

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

***COMPANY APPEAL NO. 21 OF 2015
IN
CLB COMPANY PETITION NO. 62 OF 2009***

Nafan B.V,
Regd. Office at Locatellikade 1 -
Parnassustoren – 1076AZ Amsterdam,
Postal Address:
POSTBUS 75215 – 1070AE Amsterdam. ... Appellant

Vs.

1. SAF Yeast Company Pvt. Ltd.,
Regd. Office at: 419, Swastik Chambers,
Chembur, Mumbai.

2. Mr.Arunachalam Muthu, son of
Shri TNM Arunachalam,
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai.

3. Mr.A.M.Arunachalam, son of
Mr.Aruanachalam Muthu,
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai.

4. Mr.A.M. Muthiah, son of
Mr.Arunachalam Muthu,
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai.

5. Mr.TNM Arunachalam, son of
Shri Muthiah Chettiar,
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai.

(Deceased).

6. Helios Food Additives Pvt. Ltd.,
Regd. Office at 421, Swastik Chambers,
Umarshibappa Chowk, Chembur,
Mumbai – 400 071.

7. Sharp & Tannan,
Chartered Accountants,
Office at – Ravindra Annexe,
194, Churchgate Reclamation,
Dinshaw Vachha Road, Mumbai – 400 020.

8. Lesaffre Et Cie,
Principal Office at 137,
Rue Gabriel, Peri, 59 700
Marcq-En-Baroeul, France.

... Respondents

WITH

COMPANY APPLICATION NO. 11 OF 2015

IN

COMPANY APPEAL NO. 21 OF 2015

IN

CLB COMPANY PETITION NO. 62 OF 2009

Nafan B.V.
Regd. Office at Locatellikade 1 -
Parnassustoren – 1076AZ Amsterdam,
Postal Address:
POSTBUS 75215 – 1070AE
Amsterdam & ors.

... Applicant

V/s.

SAF Yeast Company Pvt. Ltd.,
Regd. Office at: 419, Swastik Chambers,
Chembur, Mumbai, & Ors.

... Respondents

WITH
COMPANY APPEAL NO. 22 OF 2015
IN
CLB COMPANY PETITION NO. 62 OF 2009

M/s Sharp & Tannan,
Chartered Accountants
Office at – Ravindra Annexe,
194, Churchgate Reclamation,
Dinshaw Vachha Road, Mumbai – 400 020.... Appellant

V/s.

SAF Yeast Company Pvt. Ltd.
Regd. Office at: 419, Swastik Chambers,
Chembur, Mumbai. ... Respondents

WITH
COMPANY APPEAL NO. 23 OF 2015
IN
CLB COMPANY PETITION NO. 62 OF 2009

Arunachalam Muthu,
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai & ors. ... Appellants

V/s.

Nafan B.V.
Regd. Office at Locatellikade 1 -
Parnassustoren – 1076AZ Amsterdam,
Postal Address:
POSTBUS 75215 – 1070AE
Amsterdam & ors. ... Respondents

WITH
COMPANY APPLICATION NO. 12 OF 2015
IN
COMPANY APPEAL NO. 23 OF 2015
IN
CLB COMPANY PETITION NO. 62 OF 2009

Arunachalam Muthu
1, Hermes House, 7/7B,
Worli Sea Face, Mumbai & ors. ... Applicants

V/s

Nafan B.V.,
Regd. Office at Locatellikade 1 -
Parnassustoren – 1076AZ Amsterdam,
Postal Address:
POSTBUS 75215 – 1070AE
Amsterdam & ors. ... Respondents

WITH
COMPANY APPEAL NO. 24 OF 2015
IN
CLB COMPANY PETITION NO. 62 OF 2009

Lesaffre Et CIE
Principal Office at 137,
Rue Gabriel, Peri, 59 700
Marcq-En-Baroeul, France. ... Appellant

V/s.

SAF Yeast Company Pvt. Ltd.
Regd. Office at: 419, Swastik Chambers,
Chembur, Mumbai, & ors. ... Respondents

Mr. F.E. De' Vitre, Senior Advocate, with Mr. Pravin Samdani, Senior Advocate, Mr. Ciccu Mukhopadhaya, Mr. Vaibhav Mishra, Mr. Omar Ahmed, Mr. Yashesh Pajwani and Mr. Arun Siwach i/by Amarchand Mangaldas and Suresh A. Shroff & Co. for the Appellant in Company Appeal No.21 of 2015; and for applicant in Company Application No.11 of 2015 in Company Appeal No.21 of 2015; for Resp. No.2 in Company Appeal No.22 of 2015 and for Resp. No.1 in Company Appeal No.23 of 2015 and Company Application No.12 of 2015 and for Resp. No.8 in Company Appeal No.24 of 2015.

Mr. T.N.Subramanian, Sr. Advocate with Mr. Mayur Khandeparkar i/by Kanga & Co. for the Appellants in Company Appeal No.22 of 2015; for Resp. No.7 in Company Appeal No.21 of 2015 and Company Appeal No.24 of 2015 and for Resp. No.3 in Company Appeal No.23 of 2015.

Mr. Janak Dwarkadas, Senior Advocate with Mr. N.H. Seervai, Senior Advocate, Mr. Sharan Jagtiani, Mr. Chirag Kamdar, Mr. Gerald Misquitta, Mr. Alok Patel i/by Mahendra Patel & Associates, for Resp. Nos.2, 3, 4 and 6 in Company Appeal No.21 of 2015 and for Company Application No.11 of 2015; for Resp. Nos.3, 4, 5 and 6 in Company Appeal No.22 of 2015 and for appellants in Company Appeal No.23 of 2015 and for applicants in Company Application No.12 of 2015 in Company Appeal No.23 of 2015 and for respondent Nos.2, 3, 4 and 6 in Company Appeal No.24 of 2015.

Mr. Darius Khambata, Senior Advocate with Ms. Namrata M. Shah, Mr. Prashant Bari i/by Beri & Co. for Respondent No.8 in Company Appeal No.21 of 2015 and Company Application No.11 of 2015; and for Respondent No.7 in Company Appeal No.22 of 2015 and for Respondent No.2 in Company Appeal No.23 of 2015 and Company Application No.12 of 2015; and for the appellant in Company Appeal No.24 of 2015.

Mr. C.J. Joy with Mr. G.Hariharan i/by H.P. Chaturvedi for the Union of India.

None present for Resp. No.1 (SAF Yeast) in Company Appeal No.21

of 2015 and in Company Application No.11 of 2015 and Company Appeal No.22 of 2015 and Company Appeal No.24 of 2015 and Respondent No.5 in Company Appeal No.23 of 2015 and Company Application No.12 of 2015.

CORAM: N.M. JAMDAR, J.

JUDGMENT RESERVED ON : 22 APRIL 2015

JUDGMENT PRONOUNCED ON: 29 OCTOBER 2015

JUDGMENT:

This group of Company Appeals arises from the order passed by the Company Law Board, Mumbai Bench, Mumbai, on 28 March 2013, in Company Petition No.62 of 2009 filed by M/s. Nafan B.V. The Company Law Board, by the impugned order, has directed Nafan B.V. and Lasaffre Et Cie, to transfer 80722 shares i.e. 51% of shareholding to the respondents in that petition, referred to as Muthu Group.

2. Company Appeal No.21 of 2015 (Company Appeal (L) No. 30 of 2013) is filed by M/s.Nafan B.V.; Company Appeal No.22 of 2015 (Company Appeal (L) No. 33 of 2013) is filed by M/s. Sharp and Tannan, Chartered Accountants; Company Appeal No.23 of 2015 (Company Appeal (L) No. 34 of 2013) is filed by Mr.Arunachalam Muthu & Ors.; Company Appeal No.24 of 2015 (Company Appeal (L) No. 35 of 2013) is filed by M/s. Lesaffre Et CIE. Company Application No.11 of 2015 (Company Application (L) No. 37 of

2013) is taken out in Company Appeal No.21 of 2015 and Company Application No.12 of 2015 (Company Application (L) No. 43 of 2013) is taken out in Company Appeal No.23 of 2015. All these appeals and applications were filed in the year 2013; however, regular numbers were given in the year 2015.

INTRODUCTION

3. The dispute pertains to the control and management of M/s. SAF Yeast Company Pvt. Ltd. (hereinafter referred to as SAF Yeast), a Private Limited Company, having registered office at 419, Swastik Chambers, Chembur, Mumbai. SAF Yeast has one plant in Chiplun, Maharashtra and another at Sandhila, Uttar Pradesh. SAF Yeast is a joint venture company. The joint venture is between Nafan B.V. and Mr.Arunachalam Muthu and M/s.Helios Food Additives Pvt. Ltd. SAF Yeast carries on business of manufacture of yeast and is a dealer and exporter in the yeast products, bread, bread-improvers, their derivatives, and allied products. The authorized share capital of SAF Yeast originally was ₹25,00,000/- divided by 25000 equity shares of ₹100/- (each). The authorized share capital was increased from time to time and at the time of filing of the Company Petition, the authorized share capital of SAF Yeast was ₹3 crores (Rupees three crores only) divided by 300000 equity shares of ₹100/- (each). The approximate value and paid up capital of SAF Yeast at the relevant time was ₹1,58,37,500/- comprising of equity shares of ₹100/- each.

4. The shareholding of SAF Yeast is as follows: Nafan B.V. owns 80,772 equity shares, approximately constituting 51% of the total shareholding. Mr.Arunachalam Muthu holds 16,800 equity shares constituting approximately 10.607% of the total shareholding. Mr.A.M. Arunachalam holds 10396 equity shares constituting approximately 6.56% of the total shareholding. Mr.A.M. Muthiah holds 10397 equity shares, constituting approximately 6.57% of total shareholding. Mr.TNM Arunachalam, who passed away during the proceedings, held 1,800 equity shares constituting 1.13% of total shareholding. Helios Food Additives Pvt. Ltd. holds 38010 equity shares constituting approximately 24% of total equity share capital. Mr.B.B. Pay Master, who is no more, held nominal 200 equity shares of SAF Yeast.

5. Nafan B.V. (referred to as Nafan) is a Company incorporated under the laws of Netherlands, having its registered office at Loatellikade I-Parnassustoren – 1076 AZ Amsterdam. Nafan is subsidiary of Lesaffre Et Cie (referred to as Lesaffre); a Company incorporated in France having its Principal Office at 137 Rue Gabriel, Peri, 59700 NACQ-EN-BAROEUL, France. Nafan, at the relevant time, had four nominee directors on the Board of Directors of SAF Yeast. They were Mr.Denis Lesaffre, Mr.Moris Lesaffre, Mr.Alain Laloum, and Ms. Corinne Wisniewski. Mr.Arunachalam Muthu (referred to as Muthu) worked for Shaw Wallace & Co. from 1965 to 1980. He was working as a Senior Manager in yeast and

brewery division in Shaw Wallace & Co. He was involved in setting up a yeast factory and a plant at Uran, Maharashtra. A.M. Arunachalam is the son of Muthu. A.M. Muthiah is the second son of Muthu. M/s. Helios Food Additives Pvt. Ltd. is owned and controlled by Muthu and his family members. Arunachalam Muthu, when referred to individually, is referred as Muthu. When Arunachalam Muthu, his two sons and Helios Food Additives Pvt. Ltd. are referred together, they are referred as the Muthu Group. M/s. Sharp & Tannan are Chartered Accountants, having its office at Ravindra Annexe, 194, Churchgate Reclamation, Dinshaw Vaccha Road, Mumbai – 400 020. M/s. Sharp & Tannan are the statutory auditors of SAF Yeast.

FACTS

Pleadings

6. Muthu group has made a grievance that Nafan did not disclose various facts and they were brought on record by subsequent affidavits and rejoinder. Hence, the facts are narrated as per the pleadings placed on record by way of petitions, reply, rejoinder, additional affidavits, in that order.

Petition by Nafan

7. Company Petition No.62 of 2009 was filed by Nafan under Sections 111, 235, 237, 397, 398, 402 and 403 of Companies Act,

1956 (the Act), briefly on the following averments:

(i) Lesaffre is one of the leading company in the world in the manufacture of yeast. Lesaffre family set up the manufacture of yeast in France around the year 1873. Muthu met Alain Laloum in an international fair in Germany, sometime in May 1980. Muthu was keen to have a joint venture with Lesaffre. SAF Yeast was incorporated on 3 August 1981, pursuant to an agreement dated 6 June 1981, between Lesaffre and Muthu. At the relevant time, due to restrictions in India regarding foreign investment, Lesaffre was not in a position to set up a 100% subsidiary or to hold majority shares. It was therefore provided in the agreement dated 6 June 1981 that in the event the laws of India are amended and it is made legally permissible to hold the majority interest, Muthu would transfer the necessary shares to Lesaffre or its subsidiary, and that they would then hold majority of equity capital. When SAF Yeast was incorporated, the word 'SAF' was derived from the name Lesaffre and the interim license agreement was entered into between Lesaffre and SAF Yeast on 11 December 1982, after obtaining requisite approvals. Lesaffre was issued 6000 equity shares comprising of 40% of equity capital. On 22 March 1991, Lesaffre and Muthu entered into a participation agreement to update the agreement of 6 June 1981. Article 6 of participation agreement required that Memorandum of Articles of Association of SAF Yeast would reflect the terms of participation agreement. In accordance with Article 7 of the Participation Agreement, Lesaffre

was entitled to have majority in the Board of Directors of SAF Yeast. Article 7.4 provided for scheme of appointing an alternate Director. Article 7.6 lay down the day-to-day management of SAF Yeast to be in the Board of Directors, except as delegated to the Managing Director by the Board. Lesaffre was entitled to nominate the Chairman. The appointment, re-appointment, or removal of the Managing Director was subject to approval of majority of Directors, which majority was to include at least one Director nominated by Lesaffre. It was provided that, meetings of the Board could be held in or outside India. Fourteen days' notice was required under Article 7.10(b) for every meeting of Board of Directors to be given in writing to every Director in India or outside India. Under Article 13, it was a duty of Muthu to ensure that all relevant documents were open to inspection for Lesaffre.

(ii) The Government of India in an around January/February 1992 brought a change in policy. With the approval of Government of India, on 17 January 1992, the shareholding of Lesaffre was increased to 51% and subsequently around the year 2000 Nafan B.V. became owner of 51% shares and relevant entries were carried out in Members Register. Nafan was the owner of the shares as an assignee of Lesaffre.

(iii) SAF Yeast was functioning smoothly, with substantial technological and financial assistance from Lesaffre however, Muthu Group started acting oppressively to take over the powers of

the Board of Directors and fraudulently and illegally usurp Nafans shareholding. Pursuant to a transaction, sometime in the year 1997, involving SAF Yeast and Credit Agricole Indosuez (Calyon Bank) and another Company NCS Estate Pvt. Ltd., the Calyon Bank filed cases against SAF Yeast and SAF Yeast also filed criminal case No.238 of 2000 under Sections 408, 420, 477A, 467, 471 read with Section 34 of Indian Penal Code against Calyon Bank. A First Information Report was registered against Calyon Bank and proceedings were filed in the Court of Chief Judicial Magistrate, Hardoi, Uttar Pradesh. After considerable lapse of time after filing the complaint, the nominee Directors of Nafan were informed about the dispute with the Calyon Bank. All concerned including Muthu felt that the issue with Calyon Bank needed to be amicably resolved. Muthu proposed a settlement on certain conditions with the Calyon Bank by letter dated 2 March 2001. It was suggested that the offences were non-compoundable and Court at Hardoi had taken cognizance against the Calyon Bank. Muthu sought intervention through a Judge and after certain discussions, proposed certain terms and settlement. The nominee Directors of Nafan, bonafide believed that reasonable settlement with Calyon Bank as the bankers would be in the interest of SAF Yeast; however, the terms put-forth by Muthu were not reasonable.

(iv) Meeting of Board of Directors was held on 14 April 2005 in France. The pending cases with the Calyon Bank were discussed. The meeting was attended by Muthu, Lucian Lesaffre,

Alain Laloum, and Alain De Gouy. In the meeting, a resolution was passed that it would be in the interest of SAF Yeast to settle the dispute with the Calyon Bank against the payment of compensation of Euros 5,00,000 and a draft of discussion was forwarded to Calyon Bank and to Muthu.

(v) After the meeting, Muthu's attitude underwent a change. Muthu group was under a belief that the dispute with the Calyon Bank was something that could be used to their advantage by placing Nafan in difficulties. Muthu started his attempts to force Lesaffre to sell 51% shares held by Nafan so that he could control SAF Yeast. The minutes of the meeting of 14 April 2005 were incorrectly recorded and when it was pointed out, Muthu disputed the position. Correspondence ensued between the parties. Alain De Gouy informed Muthu that on Lesaffres intervention, the Calyon Bank was agreeable to certain terms and conditions. Alain De Gouy asserted that Lesaffre was not acting against the interest of SAF Yeast and it was not a shareholders' dispute.

(vi) Muthu started addressing correspondence complaining that he was being forced to take certain decisions in respect of Calyon Bank, clearly trying to make out a case against Nafan. Nafan never attempted to order Muthu in this regard and acted only to ensure that the decisions were taken in the best interest of SAF Yeast. Muthu purportedly held a Board meeting on 26 July 2005, without any notice to the nominee Directors of Nafan where

he sought to approve his own version of minutes of meeting of 14 April 2005. When requests were made to make the copies of minutes available, Muthu refused and did not provide the same. A request made for holding an annual general meeting for the year ending 31 March 2005, but was not heeded to, and when Nafan carried out inspection of documents, it found that the meeting was purportedly held on 23 November 2005. No notice was given to Nafan.

(vii) Nafan was instrumental in SAF Yeast's initial survival. It became a success due to Nafan and Lesaffres financial and technical contribution. In spite of benefiting from this substantial financial and technological assistance, Muthu attempted to discredit Nafan, as a part of a design to take control of SAF Yeast. Muthu indulged in various acts of oppression and mismanagement against Nafan in relation to SAF Yeast.

(viii) The Nominee Directors of Nafan made several requests to provide copies of minutes of meeting of Board of Directors. Letters were sent on 17 January 2006, 18 January 2006, and 5 May 2006, and in the year 2007 to 2009. Muthu failed to provide copies of the minutes and sought to run SAF Yeast as his exclusive domain. Muthu failed to provide statutory records, such as minutes of shareholders' meetings etc.

(ix) Muthu, as the Managing Director, earlier used to provide finance statement and monthly information statements to Nafan through Lesaffre. However, for the financial year 2005-06 Nafan did not receive any financial report. Muthu stopped sending reports. Nafan sought for these reports and financial information by letters dated 20 February 2006 and 18 March 2006. In spite of this position, the information was not supplied.

(x) Muthu purportedly held a Board meeting on and around 26 July 2005, without any notice to Nafan. Nominee Directors of Nafan came to know of the meeting on 26 July 2005 for the first time when it was referred to in Muthu's letter on 2 March 2006 addressed to Alain Laloum. Muthu attempted to falsify the record of SAF Yeast. Such meeting was invalid and illegal. Nafans Nominee Directors also sought for convening of Annual General Meeting and an explanation for not holding the same on time. Letters were written on 21 February 2006, 5 May 2006. These letters invoked no response and it is only when Nafan took inspection that it found out that the meeting was held on 23 November 2005. Nafan was deliberately not given notices of Annual General Meeting to avoid the majority shareholders from raising their funds, to change the number of directors and for declarations of dividend. Nafan requested Muthu to provide copies of various litigations in respect of Calyon Bank, however, Muthu failed to give these documents. Instead, Muthu persisted in his baseless allegations that Nafan was forcing him to settle with

Calyon Bank. When Nafans nominee directors came to know that Muthu had held a meeting without notice to them, they thought it necessary to appoint alternate directors. It was felt that the Company Secretary be appointed to maintain proper records and to avoid holding any meeting without notice to the Directors outside India.

(xi) A notice for Board meeting was issued on 4 May 2006 by Chairman of SAF Yeast. It was to be held on 23 May 2006 at Paris, as Lucian Lesaffre's health did not permit him to travel to India. It was for appointment of alternate directors and company secretary. On 10 May 2006, Muthu informed that he was unable to attend due to his father's ill health and the atmosphere was not conducive because of the disputes. On 11 May 2006, Alain Laloum informed Muthu and other Directors to attend by telephonic conference. By letter dated 17 May 2006, Muthu threatened that the action of Nafan was a criminal contempt, as it was an interference with judicial proceedings. By letter dated 22 May 2006, Alain Laloum made it clear that the meeting was only for alternate Directors and Company Secretary and it had nothing to do with the dispute with Calyon Bank. In spite of the same, SAF Yeast, upon instructions of Muthu, filed a criminal contempt petition against the nominee Directors of Nafan. The petition was filed by one employee of SAF Yeast and not by Muthu. There was no order of restraint by any Court and the meeting of the Board of Directors was held as scheduled on 23 May 2006 at Paris. Four nominee Directors of Nafan attended the meeting and unanimous resolution was passed

for alternate Directors for four nominee Directors of the Petitioner pursuant to Article 43 of the Articles of Association and Participation Agreement. The fact that Muthu did not attend the meeting did not make any difference, as the resolution would have in any way been passed by majority and in view of the casting vote. On 28 May 2006, Muthu wrote a letter making incorrect and false allegations against the nominee Directors of Nafan that was replied to. Minutes of Board meeting were circulated on 19 June 2006. Muthu wrote to alternate Director threatening him with criminal contempt to dissuade him from acting as an alternate Director, who later on succumbed to the pressure, and resigned. Muthu continued to make baseless allegations and threatening the alternate Directors.

(xii) On 14 July 2006, an application was made by Alain Laloum and Lesaffre and others seeking exemption from personal appearance which was rejected by the High Court of Allahabad where the contempt proceedings were pending. A Special Leave Petition was filed in the Apex Court and the Apex Court by order dated 17 July 2006 directed dispensation of personal appearance. A senior advocate on behalf of SAF Yeast opposed the Special Leave Petition, and even requests for adjournments were opposed. Meetings were held between the parties. Heads of Agreement were entered into on 14 August 2007.

(xiii) On 17 April 2009, Nafan received a notice from Company

Registrar, Pune as to why action should not be taken for non-filing of annual returns and balance sheet for the year ending 31 March 2006 to 31 March 2008. A notice for calling a meeting at Brussels or Geneva was sent to Muthu. In the meanwhile, Alain Laloum informed that he had been induced to sign some papers by Muthu for their Montreux (Switzerland) and pursuant to that; he has received some valuation made by Sharp & Tannan. The valuation had no sanctity and validity and it was just a scrap of paper. Nafan had not called it and therefore it was to be ignored. On 3 May 2009, Muthu made the usual allegations and referred to a Memorandum of Understanding (MOU) allegedly signed by Lesaffre Group. On 28 May 2009, Muthu again sought to rely on the alleged MOU, which was not signed by Nafan for sale of its shares. If the MOU were to be produced, Nafan would raise and plead its objections.

(xiv) It appears that, in the light of notice of meeting on 29 May 2009 at Paris, alleged meeting of Board of Directors was shown to be held in Mumbai on 25 May 2009, without notice. It was alleged that the deposit was made with SAF Yeast for alleged value of shares in accordance with Article 18 of Articles of Association and Nafans name was struck off from the Members Register and the name of someone from Muthu Group was entered. Each share was valued at ₹4315/-. Such valuation was fraudulent and ridiculously low and the true and fair valuation would be at least 18 million to 20 million Euros. The valuation was clearly fraudulent and arrived

at in collusion by Muthu with Sharp & Tannan. Nafan was willing to straightway pay double of the alleged fair value of ₹4,315/-.

(xv) The deletion of Nafans name from members register was fraudulent and *void ab initio* and the alleged M.O.U. had no sanctity. Muthu Group could not unilaterally take law into its own hands. Muthu Group committed fraud, mismanagement, and oppression by deleting the name of Nafan from the statutory records.

(xvi) The Board meeting dated 29 May 2009 as scheduled was held at Paris. Denis Lesaffre and Ms. Corinne Wisniewski were appointed as Additional Directors, along with some other Directors. The issue holding of alleged Board meeting on 25 May 2009 as communicated by Muthu and the deletion of name of Nafan were taken up. It was resolved that since nominee Directors of Nafan received no notice of alleged meeting of 29 May 2006, such meeting, if held, was void. The deletion of Nafans name from members register was *non-est*. The steps taken by the Muthu Group, and Muthu in particular were oppressive, fraudulent, unjust, and unfair. They had acted contrary and against the Articles of Association and the Participation Agreement of SAF Yeast. They acted in breach of fiduciary duty. Nafan had lost confidence in Muthu Group and since SAF Yeast essentially have been a quasi-partnership between two groups; Nafan was no longer in position to carry on business with the Muthu Group as a business partner.

8. Nafan prayed for following reliefs:-

(a) To pass an order thereby directing the Respondent Nos.1 to 6 to rectify the Register of Members (ROM) of the Respondent No.1 Company by inserting name of the Petitioner in relation to 80722 shares held by the Petitioner.

(b) To pass an order terminating the appointment of the Respondent No.2 as Managing Director and the Respondent No.3 as Joint Managing Director with immediate effect and remove them from the Board without prejudice to the rights of the Respondent No.1 Company to appoint any professional Managing Director.

(c) To pass an order removing the Respondent No.2 to Respondent No.4 as directors and/or any other nominee directors of the Respondent No.2.

(d) To pass an order directing that the board of Respondent No.1 Company be reconstituted at a suitable general meeting of its shareholders.

(e) To pass an order declaring Articles 14 to 18 of the Articles of Association of the Respondent No.1 Company as null and void.

(f) To pass an order thereby directing the Respondent Nos.2 to Respondent No.6 to sell the shares held by them in Respondent No.1 Company to the Petitioner and/or its nominees at a value which is double the value relied on the Respondent No.2 i.e. ₹8,630/- per share.

Reply by Sharp & Tannan

9. Sharp & Tannan as the Respondent No.7 in the petition, filed its reply on 11 August 2009 contending briefly, as follows:

The allegations made against Sharp & Tannan, statutory auditors are baseless and denied. The SAF Yeast furnished a copy of the MOU dated 29 January 2009 to the statutory auditors. It was recorded in the memorandum that Muthu Group would buy shareholding in Nafan and SAF Yeast and fair valuation is to be done by the auditors. Since Sharp & Tannan were the statutory auditors, after request was made to carry out the valuation, Sharp & Tannan issued certificate of valuation on 9 February 2009. Since there was an urgency, the valuation report was prepared expeditiously. It was forwarded to Laloum under cover of its letter dated 10 February 2009.

10. In response to the query raised by Foreign Exchange Department of Reserve Bank of India, Sharp & Tannan confirmed that it had followed Controller of Capital Issues (CCI) guidelines for valuation of equity shares of the Company. It is incorrect to state that the valuation is a scrap of paper, without sanctity and validity. It is denied that the valuation is fraudulent or ridiculously low or there has been any collusion. It is denied that the valuation was carried out to cause wrongful loss to Nafan and give advantage to the Muthu Group.

11. Sharp & Tannan has nothing to do with the dispute, as it was never a party to any decision for deletion of the name of Nafan from the members register.

Reply by Muthu Group

12. On 25 March 2010 Muthu on behalf of himself and respondent Nos.3 and 4 filed a reply. They took a stand that the correct facts were suppressed from the Board and sought to place their version of the dispute. Allegations were denied and following contentions, in short, were taken:

(i) Muthu is a Mechanical Engineer with 45 years' experience in production, distribution, and use of yeast in baking and production of alcohol. He was instrumental in setting up a brewery and a yeast factory for his past employer – Shaw Wallace & Co. He met Laloum in May 1980 at an exhibition and Laloum showed interest in setting up a factory in India since he had connections with India. He was impressed with Muthu's knowledge. Lasaffre Group had no experience of manufacturing yeast outside of Europe or any experience of using 100% yeast, and of the Indian conditions. They, therefore, had no option but to tie up with someone like Muthu. A joint venture was formed on 6 June 1981. SAF Yeast was incorporated on 12 August 1981. There were three Directors, Muthu, B.B. Paymaster, and Lucian Lesaffre. Muthu was the Managing Director right from the inception. It was the obligation of the Lesaffre Group to provide technical assistance, which they failed to do.

(ii) Muthu single handedly set up a factory at Chiplun, without any assistance from Lesaffre. He raised loans from various banks and gave personal guarantees. Lesaffre Group did not give any such guarantee. When the factory became functional, it was found that strength of yeast given by Lesaffre was unsuitable and Lesaffre had rendered no technical assistance or advise. Muthu made efforts to get the correct strength. As the factory at Chiplun progressed, a second factory was set up at Sandhila through efforts of Muthu. The assertion of Nafan that the name SAF comes from Lesaffre is not correct. The participation agreement dated 22 March 1991 was not to be acted unless the clauses were consequential to the Articles of Association. The participation agreement was never in accordance with the Articles of Association.

(iii) The participation agreement was never acted upon and the parties always acted in accordance with the Articles of Association. Several Board meetings were held in India when none of the Lesaffre nominees attended and in spite of this position, the decisions were accepted. This was because Articles of Association clearly stipulated that for Board meeting held in India, there is no requirement to give notice to the Directors based outside India.

(iv) The valuation of equity shares of SAF Yeast was carried out by M/s. Sharp & Tannan in January 1992 and fair valuation as on 31 March 1991 was ₹237 per share. The shareholding of

Lesaffre was increased to 51% around 1992-93 pursuant to further issue of the capital by SAF Yeast. Consequently, shareholding in SAF Yeast underwent a change and share of Muthu Group was reduced to 49%. A financial and technical collaboration agreement was executed on 19 March 1993 in furtherance of the agreement dated 19 October 1981. This agreement dealt with dividend by SAF Yeast to Lesaffre Group. The Government of India through Ministry of Industries approved increase of the shareholding of Lesaffre in SAF Yeast from 40% to 50% and certain conditions regarding foreign exchange dividend payment were laid down. Sometime in the year 1996, Lesaffre requested SAF Yeast to obtain molasses from one Ganesh Benzoplast for exporting it to Lesaffre Group. Certain dispute arose between SAF Yeast and Ganesh Benzoplast. Arbitration proceedings were filed. Initially, the Arbitrator gave an award in favour of SAF Yeast, directing Ganesh Benzoplast to release molasses to one M/s. NSC Estates Pvt. Ltd. M/s. NSC Estates Pvt. Ltd., on 31 January 1997 assigned molasses in favour of SAF Yeast pursuant to an export contract. It was on the condition that NSC Estates Pvt. Ltd. would be liable to make good the loss. SVG Amsterdam, a Dutch company was to make payment for the export contract under a letter of credit by Meespierson NV Bank. Calyon Bank, which was completely aware of the terms of the contract, agreed to act as an Advisor and Negotiator for the export transactions.

(v) SAF Yeast supplied molasses as per the purchase order

and letter of credit dated 4 February 1997. SAF Yeast raised an invoice of US \$ 5,59,621.92. Calyon Bank on 24 February 1997, after satisfying itself with the documents, issued a credit advice in the account and credited US \$ 5,54,638.99, minus the commission in the account of SAF Yeast. Calyon Bank wrote to SAF Yeast on 4 March 1997, enclosing a telex message of Meespierson NV, stating that an amount of US \$ 1,01,531.25 was being deducted as demurrage charges and an amount of US \$ 4,58,040.67 was being paid under letter of credit.

(vi) Lesaffre transferred its entire shareholding in SAF Yeast through Nafan. J.L. Meurant on behalf of Lesaffre informed SAF Yeast and Muthu of the transfer and request was made to SAF Yeast to take all necessary legal steps to register the transferred shares.

(vii) Calyon Bank filed a civil suit, which was, transferred to Debt Recovery Tribunal, against SAF Yeast for recovery of an amount approximately, ₹45.76 lacs including interest. Prior to filing a suit, the Calyon Bank issued the caution notice against SAF Yeast, Muthu, and Pay Master to the State Bank of India and Indian Bank Association. The State Bank of India circulated the caution notice widely to all their branches across the country. This caused serious damage to the reputation of SAF Yeast. The Calyon Bank thereafter proceeded to misappropriate about Rs.13.79 lacs and did not permit SAF Yeast to withdraw its funds even though it filed a suit for Rs.45.76 lacs, falsely claiming it to be adjusted against

interest.

(viii) A criminal complaint was filed by SAF Yeast against Calyon Bank for the misappropriation. Chief Judicial Magistrate, Hardoi (UP) issued process and F.I.R. was also registered pursuant to orders of the Magistrate and after investigation, the police filed a charge sheet against the officials of Calyon Bank and the Chief Judicial magistrate took cognizance thereof.

(ix) The appeal came up for hearing before the Debt Recovery Appellate Tribunal on 14 July 2003. The appeal was filed against the interim order passed by the D.R.T. in the application filed by the Calyon Bank against SAF Yeast. The Debt Recovery Appellate Tribunal passed strictures regarding the conduct of Calyon Bank, terming it as blameworthy. Thereafter the Debt Recovery Tribunal, on 1 April 2004 decided the proceeding against the Calyon Bank.

(x) On 14 April 2005, a meeting of the nominee Directors of Nafan and Muthu was held to discuss the dispute between Calyon Bank and SAF Yeast. Thereafter, in the Board meeting held on 26 July 2005, the minutes of the meeting dated 14 April 2005 were confirmed. In the meeting of 20 September 2005, the minutes of the meeting dated 26 July 2005 were confirmed. Again, a meeting was held on 30 October 2005, Alain Laloum attended it. Even in this meeting also, the minutes of 26 July 2005 along with

20 September 2005 were confirmed. In this meeting, the Annual Accounts and Directors reports were adopted, also holding of the Annual General Meeting for the year ending 31 March 2005 was approved, and Alain Laloum signed it.

(xi) Laloum, sometime at the end of the year 2005 when he visited India, carried with him a Deed of Settlement, which Nafan and Lesaffre wanted to SAF Yeast to sign with Calyon Bank. Lesaffre and Nafan, by virtue of their shareholding were forcing SAF Yeast to settle this dispute in a particular manner. Lucien Lesaffre on behalf of Nafan objected to the minutes of the meeting dated 14 April 2005 and 4 November 2005 prepared by Muthu. Lucien Lesaffre stated that the representative of the majority shareholder did not approve the manner in which the minutes were drafted. Muthu sent an e-mail on 13 November 2005 denying the contentions. He pointed out that it was unfortunate that in spite of the fact that SAF Yeast was struggling against Calyon Bank, Nafan and Lesaffre were not giving any support, on the contrary, they were forcing SAF Yeast to settle with Calyon Bank on unreasonable terms.

(xii) Muthu wrote to Alain De Gouy on 21 November 2005 complaining about the attempts of Lesaffre to force SAF Yeast in settling with Calyon Bank, in terms proposed by it. Muthu asserted that, in the meeting of 14 April 2005, Lucien Lesaffre had stated that SAF Yeast would have to accept the proposal for settlement. It

was further stated that Lesaffre and Calyon Bank were proposing to settle the terms without consulting SAF Yeast or its Directors. Muthu made the grievance that, throughout the dispute with Calyon Bank, Nafan and Lesaffre were supporting Calyon Bank and not SAF Yeast. Muthu also pointed out that Nafan and Lesaffre were threatening to use their majority shareholding to achieve its objects of forcing SAF Yeast to settle with Calyon Bank. Muthu also wrote to Denis Lesaffre reminding him that the Directors of SAF Yeast owed fiduciary duty to SAF Yeast and not to Calyon Bank. He asserted that it is not correct that Lesaffre sought to benefit from its relationship with Calyon Bank at the cost of SAF Yeast. He also stated that the Muthu Group was open for fair settlement with the Calyon Bank.

(xiii) On 8 December 2005, Lucien Lesaffre wrote to Muthu that he being Managing Director should not mix shareholders issues and should separately address them to Nafan. Lucien Lesaffre differed from Muthu regarding the minutes and sought to prepare a new draft reflecting the correct proceedings and the decision taken. Alain De Gouy also wrote to Muthu that shareholders of SAF Yeast must take up the issues independently. He mentioned that Calyon Bank was also willing to increase the amount of compensation. Alain De Gouy stated that they would wait for Muthu's response as regard the deed of settlement. Muthu again wrote on 3 January 2006 to Alain De Gouy stating that in the dispute of SAF Yeast with Calyon Bank, Lesaffre was taking the side

of Calyon Bank.

(xiv) On 2 March 2006, Muthu set out his grievance in a letter. He stated that Nafan was trying to force SAF Yeast in accepting the Calyon Bank's settlement proposal. Muthu reiterated that the minutes of the meeting dated 14 April 2005 were correct and they were confirmed in the subsequent meeting. Muthu placed on record the intimidation on the part of Nafan's Nominee Director to force Muthu for signing the deed of settlement with Calyon Bank. It was pointed out that though the Calyon Bank may address a letter to the State Bank of India, it was still up to the State Bank of India to delete the blacklisting of SAF Yeast. Muthu stated that there was a loss of confidence between Nafan and Lesaffre on one hand and Muthu Group on the other. He suggested that Muthu Group was willing to buy Nafan's shareholding in SAF Yeast. He also addressed an e-mail to Alain De Gouy and Lucien Lesaffre complaining of illegal and unethical conduct of the Calyon Bank and the incalculable hardship caused by it to SAF Yeast. He again reiterated that Nafan and Lesaffre were consistently siding with Calyon Bank. On 12 April 2006, Nafan and SAF Yeast asked Muthu for minutes of general meeting since 2003, details of transfer of shares and present list of shareholders. Muthu, by reply dated 19 April 2006 stated that, in view of the situation that developed and the correspondence, he was not responding to the said request.

(xv) On 5 May 2006, Alain Lesaffre replied to Muthu

denying that there were any pressurizing or forcible views of majority shareholders and reiterated stand of Nafan in settling the dispute with Calyon Bank in such a manner that would benefit SAF Yeast. Laloum also stated that there was no evidence that SAF Yeast was finding it difficult to raise finance through banks and in fact, it appeared that SAF Yeast was doing well. Laloum also asserted that offer of USD one million made by Calyon Bank, as a compensation was a fair offer. Laloum objected to the meeting of 26 July 2005 without notice to nominee Directors of SAF Yeast and approval of the minutes of the meeting dated 14 April 2005. Laloum sought appointment of alternate Directors in India and to convene a Board meeting in Paris. Laloum also stated that it is more than 15 months since a general meeting was held which was contrary to Articles of Association. Muthu wrote back on 10 May 2006 stating that it will not be possible for him to attend the meeting at Paris due to personal difficulty. He also pointed out that the atmosphere resulting due to the exchange of correspondence was not conducive for meaningful Board meeting to be held. Around this time, Muthu Group had received various caveats filed by Nafan and Lesaffre Group. Laloum asked for a dial-in-conference with Muthu and other directors. In spite of the e-mail written by Muthu to Laloum, Alain De Gouy, and Lucien Lesaffre stating that there were genuine difficulties to attend the Board meeting at Paris, the Directors of SAF Yeast in France decided to go ahead with the meeting. It was pointed out that meeting by teleconferencing is not permitted in Indian law. He also pointed

out that, such meeting would be illegal and it would be nothing but an attempt to force a settlement with Calyon Bank.

(xvi) SAF Yeast, on 29 May 2006 filed a contempt petition in Allahabad High Court, Lucknow Bench, against Calyon Bank and the nominee directors of SAF Yeast from France. Alain Laloum on 22 May 2006 informed Muthu that the Board meeting to be held on 23 May 2006 would not be illegal. Muthu Group replied to Alain Laloum placing on record their disapproval in respect of appointment of Company Secretary and an appointment of alternate directors. The vote of disapproval was communicated without prejudice to their stand that the meeting itself would be illegal. On 19 June 2006, Muthu Group received the copies of minutes of meeting dated 23 May 2006. In the minutes, the Indian directors were shown as absent and it was stated that even if the votes in respect of the resolution were four in favour and four against that the resolution, Laloum who occupied the Chair voted exercising his casting vote in favour of the resolution. On 23 June 2006, Muthu informed the alternate directors about pending criminal proceedings and the attempt of Lesaffre and French directors of SAF Yeast to force SAF Yeast into accepting the settlement with Calyon Bank. Muthu also addressed an e-mail with a copy to Alain Laloum, copy to Lucien Lesaffre, Alain de Gouy, and Maurice Lesaffre. In spite of receiving the minutes of 23 May 2005, a month late, he reiterated his objection to the meeting and pointed out that it is illegal. He also pointed out that the alternate directors

were appointed, without circulating their qualifications and credentials to occupy the position. On 7 May 2006, a meeting took place between Muthu and Lucien Lesaffre, wherein it was agreed to work together on 50:50percentage basis and signing a Heads of Agreement, which could culminate into a shareholders agreement. Again, a meeting was held in December 2006 between Lucien Lesaffre and Muthu in London. On 24 September 2007, the Lesaffre Group and Muthu Group finalized the Heads of Agreement setting out certain broad terms and as to how their relationship in SAF Yeast would continue. It was agreed that the shareholding of both the groups be 50:50percentage. The agreement, however, did not fructify into final agreement. Thereafter correspondence ensued between Alain Laloum, Lucien Lesaffre with Muthu between October 2007 to November 2008, in which it appeared that the relation between the parties had not deteriorated further.

(xvii) On 29 April 2008 Alain de Gouy resigned from the Board of Directors and Lucien Lesaffre resigned on 6 June 2008. Lesaffre appointed a new group Managing Director Jean Louis Meurant. Meetings were held between Muthu and Alain Laloum between February 2008 to August 2008 to resolve the differences, at Montreux, Geneva, and London. A meeting was held in Montreux in February 2008 on invitation of Alain Laloum where several modes of resolution were discussed. Muthu made it clear that his shareholding was not for sale.

(xviii) Laloum had been to Algeria for resolution of some issues on behalf of Lesaffre. On 10 January 2009, Laloum telephoned Muthu to come to Montreux to resolve the dispute. Laloum made travel arrangement and sent text messages to Muthu. A meeting was fixed on 23 January 2009 and text messages were exchanged. Muthu was received at Geneva Airport and was taken to Montreux Palace Hotel. At around 7.30 p.m. Laloum telephoned Muthu, and came to Muthu's room for dinner and agreed to meet next morning. On 23 January 2009 Laloum and Muthu had a meeting in the hotel. Before the meeting, Muthu spoke to J.L. Meurant on Laloum's phone. Muthu reiterated that Muthu Group is not interested in selling its shareholding. Laloum stated that Lesaffre Group should make an offer of sale of their shares in SAF Yeast. It was agreed that, to arrive at a fair value of shares, Articles of Association would be considered. Articles were faxed from the head office of SAF Yeast to the Conference Department of the hotel. After the Articles were read, Muthu agreed to suggestion made by Laloum that Muthu Group would pay Lesaffre Group a price of shares as determined by the Auditors in accordance with Article 17. At the instructions of Laloum, Muthu wrote the MOU. Laloum carried out corrections to the document in his own handwriting and initialed them. Immediately on signing the MOU, Laloum informed Meurant who also spoke to Muthu and thanked him for long association with the Lesaffre Group. Alain Laloum also forwarded a copy of the MOU on 24 January 2009 to Meurant, which Nafan had suppressed.

(xix) A meeting of SAF Yeast was held on 29 January 2009 in Mumbai where Muthu tabled the MOU before the Board. The MOU was taken on record as a notice in writing under Article 15 and it was resolved to refer the issue of fair value to Sharp & Tannan as per Article 17 of the Articles of Association. Laloum, on 7 February 2009, sent a telex message to Muthu stating that he had returned home and was awaiting copy of the valuation report.

(xx) SAF Yeast requested Sharp & Tannan on 9 February 2009 to work out the fair value of equity shares of SAF Yeast as on 31 March 2008. Sharp & Tannan carried out valuation exercise and valued the equity shares of SAF Yeast at ₹4315/- per share. Laloum telephoned Muthu on 10 February 2009 about the valuation report and Muthu informed him that Sharp & Tannan would send it shortly. Thereafter Sharp & Tannan sent their certificate of valuation on 11 February 2009 to Laloum with a copy to Meurant. Muthu sent an e-mail to Meurant with a copy to Laloum about the further steps taken pursuant to the MOU. Muthu tried to call Meurant on several occasions from 11 February 2009 to 18 February 2009 but Meurant was not available in the office. Laloum informed Muthu that Nafan could not locate the original share certificate. Between March and April 2009, Muthu took the matter of transfer of shares pursuant to the MOU and copy to Laloum and Corinne Wisniewski regarding the steps of process for completing the transaction.

(xxi) On 3 May 2009, Muthu sent an e-mail to Denis Lesaffre replying to the e-mail sent by Corinne Wisniewski dated 30 April 2009 and mentioned regarding several meetings and telephonic calls. Corinne Wisniewski replied and demanded meeting of Board of Directors of SAF Yeast. An issue was raised by Corinne Wisniewski regarding letter from ROC, Pune. Muthu clarified that it was a non-issue at the registered office of SAF Yeast was at Mumbai and not within the jurisdiction of ROC, Pune, and the steps have been taken to close the file. Muthu also stated that the permission of the Reserve Bank of India was obtained in reference to the MOU and called upon Nafan to honour and abide by the MOU.

(xxii) In the meanwhile, the Apex Court disposed of the Special Leave Petition filed by the French Directors of SAF Yeast and official of Calyon Bank on 14 May 2009 and the matter was remanded to the Lucknow Bench, High Court of Allahabad. On 14 May 2009, Corrine Wisniewski wrote to the Directors of Muthu Group forwarding a notice dated 30 April 2009 calling for a meeting of Board of Directors at Paris on 29 May 2009. On 16 May 2009, Muthu wrote to SAF Yeast informed about the default of Nafan in respect of transfer of the shares pursuant to the MOU. Muthu called upon SAF Yeast to act according to the relevant provisions of the Articles of Association of SAF Yeast, particularly, Article 18 of the Articles of Association. He also called upon SAF

Yeast to proceed to accept the consideration based on the certificate of valuation issued by Sharp & Tannan and complete the transfer. A legal opinion was obtained and the meeting of Board of Directors of SAF Yeast was held on 23 May 2009. It was resolved that SAF Yeast would create a separate bank account title “M/s. SAF Yeast Co. Pvt. Ltd. Shares Account” and the consideration in respect of transfer of shares would be deposited. K. Narsimhan, Vice President Finance of SAF Yeast was authorized to execute share transfer forms in terms of Article 18 upon receipt of consideration of ₹27,48,38,822/- for 80,772 shares held by Nafan. Muthu informed SAF Yeast that Laloum had informed him that original share certificates of Nafan were lost and called upon SAF Yeast to issue duplicate share certificate. SAF Yeast informed Narsimhan on 21 May 2009 of the decision taken in the meeting held on 23 May 2009 authorizing him to transfer the documents in the name of Nafan and in favour of A.M.Muthiah, Director. On 25 May 2009, Bank of India Shareholding Ltd. stamped nine unsigned share transfer forms. A letter of the same date of A.M. Muthiah to SAF Yeast was taken on record stating that he had paid the amount of ₹27,49,38,822/- as the purchase money for 80,772 shares. A letter from the Axis Bank of the same date confirmed that the amount was transferred from A.M.Muthiah's saving account to current account of SAF Yeast with Axis Bank. The four Indian directors of SAF Yeast attended the Board meeting. At the relevant time the record of share transfer were placed before it ascertaining that the amount was transferred. The Board of Directors considered the

request of SAF Yeast as an agent of the Nafan for issuance of duplicate share certificate for 80,772 shares. The issue was discussed and not having found any adverse evidence, resolved to cancel the lost original share certificates and issue duplicate share certificates to enable issuance of duplicate share certificate to enable issuance of duplicate share certificate. The meeting was adjourned by 45 minutes.

(xxiii) After the duplicate share certificates were prepared, the duly executed share transfer forms were taken on record along with the duplicate share certificates. The share transfer forms were accepted and resolution was passed to transfer the shares in the name of A.M. Muthiah and accept him as a shareholder for the 80,772 shares. It was thus resolved to delete the name of Nafan as a shareholder from SAF Yeast. SAF Yeast, through Muthu informed Corinne on 28 May 2009 stating the steps taken pursuant to the MOU referring to previous correspondence and that the MOU has been implemented. Muthu informed of the Board resolution taken in the meeting dated 25 May 2009 after receiving purchase consideration for transfer of shares of Nafan. The letter also stated that the entry of Nafan has been removed from the register and the name of A.M. Muthiah has been entered. It was also stated that permission of Reserve Bank of India has been obtained and called upon Nafan to nominate a bank account for transfer of purchase consideration.

(xxiv) The petition filed by Nafan suffers from suppression of various materials and vital facts especially regarding execution of MOU and on this ground alone the petition requires to be dismissed. The petition is not maintainable, as the Nafan is not qualified to file the petition in terms of provisions of Section 399 of the Act. The petition is not filed bonafide. It lacks particulars of so-called inducement, fraud, and fabrication. The suppression of material facts in the petition cannot be covered in a rejoinder, the MOU dated 23 January 2009 is valid and binding, and Muthu Group pursuant to the MOU in accordance with the Articles of Association takes steps. The Board meeting held on 29 January 2009, 23 May 2009 and 25 May 2009 are valid and the resolutions passed are binding. No notice was required to be given to the nominee directors.

Reply by SAF Yeast

13. On behalf of SAF Yeast, reply was filed by Muthu being the Managing Director and authorized signatory, briefly as under:

(i) Petition ought to be dismissed, as Nafan is not a shareholder or member of SAF Yeast. Nafan/Lesaffre entered into binding MOU to transfer shares to Muthu Group on 23 January 2009, pursuant to a meeting. This MOU was entered into to end all pending litigations in the Apex Court and High Court of Allahabad, Lucknow Bench. The signing of the MOU by Laloum itself was

notice to SAF Yeast of the same. After the execution of the MOU in a meeting of Board of Directors, the MOU was tabled as notice in writing under Article 15 of the Articles of Association. It was referred for issuance of fair value to statutory auditor. Nafan/Lesaffre did not take steps to execute the transfer of shares to Muthu Group. This constituted a default on the part of Nafan/Lesaffre and therefore SAF Yeast as a duly appointed agent was empowered under Articles of Association to act on behalf of Nafan/Lesaffre. After receiving the purchase money on/or on behalf of the Nafan, the shares were transferred. The participation agreement dated 22 March 1991 is not enforceable. The issue involving the litigation between the SAF Yeast and Calyon Bank has been set out in the reply filed by Muthu, which is adopted.

Affidavit of Alain Laloum

14. On 10 June 2010, Alain Laloum filed his affidavit taking briefly the following contentions:

(i) In 2006, Muthu initiated proceedings in Allahabad High Court, Lucknow Bench, against Laloum and other nominee directors. Several discussions took place between Muthu and Lucian Lesaffre to resolve the dispute. Lucian Lesaffre and Muthu signed Heads of Agreement at London. After the Heads of Agreement were signed, they exchanged draft of redemption

shareholder agreement. Muthu and Lucian Lesaffre agreed that their lawyers would discuss and finalize the agreement. Muthu was aware that neither Lesaffre nor Nafan will execute any agreement without first it drawn by their lawyers and placing it for approval before the Board, having been finally executed by Lesaffre family. Muthu was also aware that no policy decision, more particularly, a decision to exit from India would ever be taken without Lucian Lesaffre and Denis Lesaffre being involved and with approval of the Board of Lesaffre.

(ii) In January 2009, Muthu called upon Laloum and requested for a meeting. Muthu drew attention of Laloum to the petition pending before the Supreme Court. Though Laloum was confident that they had not committed any contempt, Muthu kept boasting about his connections with judiciary and considering the fact that some of the employees of Calyon Bank were prosecuted with, could not be taken lightly.

(iii) Laloum was to undergo hip surgery on 30 January 2009 and was unable to travel. Thereafter a meeting was fixed at the instance of Muthu at Montreux. Laloum met Muthu at Montreux Palace Hotel, which was close to residence of Laloum. It was agreed at the start of the meeting that it would be a final attempt to explore the settlement. As Muthu had travelled, long way to meet Laloum, Lesaffre felt obliged to Muthu. Muthu insisted on calling upon Articles of Association and got them faxed. He insisted on

explaining all the terms on which he would purchase the shares of Nafan. Muthu suggested that, while relevant pages of Articles were arriving by fax, they should sign a memorandum so that whatever is to be put before Denis Lesaffre would be clear. Laloum suggested that Muthu should take lead in writing the document. Muthu wrote out the document. Laloum did not pay much attention to it, as it was his understanding that it was only his proposal to Denis Lesaffre. In that, light Laloum signed the proposal. After the meeting, Laloum informed Meurent that they had signed an understanding regarding proposal, which will be forwarded. It was never discussed in the meeting what are the consequences of the sale of shares. What was signed was not an agreement for sale of shares held by Nafan in any Company. Lesaffre family could only do this. Laloum enquired about the valuation because he wanted to know if it was worthwhile to follow up with Muthu's proposal. When the valuation was received from Sharp & Tannan, Laloum was shocked at extremely low value. Laloum never informed about the loss of original certificates to Muthu.

Rejoinder on behalf of Nafan

15. Rejoinder affidavit was filed by Denis Lesaffre as a Chairman of the Board of Nafan. In the rejoinder Nafan, in short, stated as under:

i) Certain proceedings were initiated by Nafan for declaratory relief in the Court at Montreux, Switzerland for the fraud

committed by Muthu by alleging that MOU is a binding contract when it is not. The validity of the MOU is matter for the Swiss Court, the Court of appropriate jurisdiction. Various false statements have been made in the reply filed by Muthu especially regarding meeting between Muthu and Laloum in Montreux, Switzerland. The entire basis of the case put up by Muthu Group is the MOU being a binding agreement to transfer the share, is incorrect. The case put up in the reply is fraudulent, the alleged transfer of shares is void ab initio, and no Board meeting took place, which is concocted for giving effect to fraudulent scheme. Records have been fabricated and shares, worth not less than Euro 25 Million Euros, as in May 2009 have been sought to be misappropriated.

ii) The Company did not have sufficient means and but for the loans provided by Lesaffre and through its good offices from Bank Indosuez, SAF Yeast Company would not have the adequate finances. SAF Yeast Company was incapable of surviving without the support of Lesaffre. Lesaffre also provided technical assistance regarding strains, testing and technical advise. The Company profits grew not because of efforts of Muthu Group but because the yeast market in India had grown as were foreseen by Lucien Lesaffre.

iii) Muthu used the pendency of criminal proceedings to intimidate the Nafan's nominee directors and prosecuted criminal

contempt petition by extending a veiled threat of arrest. In view of these proceedings initiated by Muthu, the French Directors thought it would be beneficial to settle the dispute than to take risk of proceeding. Therefore, pursuant to this, a meeting was held in London and Heads of Agreement were drawn on 14 August 2007. The Heads of Agreement recorded the material terms and it was decided that in order to reach settlement the shareholding would be 50:50 which was expressed between Lesaffre and Muthu Group. Muthu however started stalling and resiled from his obligation to conclude the Shareholders Agreement. When the hearing was coming up before the Apex Court in November 2008, Laloum convinced Muthu to agree to postponement of hearing to give more time from the perspective of Nafan to settle differences regarding shareholder agreement. During this period, Muthu came to know that Laloum's decision would be placed before Lesaffre family that he had not agreed to any settlement and he had not been authorized to enter into any settlement.

iv) When the meeting took place at Montreux, Laloum was not well. He had travelled in a wheelchair to Algeria. Muthu insisted upon a meeting as a condition for postponement of hearing before the Apex Court. The manner in which Muthu acted during this meeting is already set out in the affidavit of Laloum. What Laloum signed was in nobody's contemplation as a contract and certainly not in Laloum's contemplation that any binding contract has been entered into. Valuation was yet to be done, contempt

proceedings were pending, and the proposal was to be considered by the Lesaffre family members. If Muthu knew that he would get a ridiculously low valuation from the auditors, MOU was a document obtained by inducement, undue influence, and fraud.

(v) When the valuation was received from Sharp & Tannan, Laloum was shocked at the low valuation and immediately spoke to Muthu and told him that it will be for the Board of Lesaffre to consider. The valuation was so ridiculously low that no attention was given to the assertion of Muthu regarding MOU. The valuation sent along with letter dated 10 February 2009 was addressed to Laloum and not to Lesaffre or Nafan. The valuation was at the instance of SAF Yeast. If the Auditor had addressed the valuation to Lesaffre, they could not have made a ridiculously low valuation. The valuation report did not take into consideration Discounted Cash Flow method, which is a detailed exercise. There was no basis for valuation to be carried out as of 31 March 2008. The manner in which the valuation was carried out and the speed at which it was carried out was entirely suspicious. The valuation was done by Nafan from reputed firms of Chartered Accountants would show that the valuation of SAF Yeast was wholly fraudulent. Even the well settled methods of valuation were not applied.

(vi) Attempts were made to meet Muthu in Paris to discuss future progress of the joint venture. Muthu avoided doing so. The Special Leave Petition before the Apex Court was adjourned on 27

March 2009 on the basis that negotiations are in progress and it was never contended that there has been any agreement to sell the shares. There was no reference to any Board meeting regarding the MOU. Muthu's lawyers opposed the adjournments thereafter in the Apex Court. It was informed by Corinne that the assertion of Muthu regarding MOU could not even be considered.

(vii) On 28 May 2009, Muthu sent a shocking e-mail that he had transferred the shares and paid the amount to SAF Yeast. The so-called Board meetings of 29 January 2009, 23 May 2009, and 25 May 2009 were suspicious. No reference was made regarding these meetings even in the Court proceedings earlier and suddenly several Board meetings have emerged in reply. The notice supposedly issued for the alleged meeting of 29 January 2009 was stated to have been addressed to Muthu, A.M.Arunachalam and Muthiah. Even the minutes of the alleged meeting are suspicious. In any way, no meetings could have been held as no notice was given to four nominee directors of Nafan. Even if any meeting was held, the meetings were void. It applies to the other meetings held on 23 May 2009 and 25 May 2009. No request was made by anybody for issuance of duplicate share certificates. Nothing was placed on record regarding the so-called request of Laloum. Even the meetings did not give 14 days' notice period nor the agenda.

(viii) The MOU is not a contract and is incapable of being enforced. There is no entity called Muthu Group or Lesaffre Group.

Neither Nafan, nor Lesaffre were party to the MOU. Laloum was not specifically authorized to enter into such transaction to the knowledge of Muthu. There was no shareholding or Board resolution of Nafan to authorize transfer of shares. Muthu himself did not comply with the precondition of enforcement of MOU. The MOU is even otherwise vague and uncertain. The reliance of Muthu Group on Article 18 of Articles of Association is fraudulent. Nafan at no time given transfer notice or any notice to SAF Yeast in writing.

(ix) The Lesaffre had contributed substantially by way of financial assistance, allowing its valuable trademarks and technical assistance to development of SAF Yeast. The Lesaffre had also contributed substantially through Muthu and held Muthu and his family. The reply filed by Muthu was thereafter dealt with parawise and the contents therein are denied and explained in consonance with the stand taken earlier.

Affidavit of J. L. Meurant

16. Meurant filed an affidavit on 18 November 2009. To summarize, asserted that around mid-January 2009, Laloum called Meurant and told him that Muthu had called him to discuss a possible solution. On 24 January 2009, Laloum attached protocol of agreement setting out Muthu's will for resolving the disputes. Nafan had at no time wish to sell its shareholding. As the MOU was not binding, it was not brought to the notice of Lesaffre.

Meurant did inform Lesaffre about Muthu's wish to buy the shares and valuation. When Lesaffre asked Laloum to have a meeting in Paris, he did not agree insisting upon receiving agenda for the meeting.

*Affidavit filed by Muthu Group in response
to affidavit filed by Alain Laloum.*

17. On behalf of Muthu Group, Muthu briefly stated as under. If there was any truth in assertion of Laloum, then he should have affirmed the petition as being the person most likely involved in the proceedings. The case that MOU is a mere proposal is contrary to the averments made in the petition. The MOU was culmination of series of meetings to settle the dispute. Laloum had a clear authority to execute the MOU. The averments made by Laloum in the affidavit were dealt with parawise and denied and the fact that the MOU was binding and Laloum had the authority was reiterated.

Sur-rejoinder filed by Muthu Group

18. Sur-rejoinder was affirmed by Arunachalam Muthu on behalf of Muthu Group on 17 July 2010 to deal with the rejoinder filed by Denis Lesaffre. It was in short, stated as under .

(i) Inspection of documents has been given by Nafan. In spite of the same, incorrect statements were made that inspection of documents is not given.

(ii) The MOU is valid and binding contract and the shares have been transferred in accordance with Articles of Association and full consideration has been paid. Only basis to discredit the MOU is that Laloum was induced to sign some papers. The record would clearly show that Laloum did dine with Muthu in his room. Laloum did not appear to suffer from any physical incapacity. He had travelled to Algeria clearly indicating that he had no health issues. Meurant was fully aware of the meetings between Laloum and Muthu. The Articles of Association were specifically called for. Thereafter the MOU was executed. Laloum did not appear to be in any physical discomfort. After the shares were transferred, there was no question of withdrawing the proceedings before the Allahabad High Court since transfer of shares was *subjudice* in the Company Petition. Laloum had full authority to execute the MOU. The valuation done by Sharp & Tannan was proper and after considering all the relevant material. No capital can be made of the fact that valuation was prepared in a short time span. The Sharp & Tannan are auditors for around 27 years and therefore they were fully aware of the finances. The criticism made on the valuation is based on incorrect figures. Lesaffre Group in the past had accepted the valuation of the auditors without questioning the basis or the integrity of the valuers.

(iii) It is not possible to believe that in spite of the fact that Meurant received the MOU on 24 January 2009, he will not inform

his colleagues. The allegation that the meetings held in January and May 2009 were not disclosed, are incorrect. The letter of SAF Yeast dated 28 May 2009 makes a reference to the Board meeting. The replies filed in earlier proceedings were not exhaustive replies. In any case, these affidavits do refer to meetings held in January 2009 and May 2009. The Board meetings held in 2009 were validly held and there is no question of that being challenged.

(iv) The allegation of forgery is false and this theory is taken for the first time in the rejoinder. The Heads of Agreement are no bar to the validity of the MOU.

(v) It is baseless to suggest that only because SAF Yeast used the trademark, Nafan should be reinstated as a shareholder. The principal product of Nafan was sold under the name Prestige. There was hardly any financial assistance provided by Lesaffre to SAF Yeast, so also the technical assistance. Both the terms, Muthu Group and Lesaffre Group are well known, and it is ridiculous to suggest that MOU is not binding on that count.

19. Further affidavit was also filed by Mr. Muthu on 11 October 2010 by placing certain documents on record.

Proceedings before the Company Law Board

20. With these pleadings, the parties went for hearing

before the Company Law Board. In addition to the voluminous pleadings and documentary evidence, the parties also filed their written submissions.

21. The CLB framed points for determination. The points for determination were -

(i) Whether the petition has not been properly verified and filed as per CLB Regulations ? If so, its effect.

(ii) Whether the petition is not maintainable on the grounds stated in the reply(s) filed by the Respondent Nos.2 to 4 ?

(iii) Whether the rejoinder/replication is part of the pleadings ? If not, its effect.

(iv) Whether the Petitioner has suppressed the material and vital facts in its petition ? If so, its effect.

(v) Whether the impugned MOU dated 23 January 2009 is invalid and unenforceable document on the grounds stated by the Petitioner ? If so, its effect.

(vi) Whether the alleged transfer of shares between member to member is covered by the first part of the Article 14 of the Articles of Association of the Respondent No.1 and the Articles 15, 18 and 19 have no application in respect of the transfer of shares as contended by the Petitioner ?

(vii) Whether the impugned MOU dated 23 January 2009 amounts a transfer notice as contained in Article 15 of the Articles of Association of the Respondent No.1 ? If not, its effect.

(viii) *Whether the Board meeting purportedly held on 29 January 2009 is non-est, illegal and invalid and the Resolutions passed in the said meetings are ineffective being contrary to law and oppressive in nature ? If so, its effect.*

(ix) *Whether the purported Board meetings held on 23 May 2009 and 25 May 2009 are non-est illegal and unlawful for the reasons stated in the pleadings of the Petitioner and the resolutions passed in the said meetings are invalid and ineffective and thus liable to be set aside ?*

(x) *Whether the purported valuation report is a manufactured/got up document prepared by the Respondent No.7 in connivance with the Respondent No.2 to Respondent No.6 to favour them in contravention of the Statutory guidelines and is not based on the recognized principles for the valuation of a company ? If so, its effect.*

(xi) *Whether the issuance of duplicate shares by the Respondent no.1 to Respondent No.4 is illegal being made in contravention of the statutory provisions as contended by the Petitioner ? If so, its effect.*

(xii) *Whether the Petitioner has successfully proved the alleged acts of oppressions and mismanagement by the Respondent No.2 to Respondent No.6 in the affairs of the Respondent No.1? If so, its effect.*

(xiii) *To what relief, if any, is the Petitioner entitled to ?*

Findings of the Board

22. (I) The Board held that the petition was properly verified, and was filed as per the Rules. It held that the petition was

maintainable and the argument that Nafan was no longer a member and therefore could not file Company Petition was rejected. The rejoinder and other affidavits are part of pleadings, the Nafan had not suppressed material and vital facts, and the petition was not liable to be dismissed on that count. The MOU was not obtained by fraud or inducement and Laloum had the authority to sign the MOU. The Board concluded that Nafan and Lesaffre wanted to sell the shares, and in fact agreed to sell their shareholdings vide the MOU. It was held that Muthu Group took immediate steps for withdrawal of the cases at their end. The MOU was not bad on the ground of uncertainty in terms and conditions. The Board held that it was competent to take into consideration the intention of the parties from the MOU to pass appropriate orders in exercise of its rights and powers under Section 402 of the Act. A transfer notice must fulfill both the conditions stipulated in Article 15, that, it must be a notice of the members desire to transfer the shares and it must appoint the Company as an agent for finding a transferee. The first part of Article 14 is separate, distinct, and independent of latter part of Article 14 and that the contention of Muthu Group that Articles 15 and 18 are applicable is incorrect. Board further held that the MOU was not a transfer notice as contemplated under Article 15. The Board held that the meeting on 29 January 2009 was held and the allegation of fabrication of record of Board meeting could not be accepted.

(II) The Board took note of the fact that admittedly the concerned

meetings were held without notice to Nafan and Lesaffre and their nominee directors in terms of the Participation Agreement. The meeting therefore was bad in law. The Board also held that, even assuming that participation agreement was not binding, it was obligatory to give notice when entire 51% shares were transferred. The meetings were therefore illegal for want of notice. Board however held that the meeting dated 29 January 2009 was not oppressive because it was in terms of the MOU. The Board held that the meetings held on 23 and 25 May 2009 were bad in law since no notice was served and no agenda was circulated, and they were oppressive. The Board came to the conclusion that the valuation prepared by Sharp & Tannan was not reliable. Valuation report was a got up document and biased. The valuation report deliberately used CCI Guidelines though they were inapplicable. The Board held that there was no request in writing by Laloum regarding the duplicate share certificates and that Article 18 did not authorize the Company to carry out any transfer in absence of original share certificates. The Board further concluded that the act of issuance of duplicate share certificates was part of a design to usurp the shareholding of Nafan. The Board accordingly concluded that Nafan succeeded in proving the case of oppression by the Muthu Group.

(IV) The Board thereafter considered the grant of relief. It noted that, it was apparent that two groups could not run the Company together. Parting of ways and sale of shares from one group to

another was most appropriate. The Board took into consideration the contribution of Muthu, equity and humanitarian perspective, and that Muthu had acted on legal advice, the intention to execute the MOU, and held that Muthu Group should be allowed to buy out the shareholding of Nafan and Lesaffre.

(V) Accordingly, the Company Law Board declared that the MOU dated 23 January 2009 was valid and enforceable, the valuation report was biased, partial, and it was accordingly set aside. The meetings dated 29 January 2009, 23 May 2009, and 25 May 2009 were declared as non-est, illegal and void. Nafan and Lesaffre were directed to transfer the shares to Muthu Group proportionate to their shareholding. To carry out a fair valuation, the Board of Directors was suspended and kept in abeyance. Until the valuation was concluded, an administrator was appointed. The administrator so appointed was authorized to appoint an independent auditor. After the complete exit of Nafan and Lesaffre of receiving the consideration, the administration function would come to an end. Accordingly, the Company Petition was disposed of by the impugned order dated 28 March 2013.

Present Appeals

23. Thereafter the above-mentioned four appeals have been filed. A Company Appeal was first filed by Nafan, in which a Company Application was taken out for interim relief. By order

dated 8 May 2013, the Court did not accept the contention of Nafan that only part of the impugned order be stayed and placed the matter on board for admission. The matter thereafter came up on board on 11 June 2013, when Muthu Group, Lesaffre, Union of India, and Sharp & Tannan filed their appeals. The appeals were admitted. Pending disposal of the appeals, order passed by the Board dated 24 June 2009 read with order passed by this Court earlier on 15 January 2010, was directed to be continued. By a separate order, the appeal filed by the Union of India was disposed of. Thereafter, the petitions were heard from time to time on various dates, as per the request of various counsel appearing in these appeals. The parties also filed voluminous written submissions.

24. Nafan and Lesaffre are broadly challenging the findings that the MOU is a valid and binding and it can be looked into for passing any order under Section 402 of the Act. They also challenge the direction that Nafan and Lesaffre Group should transfer their shareholding to Muthu Group. The Muthu Group is broadly challenging the findings that the Board meetings held in the year 2009 are illegal and oppressive, the resolutions and transfer of shares in favour of Muthu Group are illegal and should be set aside. The Muthu Group has challenged the direction that duplicate share certificates issued in favour of A.M.Muthiah is cancelled and the shareholding of Nafan and Lesaffre is restored and the rectification of register accordingly. The Muthu Group has

also challenged the findings regarding the interpretation of the articles and valuation. Sharp & Tannan have challenged the observations made by the Board in the impugned order regarding the valuation report being biased, partial, non-transparent, and deliberately based on wrong guidelines.

DISCUSSION

25. I have heard Mr. Fredun De' Vitre, learned Senior Advocate along with Mr. Pravin Samdani, learned Senior Advocate on behalf of Nafan, Mr. Darius Khambata, learned Senior Advocate on behalf of Lesaffre; Mr. Janak Dwarkadas, learned Senior Advocate along with Mr. N.H. Seervai, learned Senior Advocates on behalf of Muthu Group, and Mr. T.N. Subramanian, learned Senior Advocate on behalf of Sharp & Tannan.

26. The Board had framed points for determination. Learned Counsel for the parties have also made their submissions generally on these points for determination. In addition to these points for determination, further issues that arise for consideration are the maintainability of the appeal filed by Lesaffre Group and the grounds raised in the appeal filed by Sharp & Tannan taking exception to imputation of bias against them.

Maintainability of Lesaffre's Appeal

27. The Lesaffre has filed the Appeal No.24 of 2015. In this appeal, the Lesaffre has *inter alia* challenged the order passed by the Board as regards the declaration in Para 333 of the operative order and judgment, the findings that the resolution passed at the Board meeting of January 2009 were not oppressive, and the MOU is valid and binding; the direction to sale 51% shares of Lesaffre in the SAF Yeast; other consequential findings and directions. Mr. Dwarkadas, senior advocate appearing on behalf of Muthu Group taken a preliminary objection regarding the maintainability of the appeal filed by Lesaffre. He contended that Lesaffre was joined as a proforma respondent in the petition filed by Nafan and it was specifically stated in the Petition that Lesaffre is only proforma respondent in the proceeding. He submitted that Lesaffre did not have any cause of action to file its own petition, as it holds no shareholding in SAF Yeast neither Lesaffre was a joint petitioner with Nafan. He further submitted that Lesaffre had not filed any affidavit in reply neither any statement on oath. Mr. Dwarkadas submitted that Lesaffre had sold its entire shareholding in SAF Yeast to Nafan and Lesaffre had no interest or ownership of the shares. Mr. Dwarkadas submitted that an appeal under Section 10F of the Act can only be filed on a question of a law and a new factual position, which is sought to be introduced by Lesaffre that the shares were held by Nafan for its benefit, cannot be permitted. He submitted that the Lesaffre was not a member as defined under Section 41 of the Act. He further contended that, even assuming Nafan held share for benefit of Lesaffre, it ought to have been

disclosed as specified under Section 187-C of the Act and no such declaration has been made. He relied upon the decision of the Delhi High Court in the case of *Vinod K. Patel v/s Industrial Finance Corporation*,¹. He submitted that the concept of aggrieved person must be determined in the context of the Companies Act. Accordingly, as per his contention, the appeal deserved to be dismissed as not maintainable.

28. These submissions cannot be accepted. The operative portion of the impugned order specifically directs the 'Lesaffre Group' to sell its shareholding. It declares that the MOU executed by Laloum on behalf of 'Lesaffre group' is valid, effective, and enforceable document. The impugned order directs Nafan as well as Lesaffre to transfer the impugned shares to Muthu Group. The entire impugned order specifically contains references and directions to Lesaffre. It declares that the MOU which is executed by Laloum, which mentions 'Lesaffre Group', as valid. Any person aggrieved by any decision or order of the Company Law Board can file an appeal under Section 10-F. The phrase used is 'any person aggrieved'. Once there is a specific direction in a order to a person to transfer his shareholding it will be hyper-technical to hold that such person is not even entitled to file an appeal. What needs to be seen is the direction to the person concerned. The legality or otherwise of the direction is the matter of merits to be considered after hearing the appeal. The Muthu Group is pressing the relief granted by the

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. 2001 (103) COMPCAS 557, Delhi.

Board regarding the declaration and the transfer of shareholding even against Lesaffre. It is not argued by Muthu Group that the directions to Lesaffre be set aside. The argument advanced by Muthu Group before the Board was that Nafan was nominee of Lesaffre and Nafan is not separate and distinct from Lesaffre. Even the case of Muthu Group before the Board indicates that Lesaffre can be considered as a person aggrieved. In the facts and circumstances, therefore, the appeal filed by Lesaffre needs to be considered on merits along with the appeal filed by Nafan. When Mr. Dwarkadas had initially raised the contention regarding maintainability of the appeal filed by Lesaffre, it was kept open to be decided at the time of final order and Mr. Khambata on behalf of Lesaffre has made the submissions on merits as well. I am therefore not inclined to dismiss the Appeal No.24 of 2015 filed by Lesaffre only on the ground of maintainability. Lesaffre is entitled to contend that the directions issued to it should be set aside. However a positive relief, if any, can only be granted to Nafan as per its prayers in the petition.

Preliminary

29. I now proceed to consider the controversy at hand dealing with the four appeals on merits. Learned Counsel have taken great pains to expound the law on the subject. The Counsel and their teams have meticulously done research on various legal aspects. What needs to be kept in mind are the parameters of the

jurisdiction is exercised by the Company Law Board, the role that is played by it, and the scope of appellate power under Section 10-F. Though the learned counsel for the parties have advanced elaborate submissions on all facets of the controversy and have urged this Court to dwell into findings of facts, one cannot lose sight of the limited jurisdiction conferred on this Court under Section 10-F of the Act. The jurisdiction under Section 10-F to entertain an appeal against a decision of the Company Law Board, is not unlimited. The appeal is maintainable on questions of law. Findings of facts cannot be interfered with like a first appeal under the Code of Civil Procedure. Interference in findings of fact is not possible if the findings are not perverse. If there is a material on record to justify a factual finding, which is arrived by applying appropriate legal principles, then merely because another view is possible, the Court under Section 10-F will not reverse the finding. A mere erroneous finding of fact will not lead to a question of law.

30. I need to prefix the discussion by reiterating the basic test. This litigation is given various shapes, shades and hues of complex of legal positions, but the concept of Oppression lies at the core. The underlying principle in the concept of oppression, is fairness. This dispute, and the solution to be arrived, has to be adjudicated on the touch stone of fairness and probity. Instead of making this adjudication more complex, as sought to be done by the Muthu Group, the correct approach will be to deconstruct and simplify the controversy to get at the heart of the matter. Notions of probity

and fairness are beacons to navigate in this dispute, lest one gets lost in side alleys and traps. Learned counsel for the parties have cited almost all the cases on the subject of Indian courts, English Courts, Malaysian Courts and courts of other countries. I have referred to the ones which, in my humble opinion are closest on the fact situation and which have taken review of the case law.

31. Section 397 of the Act deals with the concept of 'oppression' and Section 398 deals with the concept of 'mismanagement'. Both these provisions enable any member of a company to approach the Company Law Board for appropriate directions. If the Board is convinced that the acts of oppression or mismanagement or both have been made out as defined under the Act, then the Board has various powers under Section 402 of the Act to pass suitable directions. The term 'oppression' generally refers to a conduct which is wrongful and harsh. It refers to a lack of probity and fair dealings in the affairs of the Company. Oppression can be in different forms. Something, which is illegal may not always be oppressive and something which is legal may be oppressive. A deliberate act to cause harm to the members of the Company in respect of the affairs of the Company would be an act of oppression. Therefore, the enquiry in such matters will be focused on probity and fairness in dealing amongst the shareholders, rather than only testing only the legality of the actions.

32. Various decisions have been cited by the learned counsel for the parties on the concept of oppressive conduct falling within the

ambit of Section 397. It is not necessary to refer to all of them individually as in the case of ***Sangramsinh P. Gaekwad v/s Shantadevi P. Gaekwad***¹, the Apex Court has outlined them as under .

“180. The expression 'Oppression' complained of, thus, must relate to the manner in which the affairs of the company are being conducted and the conduct complained of must be such as to oppress the minority members. By reason of such acts of oppression, it must be shown that the majority members obtained a predominant voting power in the conduct of the company's affairs.

181. The jurisdiction of the Court to grant appropriate relief under Section [397](#) of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section [402](#) of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may seem fit and proper, is warranted. (See Bennet Coleman & Co. v. Union of India & ors. and Syed Mahomed Ali v. [R. Sundaramurthy](#)). But the same would not mean that Section [397](#) provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analyzing the materials brought on records that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress a minority of the members including the petitioners vis-à-vis the shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court

1. (2005) 11 SCC 314

to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding of the company but such winding up order would be unfair to the minority members. The interest of the company vis-à-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956. .

“184. In Halsbury's Laws of England, 4th Edition, Volume 7, para 1011, it is stated:

"1011. Conduct amounting to oppression. In this context, "oppressive" means burdensome, harsh and wrongful. It does not include conduct which is merely inefficient or careless. Nor does it include an isolated incident: there must be a continuing course of oppressive conduct, which must be continuing at the date of the hearing of the petition. Further, the conduct must be such as to be oppressive to the petitioner in his capacity as a member: whatever remedies he may have in respect of exclusion from the company's business by being dismissed as an employee or a director, he will have none under the provisions relating to oppression.

On the other hand, these provisions are not confined merely to conduct designed to secure pecuniary advantage to the oppressors; they cover the case of wrongful usurpation of authority, even though the affairs of the company prosper in consequence."

190. In Shanti Prasad Jain v. Kalinga Tubes Ltd., etc.: [1965] 2 SCR 720 , this Court quoted with the approval the following passage from the decision in Elder's Case, , as summarized at page 394 in Meyer's case, :

"(4) Although the word 'oppressive is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are' treating the company and its affairs as if they were their own property' to the prejudice of the minority share-holders-and in which just and equitable grounds would exist for the making of a winding- up

order..... but in which the 'alternative remedy' provided by Section by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority."

191. In Shanti Prasad Jain (supra) referring to Elder Case, it was categorically held that the conduct complained of must relate to the manner of management of the affairs of the company and must be such so as to oppress a minority of the members including the petitioners qua shareholders. The court, however, pointed out that that law, however, has not defined what oppression is for the purpose of the said Section and it is left to court to decide on the facts of each case whether there is such oppression.

192. In Scottish Cooperative Wholesale Society Ltd. v. Meyer and Anr., it was categorically held that the conditions precedents contained in Section of the Act of 1948 must be satisfied before any relief can be granted.

193. Yet again in H.R. Harmer Ltd., In re, the Court of Appeal held that 'the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the 'just and equitable' rule, but only to those cases of that character which have in them the requisite element of oppression'.

It was observed:(All ER p.701 A-B)

It is not lack of confidence between share- holders per se that brings S. into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involved at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

194. In Needle Industries (supra), this Court observed:

"44. Coming to the law as to the concept of 'oppression', Section [397](#) of our Companies Act follows closely the language of Section of the English Companies Act of 1948.

Since the decisions on Section have been followed by our Court, the English decisions may be considered first. The leading case on 'oppression' under Section is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer. Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant-society could justly be described as having behaved towards the minority shareholders in an 'oppressive' manner, that is to say, in a manner "burdensome, harsh and wrongful". The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that Section "warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view". Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, "which is common to partnership, that there should be the utmost good faith between the constituent members". Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of Section (page 344, per Lord Keith; pages 368-69, per Lord Denning).

195. In Re Five Minute Car Wash Service Ltd., the Court upon considering the nature of relief which can be granted under Section of the Companies Act, 1948 observed that in a case falling under Section of the Companies Act, 1948, relief will be granted if the petitioner establishes that at the time when the petition was presented the affairs of the company were being conducted in a manner oppressive of himself and if he fails to allege facts capable of establishing that the company's affairs are being conducted in such a manner the petition will disclose no ground for granting any relief and must be dismissed in limine.

It was observed: (All ER p.247 B-D)

"Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. In Scottish Co-operative Wholesale Society, Ltd. v. Meyer (a case under s.210) Viscount Simonds adopted a dictionary definition of the meaning of "oppressive" by, it is said, "burdensome, harsh and wrongful".

In Elder v. Elder & Watson, Ltd., also a case under s. 210, the Lord President (Lord Cooper) said:

"....the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Lord Keith said:

".....oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

196. The Court in an application under Sections [397](#) and [398](#) may also look to the conduct of the parties. While enunciating the doctrine of prejudice and unfairness borne in Section of the English Companies Act, the Court stressed the existence of prejudice to the minority which is unfair and not just prejudice per se.

197. The Court may also refuse to grant relief where the petitioner does not come to court with clean hands which may lead to a conclusion that the harm inflicted upon him was not unfair and that the relief granted should be restricted. (See Re London School of Electronics).

198. Furthermore, when the petitioners have consented to and even benefited from the company being run in a way

which would normally be regarded as unfairly prejudicial to their interests or they might have shown no interest in pursuing their legitimate interest in being involved in the company. (See Re RA Noble & Sons (Clothing) Ltd.)

199. In a given case the Court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties.

200. It is now well-settled that a case for grant of relief under Sections [397](#) and [398](#) of the Company Act must be made out in the petition itself and the defects contained therein cannot be cured nor the lacuna filled up by other evidence oral or documentary. (See In re Bengal Luxmi Cotton Mills Ltd. : 69CWN137).

201. In Shanti Prasad Jain Vs. Union of India it was held that the power of the company court is very wide and not restricted by any limitation contained in Section [402](#) thereof or otherwise

202. In Shoe Specialities Ltd. v. [Standard Distilleries and Breweries \(P\) and Ors.](#), it is stated :

"While exercising the powers under sections [397](#) and [402](#) of the Companies Act, the Court is considering not only the relief that is sought for but also considers as to what is the nature of the complaint and how the same has to be rectified. It is the interest of the company that is being considered and not the individual dispute between the petitioner and the respondent. If that be so, the interest of the company requires that the majority shareholders must have their say in the management."

203. In Jesner v. Jarrad Properties, , a question arose as to whether the conduct and the background of the two companies (their informed way of doing business disregarding the Companies Act, etc.) could be taken into account to decide whether there had been unfair prejudice to one party in an application under Section of the English Companies Act was answered in the affirmative.

204. When a decision is taken on a business consideration, it is trite, the court should not ordinarily interfere. [See Maharashtra Power Development Corporation Ltd. v. Dabhol Power Co. & ors.: 2004(3)BomCR317.]”

With these principles enunciated by the Apex Court, the controversy at hand can be looked at.

33. Since the Board has determined the points of consideration and as the learned counsel for the parties also made their submissions centering on these points for determination for the sake of continuity, it will be appropriate to follow the same pattern. The issues for determination therefore will fall under five broad heads, (a) Maintainability of the company petition and whether there was any suppression facts; (b) The controversy surrounding the Memorandum of Understanding and its legal effect; (c) legally and/or oppressiveness of the decisions taken in the Board meetings held in the year 2009; (d) The correctness of the valuation and the imputations against the valuer for the valuation report; and (e) the relief to be granted.

*Maintainability of the company petition
and suppression of facts.*

34. Under this first broad head, further issues that arise are, whether there was any suppression on the part of Nafan, whether the petition was properly verified, and whether the subsequent rejoinder and affidavits should be considered along with the

petition. To indicate broadly the rival contentions, it is the case of Muthu Group that there was a blatant suppression by Nafan in the petition more particularly regarding the events leading to execution of MOU and for this gross suppression no equitable relief needs to be granted to Nafan and Lesaffre. On the other hand, it is the contention of Nafan and Lesaffre that there is no suppression and the MOU is not determinative factor but the effect of the so-called Board meetings, and in any case, at the time of deciding the petition all the facts were before the Board.

35. As regard the verification of the petition, it is contended by Mr. Dwarkadas that one Mr. Siraj Ahmed, who has no personal knowledge, has affirmed the petition. He submitted that the source and the basis of the knowledge of Mr. Siraj Ahmed are not indicated primarily because he has no such personal knowledge. It is contended that the petition is dated of prior to the date of signing the petition and is attested prior to that date. He submitted that by making a person, who is not aware of the facts, the conduct of Nafan demonstrates lack of bonafides. He relied on decision of this Court in *Intesa Sanpaolo SPA v/s Videocon Industries Ltd.*². Mr. Dwarkadas submitted that the verification would have to comply with the provisions of Order XIX Rule 3 of Code of Civil Procedure. He relied upon the decision of the Apex Court in the case of *State of Bombay v/s Purshottam Jog Naik*³. He submitted that, the Apex Court and various High Courts emphasized the need of

2. Rendered in Company Petition No.528 of 2012.

3. A.I.R. 1952 SC 317.

appropriate verification. He submitted that merely because Mr. Siraj Ahmed, has a Power of Attorney he does have a personal knowledge. Mr.De'Vitre submitted that the argument regarding lack of bonafides was not taken in the affidavit in reply nor in the rejoinder before the Board. The Board held that Siraj Ahmed being Power of Attorney had the lawful authority to the Petitioner and furthermore, Lasaffre and Laloum have filed their affidavits.

36. The Company Law Board Regulations provides that the petition can be filed through an authorized representative. It has not been put in dispute that Mr. Siraj Ahmed is not an authorized representative. In the decision in the case of *Enercon GmbH v/s Enercon (India) Ltd. & ors.*⁴, relied upon by Mr. De'Vitre, this Court held that Code of Civil Procedure is not applicable in the proceedings before the Board and Company Law Board Regulations govern them. In said decision, the Court noted that the deponent thereon had relied upon documents available and submissions were made on advice. In the present case, Laloum and Lesaffre have filed their affidavits and have taken a stand on oath regarding the events that had transpired. Therefore, even assuming there is some irregularity in the affirmation made by Mr. Siraj Ahmed, it will not be sufficient to dismiss the Company Petition on this ground alone. In the case of *Enercon GmbH* (supra), the Court relied upon earlier decisions to hold that such objections would be merely procedural objection. As regard the reflection on the bonafides of the case of Nafan is concerned, it is not that it has rested only on the

4. (2008) 143 Comp Cas 687.

verification of Mr. Siraj Ahmed. In the case of *Entesa Sanpaolo SPA* (supra) the concerned persons had avoided to take a stand on oath, which is not in the present case. Lesaffre and Laloum have filed affidavits and have put-forth factual position according to them existing, on record. Apex Court in the case of *Associate Journals Ltd. v/s Mysore Paper Mills Ltd.*⁵ has held that even if there is slight error or irregularity in filing an affidavit, opportunity needs to be given to the party to cure the defect. The Apex Court has held that the rules of procedure cannot be a tool to circumvent justice and procedural objections cannot be used to defeat to justice. The ultimate objection of Muthu Group to the verification of Mr. Siraj Ahmed is that the concerned persons have put him up to avoid taking a stand on oath. This objection does not survive once the concerned persons i.e. Laloum and Lesaffre have put forth their stand on oath and have taken a responsibility as to what is stated in those affidavits. Simplicitor dismissing the Company Petition on that ground alone would have only meant that the petition would have been filed again with same allegations for the same reliefs, which would only multiply the litigation. In the circumstances, I am not inclined to interfere with the finding of the Board that the Petition ought not to have been dismissed on this count.

37. The second objection is that the petition ought to have been dismissed since Nafan had suppressed various facts. This argument was made before the Company Law Board and it was

5. (2006) 132 Comp Cas 470 (SC).

rejected. The Board concluded that, considering the petition and rejoinder, the facts and events stated to have been suppressed pertain mostly to the period 2005-2006 which were not much relevant.

38. Mr. Dwarkadas submitted that Nafan suppressed several material documents and material facts despite them being within their knowledge. He submitted that many documents were brought on record by the Muthu Group and when Nafan submitted list of dates and events and compilation in this Court, they have given an impression that all these events and documents were always part of the record, which is not so. He submitted that, if the petition is taken as it is, it presents a complete misleading picture. According to Mr. Dwarkadas, annual accounts for the year of incorporation and for other relevant year and Directors Reports were suppressed. He submitted that these documents would have clearly shown the falsity in the case of Nafan that it had substantially contributed to set up SAF Yeast. He submitted that Directors' Reports would have also shown that the new products were developed using indigenous technology and the technology not of Nafan. He submitted that even notes of accounts for the year 2001 to 2003 have not been produced which clearly show that the Muthu Group were the key management personnel. He further submitted that e-mails sent on 4 January 2006, 30 January 2006, various letters, text messages sent on 24 October 2007, 29 October 2007 and from December 2007 to November 2008 have been suppressed, which would have

clearly demonstrated the events within the knowledge of Nafan. He submitted that if the MOU had been properly disclosed, it would have destroyed the case of oppression. So also, the text message dated 7 February 2009 sent by Laloum stating that he is waiting for the valuation report. He further submitted that the certificate of valuation, e-mails dated 11 February 2009 and 12 February 2009 and Articles of Association were not produced. He submitted that if these documents were produced, the case made out in the petition could not have been sustained. Mr. Dwarkadas submitted that various vital facts have been suppressed in the petition, and the petition ought to have been rejected on suppression of facts.

39. The facts, which have been stated to be suppressed, are mentioned in paragraph 56 of the impugned order of the Board. For sake of convenience, the paragraph is reproduced as under.

(i) Although Alain Laloum retained a copy of the MOU, which is an admitted fact that was first mentioned in the Reply filed by the Respondents and accepted in the Rejoinder Affidavit and in the Affidavit of Alain Laloum.

(ii) The Petition does not mention that before the meeting in Montreux, Switzerland, on 23rd January 2009 which resulted in the MOU, there were several prior meetings between Respondent No. 2 and Alain Laloum in Montreux, Geneva and London in the year 2008 (apart from the meetings in June and December 2006 with Lucien Lesaffre in London) to discuss the possibility of a resolution to the ongoing disputes between the Muthu Group and the Lesaffre Group;

(iii) *The Petitioner suppressed the fact that the meeting in Montreux in January 2009 was at the instance of Alain Laloum as has been brought out in the Reply with reference to Mr. Laloum's text messages and emails prior to the meeting;*

(iv) *The Petition conveys the clear impression that apart from Alain Laloum, no other officer or representative of the Petitioner / Respondent No. 8 / Lesaffre Group was aware of the MOU and valuation of the shares. Contrary to this, the Reply disclosed that in addition to Alain Laloum, Mr. J.L. Meurant (the Group Managing Director) was in the know of the meeting at Montreux on 23rd January 2009, the MOU, the valuation of the said shares and Respondent No. 2's assertion seeking the transfer of the said shares. The Petition completely suppresses Mr. Meurant's role in the matter. His name is not to be found in the Petition at all.*

(v) *After the role and knowledge of the Group Managing Director Mr. J.L. Meurant was placed on record in the Reply filed by the Respondents, in its Rejoinder Affidavit, the Petitioner has admitted (in June 2010) that Mr. J.L. Meurant was in fact aware of the meeting at Montreux on 23rd January 2009, that Mr. Laloum spoke to him immediately after executing the MOU and that on 24th January 2009 a copy of the MOU was sent by Mr. Alain Laloum to Mr. J.L. Meurant.*

(vi) *The Petitioner further suppressed the following vital and crucial facts, events, correspondence and communication between the meeting at Montreux on 23rd January 2009 and the email of 30th April 2009 (when the Petitioner by its actions of purporting to call a Board of Directors meeting of the Company at Brussels or Geneva Airport sought to resile from the MOU). The obvious and deliberate reason for not referring to the following facts / documents is that the Petitioner attempts to mislead this Hon'ble Board as to matters relating to the*

MOU (which was not annexed to the Petition), the circumstances surrounding its execution and the Petitioners full knowledge about facts over which they claim ignorance in the Petition (such as the existence of the MOU and the Valuation Report), During this period of three months, the following significant events have been suppressed by the Petitioner (with not even a fleeting reference made to any of them in the Petition):

(a) Alain Laloum by a text message sent around 7th February 2009 to Respondent No. 2 inquired about and sought the valuation report by the Statutory Auditors;

(b) The Statutory Auditors sent a copy of the valuation report directly by email to Alain Laloum and J. L. Meurant on 11th February 2009. The Petition states that Alain Laloum received the valuation report from the Respondent No. 2 and not from the Auditors;

(c) On 11th February 2009 Respondent No. 2 addressed an email to J.L. Meurant and copied to Alain Laloum referring to the MOU as a contract to transfer the said shares and seeking the transfer of the same;

(d) On the contrary, the Petition contains a positively misleading suggestion that the valuation of the said shares came to the knowledge of the Petitioner and its officers on or after 30th April 2009 or 3rd May 2009;

(vii) The Petitioner suppressed its own document, namely its own Articles of Association, obviously because Article 10(2) clearly states that each of the Directors of the Petitioner is independently authorized to represent the Petitioner. This fact is also borne out from the extract of the Petitioner from the Trade Register of the Netherlands Chamber of Commerce, a statutory body for maintaining the corporate record in the Netherland. The extracts dated 21st July 2008, which is prior to Mr. Alain Laloum executing the MOU, and 21st June 2009 clearly state Mr.

Alain Laloum's powers as being "solely/independently authorized", in accordance with the Articles of Association of the Petitioner and there was no change in his power during the intervening period (between 21st July 2008 and 21st June 2009).

(vii) The Petitioner did not disclose its own document i.e the flower of Attorney dated 31st January 2005 issued by the Petitioner to TMF Management, the Petitioner was able to solemnly argue that TMF Management was the only entity authorized to execute the MOU and bind the Petitioner. The Power of Attorney (for which Notice to Produce (and reminder) was also given to the Advocates of the Petitioner and to which there was no response at all forthcoming) clearly establishes that the Powers of the said TMF Management was very specific and restricted to routine administrative matters and that TMF Management had no such authority to execute the MOU on behalf of the Petitioner as solemnly argued by the Petitioner at the time of oral submission.

(ix) The Petitioner suppressed crucial facts and emails of the year 2005 and 2006, in relation to the issue of the Board Meeting of the Company held in France in April 2005 and the Minutes of the said Meeting as prepared by Respondent No. 2, which is one of the charges of oppression in the Petition. In this regard, the Petition suppresses the following facts and e-mails:

(a) The Petition totally omits to mention the fact that in October 2005 Alain Laloum traveled to India (Mumbai) and attended a Board of Directors Meeting at which meeting the Minutes of the Meeting of 20th September 2005 (which in turn confirmed the Minutes of the Meeting of 26th July 2005) were confirmed. This establishes that the Petitioner had express knowledge of the July 2005 Board Meeting held in Mumbai, despite which in the Petition filed four years later, the alleged failure to give notice of the July 2005 Board Meeting has

been made a ground of oppression in the Petition;

(b) The Petition suppresses two crucial emails of 4th January 2006 and 30th January 2006 which were sent by Mr. Alain Laloum to the Respondent No. 2 seeking certain additions (and not any alterations or deletions) to the Minutes of the April 2005 Meeting. These emails completely destroy the cause of action in the Petition, which is founded on the alleged inaccurate recording of the Minutes of Meeting of April 2005 as done by Respondent No. 2. Had the Minutes of the April 2005 meeting as prepared by Respondent No. 2 been as inaccurate as has been falsely suggested in the Petition, that grievance would have been made by the Petitioner in the aforementioned emails of 4th January 2006 and 30th January 2006, which was not done;

(c) Alain Laloum has stated in his Affidavit dated 10th June 2010 that since he was not the Chairman of the meeting held on 14th April 2005 (in France), he did not think it appropriate to raise the, issue of any alleged inaccuracy of the Minutes of Meeting of 14th April 2005 in person in October 2005 when he attended a Board of Directors meeting in Mumbai (despite having thought it appropriate to comment during January 2006 by his above referred emails). This untenable stand was nevertheless taken to explain the Petitioner's silence on this issue during October 2005 despite having received by then the Minutes of the said meeting of April 2005 at least by September 2005. However, even this stand (of Alain Laloum not being Chairman of the 14th April 2005 meeting) has been falsified by his email of 30th January 2006 when Mr. Alain Laloum asserted that he chaired the very same meeting (of 14th April 2005);

(x) The Petitioner failed to disclose the facts and events which shows that the Petitioner was never excluded from the administration of the Company and in particular was not unaware of the holding of AGM's. Neither was the

Petitioner unaware of the financial position of the Company. The documents and facts disclose that the Directors Reports for the years from 2004 - 2005 onwards (which is the period during which the Petitioner alleges exclusion from the Company) were always signed by a representative of the Petitioner on the Board of the Company. In some cases the Board Resolution for holding the AGM for a given year was signed by a nominee Director of the Petitioner. The Petitioner always received the dividend declared at the AGM's and on many occasions advised the rate of dividend to be declared. The Petitioner also suppressed communications by the Petitioner nominee Director's to the Respondents complimenting them on the performance of the Company in various years and in particular for 2006-2007 and 2007-2008, thus establishing their complete knowledge about the Company's affairs and financial position.

(xi) Although the Petition alleges that three Alternate Directors were appointed by the Board of the Company at a meeting held in Paris on 23 May 2006, at which none of the Muthu Groups Directors were present, inexplicably, a copy of the alleged Board Resolution of the said meeting has not been annexed to the Petition. In the Reply, the Respondents have disputed the validity of this appointment. Despite this and despite relying upon the same, even in its Rejoinder Affidavit, a copy of the Minutes of this Meeting has not been annexed. It is therefore clear that the Petitioner is steadfastly holding back from the Hon'ble Board a document, on which, strangely enough, the Petitioner places reliance.

(xii) The Petitioner alleges, as a charge of oppression, the Respondents failure to give notices to the Petitioner for Board Meetings of the Company held in Mumbai. In particular, the meeting of July 2005 held in Mumbai for which no Notice was given to the Petitioner's nominee Directors on the Board of the Company, is a made a

charge of oppression. Conscious of the fact that this charge of oppression would fail in the plain sight of Article 55 of the Articles of Association of the Company which requires notice only to Directors in India as per Section 286 of the Act the Petitioner is attempting to rake up the participation Agreement dated 22nd March 1991 as being the alleged basis of the relationship between the shareholders. In this, regard, the Petitioner suppressed a whole lot of relevant facts and events which are to the knowledge of the Petitioner and which unequivocally establish that the two shareholding groups of the Company never acted upon the Participation Agreement.”

40. Mr. Dwarkadas submitted that, since the jurisdiction of the Company Law Board under Sections 397 and 398 is equitable, the conduct of the parties is most material and, therefore, the party which suppresses relevant material, ought not to be given any indulgence. Mr. Dwarkadas relied upon the decision in the case of ***Sangramsingh P. Gaekwad v/s Shantidevi P Gaekwad***,¹ of the Apex Court; decision in the case of ***Srikanta Datta Narasimharaja Wadiyar v/s Sri Ventakeswara Real Estate Enterprises (Pvt.) Ltd.***⁶ of Karnataka High Court; decision of the Delhi High Court in ***Smt.Abnash Kaur v/s Lord Krishna Sugar Mills & ors.***⁷, decision of the Appeal Bench of this Court in ***Maganlal Kuberdas Kapadia v/s Themis Chemicals Ltd.***⁸, decision of the Apex Court in ***Gujrat Bottling Co. Ltd. & ors. v/s The Coca Cola Co. & ors.***⁹, and ***S.P.Chengalvaraya Naidu v/s Jagannath.***¹⁰

1 (2005) 11 SCC 314

6 1991 (72) CompCas 211

7 (1974) 44 CompCas 390 (Delhi)

8 Rendered in Appeal No.332 of 1991

9 A.I.R. 1995 SC 2372

10. A.I.R. 1994 SC 853

Mr. Dwarkadas submitted that these decisions and several others have laid down that the Courts exercising equity jurisdiction must not allow any attempt to mislead them and the party coming to the Court must come with clean hands and produce all the necessary documents required for adjudication. He submitted that it is not open for the party to decide which document is material and must produce all the relevant documents.

41. Mr. Dwarkadas further submitted that the documents, which were produced through a rejoinder and additional affidavits, could not be taken into consideration, as a rejoinder could not form part of the pleadings. He submitted therefore that the finding of the Board that there was no suppression and that rejoinder forms part of the pleadings is incorrect. He submitted that a rejoinder would not form part of the pleadings. According to him, charge of oppression or the cause of action must be pleaded in the petition itself. He submitted that rejoinder can only deal with the defence in the reply and cause of action cannot be founded in the rejoinder. Mr. Dwarkadas submitted that the averments in the rejoinder bring forth new grounds of oppression, such as, the MOU being not a proposal, Laloum had no authority, Muthu has played fraud, no notices of Board meetings were given, and there were fabrication of minutes of meetings. Mr. Dwarkadas relied upon the decision in the case of *Sangramsingh Gaekwad* (supra) of the Apex Court and Calcutta High Court in the case of ***Mohta Brothers (Pvt.) Ltd. v/s Calcutta Landing & Shipping Co. Ltd.,***¹¹ decision of the Madras

1 1 1970 (40) CompCas (cal.) 119

High Court in the case of *S. Seetharaman v/s Stick Fast Chemicals (P) Ltd.*,¹² and decision of this Court in *Sambhaji Waghoji Asole v/s State of Maharashtra*¹³ Relying on these decisions, he submitted that acts of oppression must be pleaded in full particulars in the petition itself and unless that is done, same cannot be enquired into by the Court. Even assuming certain facts became known of the petitioners subsequently, petition at the most can be amended which is not done in the present case. He also submitted that Order VI Rule 4 of Code of Civil Procedure stipulates that the fraud must be pleaded in full particulars in the plaint.

42. Mr. De' Vitre, on the other hand, submitted that the cause of action has been sufficiently pleaded in the petition and relief that was sought i.e. rectification of register regarding alleged deletion of shareholding, was sustainable on the cause of action made out. He submitted that certain facts that became known from the reply during the inspection after filing of the reply by Muthu Group necessitated placing the factual position on record. He submitted that pleadings should receive a liberal construction and Muthu Group was fully aware the case that they had to meet. He submitted that the petition ought to have been amended was not the plea taken by Muthu Group in the affidavit-in-rejoinder. He further submitted that the plea of Muthu Group is a mere technicality and the Board while dealing with case of oppression is entitled to take into consideration the entire material on record.

1 2 (1998) 18 SCL 399 (MAD)
1 3 2006 (1) Mh.L.J. 392

43. I have considered the submissions. Firstly, what is the exact case made out by Nafan in this petition needs to be seen. The relief sought by Nafan is that the register of members should be rectified by inserting the name of Nafan in respect of 80,772 shares and an order terminating the appoint of Mr.Muthu as the Managing Director and that Muthu Group be directed to sell their shares to Nafan. In the petition, the Nafan has pleaded the relevant particulars. It has placed on record the particulars of the parties, the backdrop to the joint venture. Then it stated that Muthu Group is attempting to prohibit Nafan from participation in the management. It is attempting to compel transfer of Nafan's shareholding. Muthu Group is committing acts of mismanagement. It has inserted the name of Muthu Group as a shareholder of 51% of Nafan although Nafan has executed no share transfer deed. Then, Nafan gives background how the dispute arose between the parties is given by narrating the events that transpired leading to litigation between SAF Yeast and Calyon Bank and the contempt petition filed in the Allahabad High court and thereafter proceedings in the Apex Court. Nafan alleged that Muthu Group failed to give statutory records, minutes of Board meetings, financial statements, then it made a grievance of holding Board meetings without notice, failure to provide documents regarding litigation and how in spite of the attempt to settle the dispute settlement did not come through. Thereafter Nafan has mentioned how Lucien Lesaffre received a notice from the Registrar of

Companies to show cause regarding non-filing of returns. It has then mentioned that Laloum informed Lesaffre and Corinne that he has been induced to sign some papers by Muthu and he has received some valuation addressed to SAF Yeast, which shows that the valuation had no sanctity. Then Nafan refers to a MOU stating that Nafan was not a party and cannot be aware of the same. Then it stated that around 28 May 2009, Muthu sent a letter stating that shares are transferred relying on the MOU. It is stated that Nafan never agreed to sale its shares. It is further stated that if the MOU is produced, Nafan will raise and plead all its objections thereto. It is then stated that when the Board meeting was held at Paris on 29 May 2009 and the agenda was sent to Muthu, Muthu fraudulently called alleged meeting on 25 May 2009, made deposit of some amount, and in accordance with Article 18 struck off the name of Nafan. This was done based on the alleged MOU and the valuation, which were fraudulent. Therefore, the entire thrust of Nafan in the manner in which Muthu removed their names without notice to them in a meeting. According to them, the MOU was not a valid document and Nafan had never agreed to sell its shares. It had specifically stated that if the MOU were produced, Nafan would make its submission and take objections accordingly.

44. It is not that the MOU and meeting with Laloum at Montreux have not been mentioned at all in the petition. The fundamental aspect of the acts of oppression is meetings without notice and the transfer of shares. There is no correspondence on

record from Nafan or Lesaffre stating that they will abide by MOU and it should be placed before the Board, nor is a specific share transfer notice given by Nafan. The entire argument of Mr. Dwarkadas on this count is based on the silence on the part of Nafan and Lesaffre Group regarding the MOU and enquiry about valuation. According to him, once Nafan was made aware that the MOU exists and will be enforced, then by not taking any steps, Muthu was right in believing that the MOU was accepted. According to Nafan, Muthu Group was trying to divert the course of adjudication towards the legality, validity and binding effect of the MOU, but from Nafan's point of view in the petition the real issue in the matter was the oppressive nature of the Board meetings through which the transfer of share have taken place.

45. The Lesaffre and Nafan had made it clear through the e-mail written by Corinne Wisniewski that the valuation was ridiculously low. Whatever may be the stand of Nafan and Lesaffre regarding the MOU, apart from making general enquiries regarding valuation, there were no further steps taken by them for execution of the MOU. In fact, they had specifically made their intention clear that they will not be going to do so in view of the valuation. The MOU did specify that there would be fair valuation and withdrawal of the Court proceedings. Therefore, according to Nafan, the MOU had to be worked upon and taken further by both sides, rightly or wrongly, which aspect is dealt with later. The case of Nafan in the petition was clear that it not ready to go by the MOU. They did not

consider it as a valid piece of document. This case is clearly reflected in the petition. Therefore, the primary grievance of Nafan that the way the meetings were held in which share transfer took place without notice to them amounts to oppression. It is the Muthu Group, which is seeking, relies on the binding effect of the MOU. The contention of Mr. Dwarkadas is that the MOU is a binding contract and non-disclosure of events surrounding the transaction amount to suppression amongst others.

46. For the purpose of examining the charge of suppression, even assuming the MOU was binding, the action of Muthu Group to transfer the shares without notice to them still could be questioned by Nafan, which they did in the petition. For that purpose, it is enough to assert that the MOU had no sanctity. There is no complete omission to mention the MOU. It is mentioned and it is stated that it is invalid. Nothing further needed to be pleaded. Whether it is binding or not would be the case of Muthu Group. Nafan had reserved its rights to make comments on the MOU. The MOU is in fact is relied upon in defence of the actions taken by Muthu Group to transfer the shareholding without notice. The primary grievance of Nafan holding a meeting without notice remains. It is, therefore, not possible to uphold the contention of Mr. Dwarkadas that the petition itself did not contain cause of action and the rejoinder sought to supply the same and the petition should have been dismissed on that count. Nafan had clearly reserved the liberty to rejoin in case the MOU is pressed in service

by Muthu group as valid document. I do not find that there was any suppression of facts either.

47. Furthermore, the Apex Court in the case of *Ram Sarup Gupta (Dead) by LRs. v/s Bishun Narain Inter College & ors.*¹⁴, has held that the pleadings should receive liberal construction and whenever question of law regarding the pleading is raised, the enquiry should not be about the form of pleadings, instead the Court must find out whether the parties knew the case and issues contested. Once it is found that, in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issues by producing evidence, it would not be open to a party to raise the question of absence of pleadings. Before the Board decided the matter, all the parties had exhaustively filed their pleadings through petition, replies, affidavits, rejoinders, sur-rejoinders, etc. and the parties were fully aware of each other's case. The decision in the case of *Mohta Brothers* (supra) is of no assistance to Mr. Dwarkadas, as in that decision, the Court was concerned with the subsequent events and held that the matter needs to be decided upon the facts pleaded in the petition. In the present case, it is a grievance of Nafan that various facts leading to the meetings were suppressed from them, which they came to know after filing of the petition and therefore rejoinder had to be filed. In this case, not only rejoinder but also sur-rejoinder has also been filed.

14 (1987) 2 SCR 805

48. In the case of *Sangram Singh Gaekwad* (supra), a dispute arose between the heirs of Sir Pratapsinhrao Gaekwad, Ruler of Baroda and the companies floated by them. Certain civil suits came to be filed by shareholders of Indreni Holdings Pvt. Ltd. challenging transfer of shares. An application also came to be filed before the Gujrat High Court under Sections 397 and 398 of the Act. The Companies Act was amended and the jurisdiction of the High Court in respect of Sections 397 and 398 was vested in the Board. Simultaneous proceedings were filed before the Company Law Board and by consent; the matter was taken up before the Company Judge to dispose of the matters based on affidavits. Appeals came to be filed before the Division Bench of the Gujrat High Court and the Division Bench allowed the appeal. The matter was thereafter taken to the Apex Court. The Apex Court determined the points for consideration. They were as regard the fiduciary duty of the Company Directors towards the shareholders and on facts whether there was any oppression, mismanagement and whether the transfer of shares was valid. The Apex Court took a review of the law regarding oppression and stated that case for grant of relief under Sections 397 and 398 case must be made out in the petition itself and the defects cannot be cured by evidence, oral or documentary. The Apex Court noted the decision in the case of *Shoe Specialities Pvt. Ltd. v/s Standard Distillaries & Breweries*¹⁵. It held that the Court considers not only the relief but also the nature of the complaint and how it is to be rectified. The Apex Court in paragraph 205 observed as under.

15 (1997) I Company Law Journal, 243

“205. The burden to prove oppression or mismanagement is upon the petitioner. The Court, however, will have to consider the entire materials on records and may not insist upon the petitioner to prove the acts of oppression. An action in contravention of law may not per se be oppressive. Bhagwati, J. (as His Lordship then was) in Mohanlal Ganpatram and Anr. v. [Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. and Ors.](#),: (1964) GLR804 at 103 stated the law, thus:

"....It may be that a resolution may be passed by the Directors which is perfectly legal in the sense that it does not contravene any provision of law, and yet it may be oppressive to the minority shareholders or prejudicial to the interests of the Company. Such a resolution can certainly be struck down by the Court under Section [397](#) or [398](#). Equally a converse case can happen. A resolution may be passed by the Board of Directors which may in the passing contravene a provision of law, but it may be very much in the interests of the Company and of the shareholders..."

(emphasis supplied).

The Apex Court specifically stated that the Court will have to consider the entire material on record and may not insist upon the petition to prove acts of oppression. This observation has been emphasized by Mr. De' Vitre. The Apex Court disapproved the reliance by the High Court on the pleadings made in some other proceedings and ignoring the assertions made by the respondent therein in the proceedings. The decision of the Apex Court in the case of *Sangram Singh* (supra) therefore does not state that in spite of the fact that the parties knew the case and all pleadings were on record, the petition ought to have been dismissed because the cause

of action could not have been made out in the rejoinder.

49. Furthermore, there are more reasons why reliance cannot be placed on the decision of *Sangram Singh Gaekwad* (supra). In the present case, the cause of action has been sufficiently pleaded in the petition for the relief that is sought. The decision of the Apex Court in *Sangram Singh* (supra) after taking review of the powers of the Board, has in fact emphasised that, looking at the nature of the proceedings, the Board will have to take into consideration the entire material on record. The other decisions cited by Mr. Dwarkadas, arise from either Civil Suit, Election Petition or a Writ Petition. The nature of jurisdiction executed by the Board is very different from exercised by the courts trying civil suit, election petition, and writ petition. It is not necessary to deal with these decisions arising under different jurisdictions, as in the case of *Sangram Singh Gaekwad* (supra) itself, the Apex Court has emphasized the jurisdiction of the Board under the very provision in question, in the cases of oppression and mismanagement and has indicated that totality of the evidence must be looked at by the Board.

50. As I have held earlier, sufficient cause of action was pleaded by the Nafan in its petition. According to them, the meetings were without notice and transfer of shares was gross act of oppression and other acts of mismanagement. Relevant particulars concerning the MOU were pleaded and that the MOU

had a no binding effect. Nafan had already stated that in case the MOU is put-forth, they reserve their right to make their submissions, which they did in their rejoinder. It has come on record that no notice was issued by the Muthu group regarding the meeting when the entire shareholding of Nafan was transferred. According to Nafan, they knew the details about the meeting only through the replies and inspection of documents.

51. It will be a failure of justice if the petition is thrown out only on the ground of suppression of facts, when the facts the Petitioner is supposed to have suppressed were the facts suppressed by the Respondent from them. As far as MOU is concerned, Nafan had mentioned the same and made it clear that it is not considering it as valid. Why it was valid was the defence of Muthu group, which they put forth. Nafan countered that defence in their rejoinder. Persons concerned filed their affidavits placing contested factual position on record. It is not that Nafan obtained an ex-parte orderly misleading the Board. Both parties were fully aware of the facts. When the Board took up the matter for consideration, all the facts were placed before it placed on record either by Nafan or by Muthu Group. It is after considering the entire record the CLB took an informed decision and to my mind rightly did not dismiss the petition on the ground of suppression of facts.

Memorandum of Understanding.

52. The next broad head for consideration is regarding the MOU dated 21 January 2009. The MOU, which is handwritten, is reproduced below.

“Memorandum of Understanding entered into between the Lesaffre Group represented by Mr.Alain Laloum and the Muthu Group represented by Mr.A.Laloum at Montreux on 23/01/2009.

Regarding the shareholdings in M/s SAF Yeast Co. Pvt. Ltd.

It was agreed that Muthu Group would buy 51% shareholding of the Lesaffre Group in M/s SAF Yeast Co. Pvt. Ltd. immediately. The fair valuation of the shares will be done by the company (M/s SAf Yeast Co. Pvt. Ltd.) Auditors in accordance with clause 17 of the Articles of Association and the Memorandum of SAF Yeast Co. Pvt. Ltd.

As soon as the valuation is carried out by the Auditors, the certificate of valuation will be forwarded by the Auditors to Lesaffre. The Muthu Group will pay Lesaffre Group according to the certificate of valuation by the Auditors.

Muthu Group and Lesaffre Group agree to end all litigation pending in the Lucknow High Court and the Hon'ble Supreme Court immediately within the legal frame work”.

53. The points of determination by the Board on this topic were, whether the MOU is invalid and enforceable document as stated by the Petitioner; Whether the MOU amounted to transfer notice

contained in Article 15 of the Articles of Association. The Board then listed further sub-points regarding the MOU. Those were, whether the MOU has been obtained by fraud and inducement; whether Laloum had no authority to execute the MOU; whether the MOU is mere offer or expression of desire; whether the MOU is a contingent contract; whether Muthu failed to fulfill his obligation contained in the MOU; whether the MOU is bad in law for uncertainty; whether the Board is competent to enforce the agreement for sale; whether the MOU can be treated as a transfer notice.

54. The Board held that the MOU was not obtained by fraud or inducement, Nafan, Lesaffre wanted to sell the shares, and they agreed to do so through the MOU. Muthu fulfilled his part of obligation. The Board is not competent to enforce the contract but is entitled to take note of the intention of the parties and the MOU did not constitute a transfer notice. In short, the Board held that the MOU is binding and though it may not be enforceable as contract, the intention of the Nafan and Lesaffre to sell shareholding was clear, but at the same time MOU could not be treated as transfer notice.

55. It has to be noted that the Muthu Group has filed a Suit No.S/2457 of 2012 in this Court for the following reliefs.

“(a) That this Hon'ble Court be pleased to order/declare the said Memorandum of Understanding dated 23 January

2009 to be valid, subsisting and binding on the Defendant Nos.1 and 2 hereto and that the Defendant Nos.1 and 2 are bound and liable to perform the same;

(b) That this Hon'ble Court be pleased to order and direct Defendant No.1 by a mandatory order of injunction to specifically perform the Memorandum of Understanding dated 23 January 2009 so as to transfer in accordance with law the suit shares to Plaintiff No.3 being a member/nominee of the "Muthu Group" and for the said purpose this Hon'ble Court give all necessary directions to specifically perform the Memorandum of Understanding dated 23 January 2009 including the Defendant No.1 taking all ancillary and incidental steps for effecting a transfer of the suit shares in performance of the Memorandum of Understanding dated 23 January 2009;

(c) Alternatively, and in the event of Defendant No.1 failing to do so, this Hon'ble Court may be pleased to appoint a Receiver or any fit and proper person to transfer the suit shares for and on behalf of Defendant No.1 and if necessary to take all incidental and ancillary steps to effect transfer of the suit shares for and on behalf of Defendant No.1;

(d) That, pending the hearing and final disposal of the present suit, the Defendant No.1 by itself and through its servants, officers and agents be restrained by an order of injunction from in any way selling, transferring, encumbering, dealing with or creating any third party rights in respect of the suit shares;

(e) That, pending the hearing and final disposal of the present suit, Defendant No.1 by itself and through its servants, officers and agents be restrained by an order of injunction from exercising any voting rights or any other proprietary/membership rights in respect of the suit shares;

(f) For ad-interim reliefs in terms of prayer (c) above;

(g) For such further and other reliefs as the nature and circumstances of this case may require; and

(h) For costs of the present suit.”

The suit was filed on 30 April 2012. In the plaint it is stated that the suit is filed to enable the plaintiff i.e. Muthu Group to secure a decree of specific performance in the event the Board in the present Company Petition holds that the MOU remains executory and has not been duly performed. It is also stated that the suit is filed to save the bar of limitation that may apply in the event the Board or any other Court holds that the MOU is only executory.

56. Therefore, a suit for specific performance of the MOU is pending in the Civil Court. The Board has also taken note of the position of law that it has no power to specifically enforce the MOU but what the Board has done is to give effect of the supposed understanding of the parties in the MOU, while passing an order under Section 402 of the Act. Mr. De’Vitre and Mr. Khambata have seriously objected to this submitting that this is indirectly giving specific performance of the contract as the suit itself stands decreed by the order of the Board. On the other hand, it is the contention of Mr. Dwarkadas that the MOU is valid, legal, binding, it constitutes a transfer notice, and therefore there was no act of oppression committed at all.

57. As I will elaborate later, the entire case hinges not on the

validity of the MOU but on whether the act of Muthu Group to transfer the shareholding of Nafan and Lesaffre without notice to them, even when they had made it clear that they were not abiding by the MOU, amount to oppression. The appropriate course of action when the Muthu Group came to know that Nafan and Lesaffre were not going to honour their so-called commitments under MOU was to file a civil suit or approach the Board for necessary relief. The question is whether the Muthu Group could have done it unilaterally without notice. There could be various angles, such as, the MOU is valid, legal and binding, and it amounts to a transfer notice; the MOU is not legal, valid and binding, and it does not amount to a transfer notice; the MOU is legal, valid and binding but it does not constitute transfer notice; the intention behind MOU can be taken into consideration while passing an order under Section 402 of the Act. However, there is yet another facet. Should the Muthu Group have given a notice of the Board meeting before transferring the shares on the basis of MOU out of fairness and as a matter of probity? Though I would proceed to examine these viewpoints, as they have been agitated before me at some length, I am of the opinion that it is the last facet that should be kept at the forefront of the discussion.

58. Mr. De'Vitre submitted that the finding that the MOU is valid and binding could not have been made, as the Board does not have jurisdiction to do so. The MOU was a disputed document and at the most an arrangement amongst the shareholders. He submitted

that the Board did not have any power to grant declaration of the validity, more particularly, since Muthu Group had already filed a civil suit for specific performance. To hold that the MOU is arrived with consent and for consideration and is nothing but to decide on its validity. He submitted that parties had initiated their respective proceedings in competent Courts. The Muthu Group had initiated civil suit in this Court and Nafan and Lesaffre had initiated proceedings in the Court at Switzerland. He submitted that dismissal of the suit in Switzerland was only on the ground of jurisdiction. It was then submitted that, even assuming the Board had jurisdiction, it could not have been directed Nafan and Lesaffre to sell their shares. He submitted that the MOU mentioned a fair valuation and withdrawal of proceedings. The valuation was not a fair valuation and Muthu Group had not taken immediate steps to withdraw the contempt proceedings. He submitted that Nafan did not ask for invalidation of the MOU, but it was put-forth as a defence by Muthu Group, and it is Muthu Group who is asking for direction based on the MOU, in spite of the fact that they have filed a civil suit.

59. On the other hand, Mr. Dwarkadas submitted that, in the petition itself it is ascertained by Nafan that the shares were transferred based on non-existing and non-binding MOU. He submitted that since having put up the case that the MOU was not binding, Nafan could not be heard to say that the Board had no jurisdiction to deal with their submission. He submitted that the

case pleaded by Nafan is that they were entitled to set aside the transfer of shares on the allegation that the MOU was not binding. In view of this assertion, the Board had to consider whether the MOU was non-existent as alleged and whether Muthu Group was justified on relying on the MOU. He submitted that the suit was filed only to save the limitation and as a precautionary measure and there will be no contrary reliefs. Mr.Dwarkadas submitted that since Nafan had invoked the power under Section 402, it was open for the Board to take into account all relevant factors for ordering a buyout to do substantial justice. According to him, the Board did not exceed its jurisdiction as MOU and the events leading to the MOU were made part of cause of action by Nafan itself, which is clear from its pleading. Mr. Dwarkadas submitted that the decisions relied upon by De Vitre and Mr.Khambatta to contend that the Board does not have powers akin to Civil Court, are not applicable as they deal with a party approaching the Board seeking relief to enforce a contract. He submitted in the present case Nafan having entered into a valid and binding MOU has filed a petition to resile from the same. He further submitted that no party should be allowed to resile from a contract. It was open to the Board to consider the MOU as one of the relevant circumstances. He relied upon decision in the case of **Probir Kumar Misra Vs Ramani Ramaswamy**¹⁶, rendered by Madras High Court, to contend that a MOU can be considered as a relevant circumstance. Mr.Dwarkadas further submitted that the contempt petition came to be withdrawn within the legal frame work and it

16 (2010) 104 SCL 174 (Mad)

was not entirely in the hands of Muthu group to withdraw the contempt petition, which had to depend upon orders of the Court. He submitted that theory of Laloum being induced is false. Nafan is changing its stand as regards the MOU, has taken contradictory stand, and ultimately has admitted that the MOU exists. He then relied upon the averments made in the rejoinder by Nafan and the additional affidavits. Mr. Dwarkadas referred to various documents on record in detail seeking to demonstrate that the MOU was not an isolated piece of document but there were series of meetings and exchange of e-mails, fax messages that led to execution of the MOU. He submitted that the MOU is a clear and binding contract and if Nafan had to wriggle out the same on the ground of fraud and inducement, the heavy burden was upon it to demonstrate the same. The MOU fulfills all the ingredients of being a binding contract and Laloum who had full authority to do so executed it. He also submitted that there is no uncertainty or vagueness in the MOU. It is handwritten. Laloum carried out corrections and initialed them. Laloum is an experienced business. He was commercial director of Lesaffre group. There was no special relationship with Muthu that he could have induced Laloum. He submitted that the conduct of the parties clearly shows that Nafan and Lesaffre were fully aware of the MOU and did not raise any objection, which would have been the first reaction if Laloum had signed a contract without their authority. He submitted that the entire conduct of Nafan in respect of this MOU is fraudulent. Mr. Dwarkadas therefore, submitted that the primary object of

Nafan to file the petition was to resile from the MOU and the Board has correctly rejected the submission that MOU is not a binding document.

60. I have considered the arguments. The Board has rendered a finding that the MOU is not an invalid and unenforceable document, it is not obtained by playing fraud on Laloum, and Laloum was authorised to sign the MOU. The Board also concluded that the MOU was not vague and Muthu fulfilled his obligations. It also held that the MOU is made by free consent. The Board relied upon the decision of **Bihar State Electricity Board Vs Green Rubber Industries** -AIR 1990 SC P 693 to hold that even though the party is ignorant of precise legal effect, it is bound by the terms of contract it signs. The Board distinguished the decision cited by Nafan to hold that the Board can take note of intention of parties and pass appropriate orders. The Board also took note of the argument on behalf of Muthu group that the agreement has already been implemented and therefore, question of enforceability does not arise.

61. The Board has culled out an intention of the parties from the MOU. It concluded that Nafan, with full knowledge and free will, had entered into a MOU for sale of its shares. This intention is relevant for considering buyout. Board accepted the position that a specific performance of the MOU cannot be granted by it ,but has taken the intention of parties into consideration. I do not think this is correct. First, this would be doing granting specific performance.

Second, assuming such course of action can be adopted in cases of unquestionable intentions, The MOU did not spell out any such unquestionable intention.

62. It is settled that the Board in law does not have power to grant specific performance of a contract between two groups of shareholders. The powers of Board under the Act are to be exercised in respect of the affairs of the company and property and not to decide the disputes amongst shareholders. The powers are conferred to correct oppressive conduct and mismanagement and not to decide civil disputes. Whether Lesaffre agreed to sell its shareholdings to Muthu group is a dispute between two groups of shareholders. In the Apex Court in the case of **Chatterjee Petrochem (India) Pvt. Ltd. v. Haldia Petrochemicals Ltd. and Ors.**¹⁷, has made it clear that the Board has no power to decide disputes regarding transfer of shares. Similar view is taken in the case of **Sangramsinh Gaekwad (supra); Incable Net (Andhra) Ltd. v. AP Aksh Broadband Ltd.**¹⁸; **T.Vinayaka Perumal v. T. Balan**¹⁹; and **Zora Singh v. Amrik Singh Hayer**²⁰, which have also been followed by the High Courts.

63. If the entire correspondence of the record is perused one thing is clear that when the Board meetings took place in May 2009 to transfer the shareholding of Nafan, Nafan had made it clear that

17 (2011) 10 SCC 466

18 2010 (6) SCC 719

19 (2011) 167 Company Cases 45 (Madras)

20 (2009) 149 Company Cases 328 (Punjab and Haryana)

it is not abiding by the MOU. When Muthu sent an e-mail on 30 April 2009, referring to the MOU, Ms. Corinne Wisnieswaski had clearly replied on 3 May 2009 that Nafan cannot even think considering the price, which was obviously not calculated on correct basis. In spite of the specific e-mail, the same valuation was used to give effect to the MOU. Therefore, when the act of transfer of shares took place, the Nafan was not ready. The MOU did mention that there should be a fair valuation of shares. The fair valuation of shares therefore was one of the preconditions of the MOU. Naffan had made it clear that the valuation was not fair. Therefore, dispute arose even within the terms of the MOU as to whether the valuation carried out was fair. The amount of consideration for transfer was not fixed in the MOU. It was to be arrived at upon a fair valuation. Once Nafan insisted that the valuation was not fair, the consideration could not be termed as fixed. A clear civil dispute therefore arose even assuming that the MOU was binding. Muthu was fully aware that there was a dispute as regards the valuation and that Nafan was not ready for the valuation. In spite of this position, meeting was held without notice and shares were transferred.

64. It was contended by Mr.Dwarkadas that Nafan itself put the validity of MOU into issue and therefore it cannot complain that the Board adjudicated upon the same. He submitted that it is case of Nafan itself that the MOU is not a valid and binding and therefore the Board had to adjudicate upon the same to hold that it is valid,

binding, and properly executed. This submission cannot be accepted. Nafan had come to the Board making a grievance regarding the meetings held without notice wherein their shareholding was transferred. Nafan had stated in the petition that, if MOU were relied upon then would reserve their right to contest the same. It is the case of Muthu Group that MOU was binding and it is wrongly been resiled from and the MOU constituted a transfer notice. The foundation of the case of Muthu Group is the MOU and it is their main defence to the allegations of oppression. According to Nafan, MOU was at the most a proposal to take the transaction forward and Muthu Group was attempting to convert this memorandum into a binding contract.

65. Reference was also made by the Board to the decision of the High Court in Switzerland in which the High Court has according to the Board held that the MOU is a contract. However, the observations and the operative part of the High Court order reported in paragraph 82 of the impugned order itself shows that the proceedings were dismissed for want of jurisdiction. Therefore, the observations made in the decision of the High Court of Switzerland could not have been held against Nafan. The legal effect of MOU is already being agitated in the Civil Court where the Court will decide its legality and validity.

66. The question therefore, arises is whether it could be said that the MOU was such a clear unequivocal document that it presented

an open and shut case, and that a clear intention of Nafan to act on the MOU followed therefrom and all that had to be done was to only complete the procedural formalities of transfer. In given case, it may be argued that a clear intention flowed from an agreement and for all purpose it was complete and only procedural formality remained and therefore the board even though cannot enforce the agreement can look at the intention. However, the present case, in my opinion, cannot be pitched at that level. Can an absolute conclusion can be drawn that the MOU was a concluded contract with full knowledge, it has been acted upon and after it is acted upon only a procedural formality remains and at that stage a grievance is being made by Nafan.

67. The question therefore is whether Nafan and Lesaffre had no case at all to dispute that they are not bound by the MOU and a clear intention emerged. Thus if they have a prima facie case that the MOU was not to be acted upon and that theory is reasonably possible then appropriate course of action for Muthu group would be to pursue their rights in the Civil Court.

68. I have already concluded that there is no suppression on the part of Nafan and the entire material on record is to be considered. The MOU therefore, is now on record. According to Muthu Group, the MOU was a culmination of series of meetings. Laloum had the authority to sign the MOU and therefore, it is complete in all respects. The explanation of Nafan and Lesaffre regarding the events surrounding the MOU is through the affidavits of Denis

Lesaffre and Laloum. According to Laloum, the document i.e. MOU was only initiation of negotiation talks. Both parties were to take it forward. According to both Laloum and Mr.Lesaffre, this was at the best, a rough proposal to end the dispute. Mr.Lesaffre has put on record that when they came to know about the valuation they immediately concluded that the price indicated in the MOU was so ridiculous that the proposal could not be taken forward. Muthu had also not withdrawn the contempt proceedings. Laloum has stated that Lesaffre being a family business, the consent of family members ought to have been taken.

69. Looking at the version put up by Nafan, I do not feel that the theory put forward by Nafan and Lesaffre that MOU was a document to explore possibility of settlement could be rejected outright as absurd. After signing of the MOU there are no steps taken by Nafan except to inquire about the valuation. Once the valuation was informed to Nafan and Lesaffre, their reaction was that the valuation was ridiculous. The manner and the form in which the document stood executed and the reaction to the valuation and in normal course of business to transfer shares, it could not be said that an unquestionable intention flowed from the MOU. Therefore, the Board even though it came to the conclusion that Laloum had the authority to sign the contract did not consider that fair valuation was one of the ingredients and after coming to know that valuation was not fair, Nafan and Lesaffre had no interest in taking the MOU forward. Therefore, the Board fell in

clear error to attribute an unquestionable intention on the part of Nafan and Lesaffre to sell their shareholding.

70. Both Muthu group as well as Nafan and Lesaffre are assisted by administrative and legal staff, as their correspondence would show. In normal business transactions, solicitors and legal professionals will draw documents for transfer of shares. Drafts would be exchanged. The understanding would be reduced to a formal documentation. There may be meetings at both ends to finalise the decisions, there would be negotiations, discussions on the price. Before the drafts are finalized, the parties could back out for legitimate or otherwise reasons. If any steps were to be taken before completion of the documents, they would be discussed specifically. This would be the practice followed in routine business transactions. In the present case, entire 51% shareholding of Nafan is sought to be transferred. The value of the same clearly exceeds millions of Euros. It is difficult to believe *prima facie* that Muthu and Laloum would simply write out the entire transaction by hand on a small piece of paper in a hotel and part ways deciding that 51% shareholding is sold, and nothing further is needed, and the agreement stood concluded, and it constituted a transfer notice which Muthu will unilaterally execute. One may advance lengthy legal arguments regarding what is meant by a contract and the binding effects etc, but any reasonable man would say, in today's age of commercialism and professionalism, this is not the way of two business groups of this level ,dealing with such high stakes,

will conclude the transaction. The theory put-forth by Laloum that MOU was just document to explore possibility of further negotiations appears to be more in tune with normal course of business and therefore cannot be rejected outright; more importantly, no unquestionable intention can be culled out from it. Laloum also stated that final decision would not be taken unless Lesaffre family decides. This also cannot be a fanciful version, as Lesaffre is a family business.

71. Therefore, it could not be said that the petition was filed by only to resile out of the clear binding contract. They had placed their stand on record that they have no intention to take the MOU forward. Since the same MOU was interpreted to derive an intention to order a buyout, it was nothing but indirectly granting specific performance of the contract by the Board. It cannot be that Board concludes that it has no power to grant specific performance of the agreement yet it will enter into disputed areas of intention of parties in respect of the said contract adjudicated as to whether intention exists and then give effect to the intention. This is not to lay down an absolute proposition then even in a case that all ingredients of contract are satisfied only procedural formalities remain, both parties take all possible steps to see that the contract is to be executed even in such circumstances the Board cannot take entry of unquestionable intention. The Board has in fact in para 165 of the impugned order rightly distinguished the case of **Probir Kumar Misra** (supra) relied upon by Mr.Dwarkadas, holding that

in that case both the parties had substantially acted on the MOU, but in the present case, it is not so. In the present case, there is a dispute between the parties. Stand is taken by Nafan and Lesaffre that they had absolutely no intention to take any steps based on the MOU considering the valuation. Once their stand was clear, was prima facie tenable, it was not open for the Board to dissect the MOU, take out the intention and use while passing an order under section 402, 403 of the Act.

72. Mr.Dwarkadas made a grievance that Nafan was changing their stand regarding the status of the MOU at every stage. Firstly, they did not accept its validity and then when they had to accept it, they called it a neutral document. I am not impressed with this submission. To my mind, the MOU is nothing but a red herring to divert the controversy. Assuming MOU exists, it is the manner in which the shareholding of Nafan has been transferred which is the crux of the dispute.

73. Furthermore, there was another contingency in the MOU i.e. withdrawal of contempt proceedings by Muthu group. The Board has observed that Muthu group took immediate steps to withdraw the contempt proceedings and it was not in the hands of the Muthu group to withdraw the contempt proceedings. It has been placed on record that after the MOU there were 22 dates in the Courts and at the stage of rejoinder arguments that the contempt petition was withdrawn. The Board has therefore, fallen in clear error to hold that immediately after signing the MOU the contempt proceedings

were withdrawn. A stand is taken on behalf of Muthu group that since the transfer of shares were being agitated in the Board issue of withdrawal of contempt proceedings had become irrelevant. Therefore, even assuming Laloum signed the MOU and Laloum had an authority to sign the MOU it is not possible to conclude that the MOU was complete in all respects and was at such a stage that even notices of its execution was not necessary. In addition, there is one aspect that is more important. The MOU is being discussed in the context of oppression. One thing was clear was that when the board meeting on 25 May 2009 took place, Muthu was fully aware that Nafan was not ready for the valuation and for going forward with the transfer of shares. Therefore, as far as Muthu is concerned Nafan was not ready to act as per the MOU. It is with this knowledge that MOU is taken forward by Muthu. Though it is contended by Mr.Dwarkadas that in spite of sending the MOU there was no response and it must be presumed that Nafan and Lesaffre had no objection, it is too naïve to believe that in spite of the acrimony that existed at that point of time between the parties, Muthu would innocently believe that Nafan and Lesaffre were ready to go by the valuation prepared by M/s Sharp & Tannan and all that remained was formality of transfer for which no notice was necessary. Therefore, MOU did not spell out a clear and unequivocal intention to transfer the shares. Therefore, though the Board was right in considering that MOU could not be specifically enforced, erred in relying on intention, which did not exist while passing an order under Section 402. The question of the validity of

the MOU has to be left to the Civil Court and I am of the opinion that the version of the Nafan regarding the MOU can be termed as so absurd that they can be ordered to sell out their shares based on the so-called intention under the MOU. Furthermore, the crux of the matter is the manner in which the meetings took place. Therefore, we now come to the crucial aspect of the case that is the Board meetings.

Nature of Board meetings

74. The disputed Board meetings were held on 29 January 2009, 23 May 2009 and 25 May 2009. It will be necessary to reproduce the minutes as they have been placed on record.

*MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF SAF YEAST COMPANY PRIVATE LIMITED HELD ON **23RD MAY, 2009** AT THE REGISTERED OFFICE AT 419 SWISTIK CHAMBERS, MUMBAI 400071 AT 12.15 P.M.*

IN ATTENDANCE :

- 1 *Mr. A. Muthu*
- 2 *Mr. A. M. Arunachalam*
- 3 *Mr. A. M. Muthiah*
- 4 *Mr. P. B. Thatte*

1 *CHAIRMAN OF THE MEETING*

Mr. A. Muthu was elected Chairman of the Meeting.

2 LEAVE OF ABSENCE

Leave of absence was granted to Mr. Alain Laloum and Mr. M. E. Lesaffre.

3 CONFIRMATION OF THE MINUTES OF THE PREVIOUS MEETING

The Minutes of the previous Board Meeting held on 17th May, 2009 were noted, confirmed and signed by the Chairman.

4 PURCHASE BY THE MUTHU GROUP OF THE SHARES IN THE COMPANY HELD BY LESAFFRE GROUP THROUGH NAFAN B. V. PURSUANT TO THE MOU DATED 23RD JANUARY 2009 - RECEIPT OF WRITTEN OPINION FROM MR. SHANTI BHUSHAN SENIOR ADVOCATE

The Chairman referred to the discussions at the Board Meeting held on 17th May 2009 wherein it was resolved to seek expert legal advice on the purchase by the Muthu Group of the Shares in the Company held by Nafan B. V. of Lesaffre Group at the fair value as determined by the Statutory Auditors in accordance with Article 17 of the Articles of Association as stipulated in the MOU dated 23rd January, 2009. The chairman tabled before the Board the written opinion dated 20th May, 2009 received from Mr. Shanti Bhushan, an eminent Jurist and Senior Advocate of the Supreme Court which states, inter alia, as follows:

"Having considered all the facts of the law particularly, the Articles of Association.....

In these circumstances, the Company is required to act in terms of Articles 18 by causing the name of Mr. A. M. Muthiah of the Muthu Group to be entered in the Register as the owner of these 51% shares and also to hold the payment by Mr. A. M. Muthiah of the Muthu Group in Trust for the Lesaffre Group for payment to the Lesaffre Group and the

receipt of the Company for the purchase money shall be good discharge to the purchasing member and after his name is entered in the Register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by the person".

After discussion it was:

"RESOLVED THAT the written opinion dated 20th May, 2009 from Mr. Shanthi Bhushan, Senior Advocate to the Company be and is hereby taken on record and that the Company act in terms of the same "

6 PURCHASE BY THE MUTHU OF THE SHARES IN THE COMPANY HELD BY LESAFFRE GROUP THROUGH NAFAN B. V. PURSUANT TO THE MOU DATED 23RD JANUARY 2009 OPENING OF CURRENT ACCOUNT TO HOLD THE PURCHASE MONEY

The chairman informed the Board that the Company is already having a Current Account with the Axis Bank Ltd., Chembur Branch, Mumbai for its regular operations. However, it is necessary to open a separate Current Account under the name and style of "SAF YEAST CO. PVT. LTD. SHARES ACCOUNT", in addition the existing current account for the exclusive purpose of holding in Trust, for and on behalf of Nafan B.V., the purchase money from the Mr. A .M. Muthiah.

After discussion it was:

"RESOLVED THAT a Current Account titled "SAF YEAST CO. PVT. LTD. SHARES ACCOUNT", be opened with the Axis Bank Ltd., Chember Branch, Mumbai in addition to the existing Current Account".

"RESOLVED FURTHER THAT Mr. A. Muthu, Mr. A. M. Arunachalam, Mr. A. M. Muthiah and Mr. P. B. Thatte, Directors of the Company and Mr. K. K.N. Swamy, an Officer

of the Company be and hereby authorized to operate the said Account singly".

"RESOLVED FURTHER THAT Mr. A Muthu, Mr. A. M. Arunachalam, Mr. A. M. Muthiah and Mr. P. B. Thatte, Directors of the Company and Mr. K. K.N. Swamy, an Officer of the Company be and hereby authorized to draw, accept and endorese, cheques, promissory notes and other negotiable instruments singly".

"RESOLVED FURTHER THAT Mr. A. Muthu, Managing Director of the Company or Mr. A. M. Muthiah, Director of the Company of Mr. A. M. Muthiah, Director fothe Company be and is hereby authorized to inform the said Bank in this matter and to take such action as may be necessary to open the said Current Account with the Axis Bank Ltd., Chembur Branch, Mumbai".

"RESOLVED FURTHER THAT the Common Seal of the Company be affixed wherever necessary in this regard".

Mr. A. M. Muthiah, being interested in the matter, disclosed his interest and did not participate in the discussions.

7 PURCHASE BY THE MUTHU GROUP OF THE SHARES IN THE COMPANY HELD BY LESAFFRE GROUP THROUGH NAFAN B. V. PURSUANT TO THE MOU DATED 23RD JANUARY 2009 - AUTHORIZATION OF PERSON FOR EXECUTION OF NECESSARY TRANSFER DOCUMENTS

The Chairman informed the Board that as per the provisions of the Articles of Association and in particular Article 18, it is necessary to authorize a person to execute the share Transfer Forms / instrument of Transfer in the name of the proposing Transferor Nafan B.V. in favor of Mr. A. M. Muthiah, Purchasing Member of the 80,722 Shares from Nafan B. V.

After discussion it was:

"RESOLVED THAT in terms of Article 18 of the Articles of Association, Mr. K. Narasimhan, Vice President Finance, be and is hereby authorized to execute the Share Transfer Forms / Transfer documents in the name of the proposing Transferor Nafan B. V. in favour of Mr. A. M. Muthiah, Purchasing Member of the 80,772 Shares from Nafan B. V., on the Company receiving the Purchase Money /relevant consideration of Rs. 27,49,38,822/- for the 80,772 Shares, net of TDS on capital gains from Mr. A. M. Muthiah.

"RESOLVED FURTHER THAT Mr. A. Muthu, Managing Director be and is hereby authorized to inform Mr. K. Narasimhan in this regard.

Mr. A. M. Muthiah being interested in the matter, disclosed his interest and did not participate in the discussions.

8. Vote of Thanks

There being no other Business, the Meeting terminated with vote of thanks to the Chair.

CHAIRMAN

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MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF SAF YEAST COMPANY PRIVATE LIMITED HELD ON 25TH MAY, 2009 AT THE REGISTERED OFFICE AT 419 SWISTIK CHAMBERS, MUMBAI 400 071 AT 4.00 P.M.

IN ATTENDANCE:

- 1 Mr. A. Muthu*
- 2 Mr. P. B. Thatte*
- 3 Mr. A. M. Arunachalam*

4 Mr.A. M. Muthiah

1 CHAIRMAN OF THE MEETING

Mr. A. Muthu was elected Chairman of the Meeting.

2 LEAVE OF ABSENCE

Leave of absence was granted to Mr. Alain Laloum and Mr. M. E. Lesaffre.

3 CONFIRMATION OF THE MINUTES OF THE PREVIOUS MEETING

The Minutes of the previous Board Meeting held on 17th May, 2009 were noted, confirmed and signed by the Chairman.

4 PURCHASE BY THE MUTHU GROUP OF THE SHARES IN THE COMPANY HELD BY LESAFFRE GROUP THROUGH NAFAN B. V. PURSUANT TO THE MOU DATED 23RD JANUARY 2009 - RECEIPT OF THE PURCHASE MONEY FROM MR.A.M.MUTHIAH PURSUANT TO RECEIPT OF WRITTEN OPINION FROM MR.SHANTI BHUSHAN SENIOR ADVOCATE

The Chairman referred to the resolution passed pursuant to the receipt of the written opinion from Mr. Shanthi Bhushan, Senior Advocate, at the Board Meeting held on 23rd May, 2009 to accept the purchase money / relevant consideration of Rs. 27,49,38,822/- net of TDS of Rs. 7,35,92,358/- on capital gains from Mr. A. M. Muthiah, the Purchasing Member of the 80,772 Shares and hold the same in Trust for

and on behalf of the proposing Transferor Nafan B. V.

The Chairman tabled before the Board a letter dated 25th May, 2009 from Mr. A. M. Muthiah informing that an

amount of Rs. 27,49,38,822/- has been transferred from his Account at the Axis Bank Ltd., Chembur Branch to the credit of the Company's Account at Axis Bank Ltd., Chembur Branch and Mr. A. M. Muthiah has requested the Company to effect the Transfer of the 80,772 Shares from Nafan B.V. in his favour and forward the relevant share certificates.

The Chairman also tabled before the Board an Advice dated 25.5.2009 received by the Company from the Axis Bank Ltd., Chembur Branch that an amount of Rs. 27,49,38,822/- has been credited to the Company's Account from Mr. A. M. Muthiah.

After discussion, it was:

"RESOLVED THAT in accordance with the Articles of Association and Written Opinion received by the Company from Mr. Shanthi Bhushan, Senior Advocate, the sum of Rs. 27,49,38,822/- being the purchase money / consideration for the 80,722 Shares, Net of TDS, be and is hereby accepted from the Purchasing Member Mr. A. M. Muthiah and the same be held in Trust for and on behalf of the Proposing Transferor Nafan B.V. till repatriation to them".

"RESOLVED FURTHER THAT a receipt for Rs. 27,49,38,822/- being the purchase money / consideration for the purchase of 80,772 Shares from Nafan B. V., net of TDS, be issued by the Company to Mr. A. M. Muthiah".

"RESOLVED FURTHER THAT the purchase money of Rs. 27,49,38,822/- be and is hereby transferred from the Company's Current Account with Axis Bank Ltd., Chembur Branch to the designated Account "SAF YEAST CO. PVT. LTD. SHARES ACCOUNT" with Axis Bank Ltd., Chembur Branch till repatriation to Nafan B. V."

Mr. A. M. Muthiah, being interest in the matter, disclosed his interest and did not participate in the discussions.

5. PURCHASE BY THE MUTHU GROUP OF THE SHARES IN THE COMPANY HELD BY LESAFFRE GROUP THROUGH NAFAN B. V. PURSUANT TO THE MOU DATED 23RD JANUARY 2009 - ISSUANCE OF DUPLICATE SHARE CERTIFICATES

The Chairman tabled before the Board a letter dated 23rd May, 2009 from the Company as the Agent of the proposing Transferor Nafan B. V. requesting the issuance of duplicate Share Certificates for the 80,772 Shares held by Nafan B.V. of Lesaffre Group in view of Mr. A. Laloum, Lesaffre's nominee Director having verbally informed Mr. A. Muthu sometime around the 20th February, 2009 that Nafan B.V. had lost the original Share Certificates and were unable to locate the same.

The Board discussed in detail all the aspects relating to the issuance of duplicate share certificates in lieu of the original Share Certificates that has been informed to be lost by Nafan B. V. The Board having not found any adverse evidence and taking note of the contents of the request dated 23rd May 2009 Resolved to issue the duplicate Share Certificates.

After discussion, it was:

"RESOLVED THAT the Original Share Certificates bearing Numbers as detailed below be and are hereby cancelled forthwith".

Original Share Certificate No	Distinctive		No. of Shares
	From	To	
6	9001	15000	6000
7	15001	20000	5000
14	36501	47500	11000
17	55001	65000	10000
18	65001	75000	10000

19	75001	85000	10000
20	85001	95000	10000
21	95001	105000	10000
22	105001	113772	8772

"RESOLVED FURTHER THAT duplicate Share Certificates be and are hereby issued in lieu of the lost and subsequently cancelled Share Certificates, as detailed below:

Original Share Certificate No (Cancelled)	Duplicate Share Certificate No	Distinctive		No. of Shares
		From	To	
6	35	9001	15000	6000
7	36	15001	20000	5000
14	37	36501	47500	11000
17	38	55001	65000	10000
18	39	65001	75000	10000
19	40	75001	85000	10000
20	41	85001	95000	10000
21	42	95001	105000	10000
22	43	105001	113772	877

"RESOLVED FURTHER THAT Mr. A. Muthu, Managing Director and Mr. P. B. Thatte, Director be and are hereby authorized to sign the duplicate Share Certificates of the Company under reference".

"RESOLVED FURTHER THAT the Common Seal of the Company be affixed on the duplicate Share Certificates".

Mr. A. M. Muthiah, being interested in the matter, disclosed his interest and did not participate in the discussions.

6. *ADJOURNMENT OF MEETING*

At this moment the Chairman inform the Board that the duplicate Share Certificate need to be prepared as per law before proceeding with the transfer and hence requested the Board to consider an adjournment of the meeting by forty five minutes.

After discussion, it was:

"RESOLVED FURTHER the meeting be adjourned and reassemble at 5.15 p.m. to continue with the remaining business, the time now being about 4.30 p.m.

Chairman"

* * * * *

75. The Board has concluded that the meetings held on 29 January 2009, 23 May 2009 and 25 May 2009 are illegal and the resolutions passed in the meetings are invalid and ineffective. Mr. De'Vitre and Mr.Khambatta contended that firstly, no such Board meetings were held and even if had to they are illegal and contrary to law. They submitted that admittedly Muthu Group served no notice, which was required under the provision of Participation agreement and as per provisions of Section 286 of the Act. Mr.De'vitre submitted that there was no quorum and no agenda of the meeting. Reliance was placed on clause 7.10.b of the Participation agreement dated 22 March 1991 and clause 20.01. He submitted that the Participation agreement was acted upon and cited instances in respect of the same which have been reproduced

in para 181 of the impugned order. Mr. De'Vitre submitted that Muthu was under obligation to incorporate the Participation agreement in Articles of Association; however, Muthu failed to do so. He relied upon decisions in the case of *Ebrahimi v. Westbourne Galleries Ltd.*²¹, followed in *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*²² and *Anderson v. Hogg*²³, *O'Neill & Another v. Phillips & Others*²⁴, in support of his submissions.

76. On the other hand, Mr.Dwarkadas submitted that the Participation agreement was never acted upon. The terms of the Participation, agreement referred to by Mr. De'Vitre is in conflict with the provisions of Articles of Association. He submitted that Article 7.10.b of the Participation agreement is not included in clause 3 of the proposed amendment. Mr.Dwarkadas submitted that meetings of the Board of directors were always conducted in accordance with the Articles of Association and notices were issued and quorum was maintained as per the articles. It was contended by Mr.Dwarkadas that the Participation agreement provides for retirement by rotation. It also states that Muthu was liable to provide personal guarantee only up to 44 per cent and secured loans availed by M/s SAF Yeast Co. Pvt. Ltd. have been to the extent of 100 per cent. It was contended that Muthu group was not required to give notice to the directors outside India as per Section

21 (1972) All ER 492 at page 500

22 (1981) 3 SCC 333

23 2000 S.L.T. 634 at page 642

24 Re a company (No.00709 of 1992) at page 969

286(2) of the Companies Act and the Articles of Association. Reliance was placed on the decision of Apex Court in the case of **Vodafone International Holdings BV Versus Union of India & anr.**²⁵, to contend that a shareholder agreement is a private contract between shareholders compared to Articles of Association, which is a public document, and the Articles of Association did not contemplate any notice to the Directors outside India. Mr.Dwarkadas contended that there was a consistent past practice of not giving notice even to nominee Directors of Nafan, which was continued for the meetings in question. No alternate directors were appointed and notice was irrelevant because Muthu group would have carried the votes in terms of their majority. He submitted that there was quorum for the meeting and Section 299 and 300 of the Act were not applicable. He further contended that there was no challenge to the meetings by Nafan nor there was any prayer to set aside the same.

77. I have considered the submissions. As regards the argument of Nafan and Lesaffre, that the meeting dated 29 January 2009 did not take place and the meetings were fabricated, the Board has rendered a finding of fact that the meeting in fact was held and the minutes were not fabricated. The Board has concluded that the charge of fabrication is akin to fraud and heavy burden lies upon the party to make such allegation. It is the contention of Mr.De' Vitre that the minutes *inter-se* show complete inconsistencies. It is stated that no individual or any person of Muthu group is identified

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as purchaser. He submitted that decision taken in the minutes were not informed to Nafan as Muthu's letter dated 20 September 2009 does not make reference to any meeting held on 29 January 2009. He submitted that minutes were never disclosed in the communication and no reference was made to the meeting before the contempt proceedings. However, as rightly observed by the Board that merely because there are contradictions in the minutes does not *per se* lead to the conclusion that the minutes are fabricated. The failure to communicate the resolutions and minutes may amount to act of oppression and/or mismanagement, but from this omission itself, it cannot be stated that the minutes themselves were fabricated. The Board has taken a view that grounds provided by Nafan were not sufficient enough to prove the charge of fabrication which required high degree of proof. The finding of the Board after scrutinising the evidence and considering the burden of proof cannot be termed as perverse to be interfered with under Section 10F of the Act. What is legal effect of the meetings is of course open for consideration.

78. Lot has been debated about the notice of the meetings dated 29 January 2009, 23 May 2009 and 25 May 2009. It is contended by Nafan and Lesaffre that as per the Participation agreement notice was required to be given and out of fairness, when it is the stand of Muthu group that the Act and the Articles of Association did not require it to be so. According to them Participation agreement was never acted upon. To my mind the most crucial

aspect of service of notice is out of fairness than out of legality, and whether probity required that the notice is to be given or not. In the case of *Kamal Kumar Dutta v/s Ruby General Hospital Ltd.* (supra), the Apex Court emphasized the need to maintain utmost good faith. The Apex Court observed as under:

“32. *Following the English cases referred to in Kalinga Tubes Ltd., similarly in Needle Industries (India) Ltd. v. [Needle Industries Newey \(India\) Holding Ltd.](#), their Lordships concluded as follows :*

The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.”

“35. *In M/s. Madhusoodhanan and Anr. v. [Kerala Kaumudi \(P\) Ltd. and Ors. reported in \(2004\)9SCC204](#) , it was found that notice not less than 21 days was not given by personal service or service by post and on facts it was found that requirement of Section [189](#) of the Act was not complied with. Under Section [53](#) of the Act, service of notice of the Board's meeting by post and by certificate of posting were not found to be reliable when the relationship between the parties was already bitter. In this case, on evidence it was found that the entries in the register were not sufficient to establish the service of notice on the Director. So far as service by certificate of posting, it raises a rebuttable presumption and the onus is on the addressee to show that the document under certificate of posting was not received by him.*

36. *In Dale & Carrington Investment (P) Ltd. v. [P.K. Parthapan and Ors. reported in, \(2005\)1SCC212](#) , their Lordships with regard to oppression held if a member who holds the*

majority of shares in a company is being reduced to the position of minority shareholder in the company by mala fide act of the company or by its Board of Directors, such act must ordinarily be considered to be an act of oppression against the said shareholder and what relief should be granted would depend on the facts of the case. The facts of the present case at hand are almost akin to the case referred to above. Allotment of additional shares to the Managing Director was found to be sole objective to gain control by becoming majority shareholder. That allotment was found to be mala fide and not in the interest of the company and no legal procedure prescribed in Articles of Association was followed and it was found to be a clear case of an act of oppression on the part of R towards P, the majority shareholder.

41. In Halsbury's Laws of England, 4th Edn., Vol.7, para 1011, it is stated :

“1011. Conduct amounting to oppression.- In this context, 'oppressive' means burdensome, harsh and wrongful. It does not include conduct which is merely inefficient or careless. Nor does it include an isolated incident; there must be a continuing course of oppressive conduct, which must be continuing at the date of the hearing of the petition. Further, the conduct must be such as to be oppressive to the petitioner in his capacity as a member; whatever remedies he may have in respect of exclusion from the company's business by being dismissed as an employee or a director, he will have none under the provisions relating to oppression.

On the other hand, these provisions are not confined merely to conduct designed to secure pecuniary advantage to the oppressors; they cover the case of wrongful usurpation of authority, even though the affairs of the company prosper in consequence.

42. In Palmer's Company Law, 23rd Edn.,p.848 it is stated :

“64-02. Relationship is with company: the fiduciary

relationship of a Director exists with the company; the Director is not usually a trustee for individual shareholders. Thus, a Director may accept a shareholder's offer to sell shares in the company although he may have information, which is not available to that other, and the contract cannot be upset even if the Director knew of some fact, which made the offer an attractive proposition. So in Percival v. Wright a person who had approached a Director and sold him shares in the company, afterwards, upon discovering that the Director had known at the time of the contract that negotiations were on foot for the purchase by an outsider of all the shares in the company at a higher figure, could not impeach the contract. In his judgment Swinfen-Eady, J. said 'there is no question of unfair dealing in this case. The Directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the Directors and named the price at which they were desirous of selling'.

43. In Pennington's *Company Law*, 6th Edn. At pp.608-09, it is stated

Directors owe no fiduciary or other duties to individual members of their company in directing and managing the company's affairs, acquiring or disposing of assets on the company's behalf, entering into transactions on its behalf, or in recommending the adoption by members of proposals made to them collectively. If the Directors mismanage the company's affairs, they incur liability to pay damages or compensation to the company or to make restitution to it, but individual members cannot recover compensation for the loss they have respectively suffered by the consequential fall in value of their shares, and they cannot achieve this indirectly by suing the Directors for conspiracy to breach the duties which they owed the company. However, there may be certain situations where Directors do owe a fiduciary duty and a duty to exercise reasonable skill and care in advising members in connection with a transaction or situation which involves the company or its business undertaking and

also the individual holdings of its members.

Therefore, the upshot of the above discussions is that the Directors are in a position of a trust. They must confirm to the probity and their conduct should be above suspicion.

(emphasis supplied)

79. With this above emphasized dicta of the Apex Court, I will proceed to consider the rival contentions. The Board in Paragraph no 3.7 of the impugned order has reproduced the relevant clauses of the Participation Agreement. First, the argument regarding the notice based on the Participation agreement and the Act. The Board has found that the parties acted upon the Participation agreement. It held that the execution of Participation agreement has not been disputed and it was acted upon. The Participation agreement was not unlawful, it was never cancelled, certain terms were acted upon, and the agreement was not contrary to the Articles of Association or the Act. Before me, it is not contended that the Participation agreement never existed. The Participation agreement was entered into on 22 March 1991. The Company had been formed in August 1981 and it was after 10 years that the participation agreement was executed. The relevant clause of the Participation Agreement is as under :

“(h). In accordance with Article 7.10(b) at least 14 days notice was required for every meeting of the Board of Directors to be given in writing to every director, including directors outside India and to their alternates, if any, in India along with an agenda for the meeting.”

80. The Board has held that the Participation Agreement required notice to be given to the directors present in India for the time being and to the directors residing outside. That the Participation Agreement provides so is not disputed and that no notice was given. The debate is whether the Participation Agreement is contrary to the Act and the Articles of Association, and whether the Participation Agreement was acted upon and is binding. Article 55 and Section 286 of the Act are reproduced as under :

“Article 55 : A Director may at any time convene a meeting of the Directors. A director who is at any time not in India shall not during such time be entitled to notice of any such meeting.

Section 286 of the Act : **286. Notice of meetings.**

Section 286 : Notice of Meetings

(1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

(2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to one hundred rupees.

Neither Article 55 nor Section 286 of the Act state that the notice that shall not be given in any circumstances to a director residing outside. Art.55 refers to a director who at present not in India. It

only indicates that one who has gone out will not be entitled to any notice. This article will have to read in a common sense manner. It does not refer to the directors who are 'residing' outside India. The articles are the one agreed by the parties and they will have to be read in that manner. It is inconceivable that the parties meant that Muthu Group could do what they want; take decisions of any magnitude like shutting down the plants, without notices to Nafan. The articles regulating notice of meetings cannot be stretched to an absurd limit. The Participation agreement therefore, only provides an additional methodology rooted in fairness concerning the notice to the directors outside. The requirement under the Participation agreement can only be termed as supplementary. The relevant clause of the Participation Agreement is not in conflict with the Articles of Association and the Act. The Board did not commit any error on this count.

81. There was a considerable debate at the bar in respect of the observations of the Apex Court in the case of *Vodafone International*. Reliance was placed on the following observations in the opinion rendered by Radhakrishnan J. as under :

“261. Shareholders' Agreement (for short SHA) is essentially a contract between some or all other shareholders in a company, the purpose of which is to confer rights and impose obligations over and above those provided by the Company Law. SHA is a private contract between the shareholders compared to Articles of Association of the Company, which is a public document. Being a private document it binds parties thereof and not the other

remaining shareholders in the company. Advantage of SHA is that it gives greater flexibility, unlike Articles of Association. It also makes provisions for resolution of any dispute between the shareholders and also how the future capital contributions have to be made. Provisions of the SHA may also go contrary to the provisions of the Articles of Association, in that event, naturally provisions of the Articles of Association would govern and not the provisions made in the SHA.

262. The nature of SHA was considered by a two Judges Bench of this Court in [V. B. Rangaraj v. V. B. Gopalakrishnan and Ors.](#) (1992) 1 SCC 160. In that case, an agreement was entered into between shareholders of a private company wherein a restriction was imposed on a living member of the company to transfer his shares only to a member of his own branch of the family, such restrictions were, however, not envisaged or provided for within the Articles of Association. This Court has taken the view that provisions of the Shareholders' Agreement imposing restrictions even when consistent with Company legislation, are to be authorized only when they are incorporated in the Articles of Association, a view we do not subscribe to.

263. This Court in *Gherulal Parekh v. Mahadeo Das Maiya* (1959) SCR Supp (2) 406 held that freedom of contract can be restricted by law only in cases where it is for some good for the community. [Companies Act](#) 1956 or the FERA 1973, RBI Regulation or the [I.T. Act](#) do not explicitly or impliedly forbid shareholders of a company to enter into agreements as to how they should exercise voting rights attached to their shares.

264. Shareholders can enter into any agreement in the best interest of the company, but the only thing is that the provisions in the SHA shall not go contrary to the Articles of Association. The essential purpose of the SHA is to make provisions for proper and effective internal management of the company. It can visualize the best interest of the company on diverse issues and can also find different ways

not only for the best interest of the shareholders, but also for the company as a whole.

265. In Shanti Prasad Jain v. Kalinga Cables Ltd. (1965) 2 SCR 720, this Court held that agreements between non-members and members of the Company will not bind the company, but there is nothing unlawful in entering into agreement for transferring of shares. Of course, the manner in which such agreements are to be enforced in the case of breach is given in the general law between the company and the shareholders. A breach of SHA which does not breach the Articles of Association is a valid corporate action but, as we have already indicated, the parties aggrieved can get remedies under the general law of the land for any breach of that agreement.

266. SHA also provides for matters such as restriction of transfer of shares i.e. Right of First Refusal (ROFR), Right of First Offer (ROFO), Drag-Along Rights (DARs) and Tag-Along Rights (TARs), Pre-emption Rights, Call option, Put option, Subscription option etc. SHA in a characteristic Joint Venture Enterprise may regulate its affairs on the basis of various provisions enumerated above, because Joint Venture enterprise may deal with matters regulating the ownership and voting rights of shares in the company, control and manage the affairs of the company, and also may make provisions for resolution of disputes between the shareholders.”

Based on the above decision, it is strenuously contended by Mr.Dwarkadas that the Participation agreement, i.e. a Shareholder agreement can never be contrary to the Act as well as Articles of Association. However, I do not think an elaborate discussion is necessary, as the clause, which gives an additional safeguard of notice, is not in conflict with the Act and the Articles of Association. The articles do not say under no circumstances notice need not be

given to those residing outside India.

82. Turning now to the argument of Mr.Dwarkadas that the Participation agreement was not acted upon. On the other hand, it is the contention of Mr.De'Vitre that it was substantially acted upon. The Board has taken note of the following events.

(i) In 1992, after the Participation Agreement, the paid up capital of the Company was increased and the shareholding of the Petitioner/Respondent No.8 was increased from 40% to 51% as provided In Clauses 5.2 and 5.3 of the Participation Agreement Respondent No. 2's rights in the additional shares were offered to Lesaffre, resulting in Lesaffre owning 51% of the paid up capital; in doing so, the Parties acted as per Clause 5.3 of the Participation Agreement.

(ii) The AOA mentions that Mr. Muthu would be the Managing Director of R1 for a period of 15 years only (Article 48 of AOA @ page 79 of Volume 1), acting under Article 7.6 of the Participation Agreement page 108 of Volume 1), Muthu has continued as the Managing Director of R1 even after the expiry of 15 years;

(iii) After, the retirement Mr. B.B. Paymaster, as chairman only the Respondent No.8/ Petitioner's nominee Directors acted as the Chairman of the Rl acting under Article 7.6 of the Participation Agreement page 108 of Volume 1;

(iv) The AOA do not provide for Board of Director meetings to be held outside India; by Article 7.10 (a) of the Participation Agreement page 111 of Volume 1, it was provided that Board Meetings may be held in or outside

India; Board Meetings have in fact been held outside India, acting on Clause 7.10 (a) of the Participation Agreement- See: Board Meeting dated April 2005 held in France;

(v) Respondent No.8/Petitioner provided technical and financial assistance to the R1;

(vi) Pursuant to the 06 June 1981 Agreement, the Respondent Company No.1 was incorporated with the name "Saf Yeast" Clause IV(2) of the first agreement dated 06 June 1981 provided that " ... At any time, should Lesaffre wish to acquire further shares in SAF Yeast Co., Mr. Muthu is prepared to sell to Lesaffre or any other individual or legal entity Lesaffre might name, 25% of his shareholdings to enable Lesaffre to have majority share holdings of SAF Yeast Co ". The 1991Participation Agreement provided for the continued use of the trade name 'SAFon the terms set out therein;

(vii) Respondent No.3 and 4 were appointed as Directors of the RI Company acting upon;

(viii) By its letter dated 30 May Respondent No.1 Company acting through Respondent No.2 as its Managing Director, confirmed its total and unconditional acceptance of various points in accordance with the 6 June 1981 Agreement and the Participation Agreement of 22 March 1981. All parties, including the Company, clearly acted on the Participation Agreement.

Mr.Dwarkadas commented on each of these grounds mentioned by the Board and contended that these findings of fact are erroneous. He contended that no efforts were ever made to modify the Articles of Association. The increase in shareholding was based on an understanding prior to Participation Agreement. Muthu was also

Managing Director before the Participation Agreement. Nothing was shown that any Joint Managing Director was appointed pursuant to the Participation Agreement and Muthu nowhere confirmed the acceptance of the Participation Agreement. He contended that no steps were taken to get the Participation Agreement incorporated. He submitted that the Participation Agreement was never implemented and it remained, at the best, a private agreement.

83. Mr. De'Vitre, on the other hand, has countered each of the assertions of Mr.Dwarkadas and contended that the Participation Agreement was acted upon. He submitted that as per the agreement when income of the Company increased and the shareholding, additional shares were offered. Muthu continued beyond the expiry of 15 years. Though Articles of Association did not specify that meetings to be held outside India, they were so held under Article 7.10(a) of Participation Agreement and pointed out the circumstances in which steps were taken pursuant to Participation agreement.

84. I do not think it is not possible to re-evaluate the entire evidence in the limited jurisdiction under Section 10-F, to find out the exact manner and which circumstance can be attributed to Participation Agreement. Suffice to note that, it cannot be said that the parties in terms of the Participation agreement took no steps at all. The Participation agreement existed. Both the parties entered

into it. Some steps were taken pursuant to the Participation agreement and it did not remain only a dead letter. The Muthu group knew that the Participation agreement required notice to the directors outside India. The stand of Muthu group that neither Articles of Association nor the Act required that notice be given, apart from not being tenable, is not reasonable. The argument that in the past no such notices were given is also not tenable. The decision of exit of one group and bringing the association, which existed for decades to an end, was one of the most important decision for SAF Yeast. It was not an ordinary routine business to be transacted. Neither the Articles of Association nor Section 286 prohibited issuance of notice for such decision. The Participation agreement contemplated issuance of notice. Ultimately, the allegations of all acts of oppression are rooted more in fairness than in legality. Once the Participation agreement existed and it contemplated issuance of notice, it was only reiteration of the obvious, which is otherwise a requirement. In fairness, the notice ought to have been given. It is the most unfair stand to be taken that the Articles of Association were not amended to include Participation agreement even though it was acted upon in same manner, and therefore, no notice before transfer of shareholding was required to be given. Such argument defies all notions of fairness.

85. The Board has rightly emphasized that merely because Participation Agreement did not legally became part of the Articles

of Association, parties knew its existence and the fact that the Participation Agreement required a notice to the Directors to be given outside India. The Board rightly observed that since this term was not contrary to the Articles, and the Act, Muthu Group was not entitled to say that it need not give notice because Participation Agreement was not part of the Articles of Association. Furthermore, it is the case of the Nafan and Lesaffre that the incorporation of Participation Agreement into Articles of Association had to be done by Muthu. When both the groups co-existed for more than 20 years and the meetings were to determine the exit of one group, that too in acrimonious circumstances, notice was required. Neither in the Articles of Association nor in Section 286 nor in any decision dealing with the similar factual situation at hand, has it been stated that it is not necessary to give notice in such circumstances. The findings of the Company Law Board that the meetings of 29 January 2009, 23 May 2009 and 25 May 2009 were illegal for want of notice cannot be termed, as perverse. The Company Law Board has also rightly taken note of the fact that the agenda of the meeting was not circulated. The agenda is not produced on record for the meetings of 29 January 2009, 23 May 2009, and 25 May 2009. This is an additional ground.

86. The Board has held that the meetings of 23 May 2009 and 25 May 2009 were illegal and oppressive. As regards the meeting dated 29 January 2009, the Board has held that it is illegal but not oppressive as it was as per MOU. This finding is not correct. The

meeting of 29 January 2009 cannot be read in isolation. The series of acts of Muthu constituted ground of oppressive. It was a larger scheme of things. If notice had been issued, Nafan would have either placed their version regarding MOU or agreed on some basic principles of valuation. Muthu seem to have in hurry to call for valuation as the events unfolded, which have been discussed subsequently, such as, the role of Sharp & Tannan. The meeting of 21 January 2009 also has to be held as oppressive apart from being illegal. The finding of the Board to that effect will have to be modified.

87. Next heads of debate are whether the MOU could be treated as a transfer notice, issuance of duplicate shares and the manner of valuation of shares by the valuer. I have already held that the holding of these meetings without notice to the Nafan and Lesaffre was illegal, unfair, and oppressive and the findings of the Company Law Board on that count are not perverse, except the modification above. However, the main argument advanced by the Muthu group is that the MOU was a transfer notice and transfer was effected as per the Articles. Question then arises is whether the MOU constituted a transfer notice. The learned counsel advanced the detailed submissions on the interpretation of the articles to demonstrate that the MOU can be treated as a transfer notice. There was also a question as to whether the transfer between member to member is covered by first part of Article 14 of the Articles of Association and the applicability of Articles 15, 18, 19

and 22 in respect of transfer of shares.

88. At this stage, it is necessary to reproduce the relevant Articles 14 to 22.

'14. A share may be transferred by a member or other person entitled to transfer to any member or other person entitled to transfer to any member selected by the transferor but save as aforesaid and save as provided by these Articles, no share shall be transferred to a person who is not a member so long as any member, or any person selected by the Directors as one whom it is desirable in the interest of the Company to admit to membership is willing to purchase the same at the fair value mentioned in Article (15) hereof.

15 The person proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice" to the Company that he desires to transfer the same. Such notices shall constitute the Company his agent for the sale of the shares to any member of the Company or person selected as aforesaid at a fair value to be agreed upon between the proposing transferor and the purchasing member and in default of such agreement to be fixed by the Auditors of the Company provided in Article 17 hereof. The transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each share. The transfer notice shall not be revocable except with the sanction of the Directors.

16 If the Company shall, within the space of sixty days after being served with such notice find a member or person selected as aforesaid willing to purchase the share (hereinafter called "the purchasing member") and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the fair value to transfer the shares to the purchasing member.

17 In case any difference arises between the proposing transferor and the purchasing member as to the fair value of the share, the Auditors of the Company may certify the fair value and the same shall be binding on the proposing transferor and the purchasing member.

18 If in any case the proposing transferor after having become bound as aforesaid makes default in transferring the shares, the Company may receive the purchase money and shall thereupon cause the name of the purchasing member to be entered in the Register as the holder of the shares, and shall hold the purchasing money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be good discharge to the purchasing member, and after his name is entered in the Register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person. The Company may authorise any person to execute the necessary transfer document in the name of the proposing transferor.

19 If the Company shall not, within the space of sixty days after being served with the transfer notice, find a member or person selected as aforesaid, willing to purchase the shares or any of them and give notice in manner aforesaid, the proposing transferor shall at any time thereafter be at liberty subject to Article 20 hereof to sell and transfer the shares to any person at any price.

22 The Directors may at their absolute and uncontrolled discretion decline to register or acknowledge any transfer of shares and shall not be bound to give any reason for such refusal and in particular may so decline in respect of shares upon which the Company has a lien. These Articles shall apply notwithstanding that the proposed transferee may be already a member'.

Transfer of shares in a company are governed by Section 108 of the Act. Section 108 (1) and (1A) of the Act which read as follows:

“108. (1) A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures: Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit: Provided further that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.

[(1A) Every instrument of transfer of shares shall be in such form as may be prescribed, and -

(a) every such form shall, before it is signed by or on behalf of the transferor and before any entry is made therein, be presented to the prescribed authority, being a person already in the service of the Government, who shall stamp or otherwise endorse thereon the date on which it is so presented, and

(b) every instrument of transfer in the prescribed form with the date of such presentation stamped or otherwise endorsed thereon shall, after it is executed by or on behalf of the transferor and the transferee and completed in all other respects, be delivered to the company,-

(i) in the case of shares dealt in or quoted on a re-

cognised stock exchange, at any time before the date on which the register of members is closed, in accordance with law, for the first time after the date of the presentation of the prescribed form to the prescribed authority under clause (a) or within [twelve months] from the date of such presentation, whichever is latter;

(ii) in any other case, within two months from the date of such presentation.”

89. The Board held that the first part of Article 14 is the separate, distinct, and all independent of latter part of Article 14. The Board has held that even if all the Articles constitute a scheme, the transfer notice must satisfy both the conditions stipulated in Article 15, that it must be a specific notice of the member desiring to transfer the shares and it must appoint a Company as the agent. The Board has held that the MOU did not satisfy these requirements.

90. Mr.Dwarkadas assailed the finding of the Board on the Articles of Association. Mr.Dwarkadas contended that Article 14, 15, 17 and 22 are applicable to transfer of shares between members, as is contemplated under the MOU. According to him, the SAF Yeast was validly appointed as an agent of Nafan, the proposing transferor, and it had validly exercised its powers under Article 18. According to Mr.Dwarkadas, the argument that Article 15 and 19 will apply only to a transfer to a non-member is incorrect as seen from the scheme of the Articles. He submitted that right to transfer shares is not unfettered and the Article 14 makes it clear

that even transfer *inter-se* between members is regulated in the manner provided by the Articles. He contended that Articles contemplate transfer notice by A Person proposing to transfer any shares and article 15 applies even to a member-to-member transfer. He submitted that the Articles 14 to 22 would have to be read harmoniously. According to Mr.Dwarkadas Article 16 has no application in the case of transfer between members *inter-se*. As regards Article 17 read with Article 15, according to Mr.Dwarkadas it would be in a case where there is a disagreement of the price of shares to be transferred. Article 19 according to him applies only where the proposed transferor has not contracted to sell his shares to another member. He contended that last sentence in Article 22 contains words 'these articles' being in plural will apply event to member to member transfer. According to Mr.Dwarkadas, combined reading of Articles as scheme is to facilitate a smooth expeditious transfer of shares by a member and it is for this reason that the Articles provide for distinct schemes. Irrespective of whether the transfer is between the members, which is covered by first part of Article 14 it has to read with 15, 17, 18, and 22. Mr.Dwarkadas placed reliance on the decision of *Holmes and another v Keyas and others*²⁶, rendered by Court of Appeal in England and decision of the Malaysian Court of Appeal in *Lo Mu Sen & Sons (SDN) BHD & ANOR*²⁷.

91. Mr.Khambatta and Mr.De'Vitre submitted that unlike a public

26 (1958) 2 W.L.R.772

27 (2002) 2 CLJ 184.

Company the transfer of shares in a private limited company can be subjected to restrictions, but there is no prohibition. They submitted that the purpose of such restrictions is to ensure that the company remains closely held and the entry of outsider is not easily possible. It was submitted that under Section 27(3) of the Act, restrictions might be imposed if the shareholder is put to notice of the restrictions and there cannot be an absolute prohibition on transferability. Reliance was placed on the decisions of ***Greenhalg v. Mallard***²⁸ and ***V.B.Rangaraj v. V.B.Gopalakrishnan***²⁹. It was argued that a private company might impose restrictions on the transferability only if the shareholder is put to express notice of the restrictions in the Articles, in the language of sufficient clarity. Referring the decision in the cases of ***Chiranji Lal Jasrasaria v. Mahabir Dhelia***³⁰ and ***Shyamdhan Chakraborty v. Presidency Nursing Homes Pvt. Ltd.***³¹, it was submitted that restrictions on transferability in the Articles could not provide for any absolute prohibition against transferability. Even the right of pre-emption does not constitute an absolute fetter on transferability. It was submitted that generally Court should lean towards transferability of shares keeping in mind pre-emption clause with sufficient latitude. Reliance is placed on the decisions in ***Enercon GmbH v/s. Enercon (India) Ltd. & ors.***³², ***Ratan Mohan Sarda & ors. v/s Capricon Oils Ltd. And ors.***³³, and ***Dhanraj Mills Pvt. Ltd. and***

28 (1943) 2 LL ER 234 (CA) at 237

29 AIR 1992 SC 453.

30 (AIR)1996 Assam P48)

31 (1975) ILR 2 Cal. Page 219

32 (2008) 143 Comp Cas 687 (CLB)

33 (2010) 157 Comp Cas 470 (CLB)

anr. v/s Global Trust Bank Ltd. & ors.³⁴. It was contended that Article 14 gives unfettered right to transfer the share to another member and the second part of Article 14 refers to restriction by way of pre-emptive right in favour of the members of the Company. According to the learned counsel, prohibition against transfer operates only in respect of a proposed transfer to a non-member and it is for that reason that the Article subjects the right of transfer to a non-member selecting the existing member or person selected by directors. It was further submitted that the restrictions of transfer to a non-member attracts provision of Article 15 to 19 and these Articles will apply only when transfer is proposed to a non-member. Reliance was placed on the decision of **Holmes V. Lord Keves** (supra). It was submitted that there is no question of appointing the Company as an agent only for a member-to-member transfer. It was submitted that, in any case, the MOU could not be a transfer notice, as Article 15 requires a notice to be given by a proposed transferor to the Company and expressly authorizing the Company as proposing transferor's agent and without any such authority, the transfer is void. It was also submitted that any document by which desire to transfer share is envisaged does not become a transfer notice. Article 15 must constitute the Company as an agent and the company cannot infer the intention. Reliance is placed on the decision in the case of **Lyle & Scott Ltd. v. Scott's Trustee**³⁵. It was contended that the MOU only refers to Article 17 for the purpose of valuation and does not constitute any transfer

³⁴ (2003) 105 BOMLR 609
³⁵ (1959) 2 All ER 661

notice.

92. I have considered the submission. Muthu group has treated the MOU as a transfer notice and authorizing the company to transfer the shares. The first question is whether the first part of Article 14 is separate, distinct, and independent of the latter part, and whether Articles 15 and 18 are applicable. Article 14 is reproduced again for the sake of convenience.

'14. A share may be transferred by a member or other person entitled to transfer to any member or other person entitled to transfer to any member selected by the transferor but save as aforesaid and save as provided by these Articles, no share shall be transferred to a person who is not a member so long as any member, or any person selected by the Directors as one whom it is desirable in the interest of the Company to admit to membership is willing to purchase the same at the fair value mentioned in Article (15) hereof.'
(Emphasis supplied)

93. Discussion on this aspect needs to be prefixed by two fundamentals. First, the articles will have to be read as a document drafted by businessperson to conduct their affairs. Second, any restriction in the articles must be spelt out with sufficient clarity. If we read Article 14 plainly, first part says that a member may transfer the shares or other person is entitled to transfer to any member selected by the transferor. This part covers a contingency of a transfer of share by a member entitled to transfer to any other member. In case of a public limited company listed on the stock

exchange, the shares are generally freely transferable. In a private limited company share transfers can have restrictions. However, normally there is no absolute bar to transfer the shares. As a broad proposition, generally law does not recognize an embargo on transfer of shares. The first part of Article 14 therefore merely reiterates the obvious position that a member can transfer the share to another member. This obvious position is stated only to emphasize the restrictions that follow in the second part of Article 14. Second part states that the shares shall not be transferred to a person who is not a member, as long as any member or any person selected by the directors is willing to purchase the same at a fair value. Such embargos are placed in closed held Company to keep them that way, discouraging the outsiders. The Article 15, 16, 17 and 18 thereafter lay down a methodology where the Company gets involved for transfer of shares and steps in as an agent. There is no logic for going through the entire process of making the Company an agent if the share transfer is between the members. The Articles are drafted by the businesspersons to govern themselves. When one member decides to transfer the shares to another, they would inform the Company. There is no special reason why in respect of this Company they should go through the entire gamut of making company the agent. This document simply and clearly contemplates this elaborate machinery for member to non-member transfer. The reading of the articles need not be made deliberately complicated and opposed to common sense, merely because such interpretation justifies the action taken by Muthu

group. If the present dispute had not arisen and the articles were to be interpreted in a routine manner, any reasonable reader would read them as for member-to-member transfer, there is no question of making the Company agent, fair valuation etc. The articles cannot be read in absurd manner or only because reading them in this manner in retrospect justifies actions of Muthu group. The finding of the Board that clause 14 is a distinct scheme did not subject to restrictions in the other articles, is a possible view to be taken, and is not perverse.

94. Furthermore, even assuming Article 15 applies it will have to be strictly followed. Article 15 reads as under:

'Article 15. The person proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice" to the Company that he desires to transfer the same. Such notices shall constitute the Company his agent for the sale of the shares to any member of the Company or person selected as aforesaid at a fair value to be agreed upon between the proposing transferor and the purchasing member and in default of such agreement to be fixed by the Auditors of the Company provided in Article 17 hereof. The transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each share. The transfer notice shall not be revocable except with the sanction of the Directors.'

Article 15 states that any person proposing to transfer his shares shall give notice in writing to the Company and the notice shall constitute a Company as an agent, which will then step in and

undertake further acts as provided in subsequent Articles. The person giving notice to the Company must have a clear and unequivocal intention that he desires to transfer the shares. Further, the notice must specifically appoint the Company as the agent. The words 'Notice shall constitute' does not mean the factum of notice to transfer itself will automatically constitute the company as agent. 'Notice shall constitute' means notice 'must' constitute the company as an agent. There cannot be a notice by implication, because it will lead to uncertainty and confusion. The notice will have to be clear, and addressed to the Company to constitute an agent.

95. Even assuming that even this was done, the Article 16 mandates the Company, within period of 60 days after having been served with a notice to find a member or person selected to purchase the shares and give notice to proposing transferor. No such notice was given to Nafan.

96. Mr.Dwarkadas placed heavy reliance on the phrase 'these articles apply' occurring in article 22. However if this argument is accepted then it runs counter to the argument that Article 14 to 22 do not apply to member to member transfer. If this argument is taken to logical conclusion then after period of 60 days, the member will be free to transfer shares to any person and there will be no agency left in the Company. The finding of the Board that Article 22 will not cover the first part of the Article 14 to the

scheme of other articles is correct. To accept this argument will be artificially stretching the meaning of the article.

97. The Articles are not to be read like a statute. Restrictions on transfer of shares from one member to another have to be specific (see ***Greenhalg*** (*supra*) and ***V.B.Rangaraj*** (*supra*)). Restrictions have to be clear to the concerned members. Further, such restrictions have to be strictly construed. If Article 15, 16 and 17 were to apply in member-to-member transfer, then the concept of fair value mentioned therein will lead to absurd reasons. There could be cases where the members have agreed on a fixed price. Such fixed price will be a fair value for them. If the interpretation of Mr.Dwarkadas is to be accepted, it will mean fair value has to be fixed only after the Company received the transfer notice. Then it will be that there will be no contract of sale until the transfer notice. Businesspersons to regulate their affairs have framed the Articles. If they wanted to place restrictions on themselves for inter-se transactions by providing a methodology to give notice to the Company to appoint a valuer and fixed fair value, they would have been so specifically provided. Such interpretation cannot be foisted because it validates the acts of one group. The interpretation placed on these articles has to be seen in the context of charge of oppression of unilaterally taking MOU as notice and transferring the shares. Question therefore is, whether the articles were so clear in their purport that even no notice was necessary. For any businessperson reading these articles, the interpretation placed on

the articles by Muthu group will not be reasonable. Muthu group has deliberately gone ahead and transferred the shares without notice and now are arguing all possible interpretations of the articles. To my mind therefore, as stated earlier, the finding of the Board that the first part of Article 14 is regarding member-to-member transfer is a distinct provision, and not subject to other restrictions, cannot be termed as perverse.

98. This view also finds support in the observation of the Apex Court in the case of *Claude Lila Parulekar Vs Sakal Papers (P) Ltd. & ors.*³⁶. In this case, the Apex Court analyzed the Articles of Association of Sakal papers, which was put in issue. The Apex Court held that there were four categories in the hierarchy – *first*: the pre-emptors; *second*: any member willing to purchase the shares at a fair value; *third*: any person selected by directors; *fourth*: the person to whom transferor may choose to sell the shares. The Apex Court held that only in the second and third case, the directors need to be constituted as agents. The following articles came up for consideration before the Apex Court. Articles 57-A and 58 to 64, read as under:

"57-A. In the event of any member of Company desires to transfer his shares he shall be bound to offer the same either to Dr. N.B. Parulekar or to Madame Shanta Parulekar or such other person or persons as Dr. N. B. Parulekar or Madame Shanta Parulekar may direct or may nominate and in which event the transferee or transferees shall pay such

36 (2005) 11 SCC 73

price as may be certified by the Auditors of the Company."

58. Subject to Cl.57A no shares shall be transferred so long as any member or any person selected by the Directors as one to whom it is desirable in the interest of the Company to admit to membership, is willing to purchase the same at the fair value as mentioned herein below.

59. Except where the transfer is made pursuant to Article here of, the person proposing to transfer any share shall give notice in writing to the Company that he desires to transfer the same. Such notice shall constitute the Directors his agents for the sale of the share to any member or persons selected as aforesaid, at a fair value to be agreed upon between the Transferor and the purchaser and in default of such agreement to be fixed by the Auditors of the Company. The notice may include several shares and in such case shall operate as if it were a separate notice in respect of each share. The notice shall not be revocable except with the Sanction of the Directors.

60. If the Directors, shall, within the space of 30 days after being served with the Transfer Notice, find a purchasing member or a person selected as aforesaid willing to purchase the share and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the fair value fixed as aforesaid to transfer the shares to the purchaser.

61. In case any differences arises between the Transferor and the Purchaser as to the fair value of a share, the Auditors of the Company shall certify in writing the sum which in their opinion is the fair value and the same be binding on the transferor and the purchase. Provided however that the Auditors so certifying shall not be considered to be acting as Arbitrators and the Indian Arbitration Act 1940 shall not apply. The Auditor shall be considered to be acting as an expert.

62. If in case the proposing transferor, after having become

bound as aforesaid, makes default in transferring the share, the Directors may receive the purchase money and shall there upon cause the name of the purchaser to be entered in the Register as the holder of the share and shall hold the purchase money in trust for the Transferor. The Directors may appoint any person to execute a transfer of the said share on behalf of the defaulting transferor. The receipt of the Directors for the purchase money shall be a good discharge to the purchaser and after his name has been entered in the Register in purported exercise of the aforesaid power the validity of the transfer shall not be questioned by any person.

63. If the Directors, shall not, within the time prescribed as aforesaid after being served with the Notice, find a purchasing member or select a person as aforesaid willing to purchase the shares or any of them and give notice in manner aforesaid, the transferor shall at any time within 30 days thereafter be at liberty subject to Article thereof to sell and transfer the shares to any person and at any price.

64. Every share specified in the Notice given pursuant to the Article hereof shall be offered to the members in such order as shall be determined by the Directors and in such manner as the Directors think fit. If no member is ready and willing to take up such shares the same may be offered to any person selected by the Directors as one to whom it is desirable in the interest of the company to admit to its membership".

These articles are similar to the ones at hand and, therefore, they have been reproduced in full as above. The Apex Court analyzed the articles as under :

24.1 The Articles give the hierarchy of the persons entitled to purchase shares upon transfer. The first right is given to the preemptors under Article 57-A. Next in the

hierarchy is any member who is willing to purchase the shares at a fair value. This follows from a reading of Article with Article The third category is of any person or persons selected by the Directors as being desirable in the interest of the company to admit to membership. The last category is the person to whom the transferor may choose to sell the shares. As long as there is any person in a higher category, there is no question of sale or purchase by a person in a lower category. Thus for example the right of a member or a person in the 2nd category to purchase shares can arise only in the event there is a default or refusal on the part of the preemptor and so on. A person may fall within any one or more of these four categories and would, by virtue of these articles have distinct and separate rights to purchase the shares in each of the four categories. So even if a preemptor or a nominee of a preemptor does not exercise his/her right under Article 57-A to purchase the shares at a price certified by the company's Auditors, such person may choose to exercise the right as an ordinary member and purchase the share at a fair value or the transferor may choose to sell the shares to such person under Article 63.

24.2 In the case of a transfer to a person in the 2nd and 3rd categories of putative purchasers, the Directors are appointed agents of the transferor. The notice of transfer is required to constitute the Directors as the transferor's agents. This notice is distinct from the other required to be given under Article 57-A. In respect of these two categories, the price of the shares is at first to be negotiated with the transferor. It is only in the case of a default in such agreement being reached that the company's Auditors step in and fix a "fair price". The third distinctive feature of these two categories is that upon refusal/default of the preemptor, the transferor is required to give a notice in writing of his desire to transfer. Giving of this notice must necessarily be subsequent to the failure of Article 57-A for whatever reason, as the Directors are required to find a willing person either in the 2nd and if not the 3rd category within a period

of 30 days. There is no time limit specified for the completion of the preemptive transfer under Article 57-A. Therefore unless the transferor gives a separate notice of the failure of Article 57-A how would a willing member know whether he/she has a right or when the period fixed for intimating their willingness to purchase was to lapse? Article also requires the Directors to give a notice to the transferor after finding a willing purchasing member or selected under Article Giving of this notice is important because if 30 days expires without such notice by the Directors, Article would come into play and the transferor would be at liberty to sell the shares to any person and at any price, albeit also within a period of 30 days from the expiry of the first period of 30 days. It follows that a notice issued prior to the preemptor exercising or failing to exercise the right under Article 57-A would not be in keeping with Articles 59 and 60 as this would make the period of 30 days uncertain if not illusory. Thus the notice by the transferor under Article must succeed the factual failure of Article 57-A and notice, if any, under Article must follow the failure of Article.

24.3. Assuming there is a willing purchaser under Article there is no time limit fixed either for the parties to arrive at a negotiated price or for the Auditor to fix a fair value. But Article indicates that the entire transaction envisaged by Articles 59, 60, and 62 would have to be completed within a period of 60 days after Article 57-A failed to operate.”

It can be seen from the above that the Apex Court categorized the seller and buyer of the shares and applied a different yardstick. The Apex Court did not hold that even in case of first category, the directors were to be appointed as agents. This decision was sought to be distinguished by Mr.Dwarkadas on the ground that the right of pre-emption was conferred on specific persons and there was no

Article similar to Article 22 in that case. As regards Article 22, I have already held that in the scheme of the present Articles, it cannot be brought in to cover member-to-member transfer. Even though right of pre-emption in the Articles in *Sakal Papers* (supra) was given to an identifiable class, in the present case also the transfer is to any person who is then identified as the one chosen by the transferor. As regards the decision by the Malaysian Court in the case of *Lo Mu Sen* (supra), once there is a decision of the Apex Court interpreting similar Articles holds the field, it is not necessary to refer to the same. Mr.De'Vitre has relied upon the decision in the case of *Dr.Percy Rutton Kavasmaneck Vs. Gharda Chemicals Ltd.*³⁷, taking a view similar to that of *Sakal Papers* (supra). Even otherwise as it is rightly pointed out by Mr.De'Vitre in the case before the Malaysian Court, the Company was a family Company and the founder of the Company, father had wished that shares will be held by the children in a particular proportion and it is in that background that the factum of transfer was considered.

99. Next question thereafter is, even assuming Article 15 and the scheme as is sought to be interpreted applies, whether this MOU constituted a transfer notice and the agency. According to Mr.Dwarkadas there is no particular format provided for a transfer notice. He submitted that all that is required is the intention. Once there is a desire to transfer the shares, it will constitute the Company as its agent. It is also contended that the agency is created by the Articles and not by a transfer notice *per se*. It was

³⁷ (2009) 96 SCL 515 (Bom)

also contended that the MOU was handed over to Muthu who was Managing director of SAF Yeast and therefore, it constituted valid notice of transfer. Mr.Dwarkadas submitted that any document which shows that there is an intention to sell can constitute a transfer notice. Reliance was placed on the decision of the English Courts in the case of *Lyle & Scott Ltd. Vs Scott's Trustees* (supra), *Mannai Investments Co. Vs.Eagle Star Life Assurance Co. Ltd.*³⁸, and *Re Ringtower Holdings plc*³⁹. It was submitted that there is no specific need to address any separate notice to the Company. It was submitted that Laloum was fully aware that Muthu was the Managing director of the Company and the signing of the MOU in the circumstances constituted sufficient notice.

100. The Board rejected the contentions of Muthu group on the ground that the Article 15 and the other modalities did not apply. I am in agreement with the view taken by the Company Law Board that the scheme as propounded by Muthu group did not apply to member-to-member transfer. However, for sake of completeness, I will consider the alternate position that even assuming the articles as contended apply, whether MOU could be treated as a transfer notice.

101. In *Sakal papers* (supra) in para 24.2, the Apex Court noted that the notice of transfer is required to constitute the directors as transferor agents. The Apex Court noted in paragraph 44 that the

38 [1997] AC 749

39 [1989] 5 B.C.C. 82

notice issued did not constitute the Directors as a transferor's agents.

“44. The notices issued in respect of the 93 and 3417 shares were not in keeping with the Articles as far as Articles to 63 were concerned. As we have already observed, notices to willing members or to selected persons under Article must succeed and not precede the actual operation of Article 57-A. The notices issued by the respondent Nos. 2, 3 and 4 also did not constitute the Directors as the transferor's agents for the purposes of selling the shares in terms of Article. There was, in the circumstances, no question of the transferors selling their shares to any 3rd party under Article unless proper notice had been issued to the 2nd and 3rd category of persons if any. There was also no question of the transferor invoking Article bypassing the right of a willing member or selected, if any, to negotiate a fair price.”

(emphasis supplied)

The above-emphasized portion would show that unless a specific notice is issued, there was no question of any agency being created. The Apex Court also held that the directors must be specifically constituted as an agent. Thus, Apex Court laid down that the transfer notice itself must make the directors the agents.

102. If one goes through the articles regarding requirement of notice again, it clearly envisages a notice from the transferor to the Company specifically constituting it as an agent. A clear unambiguous notice will curtail future litigation such as the present one. The MOU is not even a letter. It is at the most an agreement between two groups of shareholders as to their shares held. It is absurd to suggest that since Muthu is a managing director, even

though what Muthu signed was regarding his shareholding, will constitute a notice to the Company. Further MOU does not state a word of expressly authorising the Company as an agent. Such specific authorization is required and is totally missing in the MOU. In the present case, not only there is no separate and specific notice, but also the fact that the MOU was being treated as notice and was placed before the Board of directors, was not informed to Nafan and Lesaffre. The case of *Lyle & Scott Ltd.* (*supra*) did not arise from the case of oppression and mismanagement but arose from civil suit for specific performance based on the pre-emptory clauses. Furthermore, as has been rightly pointed out by Mr.De'Vitre, the concerned articles in that case only envisaged an intention to transfer and did not provide for a formal notice. Furthermore, the action of treating the MOU as a transfer notice in the present case is not to be considered as an isolated incident but in the larger scheme of things. In the case of *Re Ringtower Holdings* (*supra*) the Court concluded that there was no intention to sell the shares in the facts of the case. Merely because some observations can be used to support the submission, a judgment cannot be read *de hors* the factual backdrop. Reliance on the case of **Mannai Investments Co. Vs. Eagle Star Life Assurance Co. Ltd.** (*supra*) is equally misplaced. That was a case arising from termination of lease and the notice was construed in the context of the provisions of that Act.

103. Therefore, the action of transfer of shares based on Articles

and constituting the Company as an agent based on MOU was not only illegal and contrary to the articles on the part of Muthu group but in the factual backdrop, it was highly inequitable. Therefore, not only the Board meetings that were held without Board's notice were illegal and oppressive but also the action of using MOU as a transfer notice. It was argued that Muthu group acted based on the opinion of a senior Advocate and therefore their action was bonafide. The opinion of the senior advocate refers to Article 16, which according to Mr.Dwarkadas, does not apply. It was agreed by the counsel that it will be proper not to debate on the merits of the opinion but to restrict the debate only to bonafides. The senior advocate did not opine that Muthu group could proceed in the manner as they have done. Question here is the lack of probity. Muthu is an experienced business. He fully knew what he was doing. The opinion is only used as crutches to support an otherwise oppressive act.

104. The things did not stop at that. The shares were transferred by issuing duplicate shares. Before we consider the question of duplicate shares and thereafter the valuation, a review of the manner in which the Board meetings were held need to be taken, to put things in prospective. The minutes have already been reproduced earlier. On 23 May 2009, the meeting began at 12.15 p.m. Mr.A.Muthu, Mr.A.M.Arunachalam, Mr.A.M.Muthiah, and Mr.PB.Thatte attended it. Mr.A.Muthu was elected as the chairperson, leave of absence was granted to Laloum and

Mr.Lesaffre. The chairperson referred to written opinion received by senior advocate, which was taken on record. Purchase by Muthu of the shares pursuant to MOU dated 23 January 2009, opening of current account to hold purchase money was discussed. The current account was resolved to be opened, directors were directed to operate the account. Mr.K.Narasimhan was authorised to execute share transfer forms in the name of Nafan. Mr. K.Narasimhan was requested to act as a seller for Muthiah. Mr.Narasimhan was authorized to execute the share transfer forms on receiving the purchase money of ₹27,49,38,822 for 80,772 shares. Thereafter the meeting ended. The next meeting was held on 25 May 2009 at 4 p.m. The minutes of meeting dated 17 May 2009 were confirmed and signed. Thereafter the letter received from Mr.Muthiah, dated the same day i.e. 25 May 2009, that the money has been transferred into his account was taken. The advice received by the Company on the same day was tabled. The resolution was passed to transfer the purchase money to Company's current account. Mr.Muthiah placed the letter dated 23 May 2009 from the Company as an agent of Nafan requesting the issuance of duplicate share certificates in view of Laloum, having been informed to Muthu on 20 February 2009 that Nafan had lost original share certificates. The meeting was adjourned at 4.30 p.m. for preparation of duplicate share certificates and was re-assembled at 5.15 p.m. on the same day. On re-assembling, the resolution was passed, the transfer was completed, and the meeting ended. It is in this fashion that the duplicate share certificates have been prepared

and issued.

105. It is an admitted position on record that there is no written communication from either Nafan or Laloum informing that the share certificates were lost and duplicate share certificate need to be issued. The Company Law Board has disbelieved the theory of oral request.

106. Mr.Dwarkadas submitted that if the duplicate share certificates were not lost then nothing stopped Nafan from producing the original certificates. This submission cannot be accepted. What needs to be considered is the act of Muthu group in seeking duplicate share certificates at the time of transfer of shares on the premise of oral request made by Laloum sometime in February 2009. Laloum on oath has denied the conversation. Nafan has produced summary of telephone records to show that there were no telephone calls between 11 February 2009 and 6 March 2009. Not a single text message is also produced nor any communication in writing to issue duplicates certificates. There is no explanation at all why, if told in February 2009, suddenly Muthu thought it fit to get duplicate share certificates printed at the time of the meeting. Muthu group did not bother to crosscheck with Laloum as to whether by then he had located the duplicate share certificates. If everything was fine, Muthu could have easily asked Laloum whether the share certificates were still missing and whether duplicate share certificates be issued. Since the scheme

was to push through the disputed MOU by keeping Nafan and Lesaffre in dark, for obvious reasons this was not done. The letter of Muthu dated 23 May 2009 is reproduced below:

*“To,
Saf Yeast Co. Pvt. Ltd.,
Mumbai.*

Dear Sirs,

Sub.: Loss of Original Share Certificates by Nafan B.V. As verbally informed by Mr.A.Laloum – Request for issuance of Duplicate Share Certificates in lieu thereof.

I wish to bring to your notice that Mr. A. Laloum Director of the Company and a Director of Nafan B.V. of Lesaffre Group, shareholder in the company informed me during one of his telephone calls on or about 20th February, 2009 that Nafan B.V. has lost the share certificates for the 80,772 shares they hold in the company and they are unable to locate the same.

I therefore request the company to consider issuing duplicate share certificates in lieu of the share certificates that have been informed to be lost by Nafan B.V. to comply with the requirements of law.

Yours faithfully,

Sd/-

A. Muthu

(For Saf Yeast Co. Pvt. Ltd., Agent of Nafan B.V.)”

When Muthu wrote this letter on 23 May 2009 to SAF Yeast for issuance of duplicate certificates as an agent of Nafan, there was no

authorisation in writing in favour of Muthu to make such a request.

107. Section 84 of the Act enables a company to issue duplicate share certificate if it is proved that it is lost. Therefore, the Company must satisfy itself that the share certificates are lost. Section 84 of the Act reads as under:

[1] A certificate, under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to such shares.

[2] A certificate may be renewed or a duplicate of a certificate may be issued if such certificate-

- a. is proved to have been lost or destroyed, or*
- b. having been defaced or mutilated or torn is surrendered to the company.*

[3] If a company with intent to defraud renews a certificate or issues a duplicate thereof, the company shall be punishable with fine which may extend to ten thousand rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both

[4] Notwithstanding anything contained in the articles of association of a company, the manner of issue or renewal of a certificate or issue of a duplicate thereof, the form of a certificate (original or renewed) or of a duplicate thereof, the particulars to be entered in the register of members or in the register of renewed or duplicate certificates, the form of such registers, the fee on payment of which, the terms and conditions, if any (including terms and conditions as to evidence and indemnity and the

payment of out- of- pocket expenses incurred by a company in investigating evidence) on which a certificate may be renewed or a duplicate thereof may be issued, shall be such as may be prescribed.]

Also needs to be noticed are the Articles of Association as under:

Article 8 of the Table “A”

If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding two rupees, and on such terms, if any, as to evidence and indemnity and the payment of out of pocket expenses incurred by the company in investigating evidence, as the directors think fit”.

In the present case no attempts at all have been made by SAF Yeast to ascertain the factum of lost certificate before issuing any duplicate certificates, naturally so because the affairs of SAF Yeast in India were being controlled by Muthu at that time. When a Company receives, an application for issuance of duplicate shares there must be some investigation before concluding that the share certificates are lost. Section 84(3) makes a company liable for penal action for wrongful issuances of duplicate share certificates. Therefore, the cautious approach is warranted, not a casual one.

108. The question of issuance of duplicate share certificate arose for consideration of the division bench of Madras High Court in the case of **Shoe Specialties Ltd. Vs.Tracstar Investments Ltd. & Ors.** -[1997] 88 Comp Cas 471 (Mad)]. The Division Bench referred to J.C.Bali on Secretarial Practice in India, 5th revised edition and

quoted the passage therefrom as under:

"Loss of share certificate. - Sometimes a shareholders loses or misplaced his share certificate and is compelled to apply to the company for another certificate in place of the one lost. The articles of association of most companies and Table A provide that if a share certificate is lost or destroyed the shareholder may obtain another on payment of a fee and on supplying such evidence and giving such indemnity as the company may require. When a shareholders loses his share certificate he should at once write to the company stating clearly the loss or destruction of the certificate and request for the issue of a duplicate certificate. On receipt of the letter the company will ask the shareholders to fill in an indemnity form in which the shareholder will agree to indemnify the company against any claim that may be made by any person on the original certificate. He is also required to prove a guarantee by way of double security."

In Palmer's Company Precedents, it has been noted as under :

"The company incurs a serious responsibility by issuing a new certificate unless the old one is cancelled, and it ought not to be done except on very satisfactory proof of loss or destruction, or on a satisfactory indemnity being given."

Taking note of these passages, the Division Bench observed thus -

"Before taking a decision to issue duplicate certificates, a decision had to be taken or satisfaction must be entered that the original certificates was lost. In this case, the very request by the second respondent says that the original certificate is with the first petitioner herein. Hence, by no stretch of imagination, can it be said that the share certificate is lost or destroyed. The authority to issue a duplicate certificate rests with the company only on proof that it is lost, or at least there must be some investigation."

before coming to the conclusion that it could not be traced. The first respondent company is aware of such a procedure. One of the constituents, Sanman Investments Pvt. Ltd., requested the first respondent to issue a duplicate certificate. The first respondent did not issue duplicate certificate immediately. It directed an investigation to be made, and caused an advertisement to be published in the dailies, and waited for objections. For nearly eight months, the duplicate certificates were not issued to Sanman Investments Pvt. Ltd. So, the first respondent is also aware of the normal practice. Before the Company Law Board, the petitioners have also given other instances where the first defendant took time to investigate and satisfy itself about the loss of the certificate.

The bona fides of the first respondent at least could have been shown by issuing a notice to the first petitioner to produce the original. The inaction on the part of the first respondent in issuing a notice to the first petitioner to produce the original and the hurried manner in which a resolution was passed on the very second day of reconstitution of the new board of directors to issue a duplicate certificate shows lack of goods faith in its acts. In this connection, we may also note that even though there is not statutory provision for giving any notice or advertisement, when there is an established practice by the first respondent itself, why it deviated from such a practice should have been properly explained. No attempt was made on its part in that regard.” (Emphasis supplied)

109. In the present case, the facts are glaring. Muthu, who wants to usurp the entire shareholding of Nafan, writes to SAF Yeast on behalf of Nafan that Nafan has lost the original shares, gets the duplicate shares issued through the Company which he controls and transfers it to his group in a meeting, without a single notice to Nafan. What further is needed render a finding of gross

impropriety? The manner in which the entire meeting has been pushed through and the manner in which the duplicate share certificates have been secured is nothing but a clear and calculated design to usurp the shareholding of Nafan. Mr.Dwarkadas tried his level best to justify the act as of Muthu group. Most of the events narrated by Mr.Dwarkadas are nothing but internal discussions amongst the Muthu group starting from 16 March 2009 till 25 May 2009. The argument that the agency created in favour of the Company and the MOU itself impliedly gave the power to grant of duplicate share certificates, is sought to be raised with no foundation in law. Language of Section 84 clearly speaks to the contrary for any such implication. It was also submitted that the case in *Shoe Specialties* (supra) is distinguishable on facts. It was also contended that not every conduct need be considered as oppressive. I am not impressed by any of these submissions. The conduct of issuance of duplicate certificates was clearly a part of a design to remove Nafan and Lesaffre from the Company. Once it is held that meetings itself were illegal, the MOU did not constitute the transfer notice, then get duplicate share certificates in absence of any written authority only compounds the acts of oppression. What is sought to be done is that each act is sought to be justified in isolation, but what needs to be considered is totality of the actions leading to acts of oppression. The issuance of duplicate share certificates in this manner surely constituted one piece in the large scheme of their. I am therefore, in agreement with the Company Law Board in respect of the finding rendered by it on this

count.

Valuation

110. The next issue is regarding the valuation submitted by M/s Sharp & Tannan. The Board has concluded that the valuation report prepared by M/s Sharp and Tannan is not reliable, it is patently biased, partial and based on incorrect methods. M/s Sharp & Tannan has deliberately used guidelines, which are inapplicable. The Board has concluded that the valuation report is wrong in principle, erroneous and got up document and is liable to be set aside. This finding has been challenged by Sharp and Tannan and Muthu group. M/s Sharp & Tannan is aggrieved by the observations and declarations made by the Board that the report is biased, partial and in contravention of statutory guidelines and rules to carry out valuation of shares of going concern. It is the contention of Nafan and Lesaffre that the valuation was done at the instance of Muthu group, it was deliberately kept on the lower side and prepared in short time span to meet the requirements of Muthu group, and thus in collusion. It was contended that right from inception, Muthu knew that he would be able to get valuation from Sharp & Tannan as per his requirement.

111. Mr.Subramaniam learned Senior advocate on behalf of M/s Sharp and Tannan submitted that M/s Sharp and Tannan is unconcerned with the dispute and is only challenging the finding of imputation of bias and other criticism levelled by the Board. According to him, the valuation report was prepared adopting the well-known methods of valuation and the observations and findings

of the Board are unwarranted and are liable to be set aside. He submitted that the valuer has tendered its valuation as part of its professional duty, and not concerned as to whether it is finally accepted by the concerned parties or not, neither the professional valuer is concerned with *inter-se* disputes. Mr.Subramaniam submitted that M/s.Sharp and Tannan carried out their duty of preparing a valuation report as per rules and needless aspersions have been cast upon it. Mr.Dwarkadas submitted that the valuation report was fair and proper and reflected the correct value of shares. According to Mr.De'Vitre the valuation of the shares is so ridiculously low that Nafan and Lesaffre were immediately prepared to pay double the valuation and even higher.

112. The valuation report by M/s.Sharp and Tannan has valued 80,772 Shares of SAF Yeast at ₹4315 per share as on 31 March 2008, the total value of ₹27,49,38,822. Mr.Subramaniam submitted that the auditors examined the audited accounts for the years ending 31 March 2004, 31 March 2005, 31 March 2006, 31 March 2007, 31 March 2008 and after applying methods of valuation as per guidelines issued by Controller of Capital Issue Guidelines (CCI guidelines) for valuation of Equity Shares of the Companies and the Business and Net Assets of Branches. The valuation was done by capitalising value of average of the profits of the past for the accounting year and Net Assets Value (N.A.V) method. He submitted that the valuation had to be done on urgent basis in light of the MOU. The valuation was prepared on 9

February 2009 and forwarded to Laloum on 10 February 2009. He submitted that the Department of Foreign Exchange of Reserve Bank of India raised a query, which was replied stating that CCI Guidelines were followed. He contended that there are many methods of valuation available. No valuation report can possibly mention all methods of valuation and from that conclusions of bias, impartiality and unreliability, cannot follow. Nafan has produced no proof in support of allegations of collusion and fraud. He submitted that in a valuation report, all conceivable methods of valuation are never adverted to. Merely because the RBI circular of 2010 mentions Discounted Cash Flow method (DCF), does not mean that is the only method. Mr.Subramaniam submitted that there is nothing wrong in preparing a report within 24 hours and it is easily possible when all the data is available on the computer. He reiterated that method of valuation under CCI guidelines is legitimate method of valuation. He relied on RBI Circular No.7 of 2008/2009 dated 1 July 2008 referring to CCI guidelines. He submitted that the Apex Court in the case of **Hindustan Lever Employee's Union Vs.Hindustan Lever Ltd.**⁴⁰ and **Miheer H.Mafatlal Vs.Mafatlal Industries Ltd.**⁴¹ has laid down that the valuers are experts in their field and Court should be slow in substituting their findings. Merely because an expert adopts a particular method of valuation in one case and the same method not adopted in another case does not render the valuation bad. As regards the contentions about suppression in the pleadings, Mr.Subramaniam supported the contentions of Mr.Dwarkadas.

113. Mr.Dwarkadas contended that Nafan had furnished no particulars as to why the valuation was fraudulent. It is not open for Nafan to challenge the valuation on the ground that it is low after having left the valuation to the statutory valuers. He submitted that article 17 was referred to in the MOU and parties agreed to abide by the valuation of the statutory auditor. Nafan did not insist upon any valuation method in spite of having received the MOU some time in February 2009. He contended that if the price of shares between 1992 and 2009 is concerned, it has grown from ₹237 per share to ₹4315 per share. The same valuer had carried out the valuation earlier. In the year 1998, when Lesaffre sold its shareholding to Nafan the shares were sold at ₹ 1070. Therefore, since 1998 there has been 400 per cent increase in shares. He submitted that unless the valuation is vitiated by fraud or fundamental mistake the same could not be challenged. The particulars of fraud need to be specifically pleaded. He relied upon decisions of the Apex Court in the case of *Sangramsinh P Gaekwad (supra)*, *Bishundeo Narain & Anr. v. Seogani Rai*⁴², *The National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & ors.*⁴³ to contend that specific pleadings are required. He also relied on the decisions in the case of *Re. Organon (India) Ltd.*⁴⁴, and *G.L.Sultania v. SEBI*⁴⁵. He reiterated that merely because CCI guidelines have been followed it could not be said that

42 AIR 1951 SC 280

43 (2011) 12 SCC 695

44 (2010) 157 C-C 0287

45 AIR 2007 SC 2172

the valuation is fraudulent. He submitted that contention that there is no basis for valuation as of 31 March 2008 as incorrect as MOU required sale consideration to be paid immediately. He submitted that as laid down by Chancery Division in **Re a Company (No: 004377 of 1986)**⁴⁶, that wide discretion is conferred upon a statutory auditor for carrying out the valuation.

114. On the other hand, it is the contention of De'Vitre that Nafan was not a seller of the shares at all. The valuation was challenged to show the oppressive acts of Muthu group and the Board has rightly held that the way the valuation was carried out is oppressive. He submitted that even assuming the MOU is executable it contemplates fair valuation. The valuation carried out is not only not fair but no valuation in eyes of law. He submitted that the valuation does not take into account the well-settled methods of valuation. He submitted that the methods, which are generally adopted and mandated, have not been carried out by the valuer. He submitted that CCI method is completely inapplicable and in violation of the RBI instructions. The valuation is absurd, extremely low, completely unfair, and the Board has rightly set it aside.

115. Before issue of valuation is to be discussed in detail, it needs to be placed in correct perspective. This is not to a exercise to assess the correctness of the valuation in case of a transaction between a willing buyer and a willing seller debating over the

46 [1987] 1 WLR 102

price. This case is regarding the manner in which the valuation is undertaken, as a ground of oppression.

116. The MOU referred to a fair valuation. I have already held that, prima facie the MOU only indicated beginning of modalities depending on the fair value. The fair value has to be seen in the light of the fact situation. It was the value to be paid for exit of Nafan from SAF Yeast. That would mean that the association of Nafan and Lesaffre right from the beginning and its majority stake in the Company would end. Two groups of shareholders started SAF Yeast together. The Company is well established. It has a substantial turnover. Even assuming the case of Muthu that it was contemplated that majority shareholders would exit upon valuation; fair valuation was to be done by statutory auditor. M/s Sharp and Tannan have been the auditors of the Company for a long time. With such a major decision being left to them, it was their duty to be fair to both Muthu group, and Nafan and Lesaffre. They would be fully aware what they were determining was the price of exit of Nafan from the Company. This is not to say in a routine valuation, care need not be taken, in the present case but M/s Sharp and Tannan were fully aware of the implications of their valuation, having been associated with the SAF Yeast for several years. The manner in which the valuation was done in 24 hours, when there was apparently no need for such urgency without following well known methods which has given rise to charge of oppression by the Nafan and Lesaffre. Therefore, the entire issue of valuation has to be viewed in that perspective. There is no doubt,

as held by the Apex Court in the case of ***Miheer H.Mafatlal, Hindustan Lever, Re. Organon (India) and G.L.Sultania***, that Court need to be slow in interfering with the correctness of the valuation and substituting the wisdom of valuer. It is also settled that latitude must be given to the expertise of the valuer and merely because another valuer by adopting some other method can achieve different valuation that the valuation in question is not fraudulent. However, the issue has to be approached in the context of charge of oppression. The entire line of argument of Mr.Subramaniam and Mr.Dwarkadas has been to show that how M/s.Sharp and Tannan followed particular permissible method and how there is lack of pleadings and scope of Court to interfere with the valuation report.

117. The conduct of Muthu group in getting a valuation report in 24 hours to arrive at a valuation, which he knew was not reflecting the correct value, in itself, is alleged to be part of oppressive conduct. The Board found that M/s Sharp and Tannan did not give any reason for not adopting the DCF method and choosing Comparable Companies Analysis method of valuation and even though they were the most common method and M/s Sharp and Tannan went ahead with the CCI guidelines. In the case of **G.L.Sultania** the Apex Court has laid down that the valuation report can be questioned when well established principles of valuation are, departed without any reason, and demonstrably wrong approach is adopted. Therefore, the question arises of

explanation as to why DCF and CCA Guidelines were not adopted. It is not that these two methods are inapplicable or outdated. The valuer is supposed to take into consideration the well-established methods and give reasons as to why a particular method is being adopted. In the case of *G.L.Sultania* the Apex Court has emphasized that the valuer need to give reasons why it excludes well-established principles of valuation at all from consideration. The contention that choice of method is a matter of pure discretion of the valuer cannot be accepted. The valuer does not have discretion to simply disregard well-known methods of valuation when he is entrusted with the task of arriving at a fair valuation. Completely excluding the well-known methods of valuation, without any reason, when they had to arrive at a fair valuation, in these circumstances, was not a proper exercise on the part of Sharp and Tannan. Again, it has to be noted that for the working of the MOU, the valuation had to be fair.

118. Nothing has been shown that DCF method and CCA Guidelines have ceased to exist or they have been discontinued. The DCF method is well known because it takes into account all the relevant factors. One need not travel far for this purpose as M/s.Sharp and Tannan themselves have endorsed DCF method over all other methods. This stand of Sharp and Tannan is noted by the Gujrat High Court in the case of **Alembic Limited Vs Deepak Shah**⁴⁷, as under :

47 2002 (2) 112 Comp Cas 64.

“In light of the aforesaid principles, this court proceeds to examine the grievance of the objector that the exchange ratio has not been properly worked out. The objector is a shareholder in Alembic Ltd. with 30 shares of Rs. 10 each. The objector, who is himself a chartered accountant by profession, is not in a position to indicate as to how the exchange ratio is detrimental to the shareholders of Alembic Ltd. The exchange ratio of six shares of Alembic Ltd. (resulting company) in lieu of 100 shares of Darshak Ltd. has been proposed in view of the report of M/s. Sharp and Tannan Associates, chartered accountants. In their report dated April 17, 2001, the chartered accountants have referred to the following valuation techniques which are generally used in ascertaining the fair value of a business :

(a) Net asset value (NAV) ;

(b) Profit earning capacity value (PECV) ;

(c) Combination above ;

(d) Valuation based on discounted cash flow technique (DCF). The chartered accountants have then discussed the merits and demerits of the different techniques and thereafter suggested that since the DCF method captures all the elements of the value of a business compared to the other methods, the DCF method comprehends the difference between the values of firms having similar accounting earnings due to the difference in capital investments and other cash flows required to sustain these earnings. By adopting the said technique, the chartered accountants have worked out the fair value per share of Alembic Ltd. and Darshak Ltd. as under :

Company Valuer per share Alembic Ltd. Rs. 287.17 Darshak Ltd. Rs. 15.91

The chartered accountants have, therefore, suggested that on the basis of the aforesaid fair value per share, they consider fair and reasonable, a share exchange ratio of one equity

share of Rs. 10 each of Alembic Ltd. for 18 equity shares of Rs. 10 each of Darshak Ltd. for the purpose of the proposed merger. Thus the company has accordingly adopted the share exchange ratio of six equity shares of Rs. 10 each of Alembic Ltd. for 100 equity shares of Rs. 10 each of Darshak Ltd. for the purpose of the proposed merger.”

(Emphasis supplied)

In the above case M/s Sharp and Tannan had reasoned that the DCF method captures all the elements of valuation compared to all other methods. In the present case M/s Sharp and Tannan have not referred to DCF method at all. An explanation is sought to be given that the valuation had to be done in a hurry in view of the MOU. There was no such hurry to produce valuation report in 24 hours.

119. It was contended by Mr.Dwarkadas and Mr.Subramanian that the valuation done complies with the Reserve Bank of India circular and the RBI circulars mandating that DCF method does not apply. As it has been rightly pointed out by Mr.De'Vitre that M/s Sharp and Tannan as a statutory auditor had to arrive at a fair value. Their assignment was not to ascertain value as per the RBI guidelines but to arrive at a fair value of the shares. The RBI circular is in relation to the Special and General Permission of Reserve Bank of India under Foreign Exchange and Management Act. The permission for transfer of shares from a non-resident to resident is specified in the circular dated 4 October 2004 and it lays down that where the shares are not listed on the Stock Exchange,

the transfer of shares at a price lower than two independent valuations, one by a statutory auditor of the Company and the other by Chartered Accountant is contemplated. It is for this reason that the valuation is carried out for the purpose of Circular of the year 2004. There is no gain saying that the valuation conformed to the parameters laid down in the RBI Circular of 2004, when the Circular was not for fair value but for completely different reasons. In fact, the Circular dated 4 May 2010-RBI has emphasized for DCF as is the most relevant method for the valuation of shares.

120. The arguments advanced by Mr.Dwarkadas and Mr.Subramanian that the valuation conformed with Circular of 2004 indicate the way Muthu group and Sharp & Tannan have acted. Reliance is placed on valuation methods, which are not for fair valuation is required for completely different purpose under the RBI guidelines. The entire attempt is not to put forth the fair value of shares. M/s Sharp and Tannan based its valuation report on Net Asset Value and profit earning capacity value. Even these methods do not comply with RBI circular of 2004. Reliance of the letter dated 19 February 2009 is misplaced. This letter from Reserve Bank of India is a routine letter which only directs that Company to carry out transactions in terms of the circular. It is far-fetched to suggest that the RBI itself applied its mind and approved the valuation carried out treating it as a fair valuation.

121. It is contention of Muthu group that in the previous valuation report dated 17 January 1992 by M/s Sharp and Tannan,

the CCI guidelines have been used. However as it has been rightly pointed out by Mr.De'Vitre that the report of the year 1992 was for the purpose of an application to the Controller of Capital Issues seeking its prior approval to price of new shares. It did not require valuation of the Company as a going concern. No capital can be made therefore, on the ground that 1992 valuation was based on CCI method. The contention that NAV method was rightly followed cannot be accepted as the VIRC reference manual which explains the NAV method shows that it is to be adopted in case of manufacturing companies where fixed assets have greater relevance for earning revenues. Nothing is shown as to how this is so and the Board therefore, has correctly rejected this contention. There is no perversity in this finding.

122. Coming to the CCI guidelines supposed to be followed by M/s Sharp and Tannan, it is the contention of Mr.De'Vitre that even these guidelines have not been followed. Para 7.3 of CCI guidelines have been relied upon. I have seen the guidelines. The guidelines state that though past profits would serve as indicator, future should not be completely ignored. In spite of this position, the valuation is based on the earlier years and there is no projection for future. Even the time taken for assessing the average earning, the years in which there is an unusual variance has to be excluded. The year 2005 should have been excluded as in that year the earning was ₹82,36,045 in comparison with 2004 where it was ₹1,20,41,10352 and 2006 where it was ₹15,53,28,546 . The

reduction for lack of mobility is reduced to 20% when the CCI guidelines provide 1:15 per cent capitalisation. There is also merit in the contention of Mr.De Vitre that rate fixed under the Guidelines is now outdated and business outline has changed since 1992 to 2009. M/s Sharp and Tannan has insisted on following outdated methodologies for valuation and without any reason has not followed well-established methods.

123. It was then argued on behalf of Muthu group that once Nafan group agreed that fair valuation should be done as per Article 17 by the statutory auditor and the statutory auditor has carried out the valuation; the Court will uphold the valuation. This argument is difficult to accept. What the MOU stated was the parties would part ways on fair value and not upon valuation, which is not fair. Can it be said that even if the valuation is arrived at ignoring well-established methods and it is at ₹1, still Nafan must accept the same since it agreed that a statutory auditor would carry out the valuation. The proposition cannot be stretched to an absurd limit. Because a party agrees to a valuation by the statutory auditor it does not mean it relinquish all the rights. Various decisions were cited at the bar on this proposition by Mr.Dwarkadas, mostly of the English Court. It is not necessary to burden the record by referring to all the cases as the Delhi High Court, in the case of **Mihir Chakraborty v. Multi Tech Computers**⁴⁸, has taken review of the English decisions. In the case of *Mihir Charkraborty* (supra), the learned Single Judge noted

the rival contentions as under :

“A preliminary point has been taken on behalf of the respondents to the maintainability of the challenge mounted by the petitioner to the valuation report. Mr. P.C. Khanna, learned senior counsel appearing on behalf of the respondents, submitted that the valuer's report was binding on the parties and the court cannot go behind the same. While computing the stake/share of the petitioner in the company the valuer acted as an expert and not as a quasi arbitrator or an arbitrator. This being so his report cannot be attacked in the instant proceedings. The valuation given by the valuer is final and conclusive between the parties. In case the petitioner is aggrieved of the valuation determined by the valuer, his remedy lies in filing a suit for damages against the valuer for negligence. Mr. Khanna canvassed that initially the view of the English courts was that no action lay against the experts such as valuers, auditors, brokers etc in tort for giving an opinion or making a determination negligently. This was on the ground that they were discharging professional duties of quasi judicial character. Since the experts could not be sued, their determination could be impugned in the litigation between the parties affected by their determination or opinion. Learned counsel further argued that the aforesaid principle has been discarded in England and the position, as made clear by the House of Lords, is that an expert can be sued for damages when he acts negligently in performance of his duties. In support of his submissions, Mr.Khanna relied on the following decisions:-

- 1. Sutcliffe v.Thackrah (1974) 1 All ER 859 (HL) (pages 29 to 57).*
- 2. Burgess and another v.Purchase & Sons (Farms) Ltd. (1983) 2 All ER 4 (Ch.D) Pages 58 to 66)*
- 3. Jones and other v. Sherwood Computer Services (1992) 2*

All ER 170 (CA) (Pages 67 to 79).

Mr. Khanna also submitted that the position in India is no different from the one which is prevailing in England. In this regard he referred to the decision of the Supreme Court in K.K. Modi v. K.N. Modi (1998) 92 CompCas 30.

On the other hand, Mr. Sanghi, learned counsel for the petitioner, contended that the court can go behind the valuation report and look at the reasons offered by the valuer in support of the valuation arrived at by him. He contended that since the valuation made by the valuer was based on erroneous principles, the same can be challenged in these proceedings. In aid of his submissions he cited the following decisions:-

- 1. Dean v.Prince and others.*
- 2. Dean v.Prince & others.*
- 3. Jones (M) and another v. Jones (RR) and another.*
- 4. Arenson v. Arenson and another”.*

The learned Judge then took review of the entire case law in respect of challenge to the report of the valuation and observed as under :-

“Be that as it may, the position in law seems to be that a valuer cannot claim immunity any more if he acts negligently in making his determination and can be sued for tort or negligence but action against the valuer for damages cannot come in the way when the court is considering the validity of the valuation itself. The fact that the parties may have agreed that the valuation arrived at by a valuer would be binding on them, the agreement does not imply that they will be bound even by a valuation which is erroneous. In this country the courts cannot be bound to accept the determination or opinion of an expert which is erroneous as otherwise it would amount to perpetuating the mistake. Mr.

Khanna contended that the compromise recorded by the court constitutes a decree and if this is so the valuation arrived at by the valuer cannot be challenged in these proceedings. I regret my inability to accept the submission of the learned senior counsel. While it may be true that the compromise recorded by the court constitutes a decree but that does not mean that the report of the valuer which was directed to be filed under the order of this court cannot be touched in these proceedings. In case the report suffers from mistake or perversity, the same can certainly be set aside in these proceedings and the matter can be referred for fresh valuation by an expert. The court is not bound to accept the report in case the same is erroneous. Mr. Sanghi, learned counsel for the petitioner, claimed that M/s Coopers & Lybrand Pvt. Ltd was actually appointed by the Court under Order 26 Rule 9 C.P.C. as Local Commissioner to determine the valuation. On the other hand, Mr. Khanna, learned senior counsel for the respondents, refuted this position and submitted that the appointment of the valuer was made by by this court order on the basis of the terms of the compromise arrived at between the parties and the same was not made under Order 26 Rule 9 C.P.C. It is not necessary to examine the submissions of the learned counsel for the parties in view of the aforesaid determination.”

(emphasis supplied)

Delhi High Court has concluded that not all the principles laid down in the decisions of the English Court reflect the legal position prevalent in India. It held that an expert opinion does not enjoy absolute immunity even if it suffers from fundamental mistake, collusion, and fraud. I respectfully agree with this view. Even in the cases relied upon by Mr.Dwarkadas, and which were considered by the Delhi High Court, the Courts have kept the rider that the valuers report does not enjoy absolute immunity. In the present

case, I agree with the finding of the Board that the valuation report has to be discarded.

124. Next question is of the imputation of bias against Sharp & Tannan and the acts of oppression in obtaining such report and acting upon it. The speed at which the valuation report was generated with no apparent reason for hurry and glaring omission not taken into consideration the cogent method of valuation and the way the valuation report is then used by Muthu group raises various questions and the points to something more than a mere incorrect valuation. The Division Bench of Madras High Court in *Shoe Specialities* (supra), analyzed the law regarding fraud and collusion, held as under :

"We may have also to consider what is meant by "collusion".

In P. Ramanatha Aiyar's The Law Lexicon, reprint edition 1987, at page 216-i, "collusion" is defined as "a secret agreement for a fraudulent purpose; a secret or dishonest arrangement in fraud of the rights of another; a secret agreement by two or more persons to obtain an unlawful object, an agreement between persons to obtain an object forbidden by law, or to obtain a lawful object by illegal means". The petitioner's case is that there is secret and dishonest arrangement between the directors of respondents Nos. 1 and 2, in fraud, which has affected their right.

In Wharton's Law Lexicon, 14th edition (1993), at page 212, "collusion" is defined as "to unite in the same play or game, and thus to unite for the purposes of fraud of deception; an agreement or compact between two or more persons to do some act in order to prejudice a third person,

or for some improper purpose."

In Shrisht Dhawan V. [Shaw Bros.](#), (1992) 1 SCC 534 , their Lordships considered a similar question as to how far fraud and collusion invalidate any decision or action. In paragraph 20 of the judgment, their Lordships said thus (page 553) :

"Fraud and collusion vitiate even the most solemn proceeding in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit.....".

After extracting the various definitions in the dictionaries, their Lordships further held thus :

"... fraud in public law is not the same as fraud in private law. Nor can the ingredients which establish fraud in commercial transaction be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in Khawaja that it is dangerous to introduce maxims of common law as to the effect of fraud while determining fraud in relation to statutory law... The present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provisions of the statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is, misrepresentation must be in

relation to the conditions provided in a section on existence or non-existence of which power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. 'In a contract every person must look for himself and ensure that he acquires the information necessary to avoid bad bargain'. In public law the duty is not to deceive....".

In De Smith's Judicial Review of Administrative Law Action, fourth edition (1980), at pages 335 and 336, the learned author says thus :

"A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. For example, a local authority committee would exercise in bad faith its power to exclude interested members of the public if it deliberately chose to hold the meeting in a small room. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise."

In "Administrative Law" by justice C.K. Thakker, (1992) edition, at page 328, the learned author has stated thus :

"Sometimes, an authority entrusted with a power does not exercise that power but acts under the dictation of a superior authority. Here, an authority invested with the power purports to act on its own but 'in substance' the power is exercised by another. The authority concerned does not apply its mind and take action on its own judgment, even though it was so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad."

In Equity and the Law of Trusts by Philip H. Pettit, fifth edition (1985), at page 148, the learned author says that

there is no distinction between the words "fraud" and "dishonest".

Both of these mean the same thing and the use of the two together does not add to the extent of dishonesty required. The learned author also says at page 149 what a trustee should know before he is made liable or charged with dishonesty or fraudulent act. The learned author says thus :

"(i) actual knowledge;

(ii) wilfully shutting one's eyes to the obvious-Nelsonian knowledge';

(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

(iv) Knowledge of circumstances which indicate the facts to an honest and reasonable man;

(v) knowledge of circumstances which would put an honest and reasonable man on inquiry."

A director of a company must know that he is a trustee for the company; though he need not know all the details of it. He must know of the dishonest and fraudulent design, though not necessarily of the whole design; and he must know that his act assisted in the implementation of such design - if these acts proved, fraudulent act on the part of the directors can be imputed.

In this connection, it is better to refer to Kerr on the Law of Fraud and Mistake, 7th edition (1952), at pages 672 and 673, the learned author has said thus :

"It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud is given. Circumstantial evidence is not only sufficient, but in many cases it is the only proof that can be adduced. In matters

that regard the conduct of men the certainly of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established. Care must be taken not to draw the conclusion hastily from premises that will not warrant it, but a rational belief should not be discarded because it is not conclusively made out. If the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence of explanation, or contradiction, be adopted. It is enough if from the conduct of a party the court is satisfied that it can draw a reasonable inference of fraud, or if facts be established, from which it would be impossible upon a fair and reasonable conclusion, to conclude but that there must have been fraud....." (emphasis supplied).

These principles need to be kept in mind. As held by the Madras High Court that it is not always possible to have direct evidence of fraud and collusion and inference has to be drawn. The question that arises is whether the conclusions drawn by the Board from the circumstances can be termed as perverse.

125. The Board took note of the pleadings on record and viewed that it was sufficient to constitute pleadings of collusion. The relevant pleadings are reproduced in para 265 of the impugned order. For sake of brevity, they are not reproduced again. Thus, what was contemplated was a fair valuation by statutory auditor, which owed a duty to both Nafan, Lesaffre and Muthu group to arrive at a fair valuation. M/s Sharp and Tannan with no apparent explanation simply omitted DCF method from consideration even though it has gone on record to say that it is the best method. M/s

Sharp and Tannan produced a report in one day and then justified the omission of DCF method on the ground that there was a hurry to prepare the report. There was no such hurry and nobody had called for such immediate report within 24 hours. Though it is stated on behalf of Muthu group that Nafan and Lesaffre were insisting on valuation nothing is shown on record that 24 hours valuation was insisted upon. The learned counsel for the parties relied upon decisions dealing with instances where valuation reports have been prepared in short time. It is correct that technology and faster processing of information will expedite preparation of reports. However, whether a valuer should produce report in 24 hours, whether technology permits it to do so will have to be assessed on facts of each case. In the present case, there was absolutely no need to prepare report in a hurry and to omit the most relevant method. Nafan has placed on record that they had obtained a valuation report from another reputed valuer, which shows the same shares as valued substantially higher. According to them, the correct valuation was about 25 million Euros at that time while Sharp & Tannan valued the shareholding at approximately 27 crores only. Thus, price of a majority stake in one of leading yeast manufacturing company in India is valued at 27 crores. It cannot be helped but observing that is the cost of two, three residential flats in upmarket Mumbai. Not that on that ground alone the valuation of M/s Sharp and Tannan is bad, but this valuation carried out by another reputed valuer is not an irrelevant circumstance, when it is coupled with other circumstances. Nafan's

immediate response to the valuation was that if that is the price of shares, they were ready to pay the double. Totality of the circumstances will have to be therefore seen. Sharp & Tannan are not detached valuers but statutory auditors of the company for years with full knowledge of the finances.

126. To my mind therefore, the manner in which the valuation report was prepared and used by Muthu group, the finding of the board that this conduct of the Muthu group is a part of oppressive conduct, cannot be termed as a perverse finding. Considering the facts on record as analyzed earlier, one is surely left with an impression that something was seriously amiss the way the valuation report was presented. Had it been a stand-alone instance of a mere valuation report presented for discussions, it would have been a different matter. The preparation of such valuation report was a piece of much large picture and it fitted in the scheme of things perpetuated by Mr.Muthu. The preparation of such valuation report through M/s Sharp and Tannan completed the scheme of usurping the shares of Nafan.

127. The Board was therefore fully justified, in facts and circumstances of the case, to discard the valuation report and make the observations it made. M/s Sharp and Tannan, knowing the responsibility casts upon them and the consequences thereof, ought to have been more careful and ought not to have prepared a report on the basis completely different than the acceptable norms. The total lack of explanation as to why there was need to prepare

report in 24 hours and that DCF method was not even contemplated justifies the observations made by the Company Law Board, I do not find that the observations were unwarranted. The Company Law Board having seen the entire record was constructed to make the observations and it was justified in doing so. I therefore, agree with the conclusion of the Board that the valuation report, the meetings, and transfer of shares amounted to acts of oppression on the part of Muthu group, and the report was biased.

Relief

128. Now coming to the point of grant of relief. The Board, even though it has held that Nafan succeeded in proving the case of oppression, concluded that the ultimate relief should be that Nafan and Lesaffre must sell its shareholding to Muthu group. The Board concluded that two groups could not run the Company together as the relations between the parties have become acrimonious. The Board opined that the permanent solution in the paramount interest of SAF Yeast is sale of shares of one group to another. The Board thereafter considered the claim of both the parties as who should buy out whom. According to Nafan and Lesaffre, they are a leading business group worldwide in the yeast business. They supplied financial and technical support to SAF Yeast and they have substantially contributed to its growth. They also contended that the title 'SAF Yeast' is derived from the word 'Lesaffre'. A grievance was made that Muthu group caused SAF Yeast to file criminal complaints, which were subsequently withdrawn. On behalf of

Muthu group, it was contended that they should be permitted to buyout the share holding of the Nafan. According to Muthu group, Muthu was Managing Director since inception. The Company was managed successfully by him single handedly and without any technical support as alleged from Nafan or Lesaffre. Nafan or Lesaffre demanded no royalties and neither there was any protest. It would be in the benefit of SAF Yeast that Muthu group runs it. It was also contended that Nafan and Lesaffre any way wanted to step out of the Company and the only objection was to the valuation.

129. The Board after considering rival contentions held that it would not get into the contentions of either parties regarding their respective contribution, as it was a joint venture. The Board held that the joint venture was for commercial purpose. Lesaffre and SAF Yeast have already received back their money with interest. Nafan and Lesaffre are based in Netherlands and France respectively and it is necessary that Indians are involved in running the Company since it is in interior places in India, and the policy of Indian government relating to foreign investment may not allow Nafan to acquire 100 per cent shareholding. It was held that Muthu group has given personal guarantees. The action taken in the meetings was on legal advice and it was bonafide meeting, which had to be hurriedly called in view of the meeting to be held in Paris on 29 May 2009, and one aberration should not be a reason to severely reprimand any one. Thereafter the Board directed buyout

in favour of the Muthu group. Thus, to summarise the Company Law Board ordered buy out in favour of Muthu group because Lesaffre and Nafan have entered into joint venture for money, which they have received. They are not based in India and their personnel rarely visit the unit established in India. It is better that the Indians run the Company. Government may not allow Lesaffre and Nafan to acquire 100 per cent shareholding. Muthu group has given guarantees. Muthu has vast experience in the business and has successfully managed the Company. Actions taken in the meetings were taken on apprehension and legal advice. One aberration should not deprive Muthu group of the Company. If Muthu group is directed to exit, they will have no other source of livelihood. If Lesaffre and Nafan are directed to exit, they will not suffer any prejudice in their Multi-national Company and run various other companies in other developing countries.

130. I have considered the issue. Firstly, the Board has rightly held that two groups cannot go together and parting of ways is imminent. The Board has also rightly discarded the rival contentions of regarding contributions. SAF Yeast is a joint venture. It was created together. Nafan and Lesaffre held 51 per cent shareholding and Muthu group 49 per cent. Nothing stopped Muthu group from establishing the Company on its own, yet the Company was started as a joint venture. Nothing stopped Muthu from establishing a unit on the technology stated to be available with him, yet joint venture was formulated with Lesaffre who are already in the business of manufacturing of yeast. It was a mutual

agreement and no party was coerced or forced to set up a joint venture. Obviously therefore, it was set up for mutual benefit. Nafan and Lesaffre had placed on record their stand that they wanted to set up a unit for manufacturing of yeast in India as they saw potential in the market and in view of restrictions placed by the Indian government they had to start it in a joint venture. Therefore, once joint venture had been set up the aspect of contribution does not assume so much of importance as rightly held by the Board. The Board however proceeded to hold that Lesaffre and Nafan had already received their money back with interest as against their investment in the form of shareholding. I do not find this approach to be correct. Lesaffre and Nafan are not investors. They were 51 per cent majority shareholders of the Company. Thus, they were owners of the Company and not investors. They had equal interest in continuing the Company and it was not a mere loan transaction. These also not mere finances but experts in the production of yeast.

131. It is the contention of Mr.Dwarkadas that if the finding of oppression rendered against Muthu group is set aside and the appeal of Nafan and Lesaffre are dismissed, then the order to buyout under Section 402 cannot be disturbed. He has further contended that the entire case of Nafan and Lesaffre is that they should be permitted to buyout because they are injured party and majority shareholders. He relied on the decision of the Calcutta High Court in **Bajrang Prasad Jalan v. Mahabir Jalan**⁴⁹ to

contend that the main consideration is what course of action would be for the benefit of the Company. He submitted that in the case of **Probir Kumar Misra** (*supra*), the Madras High Court had clearly relied upon underlying intention in an agreement to order a buyout. He submitted that in any case, without prejudice, Muthu group is willing to put an end to the litigation by having the shares valued by an independent expert and thereby completing the buyout process. Therefore, the primary stand of the Muthu group is that since there is no oppression by them there is no question of any buyout of their shares and without prejudice, they are willing to buyout the shares at the valuation fixed by this Court.

132. I have already concluded that the findings of the Board regarding oppression by Muthu group are correct. Therefore, question is regarding the validity of the direction to order buyout in favour of Muthu group even if they committed act of oppression. In earlier paragraph, I have mentioned the grounds on which Board has ordered buyout of the shares of Nafan and Lesaffre. The grounds given by the Board as to why there should be a buyout of the shares of Nafan and Lesaffre are on the face of it, erroneous. The Board has stated that Muthu and his family will have no source of livelihood. The manner and the level at which the litigation is fought in the Board as well as in this Court and it will be naïve to assume that the family will be on streets. Furthermore, if a buyout is ordered, it is not that Muthu group will be thrown out on the streets without any money. The buyout will be of the value of their

shareholding, which will be substantial, and Muthu group will be free to carry on their business activities elsewhere or can always invest it. Even Mr.Dwarkadas has not contended that Muthu and his family will be on the streets. The next reason is that no prejudice will be caused to Nafan and Lesaffre if they are directed exit because they are running various other companies worldwide. If SAF Yeast was a joint venture in the area in which Nafan and Lesaffre have expertise, they cannot be ordered to be exited from SAF Yeast simply because they have other companies in other developing countries. In fact, it would strengthen the case of Nafan and Lesaffre that they should be allowed to run the Company since they have expertise and experience in running various companies in other developing countries. Then the Board has brought in the intention of Nafan and Lesaffre while executing the MOU to order the buyout, which aspect I have already dealt with. Equally untenable is the ground that since Nafan and Lesaffre are based in Europe, it is better that an Indian runs the Company. The joint ventures between Indian entities with a foreign one now common. Even though Nafan and Lesaffre are based outside India, they can always have local nominee directors and such other staff who are based in India. If buyout is to be ordered on this ground then most of the joint ventures in India will be in serious peril.

133. As regards the government of India not allowing Lesaffre to acquire 100 per cent shareholding, a specific query was put to all the learned counsel including the Union of India and nothing has

been shown that there is any embargo as contemplated by the Government of India. Policy documents have been placed on record by Mr.Samdani, the learned Senior advocate.

134. One more aspect, which has been contested that is the name of SAF Yeast. According to De Vitre, word 'SAF' is linked to Nafan/Lesaffre continuing as a shareholder and in case Nafan is ordered to exit, the Company will lose its name, which will result in substantial loss of goodwill for SAF Yeast. I find that in spite of making the submission before the Board regarding loss of good will by loss of name 'SAF', at the time of ordering buyout, the Board has not referred to it at all. In the Participation Agreement of the year 1991, the parties have agreed that SAF Yeast will use the term 'SAF' only with the consent of Lesaffre and Nafan and if the share of Nafan and Lesaffre drop below a particular limit, the word 'SAF' will be deleted. It is the contention of Muthu group that the phrase 'SAF' is not derived from Lesaffre but from a Hindi term and it is not much of importance. However, the clause in the Participation Agreement cannot be ignored. The Board has also noted that Lesaffre is a world leader in manufacturing of yeast. Phonetically SAF does seem to have been derived from Lesaffre. The name, which indicates that SAF Yeast is a part of one of the world leaders in the yeast business, will be no doubt create substantial goodwill. This aspect is important while deciding buyout.

135. One more aspect is about the technological and financial

assistance. There is no finding by the Board that Lesaffre did not extend any technological support at all. What the Board has emphasized is that since Muthu has vast experience in the field of market relating to the business of SAF Yeast, the Muthu group should be allowed to buy out the Nafan and Lesaffre. However, this finding is contrary to the Board's own finding earlier that it is not inclined to accept contentions of either parties regarding their contribution as they had entered into joint venture for commercial purpose. The Board has then gone on to hold that in case Nafan is allowed to take over the management, it may not be capable of handling the situation. This is a rather simplistic view of the way large scale industrial operations are run. Merely because if Nafan takes over the control, does not mean that it will terminate all the existing staff. Professionals manage the business nowadays. Though majority shareholders are based out of India, a professional staff can manage the day-to-day basis. Though the expertise of Muthu may not longer be available but that does not mean that Nafan and Lesaffre cannot carry out affairs of the Company by employing competent professionals. To my mind all the grounds given by the Company Law Board to order a buy out in favour of Muthu group, are completely irrelevant.

136. Though the Board has wide powers under Section 402 of the Act, the power is not to be used arbitrarily and should be based on well-settled principles. If both the parties are competent to carry on the business, then the party who is proved guilty of

oppression generally ought not be rewarded, as it will be opposed to fairness.

137. One more principle is that a majority shareholder should not ordinarily be directed to exit. Mr.De' Vitre placed heavy reliance on the decision of the Apex Court in the case of **Dale & Carrington v. P.K.Prathapan**⁴⁹. He also relied upon the decision of the Calcutta High Court in the case of **Tea Brokers v. Hemendra Prosad Barooah**⁵⁰. He submitted that the Apex Court in the case of **Dale & Carrington** (*supra*) and the Calcutta High Court in the case of **Tea Brokers** (*supra*) have clearly indicated that a party should not be allowed to reap benefits of its own wrong. In the case of **Dale & Carrington** (*supra*) the ordinary rule that the majority should not be allowed to exit has been laid down as under :

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“24. Further, it was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company by an act of the company or by its Board of Directors mala fide, the said must ordinarily be considered to be an act of oppression to the said member. The member who holds the majority of shares in the company is entitled by virtue of his majority to control, manage and run the affairs of the company. This is a benefit or advantage which the member enjoys and is entitled to enjoy in accordance with the provisions of company law in the matter of administration of the affairs of the company by electing his own men to the Board of Directors of the company.”

4 9 (2005) 1 SCC 212.

50 (1998) 5 CLJ 463.

“25. A majority shareholder should not ordinarily be directed to sell his shares to the minority group of shareholder, if per chance through fortuitous circumstances or otherwise, the minority group of shareholders comes into power and management of the company. The majority shareholders by virtue of their majority will usually be in a position to redress all wrongs done and to undo the mischief done by the minority group of shareholders, as it will always be possible for the majority group of shareholders to regain control of the company so long as they remain in majority in the company by virtue of the majority. Except in unusual circumstances the majority group of shareholders, in my opinion, should never be ordered, or directed to sell their shares to the minority group of shareholders. An order directing the majority group of shareholders to sell his shares to the minority group of shareholders will not redress the wrong done to the majority group of shareholders and will not give him sufficient compensation or relief against the acts of oppression complained of by him, and, on the other hand, may add to his suffering and grievance and cause him greater hardship. Such an order, to my mind, will not further the ends of justice and indeed the cause of justice may be defeated.”

Mr. Dwarkadas contended that in none of the decisions cited by Mr. De' Vitre, more particularly, *Dale & Carrington* (*supra*), a MOU such as the present one was involved. This argument cannot be accepted. As far as MOU is concerned, I have already rendered my findings on the same. Furthermore, the basic proposition that normally majority should not be ordered to exit is not diluted in any manner.

138. There could possibly be an exceptional circumstance where

the minority could be directed to buy out the shares of the majority. Question is whether any exceptional circumstance in the present case is made out. I have already upheld the finding of the Board that the acts of oppression on the part of Muthu group were proved. I have also held that the grounds that only Muthu is competent, that his family will be on the streets, Nafan and Lasaffre are foreigners, are all completely irrelevant grounds. The Board taking lenient view of oppression of the Muthu group on the ground they acted on the advice of a senior advocate and secondly, that since Muthu group apprehended that some stringent decision would be taken against Muthu group in the meeting to be held in Paris, held that it was natural for Muthu group to act in haste. The Board also held that one aberration should not be the reason to severely reprimand any one whosoever.

139. To my mind, the Board has trivialized the acts of oppression and has termed them as one time aberration. The holding of meetings was not as innocent as it is made out to be. As far as the opinion of the senior advocate is concerned, the learned counsel of the parties after debating over it for some time agreed that it will not be appropriate to put in issue whether the opinion was right or wrong and restricted the argument only to the bonafides of the Muthu group. I have seen the opinion. The concerned senior advocate never stated in his opinion that Muthu group can hold meetings without informing Nafan and Lesaffre and they can transfer their share holding in an unfair manner. It is not a matter

of legal niceties but a matter of basic fairness in dealing with somebody who was once a long-standing partner, and the association was almost that of a quasi partnership.

140. The Board noticed decision of the Apex Court in the case of ***Kamal Kumar Dutta Vs Ruby General Hospital Ltd.***⁵¹, but has not given effect to the underlying principle laid down therein. Out of various decisions cited by the learned counsel for the parties, the case of ***Kamal Kumar Dutta*** (*supra*) comes closest on the terms of factual situations and therefore, the most relevant. The review of law on fairness taken by the Apex Court is already reproduced. In this case, two non-resident doctors, Dr.Kamal Kumar Dutta and Dr.Binod Prasad Sinha along with an Indian entrepreneur Sajal Dutta who was the younger brother of Dr.Kamal Kumar Dutta, (*supra*) incorporated Ruby General Hospital Limited, Calcutta as a Company in the year 1991. The hospital was set up with 88 per cent shareholding. 88 per cent were NRI shares and balance by the resident Indian. Dr. Kamal Kumar Dutta contributed 4.26 crores while his brother Sajal Dutta contributed 1.23 crores. The hospital was established in the memory of late wife of Dr.Kamal. Since he and Dr.Sinha were NRIs the company was being looked after by Dr.Sajal Dutta. After the hospital prospered, dispute arose between brothers. The attempts were made by the younger brother to throw out the elder brother and Kamal Kumar Dutta filed a petition under Section 397 and section 398 of the Act before the Board. The stand of the Company was that Dr.Kamal and Dr.Sinha

5 1 (2006) 7 SCC 613

had discontinued themselves as directors. The Apex Court noted that when the meeting where the resolutions were passed to oust Dr.Kamal from managing directorship and install Sajal Dutta, notices were not given. In paragraph 46, the Apex Court observed as under :

“46. The CLB has in minute detail discussed with regard to all the resolutions which we have already adverted to. No proper notice was served on the appellant No. 1 who is a major shareholder of the company or to appellant No. 2. If the Board meeting had been convened without proper service of notice on the appellants by the respondent No. 2 then such Board meeting cannot be said to be valid. Mr. Nariman however tried to explain various meetings and their subsequent confirmation by next board meeting to show that once the resolution of the subsequent meeting has confirmed the resolution of earlier meetings then those minutes stand confirmed irrespective of the fact that the appellants had been served or not. We shall highlight some of the instances. We would show that how subtle attempt was made to show that several notices were given to the major shareholders of the company at their local address in India knowing fully well that both the appellants are NRIs. The outstanding feature is that the appellant No. 2 ,Dr. Binod Prasad Sinha has been shown as an NRI but notice to him was sent at the address P.O. Hirapur, District. Dhanbad, Bihar and those notices have even been sent with very short interval. The meeting was convened on 13.4.1996 and the notice was sent on 8.4.1996. Likewise, another meeting was scheduled to be held on 5.9.1996 and the notice was sent on the very same day i.e. 5.9.1996, the date of meeting was 2.12.1996 and the notice was sent on 28.11.1996; the date of meeting was 12.3.1996 and the notice was sent on 8.3.1996. The meeting was to be held on 27.3.1996 but the notice was sent on 22.3.1996. Apart from this, it was known to the respondent- Sajal Dutta who is the brother of appellant No.

1 that whenever his brother comes to Calcutta he does not stay in his house yet the notices were sent to Jodhpur Park, Calcutta. This shows lack of probity on the part of Respondent No. 2 to somehow or the other oust his brother from the majority shareholding. Similarly, on the basis of such resolution, Dr. Binod Prasad Sinha, the appellant No. 2 was ousted from the directorship under Section [283\(1\)\(g\)](#) of the Act on the ground that he has not attended the meeting and he has no interest whatsoever. Similarly, the appellant No. 1 was also ousted in the meeting which was held on 7.2.1996 when another meeting scheduled to be held on 16.2.1996 and it was within the knowledge of Sajal Dutta that his brother was likely to attend the meeting to be held on 16.2.1996. But suddenly the meeting was held on 7.2.1996 and the appellant No. 1 was stripped off his chair as the Managing Director of the company. Hence, Sajal Dutta became the Managing Director in place of Dr. Kamal Kumar Dutta and the minutes of the said meeting dated 7.2.1996 were not brought forward in the meeting of 16.2.1996 in which Dr. K.K. Dutta was present. The IDBI nominee reported to have advised that the draft minutes of the meeting dated 7.2.1996 to be placed before the meeting dated 16.2.1996 which would correctly reflect Sajal Dutta as the Managing Director but it was not included in the meeting of 16.2.1996. However, Mr. Nariman tried to persuade us to show that there was some defect in drafting of minutes of the resolution and therefore, it was not reflected in the meeting dated 16.2.1996. It does not appeal to us. Be that as it may, when such an important decision was taken in the absence of the main promoter of the company to oust him from the Managing Directorship and to install Sajal Dutta in his place, it is the grossest act of oppression by the Board of Directors. Sometime after dispatching Dr. Dutta from the Managing Directorship most of the shares were cornered by the subsidiary companies of Sajal Dutta so as to acquire the management of the company and to alter material change in the management of the company. What can be more unfortunate than this? When a material change is brought about in the

management to the detriment of the interest of the main promoter it is squarely covered under Section [398\(1\)\(b\)](#) of the Act. The company which is floated by the elder brother and which has been run by the younger brother in the absence of the elder brother the younger brother manages the whole company and that the Managing Director is totally ousted and shares are being cornered substantially so as to have full control of the company, is oppression being squarely covered by Section [397\(1\)\(b\)](#) of the Act.”

(emphasis supplied)

The above-mentioned passage clearly shows that the Apex Court strongly disapproved of a conduct of taking an important decision in the absence of a main promoter to oust him from directorship. The Apex Court noted that it was the “*grossest act of oppression*” and “*could not be more unfortunate.*” In this case, younger brother knew that whenever the elder brother came to Calcutta he did not stay in his house yet the notices were sent to him at that address. What the Board has trivialized as a onetime aberration is in fact the grossest act of oppression, according to the Apex Court.

141. Mr.Dwarkadas contended that in case of ***Kamal Kumar Dutta*** (*supra*) there was no MOU neither there were any articles, which did not mandate a notice nor in the past notices were given. None of these arguments have any substance. As regards the MOU and the Articles, I have already rendered my findings. The question is of probity and fairness. Muthu group fully knew that meeting is to be held in Paris. Muthu group consciously did not give notice to Nafan and Lesaffre as they wanted to transfer their share holding

behind their back and a clear plan was hatched for that purpose. Even assuming that they did so as a pre-emptive action that does not excuse taking law in their hands. They could have approached the Board or the civil court for necessary action. With full knowledge that Lesaffre and Nafan are not agreeable to abide by the MOU a meeting was held, duplicate share certificates were issued and shares were transferred at the valuation, which was not acceptable and fundamentally wrong. This is not a onetime aberration but a clear calculated act of grossest oppression. It may be that in the past notices were not given but never before stage of exit in the company had arisen. It was the most important decision to be taken in the entire existence of the company. After having successfully gone through the plan of usurping the share holding of a majority group, detailed justifications advanced to cover up the conduct, which on the face of it, lacks in fairness. Taking law in own hands cannot be termed as a normal human behaviour, as the Board has observed. If this is tolerated, it will create serious uncertainties for joint ventures and leads to complete lawlessness, as one group will simply transfer share holding of others to themselves without notice.

142. The dispute has to placed on a larger canvas. The government of India encourages inflow of foreign investment. One of the ways is setting up collaborations and joint ventures with foriegn partners. Such joint ventures are common in the age of globalization. The economic policy Indian government pursues needs the business climate in India to be stable and supportive to

investments, collaborations, and joint ventures. The Board cannot be oblivious to these wider issues when it passes orders of buyout in respect of joint ventures between an Indian resident and a foreign collaborator. It is of utmost importance that the atmosphere of trust is created between the collaborators. It is also of importance that any person seeking to do business in this country is assured that the rule of law is followed and grossly unfair conducts are not tolerated. If the acts such as the one perpetuated by Muthu group, are not corrected, it will send wrong signals in the international business community. It will reflect negatively on the general level of honesty and rule of law.

143. In the case of *Intesa Sanpaolo SPA* (supra), this Court observed as under :

*“66. The Company Court may in appropriate cases consider the larger public interest. For instance, such criterion has effect on production, markets, workers and investors. But equally important considerations are of commercial morality, national prestige and need to instill confidence in international commercial transactions. Post liberalization Indian companies have engaged in large scale commerce and financial dealings with the banks and companies abroad. Finances are advanced to the Indian companies by foreign investors. If the conduct such as the one exhibited by the Respondent Company, is condoned purely on the ground of public interest, it may protect this Company but will send a wrong signal to the investors and lenders all over the world. Investors will be reluctant to advance capital even to commercial solvent and honest companies. The division bench of Delhi High Court echoed similar sentiments in the case of *SRM Exploration Pvt. Ltd. vs. N & S & N Consultants S.R.O.*, as under :*

“12. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/ guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions.”

This is the larger public interest which goes beyond the interest of trying to protect the Respondent Company on the ground of repercussions of the admission of the admission of the petition.

67. Before I conclude, I must state, shorn of all legal niceties, that there is no manner of doubt that amounts were guaranteed to be repaid to the Petitioner by the respondent company. Respondent has resolutely refused to pay it back inspite of assuring to do so many times earlier. Absolutely nothing is placed on record to even hint that the Respondent Company does not owe the money to the Petitioner. Any other creditor would be as a right entitled to ask for admission of the petition against such a company. If so then why the Petitioner be kept away from this right, its only fault being that it lent the monies outside India and filed a suit for recovery of the same in the Court where the transaction took place. To deprive the Petitioner will encourage Indian companies to be dishonest in their international dealings. With globalization of trade and investments, cross border flow of capital and the dependence of the country's economy on international commerce, the company court needs to be alive to the changing commercial and economic realities, and exercise its discretionary powers accordingly.”

(emphasis supplied)

144. Nafan has pressed for the buyout in its favour. It has requested that any reputed valuer be appointed and they are ready to buy-out the shares of Muthu Group. On behalf of Muthu Group, it is contended that their civil suit is pending and if buyout is ordered in favour of Nafan now, then it would become 100 percent shareholder of SAF Yeast. If later the suit is decreed in favour of Muthu Group, then Muthu Group will become 51 percent shareholder and Nafan will become 49 percent shareholder, which is impracticable. It was also contended that by this methodology the MOU would be kept aside. I am not impressed by these submissions on behalf of Muthu Group. If the meetings were held in legal, proper, and fair manner, Nafan and Lesaffre would have put-forth their stand on MOU that they were not ready. Muthu Group would in normal circumstances would have filed a civil suit to enforce the MOU. Muthu Group would have sought an injunction against Nafan not to transfer the shareholding to anyone else. When Muthu Group apprehended coercive action on the part of Nafan, they could have invoked jurisdiction of the Board and the Board would have issued appropriate direction if case was made out. The Muthu group did not take any such steps expected of a law-abiding citizen.

145. The right in favour of Nafan as a majority shareholder to buy-out the oppressive minority is established right now. The right

of Muthu Group is based on the MOU which will have to be agitated in Civil Court. Grant of specific performance of an agreement is discretionary. Therefore, the right in favour of Muthu Group has not fructified yet to defeat the right which has accrued right now in favour of Nafan.

146. There is however one more aspect. I must also keep in mind the interest of SAF Yeast. If future uncertainties are avoided it will be good for SAF yeast. If future of SAF Yeast can be made litigation free, then I will explore that option first. That option I will rank higher than the right of Nafan for buyout at present. However, if that is not being secured then right in favour of Nafan will have to be given effect to. I say so because after buyout is granted in favour of Nafan, litigation will not end as the will suit goes on. Nafan has shown that it is not averse to a competitive bid, though it is their alternate submission. Therefore, if Muthu group withdraws the civil suit and undertakes not to rely on the MOU, then the litigation can be put an end to by a bid. Then if a competitive bid is held, litigation free future can be secured for SAF yeast. However, if Muthu group is not ready and this object is not being achieved then buyout in favour of Nafan will have to follow. I am, therefore, of the opinion that, before ordering a buy-out in favour of Nafan, possibility of a forward competitive bid be explored. That way, both the parties will make a competitive bid and one who will sell out, will get a fair value. It will also put an end to the litigation once for all and a single group can then manage the company. It will be in benefit of Nafan also as the bidding will take place

without any future uncertainty and it is Nafan itself, which has suggested auction as an alternate mode. This will however depend on the undertaking of the Muthu group. Otherwise, I have already concluded that there can be no buyout in favour Muthu group on a fixed valuation.

147. For the purpose of valuation of shares, it will be most appropriate that today's date is taken as a reference. The order could thus be in two steps. Part I will be the forward competitive bid for which Muthu Group will have to withdraw the civil suit they have filed and not take any steps based on MOU henceforth and convey its acceptance within a particular period .If such willingness is not shown in the stipulated period, then Part II of the order regarding buy-out will come into effect.

148. An Administrator will have to be appointed for this exercise so also a Chartered Accountant. As regard the actual modalities for both forwarding competitive bidding and the buy-out, Mr.De' Vitre has handed over a broad outline as regards the procedure to be adopted for both the options. Having found the modalities to be satisfactory, I propose to adopt them. Mr.De'Vitre has sought appointment of a retired judge as an Administrator. Board has suggested name of Justice J.N.Patel, retired chief justice of Calcutta High court as the Administrator. As regards the Chartered Accountants, the parties have not indicated any choice. Nafan has left it to the court. I am of the opinion that M/s Ernst and Young can be appointed as the Chartered Accountants. They are an

experienced firm and nothing is shown that they are disqualified to carry out the task in respect of SAF yeast.

CONCLUSION

149. The conclusion in short is as follows. The appeal filed by Lesaffre is maintainable. The petition filed by Nafan was rightly not dismissed by the Board on the ground of suppression of facts. The declaration given by the Board that MOU is valid, effective, and enforceable document and its terms are binding, cannot be sustained as it is beyond the jurisdiction of the Board, and needs to be agitated in the suit, which is pending. *Prima facie*, no unquestionable intention can be culled out from the MOU. The Board meetings held on 29 January 2009, 23 May 2009, and 25 May 2009 and the resolutions passed therein, are invalid, illegal, and oppressive, so also the issuance of duplicate share certificates. The Board has rightly discarded the valuation report and the reliance upon the same by Muthu Group is an act of oppression. The comments made by the Board on the valuation report, were justified. The direction of the Board to Muthu Group to rectify register of SAF Yeast by restoring the shareholding of Nafan and Lesaffre is valid and proper. The direction given by the Board to Nafan and Lesaffre to transfer their shareholding to Muthu Group is not sustainable and has to be set aside. Nafan is entitled to a buyout as prayed for in its petition. However, it will be in the interest of SAF yeast that the litigation ends and if Muthu group

agrees to withdraw the suit and undertake not file further proceedings based on the MOU then the dispute can be put an end to by holding a forward competitive bid. If Muthu Group is not agreeable then buyout in favour of Nafan will follow. For overseeing the two options, as suggested by the Board, Justice J.N.Patel is appointed as an Administrator. M/S Ernst and Young is appointed as Chartered Accountants to carry out the valuation. A regards the modalities for holding the auction and the buy out, the modalities suggested by Nafan are proper and can be adopted.

O R D E R

A. The declaration by the Board that the MOU dated 23 January 2009 is valid, effective and enforceable document and the terms thereof are binding upon the Petitioner and Lesaffre Group, **is quashed and set aside in light of what is observed above.**

B. The declaration by the Board that the Valuation Report prepared by Sharp and Tannan is biased, partial and in contravention of the statutory guidelines and rules to carry out the valuation of shares of a going concern and the direction to set it aside, **is confirmed.**

C. i) The declaration by the Board that the Board Meeting held on 29 January 2009 is invalid and illegal, **is confirmed.**

ii) The declaration that the Resolutions passed in the Board Meeting held on 29 January 2009 are not oppressive, **is quashed and set aside.**

iii) It is declared that the Resolutions passed in the Board Meeting held on 29 January 2009, **are oppressive.**

D. i) The declaration by the Board that the Board Meetings held on 23 May 2009 and 25 May 2009 are non-est, illegal and void, **is confirmed.**

ii) The direction by the Board that the Resolutions passed in both these meetings are set aside being illegal and oppressive to the Nafan and Lasaffre, **is confirmed.**

E. The directions by the Board setting aside the transfer of shares in favour of the A.M.Muthiah and canceling the duplicate shares issued in favour of the A.M.Muthiah, are **confirmed.**

F. The direction by the Board that the shareholding of Nafan and Lasaffre stands restored, **is confirmed.**

G. The direction by the Board to Muthu Group to rectify the Register of Members of the SAF Yeast as per law, **is confirmed**

H. The direction by the Board to Nafan and Lasaffre to transfer the 80,722 shares held by them to the Muthu Group

proportionately to their respective shareholdings, **is quashed and set aside.**

I. If within six weeks from today Muthu group withdraws the civil suit and associated proceedings filed by them and files an undertaking on affidavit in the registry of this court that they will not take any proceedings on the basis of the MOU in question, then Part-I of this order will come in operation. If the above mentioned steps are not taken by Muthu Group within the stipulated period as above, Part-II of the order will come into effect forthwith and prayer clause (a) sought for by Nafan in its company petition will stand granted on the terms mentioned in Part II.

J. Interim orders operating in these appeals shall continue for period of six weeks from today.

PART – I

a. The Board of Directors, including the powers of the Managing Director, is immediately and completely suspended.

b. Mr. Justice J.N. Patel, Retired Chief Justice of Calcutta High Court is appointed as an Administrator on the same emoluments and immunity, as directed by the Board with the powers of the Chairman of the Company's Board of Directors, and the Managing

Director, to supervise the functioning of the Company on an interim basis until the process of sale/purchase is complete; upon appointment of the Administrator, Respondent Nos.2-6 in the petition (Muthu Group) shall forthwith deposit with the Administrator signed, duly filled in but undated share transfer forms along with the original share certificates in regard to all the shares held by them in the Company.

c. Until the process of sale/purchase is complete, the powers of the Board of Directors shall be vested in an equal number of Directors/alternate directors nominated by Nafan and the Muthu Group (as one group) with the Administrator holding the casting vote, the Directors/alternate Directors nominated by Nafan and the Muthu group shall be entitled to attend meetings of the Board and/or general meeting of the Company; all such meetings, whether meeting of the Board or General Meetings, if any, shall be convened and presided over by the Administrator alone.

d. Until the process of sale/purchase is complete, the SAF Yeast and the Administrator shall not (except in the ordinary course of business), (a) sell or otherwise dispose of or encumber the Company's assets, (b) incur liabilities, (c) distribute funds from the Company, (d) enter into any contracts to be performed for a period longer than six months for or on behalf of the Company, (e) change the nature of the business of the Company, (f) alter or increase the share capital or issue further shares of the Company, or (g) enter

into any related party transactions for or on behalf of the Company.

e. The Administrator shall be entitled to appoint ,at an appropriate monthly compensation to be paid by the Company as the administrator deems fit, an independent, suitably qualified person conversant with the yeast industry to assist him in the functioning of the Company.

f. Nafan shall be provided complete and unimpeded access within seven days from the date of the order to the statutory and other records books and all the relevant documents as indicated in the Schedule to Note on Modalities given by Nafan, and shall be allowed full and unimpeded access to the Company's industrial plants.

g. Access shall also be made available to any such Chartered Accountant nominated in writing by Nafan and the said access shall be provided continuously on a day-to-day basis for a period of forty five days from today.

h. After the said forty five days of Nafan being given continuous access as provided above, a continuing competitive bid auction shall take place within fifteen days and the bidding shall be only between Nafan and the Respondent Nos.2 to 6-Muthu Group as one. The party bidding the highest cash amount for 100% of the shares under the auction shall be entitled to buy 100% of the

shares of the Company with the successful bidder getting credit for its own shares (either 51% for Nafan or 49% for the Muthu Group-Respondent Nos.2 to 6); the process of auction shall be conducted under the supervision of the Administrator.

- i. The successful bidder will deposit in Court by Bankers cheque (Demand Draft) the amount payable, along with all applicable taxes, within fifteen business days after being declared by the Court as the successful bidder.
- j. On such payment, the shares will be transferred to the buyer, the Register of Members of the Company shall be updated accordingly, the Administrator will be replaced by the board of directors appointed by the successful bidder, and payment will be released by the Court to the seller.
- k. If the successful bidder does not deposit in Court the amount payable within fifteen business days after being designated as the successful bidder, the other party will be entitled to buy the shares of the defaulting party for a price equal to the higher of either Euros 28 Million (i.e. Rs.196,83,79,380/- at the current rate of exchange), or the amount of the next highest bid (with the unsuccessful bidder getting credit for its own shares – either 51% for Nafan or 49% for the Muthu Group Respondent Nos.2 to 6) less a twenty-five per cent reduction, by depositing the amount payable in Court within fifteen business days after default.

l. Upon the completion of the exercise of transfer of shares and its consequent registration in the Register of Members of the Company, the functioning of the Administrator appointed shall stand terminated automatically and at this time, the process of sale/purchase will be deemed complete.

m. The currency for any payments made hereunder shall be Indian rupee.

n. The Nafan as well as the Muthu Group -Respondent Nos.2 to 6 shall fully cooperate in the completion of all formalities, including signing and execution of share transfer forms, compliance with any and all necessary requirements under the Company law to effect the transfer of their shares in favour of the successful bidder under the auction.

PART – II

a. M/s.Ernst and Young, Chartered Accountants are appointed to value the 49% shares of the Company held by Respondent Nos.2 to 6 Muthu group including, if required, a forensic audit/ due diligence of the records, books and accounts of the Company within three months from today.

b. For the purpose of (a) above, the Chartered Accountant so appointed shall convene a preliminary meeting with Nafan and the

Muthu group-Respondent Nos.2 to 6 to decide the valuation methods and both parties shall be entitled to make recommendations/suggestions in writing to the Chartered Accountant in that regard.

c. The appointed Chartered Accountant shall determine the fair market value of the Muthu group - Respondent Nos.2 to 6's 49% shareholding interest, as on today, using such generally accepted valuation methodologies for valuing a going concern as the Chartered Accountant deems fit and proper in the facts and circumstances of the present case, after hearing the parties.

d. Nafan shall be provided complete and unimpeded access within seven days from the date of the order to the statutory and other records books and accounts of Saf Yeast, and such other relevant documents as indicated in the Schedule to Note on Modalities given by Nafan and shall be allowed full and unimpeded access to the industrial plants.

e. The Board of Directors, including the powers of the Managing Director, is immediately and completely suspended.

f. Mr.Justice J.N. Patel, Retired Chief Justice of Calcutta High Court is appointed as an Administrator on the same emoluments and immunity as directed by the Board, with the powers of the Chairman of the Company's Board of Directors, and the Managing

Director, to supervise the functioning of the Company on an interim basis until the process of sale/purchase is complete; upon appointment of the Administrator, Respondent Nos.2-6 in the petition (Muthu Group) shall forthwith deposit with the Administrator signed, duly filled in but undated share transfer forms along with the original share certificates in regard to all the shares held by them in the Company.

g. Until the process of sale/purchase is complete, the powers of the Board of Directors shall be vested in an equal number of Directors/alternate directors nominated by Nafan and the Muthu Group (as one group) with the Administrator holding the casting vote, the Directors/alternate Directors nominated by Nafan and the Muthu group shall be entitled to attend meetings of the Board and/or general meeting of the SAF Yeast; all such meetings, whether meeting of the Board or General Meetings, if any, shall be convened and presided over by the Administrator alone.

h. Until the process of sale/purchase is complete, the SAF Yeast and the Administrator shall not (except in the ordinary course of business), (a) sell or otherwise dispose of or encumber the Company's assets, (b) incur liabilities, (c) distribute funds from the Company, (d) enter into any contracts to be performed for a period longer than six months for or on behalf of the Company, (e) change the nature of the business of the Company, (f) alter or increase the share capital or issue further shares of the Company, or (g) enter

into any related party transactions for or on behalf of the Company.

i. The Administrator shall be entitled to appoint (at an appropriate monthly compensation to be paid by the Company as the administrator deems fit) an independent, suitably qualified person conversant with the yeast industry to assist him or her in the functioning of the Company.

j. Upon the completion of the exercise of valuation, the valuation report, including the Chartered Accountant's opinion of the fair market value of the Respondents' shareholding interest, shall be delivered to the Court, Nafan and Muthu group, and within a period of thirty days after receipt, Nafan shall deposit by Bankers cheque (Demand Draft) payment as per the valuation of the Chartered Accountant which will then be transferred by the Court to the Respondent Nos.2 to 6 in the appropriate amounts based on their shareholding interest.

k. Against payment by the Administrator to the Respondent Nos.2 to 6: (a) Respondent Nos.2 to 6–Muthu group's 49% shareholding shall be transferred in favour of Nafan and the Muthu group-Respondent Nos.2 to 6 shall fully cooperate in the transfer of the said shares, including signing and executing share transfer forms, complying with any and all necessary requirements under the Company law; (b) appropriate entry shall be made in the Register of Members of the Company; (c) the mandate of the

Administrator shall stand automatically terminated after he hands over the original share certificates and duly executed and signed share transfer forms (given pursuant to above clause to Nafan, and (d) the process of sale/purchase will be deemed complete.

L. The currency for any payments made hereunder shall be Indian Rupee.

150 All the pending company applications are disposed of in terms of above.

151 Accordingly, Company Appeal No.22 of 2015 filed by M/s.Sharp & Tannan and Company Appeal No.23 of 2015 filed by Muthu group, stand dismissed. Company Appeal No.21 of 2015 filed by Nafan B.V. and Company Appeal No.24 of 2015 filed by Lesaffre Et CIE, stand disposed of on above terms.

152. No order as to costs.

(N. M. JAMDAR, J.)