court in Hind Overseas are also relevant:-

“It is not a proper principle to encourage hasty petitions of this nature without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show when 'just and equitable' clause is invoked, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders. The company court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups.”

35 In Abnash Kaur Vs. Lord Krishan Sugar Mills and Others (1974) 44 Comp Cas 390 (Delhi) the Court had noted that the powers of the Court under the ‘just and equitable’ clause are not limited but the Court must be guided by the rule of equity. If it is possible to resolve the dispute emanating between the parties by a alternate remedy, the same must first be resorted. Relevant extract of the said judgment reads herein as under:-

“It is, Therefore, safe to conclude: that the powers of the court, under the just and equitable clause are not limited; and the court will be guided by the rules of equity and will do what justice demands, keeping in view the facts and circumstances of each case. All the same the principles on which a partnership is

dissolved, may be applied to the case of a company, which consists of two members only or where the shareholding is equal or where it is a family or domestic company with the shareholding equally divided between two rival groups, which has resulted in a deadlock. Extending this doctrine a little, the Articles of Association of the company assume great importance; and if the Articles can help to resolve the deadlock the winding up has to be ruled out. The Articles have to be taken as the terms of the contract between the members, showing their intention as to how they agreed to transact the business of the company; and which must, Therefore, govern the relationship amongst them inter se. Another important principle that has emerged from the aforesaid decisions is that winding up of a domestic or family company on just and equitable rule is permissible if there is a justifiable lack of confidence in the conduct and management of the company's affairs, grounded on the conduct of directors in regard to company's business.”

36 The guidelines contained in AOA would be the governing factor between the parties to draw a conclusion as to whether an alternate remedy is or is not available to the petitioner and as noted supra, this alternate remedy is expressly contained in the SHA which will prevail even over the AOA in case of any inconsistency.

Non- Applicability of the principles of Partnership

37 The parties had by their express consent agreed that the principles of partnership would not apply. This was a conscious decision taken by the parties.

38 Article 14.1 of the SHA specifically postulates that the agreement between the parties will not be deemed to be a partnership. It reads as follows:-

“Nothing contained in or relating to this agreement shall constitute or be deemed to constitute a partnership.”

39 In (1996) 10 SCC 696 Kilpest Pvt. Ltd. and Others Vs. Shekhar Mehra, the Supreme Court after examining the principles laid down in the case of Ebrahimi (Supra) had distinguished its own case for the following reasons:-

“The promoters of a company, whether or not they were hitherto partners, elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Sections 397 and 398.”

40 The features noted by the House of Lords in Ebrahimi had been noted and would be relevant in the context of the present case as well. They read as under:-

(1) There was a prior partnership between the only two members who later on formed the company.

(2) Both the shareholders were directors sharing the profits equally as remuneration and no dividends were declared.

(3) One of the shareholders' son acquired shares from his father and from the second shareholder, Ebrahimi, and joined the company as the third shareholder - director with two hundred shares (one hundred from each).

(4) After that, there was a complete ouster of Ebrahimi from the management by the votes of the other two directors, father and son.

(5) Although Ebrahimi was a partner, Nazar had made it perfectly clear that he did not regard Ebrahimi as a partner but regarded him as an employee in repudiation of Ebrahimi's status as well as of the relationship.

(6) Ebrahimi through ceasing to be a director lost his right to share in the profits through director's remuneration retaining only the chance of receiving dividends as a minority shareholder.

Bearing in mind the above features in the case, the House of Lords allowed the petition for winding-up by reversing the judgment of the court of appeal and restoring the order of Plowman, J."

41 These features are absent in the facts of the instant case. In the present case, the parties knew each other socially only; they did not share any business arrangement earlier; they had no common business prior to the incorporation of the present company. The parties had

specifically consented to form a company upon which the principles of partnership would not apply (Article 14.1). In fact the averments in the petition decipher this intent of the parties. Para 3.26 and para 3.33 state that on 18.03.2002, the respondent had betrayed the confidence and trust reposed upon it by the petitioner by writing a letter to Lazard wherein he had sought to surreptitiously and fraudulently acquired a 60% shareholding of the Edenpark Hotels Private Limited in his own name; noting thereby that the relationship of the so call trust and faith between the parties stood destroyed as early as on 18.05.2002 i.e. even before the allotment of their shares which was on 20.03.2008; thus the submission that the trust was the foundation of this joint venture between the parties is belied.

42 The Supreme Court in Kilpest's case (Supra) has reinforced its view point by holding those who take advantage of a corporate body must be held bound by the provisions of the Act and the averments that a limited company should be treated as a quasi partnership should not be easily accepted.

43 In Hind Overseas the Supreme Court while rejecting the partnership analogy had given a wider and more liberal interpretation to

the ‘just and equitable’ clause:-

“When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding-up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company.”

44 The Supreme Court in that judgment while distinguishing the facts of Hind Overseas from Ebrahimi has also noted as under:-

“This Court observed that although the Companies Act was modelled on the English statute, the Indian law was developing on its own lines and making significant progress. Where the words used in both the Indian and English statutes were identical, English decisions might throw light and their reasons might be persuasive, but the proper course was to examine the language of the statute and ascertain its true meaning. It was apposite, having regard to the background, conditions and circumstances of present Indian society and the needs and requirements of the country that a somewhat different treatment be adopted. The courts would have to adjust and adapt, limit or extend principles derived from English decisions, entitled as they were to great respect, suiting the conditions of Indian society and the country in general, always, however, with one primary

consideration in view that the general interests of the shareholders should not be readily scarified at the alter of squabbles of directors for power to manage the company.”

45 In Ebrahimi's case there was a prior partnership between the two members who had later on formed the company. The company had first been formed by the two partners namely Ebrahimi and Nazar and later on joined by Nazar's son George Nazar as the third director. Each of the original two shareholders transferred to him 100 shares so that at all material times Ebrahimi held 400 shares, Nazar 400 shares and George Nazar 200 shares. The Nazars, father and son thus had a majority of votes in a general meeting. Until the disputes arose, all the three remained directors. Later on an ordinary resolution was passed by the company in a general meeting by the votes of Nazar and George Nazar removing Ebrahimi from the office of a director. This had led to the petition for winding up. The Court had noted that Ebrahimi had no choice left; he had no exit out; AOA of the company did not permit him to sell his shares to a third party; on all counts, he was caged; these factors had weighed in the mind of the Court to admit the winding up petition.

46 This view was also taken by Madhya Pradesh High Court in (1990) 67CompCas45(MP) Parmanand Choudhary and Ors.Vs. Smt. Shukla Devi Mishra and Ors.; it was noted that having regard to the new provisions contained in Sections 397 & 398 of the said Act, the need to extend the principles relating to the dissolution of a partnership to private companies which have been deliberately incorporated as companies under the Companies Act and are legal entities are largely to be excluded.

47 The letters exchanged between the parties dated 27.07.2004 & 08.06.2007 also categorically state that the company is being run under the provisions of the Companies Act, 1956 and cannot be treated as a partnership. Article 14.1 of the SHA also specifically excludes the applicability of the partnership principles to the aforementioned company. In Faqir Chand Gulati (para 26) the Supreme Court had noted clause 24 of the agreement between the parties specifying that the said agreement shall not be deemed to constitute a partnership which was the key factor to hold that the venture between the parties was not a joint venture.

48 The Allahabad High Court in Kiran Sandhu and Others Vs. Saraya Sugar Mills Ltd. and Others 1998 (91) Comp. Cases 146 while refusing to apply the principles of partnership to the incorporated company had relied upon the AOA of the company holding that these tenets were contrary to tenets of the principles of partnership. The relevant factor being that there was no restriction in the Articles to the transfer of shares to a third person; this was possible only in a company and not in a partnership.

49 In the present case, Article 13-A (iv) of the AOA specifically allows the parties to transfer their shares to a third party; a preemptive right is given to the existing shareholder but if this is not exercised, the member can sell his shares freely to a third party. This would not be permissible in a partnership. On this count also, it is clear that what the parties had intended was to create and incorporate a company excluding the principles of partnership. Section 91 & 92 of the Evidence Act also postulate that when a written document has been executed, no oral submission contrary to the written terms contained therein can be looked into.

50 The settled legal position thus emanating that the partnership principle would be applicable only in those cases where the deadlock is complete and irresoluble under its constitution which is clearly not so in this case. The domestic forum has not been resorted to; alternate remedy under Section 397 has also not been explored. The question of alternate remedy in fact assumes a great importance.

Party cannot take advantage of his own wrong

51 Reliance by the learned counsel for the petitioner on the judgment of *Draeger Werk* (supra) in this context is misplaced. In this case there were two partners having equal participative rights and equal shareholding of 50% each. The rest of the facts are distinct. This was a case where the respondent himself had filed a petition under Sections 397 & 398 of the Companies Act alleging oppression and mismanagement on the part of the petitioner; the respondent group had admitted that there is a complete deadlock in the management and affairs of the company; civil and criminal litigations were pending between two groups. There was a complete deadlock as no business of the company was being transacted. It was in this factual scenario that the

Court had noted that the substratum and deadlock in this company was complete which had persuaded the Court to wind up the company on the just and equitable clause under Section 433 (f). In para 17, the Court had also noted as under:-

“There cannot be any doubt that a petitioner who approaches the court under the just and equitable clause must come to the court with clean hands. He should not be responsible for breakdown of confidence between him and the other party. He should be able to satisfy the court that he has not misconducted himself. Misconduct of a petitioner that results in deadlock or breakdown cannot be a ground to wind up a company under the just and equitable clause. There should be lack of probity and confidence between the parties but the person approaching the court should not be responsible for the same. A party cannot take advantage of his own wrong, to ask for winding up under 433(f) of the Act. As the words 'just and equitable' themselves suggest the Court must be satisfied with the allegations of the petitioner that it is just and equitable to wind up a company”

52 Draegerwerk had also quoted with approval a passage from Pennington’s Company Law (Fifth edition) to support the conclusion that it had drawn. It had noted as under:-

“Nevertheless, the petitioner must show that there is no likelihood of the deadlock being resolved in fact, and for this purpose he should set out in his petition or in his supporting affidavit the relevant provisions of the company's articles (if any) and details of the attempts he has made to resolve the deadlock.”

53 This is not the situation in the instant case. The SHA & AOA of this company provide a solution for the impasse between the parties to be resolved in a domestic forum. It is the petitioner himself who is not allowing Article 6.2.1 to be given a go-ahead. He cannot be permitted to take advantage of his own wrong.

Grievances of the petitioner

54 As noted supra, the grievances of the petitioner are broadly based on the premise that the petitioner had been denied inspection of accounts; internal audit had not been conducted; business plans were not approved; there was a falsification of the record of the company which included the minutes of the Annual General Meetings and the Board meetings.

55 Under the AOA of the company, the day to day management of the company vested with the SKG group. In terms of Articles 48-A, 48-B and 49-B of the AOA, the Chairman and the Managing Director of the company were from the SKG group. The Chairman had the casting vote and except for matters enumerated in Article 43 A where a veto vote of one A and one B director was required; in all other matters the

Managing Director was looking after the day to day functioning of the company. Article 6.2.1 of the SHA coupled with the principle of Barron Vs. Potter enabled Laxmi Kumaran to resolve any kind of an impasse including the one contemplated in Article 43 A. In this background, the desire of Priya Jain (Executive Director) to obtain an equal footing with the Managing Director Sushil Gupta would be contrary to the SHA and AOA. The insistence of the petitioner on retaining K.S. Kalra and thereafter DKG's communications dated 27.09.2005 & 15.07.2006 insisting that the internal auditor K.S. Kalra should join hands with the statutory auditor which was followed by his refusal to accept any other independent auditor to audit the accounts of the company also show that these were unreasonable demands made by the petitioner to the respondent. The business plan for all the financial years 2002-2003, 2003-2004 & 2004-2005 were placed before the Board and discussed which is evident from the minutes of these meeting; merely because the word 'approved' did not specifically find mention in the minutes becomes no ground for the petitioner to make the allegations that there was no business plan which was being followed even in those years.

company is also not by itself sufficient to justify the superimposition of equitable considerations over the legal rights. Some such indications were noted in the Ebrahimi case:-

"(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

57 The Supreme Court as far back as in 1956 26 Com Cas 91 Rajahmundry Electric Supply Corporation Ltd. Vs. A. Anageswara Rao, had cited with approval the passage from (1924) AC 783 (PC) Loach's case which reads as under:-

"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, whenever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs,

then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up".

5. Powers of the Court under Sections 397 & 398 vis-à-vis Section 443 (1) of the Companies Act.

58 Once the partnership principle is rejected, the petitioner has to prove almost the same grounds even for succeeding in the present petition and therefore Sections 397/398 must be treated as another alternative and effective remedy.

59 The Indian Companies Act, 1913 did not have any provision equivalent to Sections 397 & 398 of the Companies Act; it was only by way of an amendment in 1951 that this provision was incorporated in the Act and Sections 153-C and 154-C were inserted; provision of Section 153-C was borrowed from the English Companies Act, 1945. In the Indian Companies Act, 1956, Sections 153-C and 153-D were incorporated as Sections 397 & 398. Relevant would it be also to point that in the Indian Companies Act, 1913, the provision for winding up was contained in Section 162 which is equivalent to Section 433 of the Indian Companies Act, 1956. Under Section 170 of the Companies Act, 1913, there were powers available with the Court to pass interim orders in the course of winding up. There was no provision in the nature of

Section 443 which was incorporated for the first time in the Companies Act, 1956. The recommendations of the Company Law Committee prior to introduction of Sections 397 & 398 of the Companies Act had noted that under the Company Law of England as it existed before the enactment of the Companies Act, 1948, the only effective remedy against oppression of the minority shareholders, if they succeeded in proving their case, is a winding order under the just and equitable clause; equivalent to Section 162 of the 1913 Act; the remedy very often being worse than the disease itself. It was these considerations which had weighed in the mind of the Legislature while incorporating Sections 397 & 398 into the Companies Act of 1956. The Committee in its recommendations had also noted that the discretion given to the Court under Section 210 of the English Companies Act, 1948 (Section 397 of the Companies Act, 1956) is very wide and far reaching; the Court may pass any order regulating the conduct of the company's affairs in the future and provide for the purchase of the share of any member by the another member of the company and also contrary to the existing rules of the Company Law. It had summed up by stating that the Court may impose upon the parties whatever settlement it considered as a fair and

reasonable solution of the difficulty. the discretion being unfettered.

60 The Supreme Court in AIR 1956 SC 213 Rajamundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, (a judgment delivered under the Companies Act, 1913) had an occasion to discuss the scope of Section 153-C (equivalent to Section 397 of the Companies Act, 1956); relevant extract of which reads as under:-

“The true scope of section 153-C is that whereas prior to its enactment the court had no option but to pass an order for winding up when the conditions mentioned in section 162 were satisfied it could now in exercise of the powers conferred by that section make an order for its management by the court with a view to its being ultimately salvaged.”

61 In AIR 1965 SC 1535, Shanti Prasad Jain Vs. Kalinga Tubes, (a judgment delivered under the Companies Act, 1956), the scope of Section 153-C was again the subject matter of a discussion. It was noted as under:-

“That section was based on Section 210 of the English Companies Act, 1948, which was introduced therein for the first time. The purpose of introducing Section 210 in the English Companies Act was to give an alternative remedy to winding up in case of mismanagement or oppression. The law always provided for winding up, in case it was just and equitable to wind up a company. However, it was being felt for some time that though it might be just and equitable in view of the manner in which the affairs of a company were conducted to wind it up, it was not fair that the company

should always be wound up for that reason, particularly when it was otherwise solvent. That is why Section 210 was introduced in the English Act to provide an alternative remedy where it was felt that, though a case had been made out on the ground of just and equitable cause to wind up a company, it was not in the interest of the shareholders that the company should be wound up and that it would be better if the company was allowed to continue under such directions as the court may consider proper to give. That is the genesis of the introduction of Section 153C in the 1913 Act and Section 397 in the Act”.

62 Thus wherever an alternate remedy is available to a party, the just and equitable clause could not be resorted to casually. It is not the interest of the petitioner alone which has to be considered but the general interest of the company; fairness demanded that even if the ground of ‘just and equitable’ for winding up was satisfied, the alternate remedy being available under Section 397 of the Companies Act, an order for winding up should not be made and this is particularly so in a solvent and healthy company.

63 Section 443 (1)(d) specifically postulates that on the hearing of a winding up petition, the Court may make an order for winding up the company or make such order as it thinks fit. Sub-section (2) specifies that where the petition had been presented on the ground of ‘just and equitable’, the Court will refuse to make an order of winding up if there

is some other remedy available and the petitioner is acting unreasonably in pressing his demand for winding up instead of having such an alternate remedy.

64 Section 402 gives powers to the CLB to make any order that it thinks fit on a petition under Sections 397 & 398. These powers are enumerated under Sections 402 (a) to (g) and read as under

*402. Powers of ¹[Tribunal] on application under section [section 397](#) or [398](#),.—
Without prejudice to the generality of the powers of the ¹[Tribunal] under [section 397](#) or [398](#), any order under either section may provide for—*

- (a) the regulation of the conduct of the company's affairs in future;*
- (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;*
- (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;*
- (d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand; and any of the following persons, on the other, namely:—*
 - (i) the managing director,*
 - (ii) any other director,*

²[***]

- (v) the manager,*

upon such terms and conditions as may, in the opinion of the 1[Tribunal], be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the 1[Tribunal] it is just and equitable that provision should be made.

65 These powers are exercisable by the CLB alone.

66 The Division Bench of Madras High Court in AIR 1962 Madras 493 Geetanjali Press Private Limited Vs. Thangaswami and Another

had noted that a Court whose jurisdiction has not been invoked under Sections 397 & 398 of the Companies Act would not be competent to pass any order which would amount to intervening in the management of the company in a petition for winding up; in such a petition either winding up can be made or if such a petition is not sustainable it shall be

dismissed. The Single Bench in this case had appointed an Administrator hoping to salvage the company; it had found that the winding petition could not be sustained but had passed an interim order for the appointment of an Administrator. The Division Bench had rightly noted that such an order which was essentially an order under Section 443 of the Companies Act could have been passed only during the pendency of the winding up petition and not once the winding up petition had been disposed of.

67 The orders which can be passed by the Court at the time of hearing of the winding up petition are detailed in Section 443 (1)(a) to (d).

“443. Powers of Tribunal on hearing petition.—(1) On hearing a winding up petition, the Tribunal may—

(a) dismiss it, with or without costs; or

(b) adjourn the hearing conditionally or unconditionally; or

(c) make any interim order that it thinks fit; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit.”

68 Thus under Section 443 of the said Act the Court at the time of

hearing of a winding up petition, may either dismiss it with or without costs or in the second alternate, it may adjourn the hearing conditionally or unconditionally. The third alternate gives powers to the Court to make any interim order as it thinks fit. Lastly it may make an order for winding up of the company or any other order as it thinks fit. The words ‘any other order as it thinks fit’ have necessarily to be read ejusdem generis and in the context of the words preceding in the sub-clause meaning thereby that in the fourth alternate, the Company Judge may either wind up the company or pass any other order in the course of its winding up or in its relation thereto. The ejusdem generis (or eiusdem generis, Latin for “of the same kind”) rule applies to resolve a problem where one of the words is either ambiguous or inherently unclear. This rule postulates that where the ‘general words follow enumerations of a particular class of persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those enumerated.

69 The Bombay High Court in 2002 (1) ALLMR 443 in Nilesh Lalit Parekh had construed the words “any other orders that it thinks fit” as orders other than those related to a winding up and would include orders

such as, an order for purchase of shares belonging to the petitioner. This interpretation with respect, is contrary to the very language of the section. The reasoning that Section 443 (1)(d) permits the Court to pass all such orders which are unrelated to the winding up is in conflict with the clear and explicit language contained in this statutory provision.

70 The judgments of Abnash Kaur (supra) and Shakuntala Rajpal (supra), in this context have impliedly been overruled by the judgment of Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (dead) through lrs and others 2005 (11) SCC 314. In Abnash Kaur, the Court was dealing with a composite petition under Section 433/397/398 of the Companies Act. At this point of time, the jurisdiction under Sections 397 & 398 of the Companies Act and Section 433 of the Companies Act both vested the High Court. The Division Bench upholding the reasoning of the Single Judge had allowed the purchase of shares inter se between the parties. In Shakuntala Rajpal (supra) (delivered on 05.12.1985), the Court had noted that since the petitioner being a minor shareholder did not have the requisite number of shares to apply (in terms of Section 399 of the Companies Act) under Sections 397 & 398 of the Companies Act, the alternative remedy availed by him

under Section 433 (f) of the Companies Act was maintainable. At this point of time also, the jurisdiction to deal with a petition under Sections 397/ 398 and Section 433 of the Companies Act vested in the High Court. It was only in the year 1988 that the jurisdiction under Sections 397 & 398 of the Companies Act was transferred to the CLB.

71 The vehement submission of the learned counsel for the petitioner that in these cases, the Court had noted that a relief short of winding up is not ousted from the process of winding up has been answered by the Supreme Court in Sangramsinh P. Gaekwad (supra) which has set this controversy at rest. In Sangramsinh P. Gaekwad (supra) (delivered by the Supreme Court on 20.01.2005); it was made clear that the orders which are required to be passed for grievances which can be addressed under Sections 397 & 398 of the Companies Act are in the exclusive domain of the CLB and the jurisdiction of the High Court is ousted in this regard. It had noted as under:-

“After the amendment in the Companies Act, the Company Law Board alone had the jurisdiction to entertain an application under Sections 397 and 398 of the Companies Act, as the jurisdiction of the High Court was ousted thereby and, thus, the allegations made in the Company Petition filed by the Respondent No. 12 being company petition No. 7 of 1992 could not have been the subject matter of adjudication by the High Court. It is true that what cannot be done directly cannot

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be done indirectly.”

72 Section 433 (f) has to be read harmoniously with Section 443 (2). Thus where a case under Section 433 (f) of the Companies Act is filed but the allegations are such for which an alternate remedy is available and which can be dealt with or comes within the encompass of Sections 397 & 398 of the Companies Act, it would not be competent for the High Court to assume jurisdiction of the CLB. After the amendment of the Companies Act in 1988, the powers which were earlier available with the High Court to deal with a petition under Sections 397 & 398 of the Companies Act now vest with the CLB which alone has the jurisdiction to deal with the allegations of that nature.

73 In the instant case, the allegations highlighted by the petitioner have been discussed supra.

74 Even assuming them to be correct they are all allegations of such a nature which can be addressed by the CLB in its powers under Section 402 of the Companies Act; Sections 397 & 398 of the said Act in fact confer very valuable right on a group of shareholders to seek the aid of the Court in getting their grievances redressed. The irregular and

dishonest deeds complained of by the petitioner group can well be answered by the CLB under the wide powers that it has. Section 402 (g) in fact contains the residuary powers available with the CLB which can encompass almost any kind of an order which may be passed by the CLB on the acts of the nature complained of by the petitioner. After the amendment of the Companies Act, 1956 and by the incorporation of Sections 397 & 398 into this Act, the intent of the legislature has become clear. A winding up has to be resorted to only as a last measure; a winding up order may be passed only if there is no other alternate efficacious remedy available to the aggrieved party. The forum of Sections 397 & 398 is a special forum which has been created by the Statute to be dealt with by an expert body in relation to the problems in the working of the company. The scheme of the Companies Act shows that all efforts should be made to keep the company alive; the winding up process may be resorted to only if there are extreme accentuating circumstances.

75 The present company is a healthy and going concern. It is profiting. The respondent (S.K. G. group) is making all efforts to declare dividend in the company. Because of the non-cooperation of the DKG

group, the dividend is not permitted to be declared. All efforts to resolve the disputes by amicable settlement between the parties have also become redundant. These efforts have been noted supra. The DKG group had also made an oral offer in the Court to buy out the shares of the respondent group; vehement submission of the respondent being that the petitioner is seeking an order lesser than the order for which the present petition has been presented; he is seeking to buy out the shares of the respondent which is impermissible in the present petition as this present petition should be confined only to a winding up. On the other hand, the submission of the respondent is that he is ready to purchase the shares of the petitioner. Both the parties realize that the company is a steadily growing healthy concern which will reap greater profits in the future; one wants to out buy the other.

76 In 1983 (2) All ER 854 in re a company, Vinelott, J has held that where one party wanted to acquire shares of the other party which efforts and negotiations remained un-fruitful, the Court had noted that in these circumstances the insistence by the petitioner for a winding up order to be passed, was in effect asking the respondent to buy his shares at the price he chose to place upon them or face the disruption of a

winding up order; in these circumstances, no relief was afforded to the petitioner.

77 These grievances of the petitioner as detailed and outlined above are all encompassed within the provisions of Section 397 & 398 of the Companies Act. This is the second alternate efficacious remedy available to the petitioner.

78 The judgments relied upon by the learned counsel for the petitioner reported as Moti Films, Eastern Linkers and International Caterers (supra) are all distinct on their own facts. In Moti Films (supra), the winding up petition was admitted keeping in view the large differences between the parties and the connected pending litigations in the Civil Courts which included the dissolution of their partnership firm. The AOA of Easter Linkers (supra) did not permit the parties to resort to a domestic forum; the warring two shareholders had no other remedy; there was no hope or possibility of a smooth and proper functioning of the company as a commercial concern. In International Caterers the company had been formed for the purpose of running a hotel; the management of the hotel had been handed over to a third party; there was no domestic form available to the parties; in this eventuality the

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total loss of substratum and the irresolvable deadlock between the parties had led to the winding up.

79 The judgments of the Calcutta High Court 1985 Comp. Cases Vol.58, Page 858 Modern Furnishers (Interior Designers) (P). Ltd. & Ors.; [2009] 147 Comp.Cas 130 (AP) Smt. P.Sridevi Vs. Cherishma Housing P. Ltd and Another and the judgment of this Court reported as 109(2004) DLT 198 M/s Brown Forman Mauritius Limited Vs. M/s Jagjit Brown-Forman India Ltd. & Anr. relied upon by the counsel for the petitioner are also all distinguishable. Modern Furnishers (supra) was a petition under Section 397/398 of the Companies Act; the court while dismissing the petition had noted that the relief under the aforementioned provision cannot be granted as the disputes between the parties related not only to the company but were also prevailing in the partnership firm of the parties. In Cherishma Housing P. Ltd (supra) the court had noted that the substratum of the company had come to a close and no business was being carried out by the company for the last several years; there was a cessation of all business activity. In M/s Brown Forman Mauritius Limited (supra) the joint venture agreement between the parties had been terminated; the substratum of the

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company had been lost. The English judgment of Yenidja Tobacco Company Ltd. (supra) relied upon by the learned counsel for the petitioner also does not advance his case. A winding up petition was filed on just and equitable clause as there was a complete deadlock in the company; all suggestions mooted by the Court were not acceptable; there was nothing in the Articles of the Company which could also lead to a resolution of their dispute.

80 The judgment of Ebrahimi (supra) also does not help the petitioner. Facts are distinct. In Ebrahimi (supra), a petition under Section 210 of the English Companies Act, 1948 (Section 397 of the Companies Act, 1956) along with Section 222 (f) seeking winding up of the company (Section 433 of the Companies Act) had been filed. The Single Judge had dismissed the petition under Section 210; an appeal had been filed only against the winding up order. The House of Lords in the judgment rendered by Lord Wilberforce had noted the extreme restriction that the petitioner could not exit and go elsewhere; he could not dispose of his interest in the company without the consent of the respondents; it was in these accentuating circumstances that the winding

up of the company was ordered.

81 Facts of this case are distinct. The business of the company is being run; it is profitable; one group in fact wants to out-buy the other. Both of them want to steer the wheel of the company. This is also not a case where initially, there was a partnership between the parties which has been converted into a company. In this case, there is also no admission by the respondent about the deadlock in the company. The parties have also not explored the alternative remedy either under the domestic forum or under Sections 397 & 398 of the Act.

82 The legal position culled by the Supreme Court in Hind Overseas (Supra) is that the company should not be wound up merely because of disputes which have arisen between the two groups of shareholders; if the same can be resolved by alternate modes and these alternate modes must be exhausted in the first instance; the winding up of a company is the extreme and last remedy and should be resorted to only as a final resort; this principle is fully applicable in the instant case. It is the interest of the company which is to be watched first; the personal prejudices and personal vendetta of one group qua the other cannot

become the basis of a winding petition; pressure tactics cannot be applied.

83 On all counts petition has no merit. It is liable to be dismissed. It is accordingly dismissed with costs of Rs.25,000/-. All pending applications have become infructuous. They are also disposed of.

INDERMEET KAUR, J

NOVEMBER 01, 2012

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