

IN THE HIGH COURT OF DELHI AT NEW DELHI

CO.A. (SB) 4 of 2006

Reserved on: April 30, 2013

Decision on: May 31, 2013

HILLCREST REALTY SDN BHD

..... Appellant

Through: Mr. Jayant Bhushan, Senior Advocate
with Mr. Mohit Chaudhary, Advocate.

versus

HOTEL QUEEN ROAD PVT. LTD. & ORS.

..... Respondents

Through: Mr. Harsh Sharma, Advocate for R-1.
Mr. Arun Kathpalia, Mr. Jayant K. Mehta and
Ms. Pragya Singh, Advocates for Mr. Ashok Mittal.
Ms. Tanu Priya Gupta, Advocate for South
Indian Bank.
Mr. Aman Lekhi, Senior Advocate with Mr. Atul
Sharma and Mr. Nitesh Jain, Advocates for R.P.
Mittal Group.
Mr. V. Kanagaraj, Senior Advocate with
Mr. Gautam Dhamija, Advocate for Respondent
No.3
Ms. Nidhi Mehrotra, Advocate for R-6.
Mr. Mayank Bansal, Advocate for IOB with Mr.
Deepak Sudan, AGM and Mr. Vivek Dixit, Senior
Manager.

WITH

CO.A (SB) 5 of 2006

HOTEL QUEEN ROAD PVT. LTD. & ORS.

.....Appellants

Through: Mr. Harsh Sharma, Advocate for
Appellant No.1.
Mr. Arun Kathpalia, Mr. Jayant K. Mehta and
Ms. Pragya Singh, Advocates for Mr. Ashok Mittal.
Ms. Tanu Priya Gupta, Advocate for South

Indian Bank.

Mr. Aman Lekhi, Senior Advocate with Mr. Atul Sharma and Mr. Nitesh Jain, Advocates for R.P. Mittal Group.

Mr. V. Kanagaraj, Senior Advocate with Mr. Gautam Dhamija, Advocate for Respondent No.3

Ms. Nidhi Mehrotra, Advocate for R-6.

Mr. Mayank Bansal, Advocate for IOB with Mr. Deepak Sudan, AGM and Mr. Vivek Dixit, Senior Manager.

versus

HILLCREST REALTY SDN BHD Respondent
Through: Mr. Jayant Bhushan, Senior Advocate
with Mr. Mohit Chaudhary, Advocate.

AND
CO.A (SB) 10 of 2006

ASHOK G. MITTAL Appellant
Through: Mr. Arun Kathpalia with Mr. Jayant K.
Mehta and Ms. Pragya Singh, Advocates.

versus

HOTEL QUEEN ROAD P. LTD. &ORS Respondents
Through: Mr. Harsh Sharma, Advocate for
Respondent No.1.
Mr. Jayant Bhushan, Senior Advocate
With Mr. Mohit Chaudhary, Advocate
for Hillcrest Realty SDN BHD.
Ms. Nidhi Mehrotra, Advocate for R-6.
Mr. V. Kanagaraj, Senior Advocate with
Mr. Gautam Dhamija, Advocate for Respondent
No.3
Mr. Atul Sharma and Mr. Nitesh Jain, Advocates
for R.P. Mittal Group.

Mr. Mayank Bansal, Advocate for IOB with Mr. Deepak Sudan, AGM and Mr. Vivek Dixit, Senior Manager.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
31.05.2013

1. These are three appeals under Section 10(F) of the Companies Act, 1956 arising out of the order dated 31st January 2006 passed by the Company Law Board ('CLB') in Company Petition No. 64 of 2005.

Background facts

2. The background facts are that the Government of India ('GoI') took a policy decision on 5th July 2002 to disinvest its shares in the India Tourism Development Corporation ('ITDC') which owns various hotel properties. One of these hotel properties was the Indraprastha Hotel formerly known as Ashok YatriNiwas. In terms of the approved Scheme of demerger, the hotel property was transferred to Hotel Queens Road Pvt. Ltd. ('HQR') which was created as a special purpose to enable the disinvestment. The paid up capital of HQR was Rs.90 lakhs comprising of 9 lakh equity shares of Rs.10 each. GoI held 89.97% shares, the Indian Hotels Company Ltd. ('IHCL') held 10% and balance shares were held by others.

3. GoI invited bids for sale of its shares in HQR. Moral Trading & Investment Ltd. ('Moral') a public limited company was the successful bidder. By a Share Purchase Agreement ('SPA') dated 8th October 2002 Moral acquired the shares of GoI and IHCL. The amount involved in the

acquisition was Rs.45 crores. Of this Rs.33.37 crores was funded by borrowing/loans from banks. With 99.97% equity shares of HQR being held by Moral, HQR became Moral's subsidiary. Moral's shares were listed on the Delhi Stock Exchange.

4. Mr. R.P. Mittal and his family members held the controlling interest in Moral. The case of Mr. Ashok Mittal, the younger brother of Mr.R.P. Mittal, was that the balance sum for the acquisition of shares came from contributions by both of them. Mr. Ashok Mittal claimed that while he invested Rs.5.50 crores, Mr. R.P. Mittal brought in Rs.6.23 crores. Mr.R.P. Mittal and his wife Mrs.Sarla Mittal were appointed Additional Directors of HQR on 8th October 2002.

5. On 21st December 2002, 13 shares of Moral in HQR were transferred to 7 other members. 2 shares were transferred to Mr.R.P. Mittal, 3 shares to Mrs.Sarla Mittal and 1 share to Mr. Ashok Mittal.

6. Subsequently in the Annual General Meeting ('AGM') of HQR held on 28th December 2002, Mr.R.P. Mittal and Mrs.Sarla Mittal were appointed as whole-time Directors. The Memorandum of Association ('MoA') of HQR was altered to increase its authorised share capital to Rs.33 crores consisting of Rs.80 lakhs share of Rs.8 each and 28 lakhs, 8.5% Cumulative Redeemable Preference Shares ('CRPS') of Rs.100 each (Rs.25 lakhs). On 28th June 2003, the authorised capital was again altered by increasing the CRPS to Rs.30 crores.

7. Hillcrest Realty SdnBhd ('Hillcrest'), the company registered in Malaysia was allotted 28,29,290 CRPS in HQR in two spells i.e. on 5th May 2003 and 19th July 2003 against a total investment of Rs.28.29 crores. To fund the redevelopment of the hotel, a term loan of Rs.40 crores was raised from Indian Overseas Bank ('IOB'). The loan was secured by the joint personal guarantees of Mr.R.P. Mittal, Mrs.Sarla Mittal and Mr. Ashok Mittal, the collateral security of personal assets of Mr. R.P. Mittal and Mrs.Sarla Mittal and the corporate guarantee of Moral.

8. The subject matter of the disputes between the parties concerns the following allotments of equity shares. On 27th July 2004, 23,90,000 equity shares of HQR were allotted to Moral. On 7th January 2005, a further 41,51,648 shares were allotted to Moral. On the same day 1,10,000 shares were allotted to Mr. R.P. Mittal and 4,50,000 shares to Mrs.Sarla Mittal. On 10th May 2005, a further 10 lakhs equity shares of HQR were allotted to Pondi Metals and Restructuring Metals Pvt. Ltd. ('Pondi') (managed by Mr. R. P. Mittal at the relevant time). These allotments were stated to be made at par. On 10th May 2005 a transfer of 32,88,181 equity shares of HQR held by Moral in favour of Mr. R.P. Mittal was registered. At a Board meeting held on 4th July 2005, Mr.Sumaj Jain and Mr.Narinder Pal Gupta were appointed as Additional Directors of HQR.

9. Under Section 87(2)(b) of the Act the holder of any preference share would be entitled to vote on every resolution placed in any meeting if the dividend due on such share is remained unpaid, in case of CRPS, for an aggregate period of not less than two years preceding the date of

commencement of the meeting. As CRPS of HQR had been allotted on 5th May 2003 and no dividend had been paid thereon for two continuous years, Hillcrest asserted that its right to vote had accrued on 5th May 2005. Accordingly it sent a requisition for an Extraordinary General Meeting ('EGM') by a notice dated 1st June 2005 proposing the removal of Mr.R.P.Mittal and Mrs.Sarla Mittal as Directors and appointing two other Directors in their place. However since the EGM as requisitioned was not convened, Hillcrest issued another notice on 8th July 2005 and convened an EGM on 4th August 2005.

10. At that stage HQR filed a suit CS (OS) No. 992 of 2005 in this Court on 23rd July 2005 challenging the EGM notices. According to Hillcrest it was only on the reading of plaint and suit it was learnt of the allotments made on 27th July 2004, 7th January 2005 and 10th May 2005 in favour of Moral, Pondi and Mr.R.P.Mittal and Mrs.Sarla Mittal and the inter se transfer of shares from Moral to Mr. R.P. Mittal all of which according to Hillcrest was done fraudulently, without any notice or holding any Board meeting.

11. On 12th August 2005, a learned Single Judge of this Court passed an order in IA No. 5505 of 2005 in CS (OS) No. 992 of 2005 upholding the contention of HQR that it was a private limited company and not the subsidiary of any public limited company. As a result it was held that Hillcrest could not, in terms of Section 90 (2) of the Act, claim voting rights under Section 87(2) of the Act. Accordingly, Hillcrest was restrained from giving effect to the resolutions passed at the EGM held on 4th August 2005.

The petition in the CLB

12. Hillcrest and Mr. Ashok Mittal filed Co.Pet. No. 64 of 2005 on 22nd August 2005 against HQR, Mr. R.P. Mittal and Mrs.Sarla Mittal in the CLB challenging the allotment/transfer of shares effected on 27th July 2004, 7th January 2005 and 10th May 2005. Hillcrest and Mr. Ashok Mittal contended before the CLB that there had been financial mismanagement of HQR by Mr. R.P. Mittal and Mrs.Sarla Mittal. Secondly, it was contended that Hillcrest had invested in CRPS on the understanding that HQR would remain a subsidiary of Moral and that in the event of HQR failing to pay any dividend for two years, Hillcrest would be entitled to exercise its voting rights on all resolutions. Thirdly, the allotments made on 27th July 2004, 7th January 2005 and 10th May 2005 were challenged on the ground that there was no notice under Section 286 of the Act to Mr. Ashok Mittal, who was a Director of HQR. Fourthly, the allotments were done by the remaining Directors without disclosing their obvious interest and this was in violation of Section 300 of the Act. Fifthly, the allotments were done without any valuation of the equity shares of HQR. Sixthly, no money was paid for transfer of shares. Seventhly, the transfer would bring about a situation where HQR would no longer remain a subsidiary of Moral and thus would deprive Hillcrest of any voting right under Section 87(2) (b) of the Act.

Impugned order of the CLB

13. In its judgment dated 31st January 2006, the CLB held as under:

(i) Mr. Ashok Mittal failed to produce any document to substantiate his contention that he was instrumental in Hillcrest investing in HQR.

(ii) The petition was essentially one concerning oppression since Hillcrest and Mr. Ashok Mittal did not press the allegations concerning mismanagement.

(iii) Hillcrest and Mr. Ashok Mittal could not furnish any proof of any 'understanding' that Moral would continue to be the holding company of HQR and Hillcrest would be entitled to voting on preference shares in the event dividend was not paid for two years. No presumption could be drawn from the letters dated 30th April 2003 and 21st July 2003 written by Hillcrest to Mr. R.P. Mittal that it invested in HQR on the understating that HQR would continue to remain a subsidiary of Moral. Clause 9.5 of the SPA did not convey that Moral would continue as a holding company of HQR.

(iv) The transfer of HQR shares by Moral to Mr. R.P. Mittal and Mrs. Sarla Mittal was a transfer "within the same group" and could not be held to be in breach of the assignment Clause 13.4 of the SPA.

(v) There was nothing to show that Hillcrest sought payment of dividend either in the first year or in the second year. It also declined the offer made by HQR both before the High Court and before the CLB to pay dividend dues for the two years. Thus the sole object of Hillcrest was to gain control of HQR by removing Mr. R.P. Mittal and Mrs. Sarla Mittal who had not only given their personal guarantees but also their personal assets as collateral securities and by themselves carried the affairs of the HQR right from the time of acquisition. Consequently, the lawful action taken by term holders

having overwhelming majority of equity shares to “prevent an outsider from taking control of the company” could not be said to be an act of oppression.

(vi) Mr. Ashok Mittal holding only one equity share was trying to take control of HQR with the support of Hillcrest as was evident from the fact that his sons and brother-in-law were proposed to be Directors on removing of Mr. R.P. Mittal and Mrs. Sarla Mittal as Directors. Thus Mr. Ashok Mittal being a minority shareholder was trying to oppress the majority and any action “taken legally to prevent such an occurrence by the majority cannot be considered to be oppressive”.

(vii) Article 8 of the Articles of Association (‘AOA’) of HQR which mandated notice to the Board of Directors (BoD) for any proposed sale of share by any member with a right of first purchase by any other member had to be reconciled with Article 11 which stated that no transfer of shares shall be made or registered without the previous sanction of the Board “except when the transaction is made by any Member of the company to another Member or to Members (spouse, child or children or heirs) or the Board may decline to give such sanction without assigning any reasons.” By adopting such harmonious construction it had to be held that “Article 8 would apply only to a transfer to an outsider and not in the case of a transfer from one Member to another Member.” Since in the present case the transfer was from Moral, a member, to Mr. R.P. Mittal another member, Article 8 was not applicable and as such the transfer was not invalid.

(viii) When Moral transferred one share of HQR to Mr. Ashok Mittal there was nothing to show that Article 8 was complied with. No notice of Board

meeting held by HQR from the time when Mr. Ashok Mittal became a Director was received by him. Mr. Ashok Mittal became a shareholder by registration of one share in his favour in a Board meeting held in December 2002. Hillcrest was allotted preference share in two Board meetings held on 12th May 2003 and 19th May 2003. Mr. Ashok Mittal did not attend any of the said meetings for want of notice. If the principle that meetings could not be held without notice was to be applied uniformly to all Board meetings then neither Hillcrest nor Mr. Ashok Mittal could claim to be shareholders of HQR, disentitling them from prosecuting the petition. Consequently, the CLB was not inclined to apply the said principle to any of the impugned Board meetings and declare that the allotment of shares and registration of transfer of shares was invalid on account of non issue of notice to Mr. Ashok Mittal for the Board meetings.

(ix) If Section 300 regarding the interested Directors not participating or approving the registration of shares in favour of Mr. R.P. Mittal were to apply, then even the transfer of one share in favour of Mr. Ashok Mittal approved in the Board meeting held in December 2002 would also have to be invalid. The complaint about Moral transferring shares of HQR without consideration and depositing it against the loan given by Mr. R.P. Mittal could not be examined in the present case. Consequently, the registration of transfer of shares was not oppressive to Hillcrest or against the provisions of the AoA or the Act.

(x) The allotment of equity shares of HQR to Mr. R.P. Mittal and Mrs. Sarla Mittal was with the permission of the AGM convened on 28th December 2002. Thus in terms of the decisions of the CLB in *T&K Govindraju v. Kadri*

Mills (CP Nos. 8 & 32 of 1995 CLB) and *Mukkatukara Catholic Co. Ltd. v. H.B. Thomas 96 CC 864* the allotment of shares to Directors of HQR could not be held to be in violation of Section 300 of the Act. Although the Respondents could not justify the exclusion of Mr. Ashok Mittal from the allotment of shares, they agreed during the hearing before the CLB to allot preferential shares to him as well.

(xi) The allotment of shares made on 27th July 2004 and 7th July 2005 were predominantly in favour of Moral which was the largest shareholder of HQR and, therefore, the said allotments could not be said to be fraudulent or with an ulterior motive. There was nothing to show that the minutes and communicated records of the Board meetings held on 10th May 2005 were fabricated after the EGM notice was issued on 1st June 2005 by Hillcrest. Further, Mr. Ashok Mittal was party to confirmation of the minutes of the Board meeting held on 12th May 2005. There was confirmation of the minutes and the allotments and transfers were done lawfully to protect the interest of the investors. Consequently, the Respondents could not be held guilty of any fraud.

(xii) The appointment of Additional Directors could not be stated to be prejudicial to the interests of the Petitioners or to HQR. The contention of the Respondent that the petition was filed for the sole purpose of taking over HQR and not for redressing the grievance of oppression was justified. The provisions of Section 397 of the Act could not be invoked for achieving an ulterior motive.

(xiii) The stand of Mr. Ashok Mittal that he had given a loan of Rs.5.5 crores was not specifically denied by the Respondents nor had any documents been produced to rebut it. Further the balance sheet of the HQR for the year 2003-04 showed an aggregate balance of Rs.4.91 crores in the name of Mr. Ashok Mittal under 'unsecured loans'. Consequently, it was just and equitable that Mr. Ashok Mittal also got the benefit in terms of allotment of transfer of shares. Consequently, the shares allotted to Mr. R.P. Mittal and Mrs. Sarla Mittal should be subject to an additional allotment to Mr. Ashok Mittal. Of the total loan Rs.11.73 crores given by both Mr. R.P. Mittal and Mr. Ashok Mittal the loan of Rs.5.5 crores given by Mr. Ashok Mittal constituted 46.9%. Consequently, Mr. R.P. Mittal should transfer 46.9% of 32,88,181 shares transferred to him by Moral to Mr. Ashok Mittal and this worked out to 15,42,156 shares. The consideration would be Rs.20 per share at which Moral transferred shares to Mr. R.P. Mittal. Since the consideration for such transfer was deposited against loan account of Mr. R.P. Mittal, the consideration for 15,42,156 shares to Mr. Ashok Mittal should be adjusted by debiting Mr. Ashok Mittal's account and crediting the personal account of Mr. R.P. Mittal. This is, however, subject to Mr. Ashok Mittal making a request to Mr. R.P. Mittal in writing referring to the CLB's directions and subject to availability of credit in the account of Mr. Ashok Mittal with Moral. Within 15 days of such request being made in writing, the transfer should be registered in the register of members of HQR.

(xiv) For all future Board meetings of HQR, Mr. Ashok Mittal should be given seven days' notice by registered post and he should be given inspection of statutory records in his capacity as Director and shareholder. There should

always be an additional offer of share to all shareholders whenever future allotments are made. However, since Respondents had themselves offered to pay dividends on the CRPS, they were bound to do so if Hillcrest made a request in writing.

The present appeals

14. Aggrieved by the above order of the CLB, Hillcrest and Mr. Ashok Mittal have filed Co.A.(SB) No. 4 of 2006. HQR, Mr. R.P. Mittal and Mrs.Sarla Mittal have filed Co.A. (SB) No. 5 of 2006 to the extent the CLB has directed them to transfer shares to Mr. Ashok Mittal on the strength of loan of Rs.5.5 crores given by him to Moral. Mr. Ashok Mittal has filed Co. A.(SB) No. 10 of 2006 contending that 50% of the equity in HQR should be transferred to him.

15. Co. A.(SB) No. 4 of 2006 was first listed on 7th February 2006 and, thereafter on 8th February 2006 when the Respondents therein were permitted to place on record documents necessary for disposal of the appeal. Co. A. (SB) No. 5 of 2006 was listed on 13th February 2006 when it was noted that the other appeal was listed for hearing on 7th February 2006. While directing notice in Co. A. (SB) No. 5 of 2006, the Court in its order dated 13th February 2006 noted the submission of counsel appearing for HQR, Mr. R.P. Mittal and Mrs. Sarla Mittal that no shares would be transferred to any third party. In that view of the matter, the directions issued by CLB in para 15 of its order were directed to be stayed till varied or modified. Co. A. (SB) No. 10 of 2006 was listed on 18th April 2006 when it was directed to be listed along with FAO (OS) No. 282 of 2005.

16. At the hearing of the present appeals along with FAO No. 282 of 2005 on 14th November 2008, the Division Bench passed an order holding that FAO No. 282 of 2005 could be decided independent of the company appeals. Accordingly, the present appeals were delinked from the first appeals and directed to be listed before the Company Court.

17. It is stated that Hillcrest came to know in August 2008 that Mr. R.P. Mittal had suppressed from the Court the fact that he had filed Form-23 with the Registrar of Companies ('ROC') along with a Board resolution of 30th September 2002 for converting HQR into a public limited company. Accordingly, Hillcrest contended that Mr. R.P.Mittal had played a fraud with the Court while obtaining the interim order dated 12th August 2005 in CS (OS) No. 992 of 2005 whereby it was held that Hillcrest could not invoke Section 87(2) of the Act to claim voting rights. On the basis of the above documents Hillcrest filed CS (OS) No. 1832 of 2008 on 30th August 2008 in this Court for permanent injunction, declaration and cancellation of the Board resolutions and the allotment of shares in favour of Moral, Mr. R.P. Mittal and Mrs. Sarla Mittal. On 3rd October 2008, Hillcrest filed IA No. 12638 of 2008 under Order XXXIX Rule 4 CPC in CS (OS) No. 992 of 2005 seeking vacation of the interim order dated 12th August 2005. The said application was allowed on 24th October 2008 and the interim order dated 12th August 2005 was vacated. An order was passed on 15th October 2008 in IA No. 12164 of 2008 in CS (OS) No. 1832 of 2008 by the learned Single Judge observing that had the true facts been placed before the Court, the fate of the case would have been different as in the case of a public limited company,

the right could have accrued to Hillcrest to exercise voting rights under Section 87(2) of the Act in 2002 itself. While disposing IA No. 12164 of 2008 by the order dated 15th October 2008, the learned Single Judge held that HQR had played a fraud on the Court by suppressing the material facts in CS (OS) No. 992 of 2005 by virtue of the resolution dated 30th September 2002 and subsequent actions. The learned Single Judge ordered the appointment of an Administrator to manage the affairs of HQR.

18. The appeal FAO (OS) No. 440 of 2008 filed by HQR and Mr. R.P. Mittal and Mrs. Sarla Mittal against the above order dated 15th October 2008 was dismissed by the Division Bench on 14th January 2009. While not interfering with the above findings, the Division Bench noted that HQR had not given effect to the resolution of 30th September 2002 proposing to convert itself a public limited company. While it filed Form-23 with the ROC on 8th October 2002 and a statement in lieu of prospectus on 12th December 2003, it gave effect to another resolution passed on the same day for increase in the authorised share capital of HQR. The Division Bench was of the view that instead of a retired judge act as Administrator, it was appropriate to have the democratic process of managing the affairs of HQR continued subject to the decision in the trial whether HQR was a private or a public limited company. Consequently, it was directed that Hillcrest will be permitted hence forth to exercise voting rights in all meetings of HQR subject to the decision on whether HQR is a private or a public limited company. It was held that the decision taken by the EGM held on 4th October 2005 should be given effect to and that the meeting proposed for 16th October 2008 as requested for by Hillcrest should be held as soon as possible. The Division Bench rejected the

third alternative of maintaining status quo, since that would mean that “despite Hillcrest succeeding in all counts, and having been deprived of its legitimate rights for the past several years it gained nothing and continued to lose if the present situation continues. The balance deserves to be set right and this is possible if Hillcrest is permitted by having a say in the affairs of HQR”.

The decision of the Supreme Court

19. The appeal by Mr. R.P. Mittal and Mrs. Sarla Mittal against the decision of the Division Bench dated 14th January 2009 was dismissed by the Supreme Court by a judgment dated 20th July 2009 in ***Ram Parshotam Mittal v. Hillcrest Realty SDN. BHD. (2009) 8 SCC 709***. The main plank of submission of Mr. R.P. Mittal and Mrs. Sarla Mittal in their appeal was that there were three resolutions passed on the same date i.e. 30th September 2002. The first converting HQR into a public limited company, the second increasing the authorised share capital from Rs.1 lakh to Rs.90lakhs divided into 9 lakhs equity shares of Rs.10 each and the third altering the MoA and AoA to reflect the increased authorised share capital. It was contended that the language of the first resolution was different from those of the other two in that the first was only an enabling resolution whereas the other two came into effect immediately. Accordingly, it was contended that the Division Bench committed a serious error in treating HQR as a public limited company and in giving voting rights to Hillcrest without determining the real issue on whether HQR was a public limited company and leaving it open for decision of the learned Single Judge.

20. The Supreme Court in para 69 of its judgment (SCC) negated the above contention and concluded that the first resolution was a final decision taken by HQR to convert itself from a private limited company to a public limited company. Thereafter in para 71 the Supreme Court held that it was “prima facie of the view that by the said resolutions, a final decision had been taken by Hotel Queen Road to convert itself into a public company with immediate effect without having to wait for the decision to be rendered by the Registrar of Companies, who, in any event, had no authority to make any decision in that regard”. This was further strengthened by the fact that Form-23 was filed with the ROC along with the statement in lieu of prospectus. It is further noted that having regard to the definition of a ‘private company’ in Section 3(1)(iii) of the Act as soon as the number of members exceeded 50 such company lost its character as a private limited company. On 30th September 2002, on the same day when the above resolutions were passed, shares were allotted to 134 persons and, therefore, HQR lost its private character. This explained the alteration of its authorised share capital. In para 75 (SCC) the Supreme Court concluded that “whichever way we look at the three resolutions passed one after the other on 30th September 2002, it appears to have been the intention of the company to convert itself from a private company to a public company and that the same was effected by the three resolutions passed on 30th September 2002”.

21. Reacting to the submissions made on behalf of Hillcrest that it could not have accepted the offer of HQR to pay dividend since it was not from the profits of HQR as required under Section 205 of the Act, the Supreme Court in para 76 observed “then again, the offer to pay dividends from a private

source and not out of the company's profits, is not contemplated under Section 205 of the Companies Act.” It distinguished the decisions in *In Re Bradford Investments Ltd. 1991 BCLC 224* and *In Re Walters' Palm Toffee Ltd. v. Walters All ER Repo 430* on facts and held that they did not help the case of Mr. R.P. Mittal since the language of Section 205 was “clear and unambiguous”. In conclusion it was held by the Supreme Court as under:

“79. However, for the purpose of disposing of these special leave petitions, we are prima facie of the view that by virtue of the resolutions dated 30th September 2002, Hotel Queen Road had become a public company thereby attracting the provisions of Section 87(2)(b) of the Companies Act, 1956, upon the bar under Section 90(2) thereof having been lifted. A natural consequence is that in the event dividend had not been declared or paid for a period of two years as far as Hillcrest is concerned, the Explanation to Section 87(2)(b) would come into play thereby giving Hillcrest Realty, as a cumulative preference shareholder, the right to vote on every resolution placed before the company, at any meeting, in keeping with clause (i) of Section 87(2)(b) of the aforesaid Act.

80. In keeping with the aforesaid principle, while dismissing the special leave petitions filed by Hotel Queen Road and Hillcrest Realty, we make it clear that the observations made in this judgment are of a prima facie nature only for disposal of the special leave petitions and should not influence the final decision in the suits, where the question relating to the status of Hotel Queen Road has been left open for decision. We, however, request the High Court, functioning as the trial court, to dispose of the suits at an early date so that the management and affairs of Hotel Queen Road are not left in a state of uncertainty.”

Rights Issue challenge

22. On 30th July 2009, Hillcrest issued a further letter dated 30th July 2009 for rights issue of 15000003 equity shares of Rs.10 each for cash at a price of Rs.40 per share including a premium of Rs.30 per equity share aggregating to Rs.601200120 of rights to the existing equity shareholders in the ratio of 1.67:1 equity shares for every one equity share held on the record date i.e. 26th July 2009. Aggrieved by the above move Mr. R.P. Mittal, Mrs. Sarla Mittal, Mr. Sumaj Jain and Moral filed IA No. 9920 of 2009 in CS (OS) No. 1832 of 2008 seeking to restrain Hillcrest from going ahead with the rights issue. It was contended before the learned Single Judge that the order dated 14th January 2009 of the Division Bench which was upheld by the Supreme Court had led to Mr. R.P. Mittal and Moral being ousted from the management of HQR and yet the reality was that they were the largest shareholders. In response, it was contended by Hillcrest that after it took over the management it came to know that owed the banks over Rs.30 crores and, therefore, there was need for further funds. Hillcrest submitted that it had invested Rs.30 crores to enable Moral take over HQR. The present market value of the share was Rs.145 and after the rights issue it would be around Rs.78.

23. The learned Single Judge by a judgement dated 18th August 2009 in ***Hillcrest Realty v. Ram Parshotam Mittal 165 (2009) DLT 665*** negated the objection of Hillcrest to the maintainability of the application by Mr. R.P. Mittal. It was further held that there was nothing illegal or reprehensible in the rights issue being offered at a premium on the shares of HQR. As regards the objections raised by Mr. R.P. Mittal based on Section 78 of the Act that

the amount raised by way of rights issue had to be only kept in the share capital account and could not be utilised for repaying the liabilities of the HQR, the learned Single Judge directed Hillcrest as well as HQR to file an undertaking that if the amount kept in share capital account was sought to be reduced under Section 100 and 101 of the Act approval for such reduction in share capital would be by way of a special resolution of the company. Learned Single Judge declined to grant Mr. R.P. Mittal an injunction. FAO (OS) No. 349 of 2009 filed by Mr.R.P. Mittal challenging the above order which was dismissed as withdrawn on 20th April 2010.

24. As a result of the above rights issue, the present share holding pattern of HQR is that Hillcrest holds 28,29,00,000 shares (59.82%), Mr. R.P. Mittal holds 1,837,694 shares (3.89%), Moral holds 4,151,648 shares (8.78%), Mrs. Sarla Mittal holds 375,003 shares (0.79%), Mr. Ashok Mittal holds 11,802,160 shares (24.95%) and the others holds 839,313 shares (4.41%).

25. This Court has heard the submissions of Mr. Jayant Bhushan, learned Senior counsel and Mr. Arun Kathpalia, learned Advocate appearing for Hillcrest and Mr. Ashok Mittal and Mr. Aman Lekhi and Mr.Vibhu Bakhru, learned Senior counsel for Mr. R.P. Mittal and Mrs. Sarla Mittal.

Effect of the judgment of the Supreme Court

26. The facts that have emerged after the impugned decision of the Company Law Board ('CLB') dated 31st January 2006 and which have led to further litigation between the parties culminating in the decision of the Supreme

Court in *Ram Parshottam Mittal v. Hillcrest Realty Sdn. Bhd.* has considerably changed the very basis on which the CLB proceeded.

27. The additional facts were brought on record by Mr. Ashok Mittal by filing CA No. 378 of 2009 in Co.A.(SB) 4 of 2006 in which notice was directed to issue by the Court on 23rd March 2009. Thereafter, on 30th November 2010, the Court had directed that the averments in the said application will be read and examined at the time of arguments in the appeal. It was stated that the response thereto would also be read at the time of arguments in the Co. Appeal. However, HQR, Mr. R.P. Mittal and Ms. Sarla Mittal did not appear to have filed any reply as such to CA No. 378 of 2009.

28. Along with CA No.378 of 2009, the Appellants herein have placed on record Form-23 filed by Mr. R.P. Mittal with the ROC for conversion of HQR into a public limited company. This contains the stamp of receipt thereof by the ROC dated 17th October 2002. Enclosed with Form-23 are the two extracts of the resolution passed by the members of the company at the EGM on 30th September 2002, both in relation to the conversion of HQR into a public limited company as well as increase in its authorized share capital. The explanatory statement pursuant to Section 173(2) of the Act enclosed with the agenda for the EGM states that the hotel property of ITDC was demerged with HQR and that in accordance with the Scheme of Arrangement ('Scheme') as sanctioned by the Department of Company Affairs HQR was required to allot equity shares to the shareholders of ITDC as per the ratio envisaged in the Scheme. It is stated that since the company is a private

limited company and has restricted the total number of shareholders to fifty, the present authorized share capital is insufficient to allot all equity shares.

29. A copy of the plaint in the civil suit [CS(OS) No. 1832 of 2008] filed by Hillcrest for declaration that HQR is an independent public limited company and that the provisions of Sections 85 to 90 of the Act relating to the rights of preferential shareholders pledged to HQR have also been placed on record. In the said suit, the other prayers are for declaration of the illegality of the resolution passed by the Board of Directors ('BoD) dated 27th July 2004 whereby 23,90,000 shares of HQR were allotted to Moral, the resolution at the board meeting dated 7th January 2005, whereby 41,51,648 equity shares of HQR were allotted to Moral as well as 1,10,000 shares were allotted to Mr. R.P. Mittal and 4,50,000 shares to Ms. Sarla Mittal as well as board resolution passed on 10th May 2005 transferring 32,88,181 equity shares of HQR held by Moral in favour of Mr. R.P. Mittal as well as registration of such shares by HQR in favour of Respondent No.1 and for a direction to restore the shareholding pattern of HQR as on 1st April 2004.

30. The above documents show that the BoD of HQR followed by its EGM had already resolved to convert into a public limited company. The fact of the aforementioned resolutions was suppressed by Mr. R.P. Mittal from the Court as well as the CLB. The above developments led to the order of 15th October 2008 passed by the learned Single Judge in IA No. 12164 of 2008 in CS (OS) No. 1832 of 2008 followed by the further order dated 24th October 2008 in IA No. 12638 of 2008 in CS (OS) No. 992 of 2005 vacating the

interim stay granted by the learned Single Judge on 12th August 2005 in IA No. 5505 of 2005 in CS (OS) No. 992 of 2005.

31. Both the learned Single Judge as well as the Division Bench ('DB') of the High Court as well as the Supreme Court have come to the *prima facie* conclusion that HQR had converted into a public limited company and that with the allotment of shares to 134 persons on 30th September 2002 HQR lost its private character requiring the special resolutions to be passed for alteration of its authorised share capital. The Supreme Court has made it clear that its observations were of *prima facie* nature and "should not influence the final decision in the suits, where the question relating to the status of Hotel Queen Road has been left open for decision." The resultant position is that as long as the said suits are pending even this Court cannot take a final decision on the question whether HQR is a public limited company. It has to proceed on the basis of the *prima facie* conclusion of the Supreme Court that HQR is a public limited company "thereby attracting the provisions of Section 87(2) (b) of the Companies Act 1956 upon the bar under Section 90(2) thereof having been lifted." The consequence spelt out by the Supreme Court was that Hillcrest as a CRPS holder had the "right to vote on every resolution placed before the company, at any meeting, in keeping with Section 87(2)(b)(i)" of the Act.

32. The aforementioned facts were admittedly not before the CLB when the impugned judgment dated 31st January 2006 was passed. In the said judgment, CLB has proceeded on the basis that HQR is a private limited company. In para 26 of the impugned order dated 31st January 2006, CLB

dealt with the preliminary objection raised by HQR, Mr. R.P. Mittal and Mrs. Sarla Mittal that since Mr. Ashok Mittal held only 1 share, he could not maintain the petition under Sections 397 and 398 of the Act. The CLB pointed out that in terms of Section 399, members holding 1/10th of the issued capital are entitled to file a petition and issued capital includes not only equity shares but also preference shares. Thereupon, the objection “was not pressed”. CLB also noted that it would not give any finding on the issue relating to voting rights on the preference shares.

33. The decision of the Supreme Court changes the situation inasmuch as based on its *prima facie* finding regarding the status of HQR being no longer a private company, the voting rights of Hillcrest have to be recognised. Consequently, even the question whether there was any understanding between the parties about Hillcrest having voting rights would not survive. The argument before the CLB appears to have proceeded on the basis that by allotting the shareholding of Moral in HQR to RPM, the attempt was to deprive HQR of its status as a subsidiary of Moral and thereby depriving Hillcrest of its voting rights in terms of Section 87(2) (b) read with Section 90 (2) of the Act. That issue is academic as of now. If indeed, HQR *prima facie* a public limited company, Section 90 (2) would not apply and Hillcrest would anyway have voting rights under Section 87 (2) (b) (i) of the Act.

34. Another issue that appears to have been decided in the judgment of the Supreme Court concerns the non-payment of dividend. The Supreme Court has negated the plea of Mr. R.P. Mittal that the dividend could have been paid from other sources even when HQR was not making any profits. It was

held that the wording of Section 205 of the Act was unambiguous and that dividend could be paid only from the profits of HQR. Admittedly HQR was not making any profits for a period of two years after Hillcrest was allotted CPRS of HQR. The right of Hillcrest as a holder of CPRS to exercise its voting rights has, therefore, been recognized by the Supreme Court. The assertion to the contrary by Mr. R.P. Mittal and Mrs. Sarla Mittal in their written submissions is untenable. The CLB had drawn an adverse inference against Hillcrest and Mr. Ashok Mittal for refusing to accept the dividend offered to them both before the High Court and the CLB. In light of the above conclusion of the Supreme Court, the decision of the CLB on this aspect can no longer be sustained. Consequently, the further finding of the CLB that the Appellants were unable to demonstrate acts of oppression also does not hold good.

The three Board meetings

35. The central theme of the impugned order of the CLB concerned the Board resolutions passed on three different dates approving the allotment and transfer of shares to Moral, Mr. R.P. Mittal, Mrs. Sarla Mittal and Pondy, and the *inter se* transfers. In approaching the above issue, CLB seems to have proceeded on the basis that Mr. Ashok Mittal held only one share. It is not in dispute that on 21st December 2002 Moral transferred thirteen shares of HQR to seven other persons, of which two shares were transferred to Mr. R.P. Mittal, three to Ms. Sarla Mittal and one to Mr. Ashok Mittal. The increase in the shareholding took place only subsequently at the meeting of 27th July 2004. Seen in this light, the holding of one share by Mr. Ashok Mittal cannot be said to be a very small percentage. Further the other petitioner before the

CLB was Hillcrest which had a substantial percentage of CRPS. The CLB itself recognised the right of Hillcrest to complain about oppression under Section 397 of the Act. Therefore the relatively lesser holding of shares by the petitioners could not have made a difference to the question of validity of the Board resolutions.

36. Having found that the mandatory provision of notice to the Director Mr. Ashok Mittal in terms of Section 286 was not complied, the CLB adopted a strange reasoning that by the same yardstick the allotment of shares to Mr. Ashok Mittal and CRPS to Hillcrest would also be invalid. The apparent invalidity of the Board resolutions approving allotments to Mr. R.P. Mittal, Mrs. Sarla Mittal and Pondy, and the *inter se* transfers cannot be overcome by the invalidity attaching to decisions taken at meetings where there was a failure to comply with Section 286. The resolutions under challenge were those passed at the Board meetings held on 27th July 2004, 7th January 2005 and 10th May 2005. The decisions at any of the earlier meetings were not under challenge. In ***Parmeshwari Prasad v. Union of India AIR 1973 SC 238***, the Supreme Court emphasized on the mandatory nature of Section 286 of the Act. The other principle is that no party can be allowed to take advantage of its own wrong [see ***Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan JT 2004 (&) SC 434***]. Once it was found by the CLB that there was no notice to Mr. Ashok Mittal for any of the board meetings, none of the resolutions could be held to be valid.

37. An attempt has been made by Mr. R.P. Mittal to show that Mr. Ashok Mittal had, in fact, ratified the minutes of the board meeting held on 10th May 2005 because he attended the subsequent board meeting of 4th July 2005, the

minutes of which he signed on 3rd September 2005. In the first place, the board meeting of 10th May 2005 was challenged by Mr. Ashok Mittal by filing a petition in the CLB. He cannot be said to have acquiesced in the decisions taken at that meeting. Also when admittedly Mr. Ashok Mittal was not present at the meeting held on 10th May 2005, he cannot be said to have ratified the decision taken at such meeting merely because he participated in a subsequent meeting that confirmed the minutes of the meeting of 10th May 2005. The mere signing of the minutes of the meeting of 4th July 2005 cannot lend validity to what was done on 10th May 2005, if it was *ab initio* invalid. There is a difference between recording what was done on 10th May 2005 as a fact and ratifying the decision taken on 10th May 2005. While confirmation of the minutes only records the fact of a decision having been taken, it by no means amounts to ratification of the minutes of the decision taken at the earlier meeting. In ***Dr. Chetkar Jha v. Dr. Vishwanath Prasad Verma (1970) 2 SCC 217***, the Supreme Court explained that “when the minutes of a meeting are placed before the next meeting the only thing that can be done is to see whether the decision taken at the earlier meeting has been properly recorded or not. The accuracy of the minutes and not the validity of the decision is, therefore, before the meeting.” This was followed in ***Kerala State Electricity Board v. Hindustan Construction Co. Ltd. (2006) 12 SCC 500***. It cannot be therefore said that by signing the minutes of the meeting held on 4th July 2005, Mr. Ashok Mittal had accepted the validity of the decisions taken at the Board meeting held on 10th May 2005.

38. As far as Hillcrest is concerned, it was entitled to presume that the acts of the company as well as its BoD have been done in a valid manner and

consequently not affecting the validity of the allotment of the CRPS in its favour. The doctrine of indoor management first explained in ***Royal British Bank v. Turquand (1856) 6 E&B 27*** was further explicated by our Supreme Court in ***MRF Ltd. v. Manohar Parrikar (2010) 11 SCC 374***(SCC, p.419) as under:

“111. The Doctrine of indoor management is in direct contrast to the doctrine of rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation or authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in the memorandum and articles have been properly observed. Therefore, doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of the company or corporation against dealing with the outsiders. However suspicion of irregularity has been widely recognised as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and invite inquiry.”

Section 300 and disclosure of interest

39. The manner of the CLB dealing with the objection under Section 300 of the Act regarding interested directors not participating in the board meeting is also unconvincing. The application for allotment of shares and acceptance thereof is indeed a contract between the company and the applicant, as was explained in ***Union of India v. Allied International Products Ltd. 1970 (3) Co. A. (SB) Nos. 4, 5 & 10 of 2006***

SCC 594. Mr. Ashok Mittal and Mrs. Sarla Mittal were under a fiduciary duty not to participate in the decision where shares were to be transferred to their group companies. Even if HQR were a private limited company, the compliance with the requirement of Section 300 of the Act was mandatory as explained in the decision of the Bombay High Court in *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd.* [1971] 41 CC 377 and *Madras Tube Company Ltd. v. HariKishonSomani* 1985 1 Comp LJ 195 (Mad). Section 300 of the Act was not complied with when decisions were taken at the Board meetings held on 27th July 2004, 7th January 2005 and 10th May 2005 first to allot shares to Moral and thereafter to Mr. R.P. Mittal and Mrs. Sarla Mittal and finally to permit the transfer of shares from Moral to Mr. R.P. Mittal. The CLB appears to have overlooked the aspect of under-valuation of the HQR shares. The allotment of shares to Moral was at the meeting on 10th May 2005 made at par and on the very same date the shares of Moral were transferred to Mr. R.P. Mittal at Rs. 20 per share. These acts when viewed collectively with those noticed earlier were sufficient to conclude that grounds under Section 397 had been made out.

Violation of Section 108

40. There has been a fairly serious violation of Section 108 of the Act. Section 108 of the Act mandates that share certificates must actually be tendered along with the share transfer forms duly executed by the transferor in favour of the transferee at the time of the Board approving the transfer of shares. The case of Hillcrest and Mr. Ashok Mittal is that when the transfer of shares from Moral to Mr. R.P. Mittal was approved by the BoD on 10th May 2005 the share certificates held by Moral were still with the Indian Overseas Bank

(‘IOB’) with whom they had been pledged. Although during the arguments and in the written submissions it has been urged by Mr. R.P. Mittal that this ground was not taken before the CLB, the fact remains that the occasion to urge such a ground has arisen only because of the subsequent developments.

41. Hillcrest and Mr. Ashok Mittal contended that after they took over the management of HQR, pursuant to the judgment dated 23rd January 2009 of the DB they found that the share certificates had been pledged with IOB by Moral on 17th October 2002 as security for the loan availed by it to finance the investment in HQR had been released by IOB to Mr. R.P. Mittal only on 23rd June 2006. This was confirmed by IOB by letter dated 9th February 2009 addressed to HQR. To overcome this, an affidavit was tendered in Court by Mr. R.P. Mittal, enclosing another letter of IOB dated 22nd February 2013 which stated that the share certificates were returned on 23rd June 2003 itself. This led to the Court inquiring from learned counsel for Mr. R.P. Mittal at the hearing on 5th March 2013 whether he was willing to stand by the statement made by him earlier.

42. This is noted in the order dated 5th March 2013 of the Court which reads as under:

“1. At the beginning of his arguments in reply today, Mr. Atul Sharma, learned counsel tendered an affidavit dated 5th March 2013 sworn by Mr. R.P. Mittal. The affidavit is taken on record. A copy of the affidavit has been given to learned counsel for the other parties.

2. The affidavit encloses a letter dated 22nd February 2013 of the Indian Overseas Bank (‘IOB’), Parliament Street Branch, New

Delhi, stating that the share certificates of Hotel Queen Road Pvt. Ltd. ('HQRPL') pledged by Moral Trading Limited ('MTL') were delivered back on 23rd June 2003. The said letter is stated to have been received by Mr. Mittal on 22nd February 2013 itself.

3. Learned counsel for Mr. R.P. Mittal, on instructions from Mr. R.P. Mittal, confirms that the shares of HQRPL pledged by MTL were in fact delivered back to Mr. R.P. Mittal on 23rd June 2003.

4. Mr. Jayant Bhushan, learned Senior counsel for Hillcrest Realty SDN BHD ('Hillcrest'), while commencing his rejoinder arguments, tendered an additional affidavit sworn by Mr. Girish Makhija representing HQRPL. In the said affidavit it is stated that after reading the contents of the letter dated 22nd February 2013 that was produced in the Court by Mr. Aman Lekhi, learned Senior Advocate appearing for Mr. R.P. Mittal, a letter was addressed to the Chief Manager, IOB by Mr. Ashok Mittal on 28th February 2013, seeking a clarification with regard to the dichotomy between the letter issued by IOB on 9th February 2009, [a copy of which is at page 1133 in Co. A.(SB) 4 of 2006], and the subsequent letter dated 22nd February 2013 issued by IOB. This was because in the letter dated 9th February 2009, IOB had stated that the original share certificates of HQRPL along with the blank share transfer forms were released on "23.06.2005" against acknowledgement, whereas in the letter dated 22nd February 2013 IOB stated that they had received the said share certificates "for pledge in our favour on 17.10.2002 and the same were delivered to you on 23.06.2003."

5. In response to the said letter written by HQRPL, the Assistant General Manager ('AGM') of IOB, Parliament Street Branch has, on 1st March 2013, written a further letter to Mr. Ashok

Mittal, Director, HQRPL, stating that after checking the records “it appears that the date mentioned in para 1 (of the letter dated 22 .02.2013) reading ‘23.06.2003’ is incorrect, as the correct date is 23.06.2005.” It has been reaffirmed that “the date has been rightly mentioned in our earlier letter dated 09.02.2009.” According to IOB, “the date of 23.06.2005 is also borne out from the signatures appended upon the photocopies of share certificates.” The AGM, IOB, Parliament Street, New Delhi has regretted the inconvenience caused and states that they “strictly stand by their letter dated 09.02.2009.”

6. The above contradictory stand of IOB is a cause for concern particularly since one of the main planks of the submissions of the Appellants Hillcrest and Ashok Mittal before the Court turns on the question whether the aforementioned share certificates were in fact available when a decision was taken at the Board meeting of HQRPL held on 10th May 2005 regarding the transfer of shares. With Mr. R.P. Mittal filing an affidavit today, swearing to the truth of the contents of the letter dated 22nd February 2013, and further stating before this Court through counsel that the share certificates were delivered back to him on 23rd June 2003, it becomes necessary for the Court to ascertain what the correct position is. Incorrect statements made on affidavits before this Court by either party would have serious consequences.

7. Notice without process fee will issue to the Manager of IOB, Parliament Street Branch, who wrote the letter dated 22nd February 2013 and the AGM of IOB of the same Branch, who wrote the subsequent letter dated 1st March 2013 to be present in Court together with whatever original records are there in their possession to clarify the position. Copies of both the letters dated 22nd February 2013 and 1st March 2013 will be enclosed with the summons. A certified copy of this order will also be

sent to each of them to appear before this Court on 14th March 2013 at 2:15 pm.

8. A copy of this order be given *dasti* under signature of Court Master.”

43. At the subsequent hearing on 14th March 2013, the Court noted submissions of Mr. Vivek Dixit, Senior General Manager, IOB and then passed the following order:

“By an order dated 5th March 2013 this Court had directed the notice to issue without process fee to both the Manager as well as Assistant General Manager (‘AGM’) of the Indian Overseas Bank (‘IOB’), Parliament Street Branch, New Delhi to find out why contradictory letters were written on 22nd February 2013 and on 1st March 2013 as regards the return of share certificates.

Mr. Vivek Dixit, Senior General Manager of the IOB, Parliament Street Branch is present in Court. He states that he received summons only two days ago enclosing copies of the letters dated 22nd February 2013 and 1st March 2013 and not the copy of the order dated 5th March 2013 passed by this Court.

The Court has ascertained from the Administrative Officer (Judicial), Company Branch that summons were issued only to the Manager, IOB, Parliament Street Branch, New Delhi without enclosing a copy of the order dated 5th March 2013 passed by the Court.

The Registrar General is requested to enquire why the order dated 5th March 2013 was not complied with by the Registry and submit a report before the next date of hearing.

Mr. Vivek Dixit has produced in Court the original of the letter dated 17th October 2002 written by Mr. R.P. Mittal, Director on behalf of Moral Trading & Investment Limited to the Chief Manager, IOB, Janpath, New Delhi. The said letter dated 17th October 2002 be placed in a sealed cover by the Deputy Registrar and produced before the Court on the next date.

Mr. Vivek Dixit admits his signature on the letter dated 22nd February 2013. He states that Mr. Deepak Sudan, AGM is the signatory of the letter dated 1st March 2013. Both Mr. Dixit and Mr. Sudan will file their individual affidavits explaining the circumstances under which the aforementioned letters were issued. These affidavits will also explain the procedure followed by IOB as regards the receipt and return of share certificates. The Court finds that on the original letter produced today there is no stamp of receipt of the said documents by the IOB. The affidavits will also explain whether any register is maintained by the IOB as regards the receipt and return the documents and securities. The affidavits be filed by Mr. Dixit and Mr. Sudan on or before 2nd April 2013. Both of them shall remain present in Court on the next date of hearing, i.e., 9th April 2013.

A certified copy of this order passed today as well as a certified copy of the order passed on 5th March 2013 will be delivered to Mr. Vivek Dixit as well as Mr. Deepak Sudan by a special messenger within two days from today for compliance. Additionally Mr. Dixit will communicate this order to Mr. Sudan forthwith. The Court will take a serious view if there is any disobedience of this order.

List for hearing on 9th April 2013 at 2.15 pm.

Order be given *dasti*.”

44. Consequent upon the above order Mr. Vivek Dixit and Mr. Deepak Sudan filed affidavits which the Court did not find satisfactory and passed the following order on 9th April 2013:

“1. Separate affidavits have been filed by Mr. Vivek Dixit, Senior General Manager, Indian Overseas Bank (‘IOB’), Parliament Street Branch and Mr. Deepak Sudan, Assistant General Manager, IOB in response to the order passed by the Court on 14th March 2013. There was a specific query which the Court had asked these officers to address. They were asked to explain “whether any register is maintained by the IOB as regards the receipt and return of documents and securities”. Both officers state in their respective affidavits that no such register is maintained, yet both of them state that on verification of the “records” it was found that the share certificates in question were returned on 23rd June 2005. It is not clear which ‘records’ are being referred to by both the deponents.

2. At this stage, learned counsel appearing for the IOB states that both the officers will file further explanatory affidavits placing on record the sequence of events and enclose copies of the relevant ‘records’ on the basis of which the above statements have been made in their respective affidavits dated 2nd April 2013.

3. The supplementary affidavits be filed by both officers on or before 15th April 2013 with copies to the counsel for the other parties. Responses, if any, to the above affidavits be filed by the next date. Both the officers of the IOB will remain personally present in Court on the next date.

4. The arguments of the counsel on the other aspects have concluded.

5. List on 17th April 2013”.

45. Following the above order, further affidavits have been filed by both Mr. Vivek Dixit and Mr. Deepak Sudan on 15th April 2013 and a response thereto has been filed by Mr. R.P. Mittal. Written submissions have been filed by both the parties.

46. The order dated 5th March 2013 records in para 3 that “Learned counsel for Mr. R.P. Mittal, on instructions from Mr. R.P. Mittal, confirms that the shares of HQR pledged by MTL were in fact delivered back to Mr. R.P. Mittal on 23rd June 2003.” It was at that stage that learned Senior counsel for Hillcrest produced an additional affidavit of Mr. Girish Makhija representing HQR which encloses another letter from IOB issued on 1st March 2013 again confirming that the date mentioned in IOB’s letter dated 9th February 2009 was correct and that the share certificates were in fact delivered to Mr. R.P. Mittal on 23rd June 2005. The above contradictory stands of the IOB have been explained by the authors of those letters and both of them have now stated that the share certificates were delivered to Mr. R.P. Mittal on 23rd June 2005. Mr. R.P. Mittal has filed an affidavit in response to the aforementioned affidavits of the bank officials and stuck to his earlier stand that the shares were in fact delivered to him on 23rd June 2003 itself. This is belied by the reasons explained by Hillcrest in its affidavit dated 9th April 2013. There was no occasion for the share certificates to have been returned by IOB on 23rd June 2003. From the loan account statement of Moral, which has been annexed to the affidavit, it appears that the loan of Rs. 15,00,00,000 was disbursed by IOB on 7th October 2002 and transferred to the account of HQR on 22nd July 2003. The mortgage deed for securing the loan of HQR Co. A. (SB) Nos. 4, 5 & 10 of 2006

was executed only on 20th September 2003. The question of release of the pledged share certificates on 23rd June 2003 did not arise. Mr. Lekhi tried to explain that there was a doubt as to how IOB could have issued a clarification on the same date that Hillcrest and Mr. Ashok Mittal made a request to it, i.e., 9th February 2009. It is sought to be suggested that the letter dated 9th February 2009 is, in fact, a fabricated document. This submission is belied by the two sets of affidavits filed by Mr. Vivek Dixit and Mr. Deepak Sudan the concerned officials of IOB. This Court finds no reason to disbelieve the said affidavits. The Court is satisfied with the explanation offered that the share certificates were in fact returned to Mr. R.P. Mittal not on 23rd June 2003 but on 23rd June 2005.

47. Two conclusions can be drawn from the above discussion. The first is that there is a clear violation of Section 108 of the Act. HQR did not have the share certificates along with the duly executed share transfer forms when a decision was taken at the Board meeting held on 10th May 2005 to approve the transfer of shares from Moral to Mr. R.P. Mittal. The said decision therefore is invalid. The second conclusion is that Mr. R.P. Mittal has, *prima facie*, made a false statement in his affidavit dated 5th March 2013 and counter affidavit dated 30th April 2013 before this Court that the share certificates pledged with IOB were returned to him on 23rd June 2003. This Court is, therefore, inclined to institute *suo moto* proceedings under Section 340 of the Code of Criminal Procedure, 1973 ('CrPC') against Mr. R.P. Mittal for making a false statement before the Court on affidavit.

Conclusion and directions

48. The upshot of the above discussion is that the impugned decision of the CLB upholding the validity of the Board resolutions dated 27th July 2004, 7th January 2005 and 10th May 2005 cannot be sustained in law. To that extent Co. Appeal (SB) No.4 of 2006 is allowed.

49. The next question concerns the validity of the directions issued by the CLB in para 50 of the impugned order regarding allotment of shares to Mr. Ashok Mittal. Since the transfer of shares to Mr. R.P. Mittal by Moral is *ab initio* invalid, the question of allotting shares on the same basis to Mr. Ashok Mittal obviously cannot arise. Consequently there is no need to examine the further question whether Mr. Ashok Mittal in fact contributed Rs.5.5.crores for the acquisition of HQR shares by Moral. The directions in para 50 of the impugned order of the CLB are also accordingly set aside. Co. Appeal (SB) No. 5 of 2006 is allowed and Co. Appeal (SB) No. 10 of 2006 is dismissed.

50. Thus independent of the *prima facie* finding of the Supreme Court that HQR is not a private but a public limited company, the Court finds that the impugned order dated 31st January 2006 of the CLB cannot be sustained in law.

51. The question next is of consequential relief. Pursuant to the orders of the DB as confirmed by the Supreme Court, the management of HQR is presently with the appellants in Co. Appeal (SB) No. 4 of 2006. They are also presently the majority shareholders. In light of the changed circumstances, the Court directs that status quo will be maintained as regards the BoD as

well as the shareholding of HQR till such time the suits concerning the status of HQR as a private or public limited company are finally decided. The parties are, however, at liberty to seek any variation or modification of this direction from the court in which the suits are pending.

52. Having regard to the statement made in Court on 5th March 2013 by Mr. R.P. Mittal through his counsel and the affidavit dated 30th April 2013 of Mr. R.P. Mittal, this Court is prima facie satisfied that offence under Section 191 IPC punishable under Section 196 IPC, has been committed by Mr. R. P. Mittal in relation to these proceedings. In terms of Section 340 CrPC read with Section 195(1)(b)(i) thereof, this Court is of the opinion that it is expedient in the interests of justice that an inquiry should be made into the above offence for which a written complaint should be made to the concerned Metropolitan Magistrate against Mr. R. P. Mittal. Accordingly, The Registrar General of this Court is directed to draw up and file a complaint against Mr. R. P. Mittal in the Court of the Magistrate of competent jurisdiction within four weeks. The said complaint will be accompanied by a certified copy of the entire record of Co. A. (SB) 4 of 2006.

53. The impugned order dated 31st January 2006 of the CLB is set aside. Co. Appeal (SB) Nos. 4 and 5 of 2006 are allowed and Co. Appeal (SB) No. 10 of 2006 is dismissed but with no order as to costs.

S. MURALIDHAR, J.

MAY 31, 2013

dn/tp

Co. A. (SB) Nos. 4, 5 & 10 of 2006

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