

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

Judgment reserved on 18th November, 2014
Judgment delivered on: 02nd March, 2015

+ **CO.A(SB) 4/2007**

M/S SURYA ESTATES (P) LTDAppellant

Through Mr. Ashok Bhalla and Mr. Rajeev Kumar,
Advocates with Mr. R.K. Malhotra in
person.

versus

SATISH KUMAR BHARTI & ORSRespondents

Through Mr. Krishnendu Datta with Mr. Abhinav
Hansaria, Advocates. Mr. Ankit Khurana,
Advocate for OBC.

and

+ **CO.A(SB) 8/2007 & CA No.1923/2014**

SHRI SATISH KUMAR BHARTI & ORS.Appellants

Through Mr. Krishnendu Datta with Mr. Abhinav
Hansaria, Advocates.

versus

SURYA ESTATES PVT. LTD AND ORS.Respondents

Through Mr. Ashok Bhalla and Mr. Rajeev Kumar,
Advocates for respondent No.1 with
respondent Mr. R.K. Malhotra in person.
Mr. Ankit Khurana, Advocate for OBC.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J

1. Both these cross appeals arise out of order dated 21st December, 2006 passed in a petition under section 397 & 398 of the Companies Act, 1956, (hereinafter referred to as the Act) filed by Mr. Satish Kumar Bharti and Ors. (hereinafter referred to as the Bharti Group for convenience) against M/s Surya Estates Pvt. Ltd. (hereinafter referred to as the Company) and Other and are thus being disposed of by a common order.

2. The Company Law Board (CLB for short) by the impugned judgment has declared that the Bharti Group continues to be member of the Company and has directed the rectification of the register of members by restoring the names of the Bharti Group as members. The CLB has further held that there is no nexus between the shareholding and the entitlement to space in the building and the entitlement to space did not arise out of the membership in the Company and was purely a contractual matter and as such could not be agitated in a petition under section 397 and 398 of the Act but had to be agitated in a civil court. The CLB has further held that it is for the Oriental Bank of Commerce

(hereinafter referred to as the Bank), the tenant in LG 1 to LG 4, to decide as to whom the rent kept in deposit should be paid. The CLB has further held that since the Bharti Group holds 1/3rd shares, Shri Satish Kumar Bharti will continue as a Director and the Respondents (in the CP before the CLB) shall not take any action to remove him from the Directorship. The CLB further directed that all Bank operation should be joint by at least two Directors. The CLB has given an option to the Bharti Group, if they are so interested, to sell their 1/3rd shares on a fair valuation.

3. For the purposes of disposal of the appeal, it would be expedient to examine the brief facts leading to the impugned judgment.

4. Surya Estates Pvt. Ltd., the Company, was incorporated in May 1983. Immediately thereafter, it purchased plot no. 30 and 31, Paschim Vihar, Delhi for developing the said property on a commercial basis to be known as Surya Towers.

5. As per the Bharti Group, the Shareholding of Mr. S. K. Bharti, Mr. A. N. Malhotra (father of Mr. R.K. Malhotra) and Mr. K.R. Gupta and their respective family members was adjusted to 1/3rd each. It was agreed that each group would be entitled to a certain share in the property in lieu of

its rights as equal 1/3rd shareholder/partner in the project. One basement and four floors were constructed comprising of 56 flats/office spaces. Some of the flats so constructed were, with mutual agreement/consent divided and allotted to each of the three groups.

6. It is an admitted position that the flats/spaces were allotted to the three groups, their family members and outsiders after executing Builder's Agreement for the flats/spaces.

7. As per the Bharti Group full payments were made for purchase of the flats, possession letters and "no due certificates" were issued by the Company at the time of handing over of physical possession. It is contended that though each group was allotted 1/3rd equal area in the project, each of the group had the option to purchase more area on payment of the consideration. The Bharti Group claims to have exercised the rights and purchased more area. The Bharti Group claims to have paid the entire consideration amount/dues before the date of execution of the Builder's Agreements and the same was duly reflected in the Balance Sheets pertaining to the year 1993 – 94 and subsequent years thereafter. It is contended that the lease deed with DDA did not permit the Company to sell the flats, thus it was decided that the sale be shown as allotment and

Builder's Agreements were executed. Amongst others, office space LG 1 to LG 4 was allotted to the Bharti Group.

8. Office space LG 1 to LG 4 was rented out to the Oriental Bank of Commerce (hereinafter referred to as the Bank) and tripartite registered lease deeds were entered between the Bank, the Bharti Group and the Company.

9. As per the Bharti Group, disputes arose between the parties after Mr. A. N. Malhotra resigned and his son Mr. R.K. Malhotra became a Director. It is contended that Mr. R.K. Malhotra unilaterally wrote to the Banks of the Company for singly operation of the Bank accounts by him. He sought to cancel the allotment of the Bharti Group of the offices spaces LG 1 to LG 4.

10. On account of the above and other alleged acts, the Bharti Group approached the CLB by a petition under section 397 & 398 of the Act. Pending adjudication of the said petition, the Board of the Company is alleged to have removed the names of the Bharti Group as members of the Company.

11. The Company through Mr. R.K. Malhotra has filed the appeal (Co. A. (SB) 4 of 2007) impugning the judgment in so far as it restores the names of the Bharti Group as members of the Company and directs that the Bank

operations be joint and further directs that Mr. S.K. Bharti continues to be a Director of the Company and shall not be removed as a Director.

12. The Bharti Group has filed the appeal (Co. A. (SB) 8 of 2007) impugning the judgment in so far as the CLB has upheld the appointment of Mr. R.K. Malhotra as the Managing Director and held that the cancellation of the agreements pertaining to LG 1 to LG 4, being a contractual matter, cannot be agitated in a petition under section 397 & 398 of the Act.

CO. A. (SB) 4 OF 2007 (APPEAL OF THE COMPANY)

13. Learned Counsel for the Company has contended that the instruments of transfer of shares in favour of the Bharti Group were blank and as such, the shares could not have been transferred in favour of the Bharti Group. It is contended that the transfer was contrary to the provisions of section 108 of the Act and as such, the Board of Directors cancelled the transfers made in favour of the Bharti Group. He relied upon the decision of the Supreme Court in *CLAUDE LILA PARULEKAR VS. SAKAL PAPER PVT. LTD 2005 (11) SCC 73* to contend that Section 108 of the Act is not a mere formality and non compliance therewith at the time of the transfer of shares cannot be cured subsequently and the

registration of shares invalidly transferred cannot be ratified by the board of Directors. He further submitted as there was no valid transfer of shares in favour of the Bharti Group, they could not be treated as members of the Company and the direction of the CLB that Mr. S.K. Bharti continues as a Director of the Company and that there shall be joint operation of the Bank account is erroneous and liable to be set aside.

14. The CLB in the impugned Judgment has held that during the pendency of the proceedings before the CLB, the Company had cancelled the membership of the Bharti Group without even seeking the leave of the CLB. The CLB has noticed that it was an admitted position that the Bharti Group had become shareholders of the Company on acquiring the shares of the erstwhile shareholders by transfer. It is further noticed that even in the reply to the petition, the Company had not challenged that the Bharti group were not members of the Company. The CLB has held that though the copies of the instruments of transfers, enclosed by the Bharti Group alongwith the rejoinder, were blank, it did not lead to the conclusion that at the time of lodging the shares for registration of transfer, the petitioners had lodged blank and unstamped instruments. The CLB has held that the Company has recognized the Bharti Group as shareholders for over 20

years and the removal was done during the pendency of the petition without relying upon the original documents. The CLB has thus held that the action of removal as members was malafide and grossly oppressive.

15. I do not find any infirmity with the view taken and the findings returned by the CLB. It is admitted by Learned Counsel for the Company that the Company did not possess in its records the original of the instruments of transfer submitted to the Company by virtue of which the Bharti Group acquired their shares. It is admitted that the action of removal has been taken only based on the photocopy of the instruments of transfer filed alongwith the rejoinder.

16. The transfer of shares in favour of the Bharti Group was made by the Company in or around the year 1984. The action for removal has been taken after over 20 years. During this period of 20 years, the Bharti Group was duly recognized as member and they exercised all the rights of a member. It is the stand of the Company that it does not possess in its records the original instruments of transfer as on date. The action of removal has been taken by the Company only based on photocopy of the instruments of transfer. There is nothing on record to show that when the instruments of transfer were submitted to the Company and the shares were transferred in favour of the Bharti Group, the

instruments were blank and unstamped. The transfer of shares in favour of the Bharti Group was complete and duly recorded. Neither the Company nor the Board of Directors of the Company ever questioned the transfer of shares in favour of the Bharti Group.

17. The decision of the Supreme Court in *CLAUDE LILA PARULEKAR (SUPRA)* is not applicable in the facts of the present case. In the said case, it was an admitted position that at the time when the instrument of transfer was lodged with the Company, it was not signed by all the transferors and in those circumstances, the Supreme Court held that there was non-compliance with section 108 and a subsequent ratification would not cure it. However, in the present case, there is no such admission that the instruments of transfer when submitted to the Company were blank and unstamped. The transfer was duly recorded in the year 1984. The Company cannot be permitted after a lapse of over 20 years to contend that the documents were presumably blank more so when the Company does not even possess the originals. In the absence of the originals being produced, it has to be presumed that the documents when submitted to the Company were complete in all respects and the Company has duly transferred the shares. Nothing to the contrary has been shown except a photocopy, which is not sufficient to

conclude that the provisions of section 108 were not complied with, when the instruments of transfer were submitted to the Company and when the shares were transferred in favour of the Bharti Group.

18. The cancellation of shares is clearly malafide and has apparently been actuated on account of the litigation. It is clearly oppressive of the rights of the Bharti Group. The action of the Company in removing the Bharti Group from the membership of the Company has been correctly set aside by the CLB. The impugned order on this count cannot be faulted.

19. Since the Bharti Group hold 1/3rd shares, it is entitled to a proportionate representation. Admittedly, since the very inception of its membership, the Bharti Group has had proportionate representation. There are three groups, the Bharti Group represented by Mr. S.K. Bharti, the Malhotra Group represented by Shri R.K. Malhotra and the Gupta Group represented by Shri K.R. Gupta. Each one of the groups hold 1/3rd shares of the Company and since a long time each has had 1/3rd representation on the Board of the Company. In these circumstances, the CLB cannot be said to have erred in directing that each group would be entitled to an equal participation on the board.

20. As there are serious disputes in respect of the functioning of the Company and there is distrust amongst the three groups, it would be in the interest of the Company and its shareholders that the Bank operation is carried out by at least two of the Directors. There is no thus infirmity in the CLB directing that the Bank operation shall be by two Directors jointly.

21. The appeal by the Company is thus liable to be dismissed.

CO. A. (SB) 8 OF 2007 (APPEAL OF THE BHARTI GROUP)

22. The challenge raised by the Bharti Group to the CLB upholding the appointment of Mr. R.K. Malhotra as the Managing Director, in my view, is not sustainable. The CLB has returned a finding of fact, that effective from July 1997, Mr. S.K. Bharti ceased to be a functional Director and from March 1998, Mr. R.K. Malhotra had been a functional Director having complete control and management of the affairs of the Company. The CLB has noted that even without the designation of the Managing Director, Mr. R.K. Malhotra had been discharging the functions of a Managing Director and has in these circumstances held that his designation as a MD with or without the knowledge and

consent of the Bharti Group could not be considered as an act of oppression.

23. I find no infirmity with the reasoning and finding of the CLB that as Mr. R.K. Malhotra had been acting as an MD and discharging all functions as Managing Director since March 1998 even without being so designated formally, then his being so designated clearly does not amount to an act of oppression.

24. Furthermore the other Director representing the third 1/3rd shareholders i.e. Mr. K.R. Gupta has not objected to the designation of Mr. R.K. Malhotra as a Managing Director. The appeal on this count is liable to be dismissed.

25. In my view the finding of the CLB that the cancellation of the agreements pertaining to LG 1 to LG 4 being contractual cannot be agitated in a petition under section 397 & 398 of the Act, in the facts of the present case, is not sustainable.

26. It is an admitted position that all the flats/spaces in the building have been sold by the Company by way of Builder's Agreements. The same manner of sale has been followed for sale of the flats/spaces to the three Directors, their family members and third parties.

27. The four Builder's Agreements in respect of the LG 1 to LG 4 are all dated 15th June 1994. The Builder's Agreements have not been denied by the Company. The Builder's Agreements record that the entire sale consideration has been paid by the allottees of the respective flats. The Balance Sheet of the Company as on 31.03.1995 read with the "Detail Schedule of License Fee Received till 31.03.1995" shows that the entire sale consideration for the said spaces has been received by the Company. The audited Balance Sheets as on 31.03.1995, 31.03.1996 and 31.03.1997 are signed by the three Directors representing the three groups. The Company has not denied the said balance sheets. The Builder's Agreement in favour of Mr. Satish Kumar HUF has been signed by Mr. K.R. Gupta the third Director. The said agreement also records that the entire sale consideration has been paid and "nil" amount is payable.

28. The Company by resolution of the Board of Directors dated 02.02.1998 consented to participate in the Lease Deed for "Bank Branch Premises" between the Oriental Bank of Commerce as a Lessee and the four allottees of the respective basement spaces as Lessor and the Company as Confirming Lessor. The resolution authorized Mr. S.K. Bharti of the Bharti Group to execute the tripartite Lease Deed on behalf of the Company. The said resolution is

signed by all the three Directors. The resolution is not denied by the Company, however by an undated letter issued by the Company (Annexure V @ 218), the said authority has been terminated and it is stated that Mr. S.K. Bharti is not authorized to sign any document singularly. The letter thus amount to an admission of the genuineness of the resolution dated 02.02.1998.

29. Tripartite Lease Deeds were executed on 26.03.1998. The Lease Deeds record that apart from four spaces in the Basement, space on the Ground Floor owned by the Company was also let out to the Bank. Part of the rental to be received by the Bharti Group for the spaces in the Basement was to be shared with the Company.

30. The Lease Deeds in respect of LG 1 to LG 4 record that the ownership of the spaces is with the Lessor i.e. the Bharti Group. The Lease Deeds further record that the purpose of letting to the Bank is “for running the Banking business”. Even the resolution dated 02.02.1998 records the Lease Deeds are for “Bank Branch Premises”.

31. Letters were written to the Bharti Group by the Company in or around May 2003 contending that only a part payment had been received by the Company till 08.05.1993 and further demanding balance payment failing which action

of cancellation of flat/space was threatened.

32. On 22.07.2003, letters were written to Bharti Group to the effect that it was noticed that the spaces were rented out to the Oriental Bank of Commerce for conducting commercial activity, which was against the byelaws of DDA. The Bharti Group was called upon to stop the misuse failing which action for cancellation was threatened.

33. By letters dated 25.08.2003, the office spaces were cancelled on the alleged grounds that the arrears of license fee was not paid and the leasing out to the Oriental Bank of Commerce was contrary to bye laws of DDA. The Company also called upon the Oriental Bank of Commerce not to pay the rent to the Bharti Group but to pay the same to the Company.

34. It is the settled law that in the exercise of discretion, the Directors have to act for the paramount interest of the Company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the Company and towards every shareholder. The Directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive. The action of the Directors have to be tested from three angles viz. (i) whether the Directors acted in the interest of the Company;

(ii) whether they acted on a wrong principle; and (iii) whether they acted with an oblique motive or for a collateral purpose.¹

35. The action of the Directors is liable to be set aside if the same is done oppressively, capriciously, corruptly or is in some other way mala fide.²

36. The Supreme Court of India in **SANGRAMSINH P. GAEKWAD V. SHANTADEVI P. GAEKWAD**, (2005) 11 SCC 314 laid down as under:

180. The expression “oppressive”, it is now well settled, would mean burdensome, harsh and wrongful. “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

¹ **Bajaj Auto Ltd. v. N.K. Firodia** [(1970) 2 SCC 550]

² **Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunhunwala** [(1962) 2 SCR 339 : AIR 1961 SC 1669]

Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. (See Bennet Coleman & Co. v. Union of India [(1977) 47 Comp Cas 92 (Bom)] and Syed Mahomed Ali v.R. Sundaramoorthy [AIR 1958 Mad 587 : (1958) 2 MLJ 259 : (1958) 28 Comp Cas 554] .) 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 analysing the materials brought on record 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 entire body of shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding up 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.

182. Mala fides, improper motive and similar other allegations, it is trite, must be pleaded and

proved as envisaged in the Code of Civil Procedure. Acts of mala fides are required to be pleaded with full particulars so as to obtain an appropriate relief.

183 The remedy under Section 397 of the Companies Act is not an ordinary one. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The acts complained of may either be designed to secure pecuniary advantage to the detriment of the oppressed or be a wrongful usurpation of authority.

(Underlining supplied)

37. It is a settled proposition of law that, it is not necessary that in every case the relief of winding up should be granted. It is an option with the Tribunal if it considers that in order to bring to an end the matters complained of, it can pass orders for winding up if it is just and equitable or it can pass such order as it thinks fit. It does not necessarily mean that in every case such winding-up order need be passed.³

38. The Supreme Court of India in ***V.S. KRISHNAN V. WESTFORT HI-TECH HOSPITAL LTD., (2008) 3 SCC 363*** referring to various judicial pronouncements laid down the

³ ***Kamal Kumar Dutta v. Ruby General Hospital Ltd., (2006) 7 SCC 613***

following principles to show as to what would constitute oppression:

(a) Where the conduct is harsh, burdensome and wrong.

(b) Where the conduct is mala fide and is for a collateral purpose where although the ultimate objective may be in the interest of the Company, the immediate purpose would result in an advantage for some shareholders vis-à-vis the others.

(c) The action is against probity and good conduct.

(d) The oppressive act complained of may be fully permissible under law but may yet be oppressive and, therefore, the test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is mala fide or for a collateral purpose, it would amount to oppression under Sections 397 and 398.

(e) Once conduct is found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put an end to such oppression is very wide.

(f) As to what are facts which would give rise to or constitute oppression is basically a question of fact and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact.

39. The Supreme Court in ***CHATTERJEE PETROCHEM V. HALDIA PETROCHEMICALS, (2011) 10 SCC 466*** referred to the earlier decision in ***SHANTI PRASAD JAIN VERSUS KALINGA TUBES LIMITED [AIR 1965 SC 1535 : (1965) 2 SCR 720]*** to hold that the law had not defined as to what would amount to “oppressive” for the purposes of Section 397 and it is for the courts to decide on the facts of each case as to whether such oppression exists which would call for action under Section 397. The conduct of the majority shareholders should not only be oppressive to the minority, but must also be burdensome and operating harshly up to the date of the petition.

40. The Supreme Court further in ***CHATERJEE PETROCHEM (SUPRA)*** referred to ***SHANTI PRASAD JAIN CASE (SUPRA)***, wherein it has been held that to consider whether the conduct of the majority shareholders was oppressive to the minority as members, it is required that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the Company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of

confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the Company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

41. When viewed in light of the principles as laid down by the Supreme Court in various judicial pronouncements, it is clear that the action of termination of the Builder's Agreements of the Bharti Group is clearly an act of oppression on the part of the Company.

42. The Company has sought to revoke only the agreements in favour of the Bharti Group. The Bharti Group has been singled out.

43. All the flats/spaces in the building have been sold by the Company by way of Builder's Agreements including to the three Directors, their family members and third parties. The Builder's Agreements in favour of the Bharti Group record that the entire sale consideration has been paid and the balance payable in nil.

44. The Balance Sheet of the Company as on 31.03.1995 read with the "Detail Schedule of License Fee Received till

31.03.1995” shows that the entire sale consideration has been received. The Balance Sheet for the year ending 31.03.1995 signed by the three Directors show that a sum of Rs. 35,62,558/- has been adjusted from the building fund as license fee recovered during the said financial year. The said amount tallies with the detail schedule of license fee recovered during the financial year 1994-1995. The statement includes the payments made by the Bharti Group towards purchase of their flats/spaces. The Builder’s Agreement in favour of Mr. Satish Kumar HUF has been signed by Mr. K.R. Gupta the third Director. The said agreement also records that entire sale consideration has been paid and ‘nil’ amount is payable. The Company consented to participate in the Lease Deeds for “Bank Branch Premises” between the Oriental Bank of Commerce as a Lessee and the four allottees of basement floor as Lessor and the Company as Confirming Lessor. The Lease Deeds record the ownership of the Bharti Group of the spaces besides recording the purpose of letting to the Bank for running the Banking business.

45. In the cancellation letters, no reference has been made by the Company to the payments reflected in the “Detail Schedule of License Fee Received till 31.03.1995” and the Balance Sheets as on 31.03.1995, 31.03.1996 and

31.03.1997, which have been signed by the Directors of the Company and also of the Builder's Agreements in favour of the Bharti Group that acknowledge that the entire sale consideration had been paid and that the balance payable was 'nil' and more so of the Builder's Agreement in favour of S.K. Bharti HUF that was signed by Mr. R.K. Gupta, the third Director.

46. The Builder's Agreements are sought to be cancelled without taking into account the records of payments and the fact that the Bharti Group was duly permitted by the Company to rent out the space in the Basement to the Bank for carrying out Banking operations and to open a branch in the said spaces and further of the fact that the Company was also receiving proportionate share in the rent from the Bank. No notice or threatened action from DDA for misuse has been relied upon by the Company.

47. The various steps taken by the Company and the sequence thereof clearly establish that the conduct was burdensome, harsh and wrongful and thus is clearly oppressive to the Bharti Group, which holds 1/3rd of the shares of the Company.

48. The CLB committed an error in holding that there was no nexus between the shareholding and the entitlement to

space in the building and the entitlement to space did not arise out of the membership in the Company and was purely a contractual matter and as such could not be agitated in a petition under section 397 and 398 of the Act but had to be agitated in a civil court. The CLB did not appreciate that the Bharti Group was not seeking any enforcement of right qua any entitlement to spaces in the building but was challenging the action of the Company in singling out the minority shareholders i.e. the Bharti Group and seeking to cancel the Builder's Agreements and directing the Tenant Oriental Bank of Commerce not to pay any rent to the Bharti Group. Even if assuming that there was no nexus between the shareholding and the entitlement to space in the building or the entitlement to space did not arise out of the membership in the Company, it would not make any difference to the burdensome, harsh and wrongful conduct of the Company and the other Directors in singling out the Bharti Group.

49. The CLB erred in not appreciating that the Company by its actions was seeking to deprive the minority shareholders of a valuable asset purchased by them from the Company. This action was being taken by the Company only against the minority and not against any other purchaser of flats/space. Even if the argument of the Learned Counsel for

the Company, that some records were not handed over by Mr. S.K. Bharti (as was raised with regard to the share transfer documents), was to be extended to the records with regards to the payment in the year 1994 as reflected in the “Detail Schedule of License Fee Received till 31.03.1995” and the Balance Sheets as on 31.03.1995, 31.03.1996 and 31.03.1997, the action would still be wrongful and oppressive as the “Detail Schedule of License Fee Received till 31.03.1995” reflects payment received from several buyers. The Company and the other Directors have not shown that any action has been taken against the other buyers whose names are reflected in the said statement. If the record *qua* the Bharti Group is not available, then how is it possible that the records of the other buyers of the same period are available? The Bharti Group has been clearly singled out. The order of the CLB to this extent is clearly not sustainable.

50. In view of the above, the action of the Company and the other Directors in cancelling the four Builder’s agreements dated 15th June 1994 in respect of LG 1 to LG 4 of the Bharti Group being wrongful, burdensome, harsh and oppressive is liable to be set aside.

RENTAL IN RESPECT OF LG 1 TO LG 4

51. By order dated 30.03.2011 this court had directed the Oriental Bank of Commerce to hand over the keys of LG 1 to LG 4 and LG 18 (*sic G 18*) to the Registrar General of this Court. The Registrar General was also directed to take possession of FDR of 12,58,164.54 in from the Bank. It was further directed that the issue as to whether any further amount is due and payable by the Bank on account of rental/user charges or on account of alleged damages caused to the aforesaid property would be determined later on.

52. As per the Oriental Bank of Commerce, it stopped paying rent on account of disputes between the Directors. The CLB by its order dated 26.07.2004 directed the Bank to pay the rental arrears upto 31.12.2003 to the Bharti Group. Rent upto 31.12.2003 was paid in terms of order of the CLB dated 26.07.2004. On 30.08.2005, the Bank made a statement before the CLB that it was willing to vacate the premises. The CLB directed that on vacation, the rent should be kept in a fixed deposit in the Bank itself in the name of the parties.

53. On 03.01.2006, the Bank issued a legal notice to the parties contending that it had made FDRs in the sum of Rs. 12,58,164.54 after deduction of TDS as rental till 30.11.2005. It was further contended that it had vacated the premises and shifted the branch on 21.11.2005. It was further

mentioned in the notice, that in the suit filed by the Company against the Bank, the Bank in its reply had prayed that the Bank be allowed to deposit the FDRs and the keys in court. The Bank by the said notice called upon the parties to receive the keys and the FDRs.

54. The Bharti Group by its reply dated 12.01.2006 to the said legal notice stated that the offer of deposit of keys in the suit filed by the Company was untenable and misconceived and called upon the Bank to indicate the date and time at which they could receive the keys of the tenanted premises.

55. The Company by its reply to legal notice dated 09.01.2006 directed the Bank to segregate and separate the premises LG 1 to LG 4 and then to hand over the separate keys in the office of the Company.

56. The Bank thereafter neither took any further steps to hand over the keys of the premises or file an application before any court seeking to deposit the keys in court.

57. However, on 21.08.2008 the Bank filed a reply before this Court in Co.A. (SB) 8/2007 contending that it had vacated the premises long ago and had moved an application before the CLB in respect of which the CLB had passed an order on 30.08.2005. It further contended that the Bank was repeatedly writing to the Company and the Bharti Group to

take over vacant and peaceful possession of the tenanted premises but the same was not taken over. The Bank prayed that the keys and the FDRs lying with the Bank be permitted to be deposited in court.

58. The Bank thereafter filed an application being CA 262 of 2010 in Co.A. (SB) 8/2007 praying that the Bank be permitted to deposit the keys and the FDRs with the court. By order dated 30.03.2011, the counsel for the Bank was directed by this court to deposit the keys of LG 1 to LG 4 and LG 18 (*sic G 18*) Premises with the Registrar General of the Court and the Registrar General was also directed to take possession of the FDRs in the sum of Rs. 12,58,164.54 from the Bank. The court further directed that the issue as to whether any further amount is due and payable by the Bank on account of rental/user charges or on account of alleged damages caused to the aforesaid property would be determined later on.

59. From the above facts, it is apparent that the Bank before the CLB made a statement on 30.08.2005 that it was willing to vacate the premises but the premises was not vacant on the said date, the Bank had only expressed its willingness to vacate. There is a difference in willingness to vacate and actual vacation of the premises. The Bank has submitted that it actually vacated the premises on

21.11.2005. Though the Bank issued a legal notice to the parties offering to hand over the keys, however the keys were not actually handed over. Both the Bharti Group and Company demanded the keys from the Bank. Faced with the conflicting demand, the course of action for the Bank was to approach the CLB where the proceedings were pending offering to deposit the keys in court. The Bank for the first time by its reply dated 21.08.2008 prayed to this court to deposit the keys in court. Thereafter the Bank moved an application being CA 262 of 2010 praying for deposit of keys in court. The keys were actually handed over to the Registrar General of this court pursuant to the order dated 03.03.2011.

60. In my view, since the Bank had prayed to this court by its reply dated 21.08.2008 to deposit the keys in Court, the Bank would not be liable to pay any rental after the said date. As it was obligatory on the part of the Bank to approach the court for deposit of the keys in court, similarly, it was obligatory on the part of the Company and the Bharti Group to accept the prayer made by the Bank in its reply dated 21.08.2008 to deposit the keys in court. The Bank is thus liable to pay rent for the said premises comprising of LG 1 to LG 4 and G 18 till 21.01.2008. Since the Bank has already deposited the rent w.e.f. 01.01.2004 till 30.11.2005

(amounting to 12,58,164.54) with this court, the Bank shall pay the balance rent from 01.12.2005 till 21.08.2008 alongwith simple interest @ 8% per annum from the date the amounts fell due till the actual date of payment. The amount be paid in the same proportion and in the same names as was being paid earlier. In case the Bank has already paid any rent towards the Flat G 18 to the Company for the aforesaid period, the same shall be adjusted from the rent held to be payable to the Company.

61. The FDRs deposited with this court alongwith the accrued interest thereon are directed to be released in favour of the respective persons as per the details mentioned in schedule I (@ page 593 of Co.A. (SB) 8/2007). There is nothing on record to show that anything is payable by the Bank towards any alleged damage caused to the property as was recorded in order dated 30.03.2011.

62. Since, I have held the termination of the spaces LG 1 to LG 4 to be unlawful, the Bharti Group is entitled to receive the keys of the premises LG 1 to LG 4. The Company, being the owner/landlord of the fifth premise i.e. G 18 (incorrectly mentioned in some places as LG 18), is entitled to receive the keys for the said premises.

CA 1923 of 2014 in Co. A. (SB) 8 of 2007

63. This Application has been filed by the Bharti Group seeking a restrain against the Company from passing any resolution as proposed in the notice dated 08.08.2014.

64. By the notice dated 08.08.2014, a resolution by circulation was proposed to be passed whereby Mr. K.R. Gupta was proposing to retire as a Director and in his place, a Nominee Director Mr. Lalit Kumar Mishra was proposed to be appointed to represent his group on the Board.

65. The contention of the Bharti Group is that Mr. K.R. Gupta had resigned as a Director on 07.08.2004 as he had tendered his resignation to the Company. It is contended that Mr. K.R. Gupta ceased to be a Director even if the resignation was not accepted by the Company for want of nominee or representative Director.

66. On behalf of the Company, it is contended that each of the three Directors represent their respective group. It is contended that the CLB has also recognized that there are three Directors representing their respective groups that hold 1/3rd shares each of the Company. The fact that the CLB has directed that the operation of the account shall be jointly by at least two Directors recognizes the fact that the three Directors are continuing.

67. The case of the Bharti group as set up is that the

Shareholding of Mr. S. K. Bharti, Mr. A. N. Malhotra (father of Mr. R.K. Malhotra) and Mr. K. R. Gupta and their respective family members was adjusted to 1/3rd each. It was agreed that each group would be entitled to a certain share in the property in lieu of its rights as equal 1/3rd shareholder/partner in the project. As the admitted case of the Bharti Group is that there are three groups each holding 1/3rd shares of the Company, and further it is on this very ground that the CLB has directed that Mr. S.K. Bharti shall continue as a Director on the board, the Bharti Group cannot challenge the right of Mr. K.R. Gupta to continue on the board to represent his group which holds 1/3rd shares of the Company. Each of the three groups is entitled an equal participation on the Board of the Company. Mr. K.R. Gupta is thus entitled to be a Director on the board of the Company and further is also entitled to nominate in his place a Director on the board to represent his group in case for any reason he is not in a position to continue as a Director.

68. The application thus has no merit and is accordingly liable to be dismissed.

69. In view of the above, it is directed as under:

- (i) The Appeal filed by the Company (i.e. Co.A. (SB) 4/2007) is dismissed, confirming the direction of the CLB that the Bharti Group

continues as members of the Company and the register of members be rectified accordingly and further confirming that the Banking operations shall be by two Directors jointly. However to maintain complete fairness and transparency, the third Director shall be provided every fortnight with the complete details of the Banking operations alongwith all supporting documents and vouchers.

- (ii) The appeal filed by the Bharti Group (i.e. Co.A. (SB) 8/2007) to the extent that it challenges the appointment of Mr. R.K. Malhotra as a Managing Director is dismissed.
- (iii) The action of the Company and the other Directors in cancelling the four Builder's agreements dated 15th June 1994 in respect of LG 1 to LG 4 of the Bharti Group is held to be wrongful, burdensome, harsh and oppressive. The said action of the Company is set aside. The appeal of the Bharti Group to this extent is allowed.
- (iv) The Oriental Bank of Commerce is held liable to pay rent for the said premises comprising of LG 1

to LG 4 and G 18 till 21.01.2008. Since the Bank has already deposited the rental w.e.f. 01.01.2004 till 30.11.2005 in the form of FDRs (amounting to 12,58,164.54) with this court, the Bank shall pay the balance rent from 01.12.2005 till 21.08.2008 alongwith simple interest @ 8% per annum from the dates the amounts fell due till the actual date of payment. The amount be paid within 6 weeks from today, in the same proportion and in the same names as was being paid earlier. In case the Bank has already paid any rent towards the Flat G 18 to the Company for the aforesaid period, the same shall be adjusted from the rent held to be payable to the Company.

- (v) The Registry is directed to release the FDRs deposited with this court alongwith the accrued interest thereon, if any, in favour of the respective persons as per the details mentioned in schedule I (@ page 593 of Co.A. (SB) 8/2007).
- (vi) The Registry is directed to hand over the keys of the premises LG 1 to LG 4 to the Bharti Group and the keys of the fifth premise i.e. G 18 (*sic LG 18*) to the Company.

(vii) Each of the three groups is entitled to an equal participation on the Board of the Company. Mr. K.R. Gupta is entitled to be a Director on the board of the Company and is also entitled to nominate in his place a Director on the board to represent his group, in case for any reason he is not in a position to continue as a Director. CA 1923 of 2014 in Co. A. (SB) 8 of 2007 is dismissed in these terms. Interim order dated 29.08.2014 is vacated.

(viii) All notices for meetings of the Board of Directors or Shareholders together with the agenda shall be sent by registered/recorded speed post at least 10 days in advance. In case any larger notice period is prescribed by statute, the same shall be complied with, while sending notices by registered/recorded speed post.

70. The appeals are accordingly disposed of, with no orders as to costs.

SANJEEV SACHDEVA, J

MARCH 02, 2015

hj/sk