

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPEAL NO.19 OF 2009
IN
CLB COMPANY PETITION NO.106 OF 2005**

Akkadian Housing and Infrastructure
Pvt. Ltd. & Anr.

...Appellants
(Org. Petitioners)

Versus

Pantheon Infrastructure Pvt. Ltd. & Ors.

...Respondents

WITH

**COMPANY APPLICATION NO.354 OF 2009
IN
CLB COMPANY PETITION NO.106 OF 2005
IN
COMPANY APPEAL NO.5 OF 2009
WITH**

**COMPANY APPLICATION NO.707 OF 2009
IN
COMPANY APPEAL NO.19 OF 2009**

WITH

**COMPANY APPLICATION NO.104 OF 2010
IN
COMPANY APPEAL NO.19 OF 2009
IN
COMPANY PETITION NO.106 OF 2009**

WITH

**COMPANY APPLICATION NO.18 OF 2010
IN
COMPANY APPEAL NO.19 OF 2009**

WITH

**COMPANY APPLICATION NO.45 OF 2010
IN
COMPANY APPEAL NO.19 OF 2009**

WITH

**COMPANY APPLICATION NO.7 OF 2015
IN
COMPANY APPLICATION (L) NO.50 OF 2015
IN
COMPANY APPEAL NO.19 OF 2009**

WITH

**COMPANY APPEAL NO.21 OF 2009
IN
CLB COMPANY PETITION NO.106 OF 2005**

WITH

**COMPANY APPLICATION (L) NO.3 OF 2014
IN
COMPANY APPEAL NO. 19 OF 2009**

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Ms. Fereshte Sethna, a/w. Ms. Anooja Menon, Mr. Manan Shukla, Mr. Shantanu Singh and Ms. Khushboo Shah, i/b. Duttmenon Dunmorrsett, for the Appellant.

Mr. Aspi Chinoy, Senior Advocate, a/w. Mr. M.S. Doctor, Senior Advocate, Ms. Ankita Singhanian, i/b. Bachubhai Munim & Co., for Respondent Nos. 2, 6 to 9 and 11 and for Appellants in COAPP/21/2009.

Mr. Milind Sathe, Senior Advocate, a/w. Mr. Shyam Mehta, Sr. Advocate, Ms. Naira Jejeebhoy, Ms. Spenta Havewala, Mr. Robin Fernandes, i/b. Federal & Rashmikant, for the Respondent Nos. 4, 12 and 13.

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CORAM: S.C. GUPTA, J.

RESERVED ON : 21 AUGUST, 2015.

PRONOUNCED ON : 21 SEPTEMBER, 2015.

JUDGEMENT :-

. Company Appeal No.19 of 2009 impugns an order passed by the Company Law Board, Principal Bench (“CLB”), in the Appellants’ petition under Sections 397 and 398 of the Companies Act, 1956 (“Act”). The facts of the Appellants’ case may be briefly stated thus:

2. Appellant No.1 – Akkadian Housing and Infrastructure Pvt. Ltd. (“Akkadian”) – is a private company limited by shares incorporated under the Act and owned/controlled by Appellant No.2 – Alnoor H. Jamal (“Jamal”) – who is a foreign national of Indian origin based in Kenya. Jamal is a businessman of Canadian nationality and claims to be holding varied business interests globally. Akkadian is the registered holder of 14,023 fully paid up equity shares of the first Respondent Company (“Company”), which comprise of 28.33% of the issued equity capital of the Company, in respect of whose affairs allegations of oppression and mismanagement are made in the original petition and which form the subject matter of the present appeal. Respondent No.2 – Shobhit Rajan (“Rajan”), who is the Managing Director of the Company, is alleged to be holding the balance 71.67% of shareholding of the Company through himself and his friends and /or relatives and/or entities controlled by him, who are also arraigned as Respondents to the original petition.

3. Sometime in early 1999, Jamal claims to have come to know of a prime property admeasuring about 13 acres at Saki Naka in Andheri (East), Mumbai (“subject property”), owned by M/s. Parke Davis (India)

Ltd., which the latter was proposing to sell. After initial negotiations with Parke Davis, Jamal approached Rajan with a proposal of joint acquisition and development of the subject property. Jamal and Rajan agreed to jointly acquire and purchase the subject property through a company. An existing company by the name of A-Class Builders and Developers Pvt. Ltd., since re-named as the Company herein, was acquired for the purpose and a shareholders' agreement dated 23 December 1999 was entered into between Jamal and Rajan to operate, manage and control the Company. Jamal and Rajan were each to subscribe for and acquire 50 per cent of the issued and paid up shares of the Company. The Company's board of directors was to comprise of six directors of whom three were to be appointed each by the groups representing Rajan and Jamal subject, however, to equal capital contribution by the two groups. The shareholders' agreement also contained a pre-emption clause and made special provisions for transfer of shares. The Company started with an initial authorized, issued and paid up share capital of Rs.4.9 crores, which was contributed equally by Jamal and Rajan groups. The initial part payment of Rs.4.9 crores for the purchase of the subject property was financed out of this contribution.

4. Sometime in 2000, with a view to tap sources for funding of the development project, Rajan and Jamal agreed to take Respondent No.3 – Nilesh Parekh (“Nilesh”) – on board, by diluting their respective equities of 16.67% each in favour of Nilesh. Nilesh, in turn, would ensure that the house of Tata's, through their property development arm – Tata Housing and Development Company Limited, would provide the requisite capital and technical expertise to develop the subject property. A

Supplementary Agreement dated 15 June 2000 was accordingly entered into between Rajan, Jamal and Nilesh. Under this agreement each of the three groups represented by them was to subscribe for and hold 33.33% of the issued and paid up shares of the Company and each group was to be entitled to appoint two directors on the board of the Company comprising of six directors. Simultaneously with this agreement, Minutes of Meeting were drawn between the three on the same date, i.e. 15 June 2000. The Supplementary Agreement read with the Minutes formed a new contract, modifying the earlier contract contained in the Shareholders' Agreement between Jamal and Rajan.

5. The development project over the subject property, as conceived by the parties, involved three phases – Phase 1 involving completion of rentable area of approx. 2,00,000 sq. ft. of the original factory premises of Parke Davis ("Plot A"), Phase 2 involving construction of a tower ("Plot B") and Phase 3 involving balance development ("Plot C").

6. At this stage, in or about March 2001, Respondent No.4 – Bharat Doshi ("Doshi") – was involved by the parties into the project. Doshi promised to bring in a sum of upto Rs.15 crores for the development project. Based on this promise, an adhoc 15% equity was agreed to be divested by the three, namely, Rajan, Jamal and Nilesh, in favour of Doshi - by diluting their respective equities by 5% each. It was also contemplated that within a stipulated time-frame, Doshi's investment would be returned to him with returns and the shareholding of the three parties would revert to 33.33% each as before.

7. In or about March 2001, the acquisition of the subject property was accomplished by the Company. A total consideration of Rs.49 crores was paid to Parke Davis for the acquisition. A major part of this consideration came from funds arranged through banks and financial institutions in addition to the initial contribution of Rajan and Jamal of Rs.2.45 crores each.

8. The Company also proceeded to develop the first two phases (Plots A and B) in the name of Logitech Park. A total area of about 9.25 lakh sq. ft. was built by the Company in these two phases. Out of this area, an area of about 71600 sq. ft. was sold, whilst about 8.48 lakh sq. ft. was leased out to various parties.

9. At this stage, in or about 2005, disputes arose between the parties over further funding of the project. In November 2004, Rajan declared that Jamal had vacated his office as a director of the Company under Section 283(g) of the Act. These disputes led to Jamal filing the original petition under Sections 397 and 398 of the Act, complaining of acts of oppression and mismanagement in the affairs of the Company on the part of Rajan and others.

10. By an interim order dated 27 December 2005, the CLB directed that Jamal should be invited to all board meetings and allowed to take part in the deliberations; that status quo in respect of the composition of the board as of date with Jamal as an invitee should be maintained; and that all proposals for sale/lease of the Company's

property should be placed before the board for its approval and Jamal should be allowed as an invitee to consider and react to the same.

11. At the hearing of the petition the main contentions of the Appellants were as follows :

(a) Jamal was the prime mover as far as the only business of the Company, namely, acquisition and development of the subject property, is concerned;

(b) In breach of the terms of the Shareholders' Agreement, by false misrepresentation and with malafide intention, Rajan reduced the shareholding of Jamal from 50% to 28.33%, whilst Rajan himself continued to control, through Nilesh, Doshi and others, 71.67% shares in the Company, which was against the original understanding of 50% stake in the equity each of Rajan and Jamal;

(c) Jamal was unauthorisedly removed from the board of directors of the Company as an act of oppression, by manipulation of the Company's records and with a view to completely oust him from the affairs of the Company;

(d) Rajan, being in control of the Company, sold and leased out constructed areas of the project below the market rates, and also rotated and laundered the Company's funds prejudicially to the interests of the Company.

After the proceedings were started before the CLB, by various interim applications, allegations concerning individual transactions with various parties (such as Fine Plaza, Ecstasy, Stylus., etc.) were made.

12. In its impugned order dated 8 January 2009, the CLB, after analyzing the facts of the case, held that if at all one of the two, Rajan and Jamal, had to be considered as the prime mover of the project, it could only be Rajan and not Jamal. The CLB did not find fault with the reduction of Jamal's shareholding from 50% to 28.33% (i.e. by divestment in favour of Nilesh and Doshi), though it observed that Rajan should have kept Jamal informed about the former controlling the shares meant for Nilesh and Doshi. The CLB, however, found the act of removal of Jamal as a director oppressive and declared the cessation of Jamal as a director in the Company's records as null and void. As for lack of transparency, and sales and leases at an undervalue and other financial irregularities, the CLB examined four particular transactions, i.e. Ashwamegh, Fine Plaza, Ecstasy and Stylus. Whilst the CLB found some substance in the transaction pertaining to Ecstasy (and directed making good of the loss on account of loss of interest in respect of this transaction by Rajan), it did not find anything wrong in the transactions concerning Ashwamegh, Fine Plaza and Stylus. Whilst CLB found no substance in the allegations of siphoning of funds, it found fault with non-charging of interest on loans given to related parties. The CLB also did not find any substance with the payment of remuneration and perquisites to Rajan by the Company. The CLB found that Rajan had a justifiable grievance that Jamal failed in his obligations/commitments to bring in funds. Whilst considering reliefs to be granted on these facts, the CLB found that though the only oppressive

act found was of removal of Jamal as a director and the only act of mismanagement found was of non-recovery of interest from one or two parties, the relationship between the parties had soured so much that in the interest of the Company, parting of ways was the best solution. The CLB, then, considered suggestions of Counsel on both sides (and also the applicable principles) on various alternatives in this behalf. The CLB, firstly, held that since, in the present case, it was Rajan, who had been managing the affairs of the Company, whilst Jamal had not been in participation, it was Jamal who had to exit. Secondly, it held that on the question of valuation of his share, Jamal was only entitled to share profits arising out of the valuation of the land. The CLB then had to determine the date of valuation and the proportionate share of Jamal. The CLB was of the view that the date of valuation should be the date of the filing of the petition. It reckoned 4.35% of the profits arising out of the value of the land as a just and reasonable return on the investment made by Jamal, to which 50% increase could be added to take care of the pendency of the petition for nearly three years, thus taking the profit sharing of Jamal to 6.6% of the profit on the value of the land. The value of the land was taken at the highest price prevailing during the last quarter of 2005 (the petition having been filed on 7 December 2005). The CLB ordered that from the value so determined, the total cost of the land taken at Rs.56.56 crores (i.e. basic price + interest + stamp duty and registration charges) should be deducted to arrive at the profit and of this profit, Jamal should get 6.6% subject to a minimum of Rs.30 crores. The petition was disposed of in these terms, reserving the jurisdiction to determine the value of the land.

13. This order is challenged in the present appeal on several grounds. The grounds formulated by Ms. Sethna, learned Counsel for the Appellants, at the hearing, may be briefly stated as follows :

(i) The dilution of the shareholding of Jamal from 50% to 28.33% and his ouster from the management of the Company were illegal acts and constituted oppression;

(ii) The various acts of Rajan in selling/leasing the Company's property at an undervaluation, diverting the Company's funds to related parties, illegal aggrandisement by seeking excessive remuneration, perquisites, etc. constituted acts of mismanagement of the affairs of the Company.

(iii) On findings of oppression and mismanagement, Jamal should have been restored as a 50% shareholder of the Company, reinstated in the management and various equitable reliefs should have been granted under Section 402 of the Act with a view to do substantial justice;

(iv) The Company was in effect a quasi partnership between Rajan and Jamal and principles applicable to dissolution of partnership ought to have been applied to, and legitimate expectations of shareholders/partners should have been given effect to, in this case;

(v) Whilst granting relief in the matter to Jamal, the 'cure' suggested was worse than the 'decease', since Jamal was put in a worse position than he would have been in, had he not approached the CLB for

redressal of his grievance, as he got merely 6.6% of profit on the land held by the Company against his 28.33% shareholding in the Company;

(vi) The CLB should have asked Rajan to exit from the Company as the oppressor or, in the alternative, bifurcated the property;

(vii) The CLB erred in valuing the property as at the date of the petition instead of valuing it as at the date of the judgment;

(viii) Jamal did not get a fair market value of his share in the Company, but instead got a discounted value, which was impermissible.

14. The appeal basically involves three aspects. The first is the case of oppression made out by the Appellants. This involves the dilution of the equity of Jamal from 50% as originally proposed to 28.33% which it was brought down to as a result of divestment in favour of Nilesh and Doshi. In effect, it is claimed by the Appellants, Rajan himself controlled the balance 71.67% share in the Company through himself and his friends/relations and entities controlled by him including Nilesh and Doshi. The ouster of Jamal from the management is claimed to be another act of oppression. The second aspect is the case of mismanagement. This involves various financial irregularities on the part of Rajan as alleged by the Appellants. We will examine whether the CLB has made any errors of law in drawing its conclusions on these two aspects. The third and the last aspect is the relief granted by the CLB. We will examine if there is any error of law in granting the relief.

15. **On the case of oppression :**

15.1 The case of the Appellants is that the original Shareholders' Agreement between Rajan and Jamal stipulated 50:50 shareholding ratio between the two, but in breach of that agreement, by false misrepresentation and in a malafide manner, Jamal's shareholding was brought down to 28.33% by machinations of Rajan. This is said to have been brought about in stages. Ms. Sethna argues that contrary to the Shareholders' Agreement, in the first place, even initially Jamal was allotted only 100 shares (instead of 250 shares) out of the 500 shares acquired from the erstwhile shareholders of the Company. Then, when Nilesh was inducted into the membership of the Company, Jamal's shareholding was brought down to 33.33%. It was reduced further to 28.33% at the time of induction of Doshi. At each of these stages, Jamal was made a misrepresentation; Jamal was never informed that it was Rajan who actually controlled the shareholding divested in favour of Nilesh and Doshi; and Rajan's act of thus gaining control over 71.67% shareholding of the Company was a malafide act. Secondly, it is submitted that Jamal was illegally ousted from the management of the Company by removing him from the directorship of the Company unauthorisedly.

15.2 At the outset, it must be noted that under the Shareholders' Agreement of 23 December 1999, what was contemplated was that each of the groups represented by Rajan and Jamal would hold 50% of paid up capital of the Company and have equal representation on the board of directors subject to the obligation of each to provide the balance of the

purchase price in equal share, that is to say, to bring in Rs.22.5 crores each and also the equal share of amount required for stamp duty and transfer costs. The relevant provision (part of Clause 5) is quoted below:

“In the event of either Group not providing partly or fully the amount required for completing the sale and same is provided by the other Group then the share of the Group which is not funding will be reduced in proportion to the amount not provided i.e. the profits will be shared by the parties hereto in the proportion in which they have contributed the capital. If the capital contributed by the defaulting Group is less than 26% of the paid up capital then it will not have any representation on the Board. If the said capital is between 26% to 49% then its representation on the Board will be reduced to one nominee on the Board of Directors.”

By the Supplementary Agreement of 15 June 2000, after Nilesh joined the membership of the Company, the relevant clauses were modified to provide for 33.33% shareholding to each of the groups represented by Rajan, Jamal and Nilesh. Clause 5, part of which is quoted above, was substituted by the following clause :

“The balance consideration of the purchase price and stamp duty and registration fees (if required) to be paid by the Company to Parke-Davis India Limited at the time of completion of sale shall be provided by each Group in equal shares.”

Simultaneously with the Supplementary Agreement, Minutes of Meeting were signed by Rajan, Jamal and Nilesh, which provided as follows :

“It was agreed between the parties that from the sale proceeds received from the sale and/or disposal in any manner of the property of M/s. Parke Davis (India) Ltd. at Saki Naka, all borrowings including that of Housing Development & Finance Corporation Ltd.(HDFC) and/or ICICI should be first paid. Thereafter monies brought in, quantified and accepted by all the parties at Rs. 4 crores each by A Group and B Group excepting monies required for share capital, shall be repaid. Thereafter the terms and conditions regarding division of profit in three shares as per agreement dated 23rd December 1999 between Mr. Alnoor Jamal and Mr. Shobhit Rajan and Supplementary Agreement dated 15th June 2000 between Mr. Alnoor Jamal, Mr. Shobhit Rajan and Mr. Nilesh Parekh will come into effect.”

15.3 In the backdrop of these provisions, the CLB rejected Jamal’s case of oppression on account of reduced shareholding on the following basis :

(a) In the present case, Jamal actively participated in the allotment of shares to the Respondent Companies and accepted 28.33% shares as per the agreement.

(b) The CLB was bound by the decision of the Supreme Court in **Shanti Prasad Jain Vs. Kalinga Tubes Ltd.**¹, which was followed in a number of cases, that private agreements between shareholders (to which the Company was not a party) could not be enforced through petitions under Sections 397 and 398 of the Act.

(c) None of the terms of the Shareholders’ Agreement was found

1 AIR 1965 SC 1535

to have been acted upon by anyone. In other words, Jamal himself, along with others, had abandoned the rights and obligations arising out of the agreement.

(d) Jamal had not produced any supporting document to establish that he had acquired the initial 250 shares, or even 100 shares for that matter, by paying any consideration.

(e) In any event, by registering 100 shares in favour of Jamal, Rajan had not secured himself any extra benefit, as no dividend or other benefit on the shares had been denied to Jamal except that on this ground Rajan had claimed that Jamal was actually never a 50% shareholder. Further, and in any event, the agreed percentage of 28.33% for Jamal had been ensured for him at the time of further allotment of shares.

(f) Induction of each of Nilesh and Doshi had a distinct purpose and no grievance could be made by Jamal about the shares respectively allotted to them, in the facts of the case.

(g) There is nothing to show that Jamal had any specific complaint if shares had in fact been allotted to Nilesh and Doshi. If at all anyone could complain about Rajan controlling the shares meant for Nilesh and Doshi, it would only be Nilesh, who had a written agreement for allotment of 28.33%, and Doshi, who had an oral agreement for 15%, since according to both they had complied with their respective obligations against their entitlement for allotment of shares.

(h) Lastly, the percentage of shareholding was of no relevance from the standpoint of the final order that the CLB had proposed to make.

15.4 None of these conclusions, which form the basis of the CLB's final conclusion against any oppression on account of reduction of Jamal's shareholding, can be faulted on any question of law. The first stage of reduction of Jamal's agreed shareholding, i.e. allotment of 100 instead of 250 out of 500 shares of the Company initially, is adequately explained. Ms. Sethna tried to show some corrections and interpolations in the register of members. The CLB noted in this behalf that not only in the Folio of Akkadian (the Company of Jamal through whom he held the Company's shares), even in other Folios there were corrections and alterations. Secondly, there were no supporting documents to show that Jamal had originally acquired 250 shares of the Company, but that by manipulation of records his shareholding was brought down to 100 shares. The CLB observed that when there was no proof of any consideration paid for even 100 shares by Jamal, merely on the basis of errors and alterations in the register of members, no grievance could be made about reduction of Jamal's shareholding from 250 to 100 allegedly by way of a manipulation. Besides, this aspect of the matter is hardly of any relevance, since, as rightly observed by the CLB, Rajan has neither taken any advantage of denying those 150 shares to Jamal nor any extra benefit to himself and in the end, at any rate, the agreed shareholding of 28.33% was actually allotted to Jamal. No error of law can be found in the analysis of the CLB or its conclusion in this behalf.

15.5 The second stage of reduction of Jamal's shareholding, i.e.

when Nilesh was inducted, is also adequately explained. As observed by the CLB, Jamal was a party to this arrangement. He actually signed a Supplementary Agreement for the purpose. Nilesh's commitment as against 28.33% shareholding to be allotted to him was to get the House of Tata's on board for development of Phase-2 and 3. Tatas did after all enter into an agreement with the Company after Nilesh's induction. The CLB noted that Tata's association at that stage had greatly benefited the Company inasmuch as the Company could raise a loan from ICICI Bank for making the balance payment of Rs.44.4 crores to Parke Davis. Tata's also took space in the existing building (Phase 1) for their sister concern, Sitel. The Tata's, noted the CLB, had their own reason for leaving the project. Merely because Tata's, having first associated themselves with the project post-induction of Nilesh (whose commitment was to get them on board), left the project later, it cannot be said that Nilesh's induction was vitiated for any reason or that it was not bona fide or for a genuine purpose. No fault can be found *per se* with 28.33% shareholding offered to Nilesh in a duly signed Supplementary Agreement between Rajan, Jamal and Nilesh. The CLB also found that at the relevant time, i.e., when Nilesh resigned from the Board in 2001, or when the board of the Company noted in its meeting of 18 September 2003, which was attended by Jamal, that Tata's had expressed their intention to exit from the project, or even when Tata's actually left in 2004, Jamal did not raise any issue about Nilesh. In the premises, the CLB did not find anything wrong about 28.33% shareholding meant for Nilesh. This part of the impugned order is clearly sustainable and gives rise to no question of law.

15.6 The third stage of reduction was when Doshi was inducted.

Again, his induction was accepted with open eyes by Jamal, though there was no written agreement with Doshi unlike in the case of Nilesh. It is common ground, however, that Doshi was brought in so that he could get upto Rs.15 crores for the project. The allegation is that Doshi purportedly brought in only Rs.2.72 crores as against the promised Rs.15 crores and even from this amount, a substantial part was taken away by Doshi, leaving only Rs.82,100 to his credit. Ms. Sethna even commented about the figure of Rs.2.72 crores and suggested that there was no proof even for this amount. Mr. Sathe, learned Senior Counsel appearing for Doshi and some corporate entities on his behalf (Respondent Nos. 12 and 13), relied upon a chart showing the funds which went into the purchase of the subject property, including the stamp duty and other components. He submitted that Doshi jointly with Rajan arranged for, and brought in, a large part of these funds. He submitted that when it was imperative that stamp duty to the tune of Rs.4.93 crores was paid before execution of conveyance of the property, the requisite funds were brought in/arranged by Doshi and Rajan. Out of these funds, a sum of Rs.2.72 crores was brought in by Doshi himself. There is certainly material on record to suggest that Doshi played a meaningful role, justifying his induction into the Company. That itself should be sufficient to sustain the CLB's conclusion in this behalf. But what is more important is Jamal's own admission contemporaneously made before the disputes arose between the parties, when, on 4 March 2005, in the wake Doshi's proposed exit from the Company, he (Jamal) categorically asserted that he had no complaint against Doshi, who, Jamal himself agreed, had played his role and assisted the project. Jamal even suggested that the parties should convince Doshi to stay on till the conclusion of the project. In the face of

all this material, if the CLB concludes that Jamal was not justified in making any grievance about the association of Doshi after the disputes arose, surely it is a plausible conclusion and does not give rise to any question of law.

15.7 That leaves only one question to be decided about the reduction of Jamal's shareholding through induction of Nilesh and Doshi, namely, the linkage between Rajan and the entities to whom shares meant for Nilesh and Doshi were allotted. The CLB noted in this behalf two important points. First, according to Jamal, he agreed to reduce his shareholding from 50% to 28.33% only on the consideration that he would not be required to fund the project; the admitted fact was that he actually did not contribute any funds for the project besides his initial contribution of Rs.2.45 crores; and Jamal had nowhere averred or even conveyed through Counsel during arguments that had he been aware that the shares meant for Nilesh and Doshi were to go to Rajan, he (Jamal) would have undertaken the obligations under which the shares were to be allotted. Secondly, there is nothing on record to show that Jamal had any objection to the allotments *per se* to Nilesh and Doshi. If that is so, the complaint, if any, as noted by the CLB, could only be made by Nilesh and Doshi, according to whom their respective obligations were complied with, if shares were not allotted to them despite such compliance. And finally, the percentage of shareholding, in the ultimate analysis, hardly had any bearing on the order that the CLB actually made. (This aspect will be dealt with later in this order.) There is, thus, no merit in Jamal's case concerning linkage of Rajan to the allottee entities.

15.8 The only other ground urged in support of Jamal's case of oppression was his removal as a director of the Company. The CLB, in this behalf, actually held the removal to be illegal and void, acknowledging the same to be an oppressive act. There is nothing, therefore, for this Court to consider further in this behalf save and except the argument of Ms. Sethna that reliefs of reinstatement and other appropriate directions under Section 402 of the Act ought to have been granted in that case, which aspect is considered later in this order.

15.9 The law cited by Ms. Sethna in connection with oppression within the meaning of Section 397 of the Act and also, concerning the reliance upon shareholders' agreement in relation thereto, does not fall for consideration, since I have upheld the conclusions of the CLB on the ground that they are supported by material on record and not vitiated by consideration of any non-germane or irrelevant material. In the face of the Shareholders' Agreement, the Supplementary Agreement and the Minutes of Meeting, the conclusion that there was no oppression of Jammal on account of reduction of his shareholding from 50%, as originally proposed, to 28.33%, as finally brought down to, is clearly sustainable and does not give rise to any question of law.

16. **On the case of mismanagement:**

16.1 The Appellants' case of mismanagement is based on (i) acts of sale and leasing of constructed areas of the project purportedly below the market rates, (ii) rotating and laundering of the funds purportedly prejudicially to the interests of the Company and (iii) benefits purportedly

extended to related parties at the expense of the Company.

16.2 The allegation of the Appellants before the CLB was that Rajan sold and leased substantial portions of constructed space without due publicity and at an undervalue only with a view to enrich himself by underhand dealings. There were four such transactions particularly brought before the CLB. They concern, and are discussed in the impugned order under the headings of, (i) Ashwamegh, (ii) Fine Plaza, (iii) Ecstasy and (iv) Stylus. Of these, only Ashwamegh transaction was actually referred to specifically in the petition, whilst the other three transactions were brought before the CLB by way of interlocutory applications.

16.3 The grievance of Jamal in regard to the transaction with Ashwamegh, where 18000 sq. ft. of constructed area was sold, was that : (a) Jamal was not consulted; (b) the sale price of Rs.4.5 crores was much below the market price, stated to be Rs.10 crores; (c) the sale price was not received as per the stipulated time line; (d) when Ashwamegh failed to pay the full consideration within the stipulated period, the agreement of Ashwamegh ought to have been cancelled and its deposit forfeited; (e) the promoters of Ashwamegh were parties related to Rajan; and (f) even before receipt of full consideration from Ashwamegh, it was allowed to rent out the space to M/s. Lucent, implying thereby that as a matter of fact the consideration later paid by Ashwamegh was out of the rental received by it in the interregnum. After considering the allegations and supporting material placed on record by the parties, the CLB found that (i) Jamal had not furnished any comparative sales figures during the

relevant period to prove his case of sale at an undervaluation; (ii) On the contrary, Rajan had submitted a comparative statement of sales obtained from M/s. Jones Lang, from which it appeared that if at all there was a short sale, it could at best be of the order of Rs.21 lacs; (iii) there was no document on record reflecting any transaction between Ashwamegh and Lucent and in the absence of such document, it was difficult to determine whether Ashwamegh had obtained any undue benefit from the alleged transaction with Lucent; (iv) Even though as per agreement Rajan had to consult Jamal for disposal of the properties, there was nothing on record that till the disputes arose between the parties, Jamal had tried to exercise such right of consultation; (v) Anyway, such contractual rights could not be enforced in a petition under Sections 397/398; and (vi) The Board could not take any decision on the issue of related parties without proper material (the position being that Jamal was not able to identify the promoters of Ashwamegh, whilst Rajan had categorically stated that Ashwamegh was not a related party). The CLB, was, however, of the view that interest ought to have been recovered from Ashwamegh for delayed payment of consideration, but did not accept the Appellants' case that the agreement with Ashwamegh should have been cancelled. The basis of upholding the transaction notwithstanding acceptance of the case of delayed payment of consideration was that the Board being a court of equity, could not ignore business realities and inquire into the correctness or otherwise of a decision other than for examining if the same was mala fide or resulted in enrichment of the decision makers at the cost of the Company. In the face of its observations that the property was not sold at an undervalue, that there was nothing to suggest either than Rajan and Ashwamegh were related parties or that the decision was against the

interest of the Company or enriched Rajan, the CLB refused to order cancellation of the transaction. Besides, the CLB held that Ashwamegh was not a party to the petition and in its absence the agreement could not have been cancelled, in terms of Section 402(e) of the Act.

16.4 These are all cogent reasons. There is material on record to sustain these and no irrelevant or non-germane material is taken into consideration to arrive at these. It is trite law that this Court, whilst exercising its jurisdiction under Section 10F, does not examine conclusions of fact as an ordinary court of appeal would in a civil appeal. Only if this court finds an error of law in the order, would this court interfere with it. In the case of a conclusion of fact, a question of law would arise only if the conclusion is vitiated on a Wednesbury principle or is unsustainable on account of perversity. I do not find any such case here. No question of law arises in the appeal in relation to the conclusions referred to above.

16.5 As in the case of the case of oppression, I have not considered case law cited across the bar in this behalf, since I accept the legal position contended by the Appellants, but find that in the present case, the impugned order does not fall foul of those legal principles.

16.6 The cases of Fine Plaza, Ecstasy and Stylus also follow the same pattern and the conclusions of the CLB concerning them can be sustained as possible conclusions of fact, which are neither unsupported by materials on record nor based on irrelevant or non-germane materials. In the case of these three transactions, in the first place, it needs to be noted that the allegations of the Appellants do not form part of the

petition. These have been brought in by way of various interlocutory applications. Mr. Chinoy for the Respondent is right in his submission that the case of oppression and mismanagement in a petition filed under Sections 397 and 398 has to be tested on the allegations made and pleas raised in the petition. The petition merely contains allegations concerning Ashwamegh and does not refer to any acts of oppression or mismanagement concerning Fine Plaza, Ecstasy or Stylus. The allegations concerning these form part of interim applications of the Appellants before the CLB in the original petition. The original petition is not amended to include these. Be that as it may, the CLB has nevertheless proceeded to consider these allegations and found no merit in the same. In Fine Plaza, the CLB found that the Appellants did not establish that it was a related party of Rajan. The CLB also found the consideration of Rs.22.51 crores received by the Company to be adequate and proper after considering the sales instances placed on record and also the fact that the Registrar had accepted the valuation of Rs.22.51crores. The CLB did not find any fault with the business decision of the board in selling the area rather than leasing it for rental income. For the same reasons, as in the case of Ashwamegh, the CLB did not find a case made out for cancellation of the Fine Plaza transaction under Section 402(e) of the Act. In Ecstasy, though the CLB found that the payment of Rs.28.11 crores paid to Ecstasy was, in the absence of any particulars forthcoming, a diversion of funds, it noted that this amount had come back. What the CLB found amiss was the fact that it came back sans any interest. It accordingly ordered recovery of interest from the party and in default, restitution of the Company by Rajan to the extent of the amount of interest. In Stylus, the CLB found that the decisions were duly taken in board meetings of

the Company, which were not objected to by Jamal. Though the CLB found some substance in Jamal's contentions regarding lack of full transparency in the Stylus matter, since the draft agreement was not placed before the board, it observed that merely for that reason, the agreement could not be cancelled unless it was found to be against the interests of the Company. The CLB did not find any substance in the alleged association of Stylus with Rajan and found the royalty received to be commensurate with the market rates. None of these conclusions can be faulted. No question of law can be said to arise in connection with these conclusions.

16.7 On the allegations of rotation of funds, the CLB held that it could not examine day to day transactions; that in a private company engaged in construction work, it was not uncommon that when the company was in need of short term funds, the promoters would bring in money and then when funds are available with the company later, would take the same out; that what was to be examined was whether funds were provided when the Company was in need of them; that it was an admitted position that the project had progressed well, the Company had earned profit of over Rs.14 crores as on 31.3.2007 and Rajan could manage to save about Rs.11 crores payable towards penal interest. The CLB found that there was no instance brought to its notice by the Appellants where money was taken out of the Company without accounting for the same. The CLB found no siphoning of funds, but merely found fault with non-charging of interest to certain parties such as Ecstasy, Millennium and Parshaw and ordered recovery of interest.

16.8 As for the remuneration paid to Rajan, the CLB did not find the same to be excessive or unreasonable.

16.9 None of the conclusions of the CLB noted above concerning Jamal's case of mismanagement can be described as perverse. They are all supported by evidence on record; no irrelevant material is considered to arrive at the same; and they are all possible conclusions. No question of law arises therefrom for the consideration of this Court under Section 10F.

17. **On the relief granted by the CLB :**

17.1 That brings us to the third and the last aspect of the matter, namely, the legality or validity of the relief granted by the CLB in the matter, which, I must admit, engaged much of my attention in the appeal herein. At the first blush, it seemed rather odd to me that even after acknowledging 28.33% share of the Appellants in the first Respondent Company (if not 50% as claimed by Jamal), the consideration for the Appellants' exit from the Company is not the market value of 28.33% share, but 4.35% of the profits arising out of the value of the land, which, with addition of 50% to take care of the pendency of the petition for nearly three years, works out to 6.6%. On a closer scrutiny, however, it not only appears to be a legitimate relief, and therefore, not giving rise to any question of law, but also a reasonable and adequate relief in the facts of the case. The following paragraphs discuss that aspect of the matter.

17.2 At the outset, it needs to be noted that the relief ordered is really speaking a 'no fault' relief, that is to say, a relief not based on findings of oppression and mismanagement, but under the jurisdiction of the Court to do justice in a petition under Sections 397 and 398 of the Act, even if a case of oppression and mismanagement is not made out in terms. The parties before me have differing perceptions on the nature of this relief. Ms. Sethna for the Appellants claims that at least some instances of oppression and mismanagement are found in favour of her clients and therefore, equitable reliefs under Section 402 should have been granted; and that ultimately, if at all someone had to exit, it should have been Rajan as the oppressor rather than Jamal as the oppressed. Mr. Chinoy for the Respondent Rajan, on the other hand, submits that the relief granted here is essentially on a 'no fault' principle and as a just and equitable relief in the peculiar facts of the case.

17.3 Ms. Sethna is partly right inasmuch as there is one particular act of oppression found against Rajan and that is the removal of Jamal from the directorship of the Company. So also, it is possible to say that there is some mismanagement found as a matter of fact, that is to say, not charging of interest in respect of certain funds made over to, or recovered late from, certain parties. But none of these findings can sustain an order asking Rajan to exit from the Company and directing Jamal to be put in sole management thereof. An unauthorized removal from directorship would entail at the most a reinstatement on the board of directors and non-charging of interest, a restitution of the Company by Rajan to the extent of such interest. Besides, it is important to note that as much as the solitary acts found against Rajan, which are referred to above, the CLB

also found that Jamal did have funding obligations, which he did not fulfill and Rajan did have a justifiable grievance on that score. The CLB, in the light of all these facts came to the conclusion that the relationship between the parties has soured so much that in the interest of the Company, parting of ways was the best solution. What appears from the impugned order, and this is hardly disputed by either of the parties, is that parting of ways as such as between Rajan and Jamal was not seriously contested by anyone. In fact, both Appellants and Respondents accepted that the solution had to be parting of ways. The question, if at all, was only who exits and at what price. In the premises, the order providing for parting of ways can only be described as a 'no fault' relief, which the CLB may well grant in a petition like this.

17.4 **In Needle Industries (India) Ltd. vs. Needle Industries Newey (India) Holding Ltd.**², the Supreme Court held that even though the company in that case failed to make out a case of oppression, the court was not powerless to do substantial justice between the parties. In that case, the question was of placing the parties in the same position in which they would have been had the meeting, complained of as illegally held, been held in accordance with law. The court asked the Indian shareholders to pay a premium on the excess holding or the right shares, which they had originally shown willingness for, and which factor, to some extent, had gone in their favour on the question of oppression. Having had the benefit of that stance, they must, the court held, now make it good. The court hastened to add as follows :

“We must make it clear that we are not asking the Indian

2 (1981) 3 Supreme Court Cases 333

shareholders to pay the premium as a price of oppression. We have rejected the plea of oppression and the course which we are now adopting is intended primarily to set right the course of justice, insofar as we may.”

Later in the case of **Sangramsinh P. Gaekwad vs. Shantadevi P. Gaekwad**³, the Supreme Court reaffirmed the principle that in a given case the court, despite holding that no case of oppression has been made out, may grant such relief as to do substantial justice between the parties. In a more recent case, in **M.S.D.C. Radharaman vs. M.S.D. Chandrasekara Raja**⁴, the principle was reiterated once again.

17.5 The parting of ways thus being held to be on a 'no fault' principle and to do substantial justice and found to be in order, the controversy really boils down to the manner ordered by the CLB to achieve it. As noted above, there are two fundamental issues : One, who should go out - should it be Rajan or Jamal and two, what should be the consideration for such exit.

17.6 On the first issue, the CLB held that it would have to be Jamal rather than Rajan to exit the Company. It was submitted before the CLB on behalf of Jamal that Rajan should go out and Jamal should get the Company. The submission was on two grounds. Jamal was said to be the prime mover of the project. And he was said to be the oppressed. As for the second ground, I have already held above that the parting of ways, in the present case, was rather on a 'no fault' basis and therefore, Jamal could not expect Rajan to go out as an oppressor. On the contention that

3 (2005) 11 SCC 314

4 (2008) 143 CompCas 97 (SC)

Jamal was the prime mover, the CLB found against him and came to the conclusion that if at all one of the two had to be considered as the prime mover, it could only be Rajan and definitely not Jamal. The reasons considered by the CLB for this conclusion were these : (a) From the documents produced by Jamal, it was beyond doubt that he was not only in negotiation with M/s. Warner Lambert but had agreed for a consideration of Rs.49 crores for the property and entered into a draft MOU fixing the earnest money at 10% of the price; Similarly, from the document produced by Rajan, it was abundantly clear that even he was in independent negotiations with Parke Davis; But the fact of the matter was that neither of the two had concluded the contract; (b) If Jamal was the prime mover, he could have got the property on his own and there was no need for him to have entered into JVA the next day, i.e. 23.12.1999, with Rajan; (c) The offer of Rs.49 crores was really a joint offer and the property was acquired by joint efforts; (d) Jamal had (after making an initial equal payment towards the earnest money) expected Rajan “*to organize the balance payment to Parke Davis*” and had played no role in ensuring the balance payment to Parke Davis; (e) But for the efforts of Rajan, the Company would not have been in possession of the property and as a matter of fact even the earnest money of Rs.4.9 crores would have been forfeited by Parke Davis; Rajan not only gave his personal guarantee but also his properties at Khar and Lonavla as collateral security for raising the loan from ICICI for payment to Parke Davis; and (f) The massive and beautiful buildings that had come up on the project site were due to the efforts of Rajan, both in organizing funds and in actively implementing the project, for which Jamal had even complemented Rajan. On these findings of fact, the CLB held that it was not Jamal, but

Rajan, who was the prime mover. Once again, the findings of fact and the conclusion based thereon cannot be termed as either impossible, or vitiated by lack of supporting material or consideration of irrelevant material. Apart from the question of prime mover, the CLB also considered the position that the Board had always taken the view that persons in active management, whether in minority or majority, should have the right to take over the Company. The CLB considered the decisions in **Praful M. Patel vs. Wonderweld Private Limited**⁵, **C.M. Jain vs. CRM Digital Synergies Pvt. Ltd.**⁶ and in **Re: Nikhil Rubbers Pvt. Ltd.**⁷ in this behalf and held that since it was Rajan, who had been managing the affairs of the Company, while Jamal had not been in participation, the question of directing Rajan to sell his interest to Jamal did not arise. There is no issue joined at the hearing before me with the finding that Rajan indeed was in active management of the Company and not Jamal at any time. If that is so, in the face of the facts recounted above, hardly any exception can be taken to the order requiring Jamal to exit rather than Rajan.

17.7 That brings us to the question of legality and validity of the consideration ordered to be paid to Jamal by the CLB against his exit. This, in turn, involves two aspects, namely, the method applied by the CLB for working out the compensation and the actual quantum of the compensation worked out. In other words, we have to examine the principle of valuation used by the CLB and the actual working out of the value of Jamal's share on such principle.

5 (2002) 36 SCL 825 CLB-ND

6 2008 142 CompCas 658 CLB

7 (2008) 215 CTR All 332

17.8 The principle of valuation used by the CLB was sharing of profits arising out of the valuation of the land. This was broadly on the footing that the JVA between the parties was really limited upto the stage of acquisition of the property; that Jamal's own understanding was that he was not to bring in any funds and in fact had brought in none and had also not been in active management in the implementation of the project; and that Jamal, therefore, could not have any share of the value accrued on account of the development of the property, but his share should be restricted to profits arising out of the land.

17.9 Several grounds have been urged before me to challenge this valuation of the Appellants' share. It is submitted that the first Respondent being a real estate company, the best way to part would have been to bifurcate the immovable property. That was indeed one of the suggestions made by Counsel for Jamal before the CLB. The suggestion was that the entire project should be partitioned in equal shares between Rajan and Jamal or in the proportion, which the CLB might decide. The other alternatives suggested by Counsel were : (i) sale of the project and division of sale proceeds between the shareholders, (ii) Jamal should get the Company, and (iii) the entire project should be valued as to the date of the order and Jamal should be paid in cash in the determined proportion. In this behalf, what we need to consider is, whether there is any error of law in the CLB rejecting the alternatives suggested by Counsel for Jamal or making valuation the way it did in the impugned order.

17.10 The alternative that Jamal should get the Company has

already been discussed above and on that the CLB's conclusion has been found to be in order. Let me now take up the alternative of sale of the project and division of proceeds. The CLB rejected this alternative, holding that such an order would actually amount to winding up of the Company, whereas proceeding under Sections 397 and 398 were alternative to winding up and the paramount consideration was to ensure that the Company survives. The CLB dealt with the decision in the case of **Vijayawada Sharebrokers Limited**⁸ relied upon by Counsel for Jamal in this behalf. In that case, the CLB had directed the company to sell the only landed property of the company and apportion the sale proceeds between shareholders. This property was acquired by the company for establishing a stock exchange, which was the main object of the company. SEBI, however, declined to give permission to set up the stock exchange. The proposal to construct one was, accordingly, given up by the company and for over ten years, the company did not conduct any business except deriving some rental income from the land. There were various allegations of oppression and mismanagement including about alleged attempts on the part of the company to sell the land at an undervalue. In these facts, the land was directed to be sold under orders of the CLB and proceeds distributed between shareholders. These facts were clearly distinguishable from the facts of our case. The CLB found that the Company, here, was actively engaged in the business for which it was established, was making profits after being brought up single handedly by Rajan to the present level, and it would really be oppressive to Rajan if the project were now to be sold and proceeds distributed. That is perfectly reasonable. The reasons cited are cogent and acceptable. No error of law can possibly arise.

8 2008 144 CompCas 326 (AP)

17.11 The next suggestion was for partitioning the project in equal or determined shares. Equality of sharing has been dealt with above and ruled out. But it is submitted that this could have been done in any ratio which the CLB might have deemed proper. Before the CLB several judgments were cited in support of such division. These were the cases of **Bhola Nath Paper House Limited**⁹, **Trackparts of India Limited**¹⁰, **Jaidka Motor Company Limited**¹¹ and **James Fredrik**¹². Learned Counsel for the Appellants cited before me the cases of **Mahavir Prasad Jalan**¹³, **Dale and Carrington**¹⁴, **Ramkishore**¹⁵, **Vinod Kumar**¹⁶ and **Re: Bird Precision Bellows**¹⁷, in support of the case that this was not an unusual order to make and in the facts of the case, was actually a proper order to make.

17.12 The cases relied upon by the Appellants do show that it may well be permissible to divide the business and assets of a company between two groups of shareholders as part of relief under Section 402 of the Act. But that is essentially a matter to be governed by individual facts of each particular case. In **Bhola Nath Paper House Limited** (supra), a family company, each of the two groups held 50% shares and each had a managing director on the board; the business had been effectively bifurcated and each group was managing separately a godown and a shop, and yet admittedly the business could not be carried on smoothly. A

9 1983 53 CompCas 883 Cal

10 2002 CompCas 350

11 1997 1 Comp LJ 268 (CLB)

12 2000 101 Comp LJ 268 (CLB)

13 AIR 1999 Cal 156

14 (2005) 1 SCC 212

15 2004 50 SCL 461 CLB

16 2005 (5) Bom CR 84

17 [1985] 3 All ER

case of oppression and mismanagement was established, though it was not advisable to wind up the company. In the result, the court found the option of dividing the business and assets between the two groups as the only equitable way of parting of the two. In **Trackparts of India Limited**(supra), a listed company in which two groups of family members had equal shareholding (24% each) and each had a managing director/joint managing director, there were three divisions, one under the management of one group and two under the other. What the Board did was to finalise this division after an exercise of valuation. In **Jaidka Motor Company Limited** (supra), an original partnership of two groups of family converted into a company with the two having equal shareholding and representation on the board, the company had two business units, one at Patna and the other at Kolkata managed by each group separately. As part of the relief granted under Section 402, the Board directed each business unit to be separately managed by one group - the Patna unit by the petitioners who were already managing it and the Kolkata unit by the Respondents who were likewise managing it separately. In **James Fredrick** (supra), in the peculiar facts of the case, the Board directed a five-way division of the shareholding of a subsidiary company held by a holding company with five equal shareholders, who were family members, thus redistributing the investment in the subsidiary and not strictly dividing the business or assets.

17.13 An analysis of these cases would show that the companies in these cases essentially were family companies with equal shareholdings and what is important, were in joint management with each group individually managing a part of the business or a separate undertaking.

The Courts ordered division of business and assets on the same lines as was broadly the case whilst the companies were under joint management, as the most suitable option for achieving parting of ways between the groups.

17.14 In our case, that is not so. The Company is not a family company or even a quasi-partnership between the groups, as will be discussed later. The shareholding between the groups is not equal. There is no involvement of the Appellants' group in the management of the Company. The rejection of the Appellants' suggestion, in the premises, of dividing the land between the two groups in a ratio to be determined by the CLB, thus, cannot be termed as an impossible or perverse view. The CLB clearly had the discretion to mould an appropriate relief whilst ordering parting of ways between the two groups and its conclusion that division of the assets/land between the parties ought not to be ordered, in the present case, cannot be termed as an unsound exercise of such discretion or actuated by a non-germane consideration.

17.15 That leaves us with the last of the options suggested by the Appellants' Counsel to the CLB, and which the CLB examined in great detail, namely, valuation of the project and payment of his share to Jamal in cash in a determined portion. In arriving at its conclusion on this option, the CLB considered the following : Firstly, despite its conclusion that the Shareholders' Agreement between the parties, being a private agreement, was not binding on the Company, it nevertheless examined Clause 5 of the agreement read with the Supplementary Agreement and Minutes of Meeting of 15 June 2000. It came to a conclusion that Clause

5 operated only upto the stage of acquisition of the land and not to the implementation stage of the project. Secondly, the CLB considered that even assuming the agreement to be applicable to the development stage, profit sharing was to be in proportion to the respective contribution of the groups, which included all types of funding provided by the groups, whether by way of share subscription or loans brought in. This conclusion was on the footing that firstly, the clause, read as a whole, talked of 'providing amount required' for completing the sale and secondly, read in the context of the other clauses of the agreement, made it clear that the intention of the parties was to provide compensation to the parties on the basis of the funding provided by them and not necessary actual share capital subscribed by them. It, therefore, concluded that bank loans arranged by Rajan by giving his personal guarantees cannot be excluded for determining the profit sharing ratio, though interest paid by the Company to the banks on these loans may have to be deducted from the loans. Thirdly, the CLB considered whether the valuation must be for the entire project. In this behalf, the CLB considered the totality of the agreements, namely, the JVA (already considered above), the supplementary Agreement and the Minutes, and held that they did not talk of development, but dealt only with acquisition of the property. Even Counsel for Jamal, according to the CLB, contended that the joint venture agreement was limited upto the stage of acquisition of the property. Considering further the facts that Jamal neither brought in any money for development of the property nor contributed to the active management in any way, the CLB held that he had no share in the value accrued on account of development.

17.16 The principle of profit sharing thus being deduced, the CLB had to decide two more aspects before arriving at the actual cash compensation payable to Jamal. One was the date of valuation of the land and the other was the proportion of the share of Jamal in such valuation. What was suggested by Rajan's Counsel was that other than making an initial investment of Rs.2.45 crores, Jamal had done nothing – he neither brought in any funds nor did he participate in the affairs of the Company – and therefore, he should be treated merely as an investor or like a sleeping partner and be paid simply a fair return by way of interest on his investment. This suggestion did not, however, find favour with the CLB. It was of the view that since it was anyway restricting Jamal's entitlement to valuation of land and the allegation of his being a sleeping partner related mostly to project implementation, it would be inappropriate to then treat his entitlement as merely return by way of interest. The CLB instead proceeded to determine the proportion of Jamal's share in the total valuation arrived at.

17.17 The CLB was conscious that in all cases of valuation concerning a company, the proportion is usually based on the shareholding ratio. But there was a cogent reason in the present case, according to the CLB, to depart from this principle. In the present case, the parties had themselves agreed to sharing of profits in the ratio of funding brought in by them respectively and even otherwise, on an equitable principle, in the peculiar facts of the case, the shareholding could not be taken to determine profit sharing entitlement. The CLB instead proposed a sharing proportion on the basis of the funding proportion. The total cost of the land was Rs.56.56 crores (including

interest for delayed payment and stamp duty), out of which the personal contribution by the parties was to the tune of Rs.12.17 crores and the balance was financed by the funds brought in by Rajan and others (which funds were also to be treated as part of funding obligations, as discussed above). Thus, Jamal's contribution of funds to meet the cost of land was 4.35%. That was treated by the CLB as the proportion of the profits arising out of the land value to which Jamal was fairly and equitably entitled.

17.18 On the date of valuation, the parties propounded diverse approaches before the CLB, each relying on judgments in support. Counsel for Jamal rooted for the date of the order as the most appropriate date of valuation. This was on the ground that the price of the land had gone up due to market conditions and not due to efforts of Rajan. Learned Counsel relied on the cases of **Mahavir Prasad Jalan** (supra), **London School of Electronics**¹⁸, **Profinance**¹⁹, **Re: Ghyll Beck Driving Range Ltd.**²⁰ and **Re: A Company Ex parte Harries**²¹ and submitted that considering that the value had gone up, through no effort of the rival, even during the pendency of the proceedings, the value for the purpose of sharing should be determined on the date of the order. Learned Counsel for Rajan, on the other hand, submitted that the CLB had been consistently following the principle of fixing the date of valuation as the date on which the petition was filed and there was no reason, in the facts of the present case, to deviate from this practice. Learned Counsel, in support, relied on the case of **Scottish Co-operative Wholesale Society**

18 Re (1985) 1 BCC 99, 394

19 (2002) BCLC 141

20 (1993) BCLC 1126

21 (1989) BCLC 383

Ltd.²² and Nikhil Rubber²³.

17.19 The CLB held that there was no general proposition that a particular date alone should be chosen for valuation, though ordinarily the Board had always leaned in favour of the date of presentation of the petition as the appropriate date of valuation; and that there was a wide discretion to the Court in that behalf, to be exercised for doing what was just and equitable between the parties. Considering the fact that the entire project, in the present case, including the conveyance of the land had been a single man show (namely, Rajan) without any assistance from Jamal beyond contributing for the initial earnest money, there was no persuasive ground to deviate from the ordinary practice of going by the date of the petition. The CLB also observed that the real estate market was fluctuating and there was no definiteness as to whether the land value had gone up or down during the pendency of the petition, and that, besides, fixing the date of the order as to date of valuation would amount to leaving the matter to chance. The CLB, in the premises, was of the view that the date of valuation should be the date of filing of the petition. However, considering the fact that the matter had been pending before it for nearly three years, for no fault of anyone, the CLB fixed a 50% mark-up on the share of profit to be received by Jamal at the valuation as of the date of the petition.

17.20 Lastly, the CLB had to determine the actual value as of the chosen date. The petition having been filed in December 2004, the highest price prevailing during the last quarter of 2005 was reckoned as

²² (1958) 3 ALLER

²³ (2008) 215 CTR All 332

the appropriate price to determine the value of the land. It called upon the parties to obtain market rates as of the last quarter of 2005 from reputed real estate agents to enable it to determine the value and arrive at the profit after deducting the total cost of the land without taking into account the interest paid to banks towards the loan for the acquisition of the land. Then from the profits so arrived at, 6.6% would be paid to the Appellants.

17.21 At the same time, the CLB thought it fit to assure unto Jamal a fixed minimum compensation. Considering Rajan's preparedness to offer a sum of Rs.20 crores to buy peace, and the mark-up of 50% proposed by it, the CLB put that fixed minimum at Rs.30 crores. Thus, in the end, the consideration that Jamal would get worked out to 6.6% of the profit arising from the valuation of the land (the market value as in the last quarter of 2005 less the cost, but without adding interest paid to banks to the cost) or Rs.30 crores, whichever was higher. That, said the CLB, was a just and fair return on his investment of Rs.2.46 crores, which remained in the Company for about 8 years.

17.22 The question now in the appeal, that is left to be answered, is: Is there any error of law in this determination? We shall presently answer it. But before we do so, it would be apposite to note the limits of our inquiry. In **V.S. Krishnan Vs. Westfort Hi-Tech Hospital Ltd.**²⁴ the Supreme Court explained the scope of the jurisdiction of the High Court under Section 10F of the Act in the following words :

“16. It is clear that Section 10-F permits an appeal to the

24 (2008) 3 Supreme Court Cases 363

High Court from an order of the Company Law Board only on a question of law i.e. the Company Law Board is the final authority on facts unless such findings are perverse, based on no evidence or are otherwise arbitrary. Therefore, the jurisdiction of the appellate court under Section 10-F is restricted to the question as to whether on the facts as noticed by the Company Law Board and as placed before it, an inference could reasonably be arrived at that such conduct was against probity and good conduct or was mala fide or for a collateral purpose or was burdensome, harsh or wrongful. The only other basis on which the appellate court would interfere under Section 10-F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to construe (sic consider) relevant materials.”

As much as a conclusion about the conduct which may amount to oppression or mismanagement, even the conclusion as to the relief to be awarded, where the Board has a wide discretion, is subject to the same level of scrutiny. Whether compensation determined by the CLB for the exit of a shareholder from the company is fair and equitable in the facts of an individual case will be examined by the High Court in an appeal under Section 10-F on the touchstone of these very principles. The Court will consider if the relief awarded is against the law or such that no reasonable person properly instructed in law could have arrived at or is determined on consideration of irrelevant material or omission to consider relevant material.

17.23 Let us now examine, in the light of these principles, whether the valuation exercise carried out by the CLB in the present case can be said to be vitiated and liable to be interfered with by this Court under Section 10-F. As noted above, the conclusion of the CLB regarding the valuation comprised of three aspects : (a) the basis of valuation, (b) the

proportion of the exiting shareholder's interest and (c) the date of valuation. Let us examine if on any of these aspects the conclusion merits interference on the above principles.

17.24 The CLB obviously made a departure from the ordinary rule of going by the shareholding ratio. But this departure is supported by cogent reasons. It is important to note that the Company was established to purchase and develop the Parke Davis property. Purchase of land and development of real estate envisage large funding and also extensive management of affairs. The CLB's conclusion that the parties themselves agreed to share profits on the basis of the ratio of funding brought in by the respective parties is reasonably based on the agreement between the parties, which is reflected in the JVA, Supplementary Agreement and Minutes of Meeting, referred to above. It is a legitimate and perfectly possible conclusion that contribution of capital in this context not only included share subscription, but funds brought in by each, whether in the form of share subscription, borrowings or otherwise. Secondly, the CLB determined that Jamal was entitled to sharing only of profits arising out of the valuation of the land. This was on the footing that he merely contributed for the initial earnest money paid for the land and did not contribute anything towards the further purchase price of the land or its development and also did not participate in the management so far as the development was concerned; and that in fact it was a one man show of Rajan. Again a conclusion based on appreciation of facts and perfectly reasonable, supported by relevant material and uninfluenced by irrelevant material. The basis of valuation, considered by the CLB in its impugned order, thus, cannot be faulted on any question of law.

17.25 The proportionate share of Jamal in these profits was accordingly based on his share in the funding provided by the parties. Jamal's contribution, as noted above, to meet the cost of land was 4.35%. He had brought in 2.45 crores out of the total of the land of Rs.56.56 crores, the balance being provided by Rajan and others. The proportionate share of Jamal so determined is merely a logical fall-out of the principle applied by the CLB. We have found the principle in order and as for the figures there is no contest.

17.26 As far as the date of valuation is concerned, the CLB has a wide discretion in that behalf. It must do what is just and equitable in the peculiar facts and circumstances of the case. But other things being equal, the valuation ordinarily must be of the date of the petition. The following passage of Lord Denning, J. in **Scottish Co-operative Wholesale Society's** case is very much instructive.

“One of the most useful orders mentioned in the Section which will enable the Court to do justice to the injured shareholders is to order the oppressor to buy their shares at a fair price, and a fair price would be, I think the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive.”

Even the trend of the judgments delivered by the CLB in this behalf shows that the Board has very often leaned in favour of the date of presentation of the petition. As noted above, the CLB found no reason in the facts of the present case to depart from this principle. There is indeed none. In any event, the CLB not only fixed the date of valuation as the date of the petition, but considering the pendency of the petition for about three

years, for the fault of none, fixed a 50% mark-up on the share of the profit determined as at the date of the petition. That was to compensate Jamal for the delay between the presentation of the petition and the order. There is nothing pointed out in the appeal or at the bar to claim that this mark-up was in any way unfair. The conclusions of the CLB on the date of the valuation and the mark-up to take into account the impact of the pendency of the petition, thus, cannot be faulted on any ground of law.

17.27 There is one more way of looking at the reasonableness of the compensation. The submission of the Appellants is that the Company in the present case is in the nature of a quasi-partnership and principles of dissolution of partnership should be applied to parting of ways between the shareholders here, suggesting thereby that the valuation of shares should be on a pure pro-rata basis. On the other hand, it is the submission of the Respondents that the Company is a joint venture between businessmen who had come together for a particular project, namely, acquisition and development of a particular property and there are no incidents of quasi-partnership – neither equality of shares nor joint participation in management. It is submitted that in the present case, the minority share ought to be valued not on a pro-rata basis, but at a discount, as is usually the case.

17.28 In **Re: Bird Precision Bellows Ltd.**²⁵, the Court held that it was axiomatic in all cases of valuation that a price fixed by the Court must be fair; while that which is fair may often be predicated in regard to matters of common occurrence, it can never be conclusively judged in regard to a particular case until the facts are known. Broadly speaking,

²⁵ (1984) 3 All ER 444

shares in a small private company are acquired either by allotment on its incorporation or by transfer or devolution at some later date. There are two categories of such companies. In the first category it is a matter of common occurrence for a company to be incorporated in order to acquire an existing business or start a new one, and, in either event, for it to be a vehicle for the conduct of a business carried on by two or more shareholders which they could, had they wished, have carried on in partnership together. Such a company may be described as a quasi-partnership. Three typical elements have been identified in respect of such companies, one, or probably more, of which will characterise the company as a quasi-partnership. These are – (a) formation and continuation of an association on the basis of a personal relationship involving mutual confidence, (b) an agreement or understanding regarding participation in the conduct of business by the shareholders, and (c) restrictions on share transfers. These elements, though not exhaustive, are generally regarded as the most important. The last of these three elements is usually a defining criterion of any private company, but in the case of a quasi-partnership may take in special restrictions such as compulsory transfers to existing shareholders, pre-emption rights of other shareholders, etc. In the case of a quasi-partnership of this type, the common course would be to fix the price for transfer of shares on a pro-rata basis according to the value of the shares as a whole and without any discount. In the case of other private companies, irrespective of the nature of the company, it is a matter of common occurrence for a shareholder to acquire shares from another at a price which is discounted because they represent a minority holding. The minority shareholder himself might have acquired the shares purely for

investment and played no part in the affairs of the company. In that event, it might well be fair, that he should have been bought out on the same basis. Though there is no universal rule in the case of either of the two categories, these are general principles, which are, of course, subject to exceptions. For example, in a quasi-partnership, as explained by the Court in **Bird Precision**, there may be the case of a minority shareholder whose interests had been unfairly prejudiced by the conduct of the majority, but who had nevertheless so acted as to deserve his exclusion from the company. In such a case, despite the company being a quasi-partnership, the exit of that minority shareholder can be at a discount and not pro-rata valuation. Likewise, depending on special and particular facts of the case, in an ordinary private company, the exiting shareholder's share may be valued pro-rata and not at a discount. But that would be in the special facts of a case, but for which the general rules would ordinarily be followed. When the case of **Bird Precision** went to the Court of Appeal, the appeal was dismissed, with the Court further adding that the 'proper' price is the price which the Court in its discretion determines to be proper having regard to all the circumstances of the case. The Bird Precision principle was followed in **Re D.R. Chemicals Ltd.**²⁶ where the Court put the matter thus :

“approach the matter somewhat differently. Mr. Harries is a minority shareholder seeking a fair price for his shares. In the absence of any special features the value of his shares must reflect the fact that his holding is only a minority holding, though an important minority holding enabling the holder to block all resolutions other than one requiring a bare majority of votes. I cannot see that after his election he could have obtained a winding-up

26 (1989) 5 BCC 39

order in order to receive a rateable share of the company's assets. Neither the previous history of the company nor the parties' conduct requires as a matter of fairness a sale on the pro rata basis, given the fact of his election. Accordingly in my judgment the discounted basis of valuation is appropriate.

In **Re McCarthy Surfacing Ltd.**²⁷, the Court was concerned with the case of shareholders, who, though originally were quasi-partners, had subsequently lost their position as quasi-partners. The Court held that it would not be an appropriate exercise of its discretion to direct that their shares should continue to be valued as if the quasi-partnership existed. The Court held that this was a fortiori the case in view of the fact that the value of the company had increased so substantially during the period when they had played no part in its management. In the circumstances, the Court treated them as having been investors in the company and valued their shareholdings accordingly.

17.29 In the present case, the CLB did not find the Company to be a quasi-partnership. Clause 25(10) of the Shareholders' Agreement itself indicated that both Rajan and Jamal had voluntarily agreed in writing that partnership principles would not apply insofar as their association was concerned; the record of the case did not indicate that Rajan and Jamal were equal partners in the sense of being 50% partners each; that it was an admitted fact that Jamal never involved himself actively with the management of the company. On these facts, the CLB held that it would be difficult to apply the quasi-partnership principles. The conclusion, which is essentially one of fact (or, at any rate, a mixed question of law and fact), is a reasonable conclusion, which cannot be questioned on a

²⁷ 622 Butterworths Company Law Cases (2009) 1 BCLC

ground of law in this appeal.

17.30 If the Company was not a quasi-partnership, the approach of the CLB in not ordering valuation of shares on a pro-rata basis cannot be faulted. Jamal's shareholding was obviously a minority shareholding and could very well be valued at a discount. His case appears to be more akin to an investor who holds a minority stake in a private company rather than a quasi-partner who could claim a pro-rata valuation.

17.31 Once, as a matter of principle, valuation of Jamal's share at a discount is accepted, the actual valuation, or in other words, calculating of the discount, is really a question of fact, the sole basis of which is the consideration of what is fair in the facts of the particular case. As we have noticed above, the CLB has arrived at a fair basis and proportion in the particular facts of the case for valuing Jamal's share. It cannot be faulted on the principles which we have noted above in connection with the scope of challenge in an appeal under Section 10-F.

17.32 Ms. Sethna argues, referring to the case of **Re Planet Organic Ltd.**²⁸, that any discount in this behalf must be considered by the Court on an expert testimony and it is not for the Court to decide the same unilaterally. There is always some amount of arbitrariness in a matter like this. Thumb rules are used and different experts or valuers or even courts would come to different estimates. What the Court in a 10-F appeal has to see is whether the conclusion is perverse and not possible to sustain on the basis of material on record. The CLB has acted reasonably in the matter. It has taken into account all relevant aspects. There are seven

28 366 Butterworths Company Law Cases (2000) 1 BCLC

germane aspects in this behalf as outlined by Mr. Chinoy. Firstly, the relief is not being granted on a finding of oppression or mismanagement, but on a 'no fault' principle to do justice between the parties. Secondly, the company is no glorified or quasi partnership. Thirdly, the parties did not envisage the ratio of share subscription as the basis of profit sharing. Fourthly, Jamal played absolutely no part in the matter of development of land. Fifthly, even in the purchase of land his contribution was merely Rs.2.45 crores in a total outlay of nearly Rs.56.56 crores. Sixthly, the valuation, on a fair consideration of the facts of the case, was ordered to be as of the date of the petition. And lastly, as a result of the delay in the hearing of the petition, which was not due to the fault of any of the parties, a 50 per cent mark-up on the original valuation as of the date of the petition was ordered. These are all relevant considerations, on the basis of which the CLB has ordered valuation of Jamal's share and claimed the same to be just and equitable. This Court cannot find fault with this conclusion on any question of law, particularly having regard to the relevant principles for interference with the Board's order under Section 10-F.

18. There is, thus, no merit in the appeal. The appeal is dismissed. There shall, however, be no order as to costs.

19. In the companion company appeal (Company Appeal No. 21 of 2009), Rajan and others have challenged those parts of the impugned order by which (i) the CLB held the act of Rajan in declaring the office of director as having been vacated by Jamal as oppressive, (ii) the CLB observed that interest would be recoverable in respect of certain

transactions concerning Ecstasy, Millennium, Parshwa etc. and (iii) the CLB ordered the minimum guaranteed compensation of Rs.30 crores to Jamal. The final order of the CLB providing for parting of ways, as I have observed above, was on a 'no fault' principle. The purported acts of oppression concerning the directorship of Jamal and non – recovery of interest from certain parties do not bear on the operative order passed in the matter. Indeed, no serious submissions were advanced by learned Counsel for the Appellants in Company Appeal No. 21 of 2009 on these issues. Even the challenge to fixation of minimum compensation of Rs.30 crores for Jamal was not pressed at the bar. I have already found the compensation fixed for the exit of Jamal as fair and equitable. There is, thus, no merit in this appeal. Appeal No. 21 of 2009 is, accordingly, dismissed with no order as to costs.

20. In view of the disposal of the Company appeals, the company applications seeking interlocutory orders are also disposed of.

(S. C. GUPTE, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgement/Order.