

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

**COMPANY APPEAL NO.18 OF 2008**

**IN**

**COMPANY PETITION NO.4 OF 2007**

|                                                   |                 |
|---------------------------------------------------|-----------------|
| 1. Mr. O.K. Varghese,                             | )               |
| S/o. Ollukaran Kunjipalu, 4B, Dasmesh Co-op.      | )               |
| Housing Society Limited, 155, C.N. Dutta Marg,    | )               |
| Andheri (West), Mumbai – 400 053.                 | )               |
| 2. Mr. O.K. Kuriappan,                            | )               |
| S/o. Ollukaran Kunjipalu, Ollukaran, Nellay, P.O. | )               |
| Trichur, Kerala.                                  | )               |
| 3. M/s. Spectron Engineers Pvt. Ltd.              | )               |
| 129, Andheri Industrial Estate, Off Veera Desai   | )               |
| Road, Andheri (West), Mumbai – 400 054.           | )               |
| 4. Ms. Elsy Anthony,                              | )               |
| W/o. Anthony Joseph, OFS Tottam, 9/26A,           | )               |
| Kilchitrachavadi, Perunvedapathi, Coimbatore      | )               |
| 641 007.                                          | )... Appellants |

Vs.

|                                                  |                  |
|--------------------------------------------------|------------------|
| 1. M/s. OFS Industries (P) Ltd.                  | )                |
| 126 Damji Shamji Udyog Bhavan, Veera Desai       | )                |
| Road, Andheri (West), Mumbai 400 053.            | )                |
| 2. O.K. Augusty                                  | )                |
| S/o. Ollukaran K. Kunjipalu, 135, Nibbana Pali   | )                |
| Hill, Bandra (West), Mumbai 400 050.             | )                |
| 3. Mr. O.K. Jose,                                | )                |
| S/o. Ollukaran Kunjipalu, Ollukaran, Nellay P.O. | )                |
| Trichur, Kerala.                                 | )                |
| 4. Mrs. Vasanthi Ramappa Kanchan,                | )                |
| 38, Prashant Building, Davood Baug Road,         | )                |
| Andheri (West), Mumbai 400 053.                  | )                |
| 5. Mr. H.R. Kanchan,                             | )                |
| Chartered Accountant, 19, Andheri Universal      | )                |
| Industrial Premises, 57, J.P. Road, Andheri      | )                |
| (West), Mumbai 400 058.                          | )... Respondents |

**WITH**

**COMPANY APPLICATION NO.1203 OF 2008**

**WITH**

**COMPANY APPLICATION NO.1377 OF 2008  
WITH  
COMPANY APPLICATION NO.1128 OF 2009  
WITH  
COMPANY APPLICATION IN APPEAL NO.59 OF 2016  
IN  
COMPANY APPEAL NO.18 OF 2008  
WITH  
COMPANY APPEAL NO.30 OF 2008**

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Mr. Aspi Chinoy, senior advocate a/w. Mr. Vibhav Krishna, Mr. Tahir Prande and Mr. Devan Lakhotia i/b. Juris Consillis for appellants in COAPP/18/2008.

Ms. Anushree Priyadarshni i/b. Auris Legal for appellants in COAPP/30/2008.

Ms. Savina R. Crasto for respondent no.1 in COAPP/18/2008.

Mr. D.D. Madon, senior advocate a/w. Ms. Ferzana Behramkamdin, Ms. Shivani Khanna and Mr. Sahil Bijliwala i/b. FZB and Associates for respondent no.2 in COAPP/18/2008.

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**CORAM : K.R.SHRIRAM, J.  
RESERVED ON : 16<sup>th</sup> MARCH, 2018  
PRONOUNCED ON : 16<sup>th</sup> APRIL, 2018**

**JUDGMENT :**

1           The present appeal has been filed under Section 10F of the Companies Act 1956 and impugns the order dated 23<sup>rd</sup> June 2008 passed by the Company Law Board (CLB) in the petition filed by respondent no.2, *inter alia*, under Sections 397, 398, 399, 402, 403, 235 and 250 of the Companies Act 1956. The original petition was filed alleging oppression and mismanagement on the part of appellant nos.1,2,3,4, respondent nos.4 and 5. Respondent nos.4 and 5 have filed a separate appeal being company appeal no.30 of 2008. Appellant nos.1 and 2 and respondent nos.2 and 3 are brothers. Appellant no.4 is their sister. Appellant no.3 is a company owned/controlled by appellant no.1. Respondent no.1 is the company.

Respondent no.5 was auditor of the company.

2           The brief facts are as under :

(i) Respondent no.1 company (M/s. OFS Industries (P) Limited) promoted by respondent no.2 was incorporated on 15<sup>th</sup> December, 1983. The issued share capital of respondent no.1 was 1,50,000 shares of Rs.10/- each. Respondent no.2 held 1,46,000 shares. Respondent no.3 held 2,500 shares. Appellant no.4 held 500 shares and 1,000 shares held by one K. Kunjipali. From 1983-1996 the company was rendering agency and brokering services to foreign companies. Its net worth as on 31<sup>st</sup> March, 1998 was about Rs.29.34 lakhs.

(ii) During 1997-1998 respondent no.2 was involved in a matrimonial dispute with his wife and therefore, he requested appellant no.1 to assist in the running of respondent no.1. Appellant no.1 was also appointed as a Director.

(iii) Between 1998-2004 appellant no.1 was taking care of respondent no.1. During this period, the business of respondent no.1 also improved and the net worth as on 31<sup>st</sup> March, 2005 was about Rs.207.95 lakhs.

(iv) It was the case of respondent no.2 in the CLB that towards the end of 2005, respondent no.2 came to know about certain illegal activities carried out by respondents therein and in particular, appellant no.1 in connivance with respondent no.5 herein. Hence, on 14<sup>th</sup> November 2005,

respondent no.2 removed appellant no.1 from the board of respondent no.1 company. Appellant no.2 was also removed from the board on 2<sup>nd</sup> January 2006. On 22<sup>nd</sup> December 2006 respondent no.2 received a notice of EOGM requisitioned at the behest of appellant no.1, *inter alia*, for removal of respondent no.2 from the board of respondent no.1. On receipt of the said notice, it is the case of respondent no.2 that he undertook a search at ROC office and discovered that there has been an illegal increase and subsequent allotment of shares in favour of appellant nos.1 and 2 resulting in respondent no.2 being reduced to a minority. Hence the petition was filed in CLB.

3           Broadly stated the issues raised by respondent no.2 were as under :

(a) that from 1997-1998 he has been involved in a matrimonial/custody dispute and had accordingly arranged for appellant no.1 (respondent no.3) to become a working director and look after the company's business and affairs till 2004-2005 for about six years;

(b) that on 4<sup>th</sup> September, 2003 appellant no.1 (respondent no.3) had unilaterally and without approval of the board of directors illegally created and issued an additional 8,50,000 shares and allotted them to himself and others thereby reducing the shareholding of respondent no.2 from 97% to 19.2%;

(c) that respondent no.5 had consistently approached

respondent no.2 at the very last minute and has falsely taken his signatures on various company law forms like blank annual return forms, etc. on the ground of alleged urgency to submit the same with the Registrar of Companies and then misused these forms to show appellant no.1 as majority shareholder of the company;

(d) that respondent no.5 had signed the balance sheet of respondent no.1 for the financial year ended 31<sup>st</sup> March 2005 without being approved by the board of directors of respondent no.1, which is obvious from the balance sheet for the year where only one director, i.e., appellant no.1 and respondent no.5 has signed and no other director has signed the same. Respondent no.2 had annexed to the petition, a copy of the balance sheet signed only by appellant no.1 and respondent no.8;

(e) that he had removed appellant no.1 as a director on 14<sup>th</sup> November 2005 and had filed Form 32 regarding appellant no.1 ceasing to be a director of respondent no.1 company;

(f) that on 22<sup>nd</sup> December 2006 respondent no.2 had received a notice convening an EOGM on 29<sup>th</sup> January 2007 to pass resolution for the removal of respondent no.2 as a director of the company. Respondent no.2 claims that on receipt of said requisition/notice, respondent no.2 undertook a search at ROC and discovered that there has been an illegal increase and subsequent allotment of shares in favour of others in the company thus reducing respondent no.2 to a minority;

(g) Prayer a, b and c of the petition had accordingly impugned the increase in share capital and the EOGM notice.

4 Respondent no.2 had also alleged that in 2005-2006 appellant no.1 had diverted to himself through his company appellant no.3 – Spectron Engineers Private Limited, contracts with BG Exploration and Production India Limited (value Rs.4.03 lakhs), Hyundai Heavy Industries Company Limited (value Rs.5.02 lakhs), Oil India Limited and Cairn Energy Limited and had put in a competing bid for a contract with ONGC Ankleshwar. Respondent no.2 had also averred that funds were taken out of respondent no.1 in different modes during 1999-2001 and brought back as unsecured loans from outsiders and were finally converted into equity shares and further that many outflows in the company's books have been shown which are fictitious having no supportings. One of the many examples is Rs.63.85 lakhs on 31<sup>st</sup> March 2001 to Barkha Industries Limited whose business is sub brokerage and commission.

5 Respondent no.2 also alleged that appellant no.1 had misappropriated two fixed deposits of Rs.1 crore and Rs.50 lakhs of respondent no.1. Prayer (d) of the petition accordingly required appellant no.1 to pay to the company the two fixed deposits totaling to Rs.1,50,00,000/- and Rs.1,50,58,768/- being profit misappropriated for six years.

6           It is well settled, as held, *inter alia*, by the Hon'ble Supreme Court in ***V.S. Krishnan & Ors. Vs. Westfort HiTech Hospital Limited & Ors.***<sup>1</sup> and followed in ***Purnima Manthena & Anr. Vs. Renuka Datla & Ors.***<sup>2</sup> that an Appeal under Section 10F of the Companies Act, would lie only on a question of law arising out of the order. In ***Dale and Carrington Investment Private Limited and Anr. Vs. P.K. Pratapan and Ors.***<sup>3</sup>, the Supreme Court held that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In *Dale and Carrington* (Supra), the Apex Court observed that the Company Law Board in the order impugned in that matter, had delivered a judgment in a very cursory and cavalier manner without going into real issues which were germane from the controversy involved in the case and in such circumstances, the High Court can interfere and High Court cannot be stated to have exceeded its jurisdiction under Section 10F of the Companies Act while deciding the appeal. Paragraph 35, 36 and 37 of *Dale and Carrington* (Supra) read as under :

35. We have now to deal with the question of scope of appeal filed under Section 10-F of the Companies Act by Prathapan in the High Court.

36. Section 10-F refers to an appeal being filed on the question of law. The learned counsel for the appellant argued that the High Court could not disturb the findings of facts arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High Court could not go into

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1. (2008) 3 SCC 363

2. (2016) 1 SCC 23

3. (2005) 1 SCC 212

*and therefore the judgment of the High Court is liable to be set aside. We do not agree with the submission made by the learned counsel for appellants. it is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has not gone into real issues which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter. As already stated the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujan and whether the allotment of additional shares was an act of oppression on his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan i.e. his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same.*

*37. We find no merit in the argument that the High Court exceeded its jurisdiction under Section 10F of the Companies Act while deciding the appeal.*

7           Therefore, it is clear that the scope of jurisdiction of this Court is restricted to a question of law and if it can be held that a finding(s) of fact(s) are perverse and based on no evidence, then that perversity itself may be treated as a question of law. This Court would truly be required to assess the judgment of the CLB holistically to ascertain whether the judgment is perverse.

8           Mr. Chinoy submitted that the findings of the CLB were *ex facie* perverse because the CLB, though has reproduced submissions made by appellants, when it came to dealing with the rival submissions, the CLB has simply held in favour of respondent no.2 by stating that appellants have failed to refute the allegations or specific allegations of diversion of business

and funds have not been refuted by appellants or that it would not be just and fair to dismiss this petition at the threshold on the ground of alleged unclean hands of respondent no.2 or it is difficult to give credence to appellants explanation and documents relied upon by them which have been challenged to be fabricated and manipulated, the documents referred to and relied upon do not make a fool proof case or in the totality of circumstances of the case the contention of respondent no.2 that blank documents were got signed by him cannot be disbelieved etc.

9           Mr. Madon appearing for respondent no.2 supported the impugned judgment and submitted that the findings of the CLB were perfectly in order and did not require any interference by this Court. Mr. Madon took the Court through various documents to submit that there was illegal increase in the share capital of respondent no.1, there was collusion between appellant no.1 and respondent no.5, the records of respondent no.1 was handed over to respondent no.5, there was enough evidence to show misappropriation of funds of respondent no.1 by appellant no.1 and there were various instances of diversion of business of respondent no.1 by appellant no.1 to his own company – appellant no.3 which would amount to mismanagement and hence no interference is called for.

10           In the impugned judgment, the facts and rival submissions are extensively recorded from paragraph 1 to paragraph 43 (almost 29 pages). The rival submissions, however, have been dealt with, in my view, in a very

cursory and cavalier manner. I have with the assistance of the opposing counsel perused the entire impugned judgment and also the pleadings and the documents. There are enough materials in the impugned judgment or lack of material to label the impugned judgment as perverse.

11           The allegation of respondent no.2 that the share capital was unilaterally and illegally increased to 10,00,000 equity shares of Rs.10/- each without the board of directors' approval and without knowledge of respondent no.2 and approval is incorrect and belied by the records. This point has been simply decided by stating *“it is noted that respondents have not been able to meet petitioner's contentions challenging the increase and allotment of shares and it is difficult to give credence to respondents' explanation and documents relied upon by them which have been challenged to be fabricated and manipulated to achieve respondents' ulterior motive to gain control over respondent no.1 reducing petitioner's 97.33% shareholding to 19.20% and expecting petitioner to give his consent which would be nothing short of suicide, the documents referred to and relied upon do not make a fool proof case ..... No credence can be given to the contention that the petitioner has acquiesced to the increase and allotment as he has not challenged allotment of 46,000 shares to himself ..... In the totality of the facts and circumstances of the case, petitioner's contention that blank documents were got signed from him cannot be disbelieved”*.

12            Infact the records established that respondent no.2 had approached the CLB with a false case that he had not approved the issue of the said additional shares and he was not aware of the same till he received the EOGM notice in December 2006. In fact the documents indicate that respondent no.2 had at all times been aware of and had approved the increase in capital and further shares. The balance sheets of the years 1999-2003, which had recorded that “shareholders funds” had increased from time to time and had aggregated to Rs.100,00,000/- by 2002, had all been approved and signed by respondent no.2 as the Managing Director of respondent no.1. The annual returns of 2003 and 2004 and the balance sheet of 2004-2005, all of which had reflected and recorded the increase in share capital to 10,00,000 shares of Rs.10/-, had all been approved and signed by respondent no2. as Managing Director.

13            Respondent no.2 had approached the CLB with a false case that his signature had been taken on blank printed annual return forms which had been subsequently misused to record the increase in share capital. But the record establish that the Annual Returns of 2003 & 2004, which recorded the increase in share capital, had been prepared and filled in the computer and respondent no.2 had signed/initialed on every page of the annual returns. Respondent no2. had made a false statement that he had not signed the balance sheet as of 31<sup>st</sup> March 2005, which had recorded the increase in share capital to 10,00,000 shares and that the same

had only been signed by appellant no.1 and respondent no.5. Appellant no.1 and respondent no.5 had in their affidavits referred to and produced the photocopy of the balance sheet which had been duly signed by respondent no.2 as Managing Director and that recorded the increase in share capital to 10,00,000 shares. Thereafter, respondent no.2 himself had admitted in his affidavit that he had signed the balance sheet of 2005 and that he had also arranged to file the same with the Income Tax Department. Respondent no.2 had, however, falsely disputed his signatures on the photocopies of the Balance Sheet as at 31<sup>st</sup> March 2005. Copies of these balance sheet had been obtained from the Income Tax Department. Subsequently, pursuant to an application made to this Honble Court, the original balance sheet as at 31<sup>st</sup> March 2005 was produced by the Income Tax Department/Police authorities and the same was found to be identical to the said photocopies.

14            Respondent no.2 had approached the CLB by alleging (i) His signature had been falsely taken “on various Company Law Forms like blank annual return forms, etc” on the ground of alleged urgency to submit the same to the ROC and that these had subsequently been misused to show appellant no.1 as major shareholder of the company; (ii) He had not signed the balance sheet of respondent no.1 for the year ended 31<sup>st</sup> March 2005; (iii) Respondent no.2 had annexed a copy of the balance sheet which was signed only by appellant no.1 and respondent no.5 and (iv) That only when he received the EOGM Notice dated 22<sup>nd</sup> December 2006, he had made a

“search at ROC and discovered that there has been an illegal increase and subsequent allotment of shares in favour of respondents” and that he accordingly filed the petition on 15<sup>th</sup> January 2007.

15 In reply, appellant no.1 in his affidavit dated 30<sup>th</sup> March 2007 and affidavit of respondent no.5, pointed out that :

(i) The annual accounts of the company established that till 1997 turnover and profits of respondent no.1 were minimal, the accumulated profits was Rs.331,784/-, i.e., an average of Rs.25,521/- per year, the net worth of respondent no.1 as on 31<sup>st</sup> March 1998 was Rs.29.34 lakhs;

(ii) Appellant no.1 had been successful in getting contracts for respondent no.1 from (1) Oil India, Jodhpur; (2) ONGC Ankleshwar and (3) ONGC Uran. This resulted in the profits and turn over of the company increasing manifold, during the period 1997-2004 the average profits per year were more than Rs.15,00,000/-, i.e., 60 times more than the average profit of Rs.25,521/- per year for earlier period, the networth as on 31<sup>st</sup> March 2005 was Rs.207.95 lakhs, as against Rs.29.34 lakhs in 1998;

(iii) The Banks & Financial Institutions had required the paid up capital to be increased to sustain additional/enhanced credit facilities required for these contracts. It was in these circumstances that the share capital was increased.

After the aforesaid affidavit dated 30<sup>th</sup> March 2007 of appellant no.1, respondent no.2 had filed three affidavits : (i) Affidavit dated 6<sup>th</sup> June 2007, (ii) Affidavit dated 16<sup>th</sup> October 2007 and (iii) Affidavit dated 20<sup>th</sup> December 2007, in all of which these statements have not been dealt with or disputed.

16           Accordingly from 1998 onwards, diverse amounts had been brought in as share application money and these amounts had been reflected as “Shareholders funds” in the balance sheets of the company from 1999 to 2003. By 2002-2003 these amounts had aggregated to an additional sum of Rs.85,00,000/-. The balance sheets for the years ended 1997 to 2004, reflecting the aforesaid additional amounts of “shareholders funds”, had all been duly approved and had all been signed, *inter alia*, by respondent no.2 as Managing Director. The annual accounts/balance sheets from 1997-2003 were annexed as Exhibit R-7 to the Affidavit dated 14<sup>th</sup> February 2007 of appellant no.1.

The balance sheet as on 31<sup>st</sup> March 1999 recorded an increase in “shareholders funds” from Rs.16,75,000/- to Rs.40,45,000/-. The balance sheet as on 31<sup>st</sup> March 2000 recorded an increase in “shareholders funds” from Rs.40.45 lakhs to Rs.79.25 lakhs. The balance sheet as on 31<sup>st</sup> March 2001 recorded an increase in “shareholders funds” from Rs.79.25 lakhs to Rs.100 lakhs. The balance sheet as on 31<sup>st</sup> March 2003 recorded that “shareholders funds” were Rs.100 lakhs. All these balance

sheets had been duly approved and signed by respondent no.2 as the Managing Director. These balance sheets clearly established that respondent no.2 was fully aware and had approved an additional Rs.85,00,000/- being brought in as “shareholders funds” by 2002-2003. Not once has respondent no.2 protested.

17           In the affidavit of 14<sup>th</sup> February 2007, appellant no.1 has averred that on 19<sup>th</sup> August 2003, 850,000 additional shares were duly issued and allotted, after necessary resolutions had been passed and that a return of allotment dated 2<sup>nd</sup> September 2003 was filed by respondent no.1 with the ROC. The annual return of respondent no.1 for 2003, was also signed by respondent no.2 as the Managing Director. This annual return reflected that the issued capital of the company had been increased to 10,00,000 equity shares of Rs.10/- . The annual return of respondent no.1 for 2004 was also signed by respondent no.2 as Managing Director. This annual return also reflected that the issued capital of the company had been increased to 10,00,000 equity shares of Rs.10/- each. The explanation of respondent no.2 for having signed the said annual returns, was that his signature had been taken “on various company law forms like blank annual return forms,” on the ground of urgency to submit the same to the ROC and that these had subsequently been “ misused to show appellant no.1 as major shareholder of the company”. This explanation of respondent no.2 for having signed the annual statements cannot be accepted. Respondent no.5

has in his affidavit dated 12<sup>th</sup> May 2007 pointed out that the annual returns had been printed out from computer after filling in all the details and that respondent no.2 had signed and initialed on all the pages including the annexures showing the shareholding. In response to this affidavit of respondent no.5, respondent no.2 filed an affidavit dated 6<sup>th</sup> June 2007 where he changes his stand and alleged, contrary to his earlier statement, that the annual returns “have not been signed by me and in the event the signatures are purported to be mine, are also blatant forgeries”. It has to be noted at the cost of repetition that the balance sheet and accounts for the year ended 31<sup>st</sup> March 2005, which clearly reflected that the issued capital had been increased to 10,00,000 equity shares of Rs.10/-, i.e., Rs.100 lakhs had also been duly signed by respondent no.2 as the Managing Director and had also been filed by respondent no.2 with the Income Tax Department.

18            In the company petition, respondent no.2 had come with a clear case that he had not signed the balance sheet for the year ended 31<sup>st</sup> March 2005 and that the same had only been signed by appellant no.1 and respondent no.5. This clearly was a false statement. Respondent no.2 had also annexed to the petition a photocopy of the balance sheet as at 31<sup>st</sup> March 2005, which was only signed by appellant no.1 and respondent no.5 and which was not signed by respondent no.2.

19            Appellant no.1 had in his affidavit dated 30<sup>th</sup> April 2007 pointed out that respondent no.2 had duly signed the balance sheet as at

31<sup>st</sup> March 2005, which reflected that the issued capital of the company was Rs.10,00,000 equity shares for both 2004 and 2005. Appellant no.1 had annexed a photocopy of the balance sheet duly signed by respondent no.2 also. Respondent no.5 had by his affidavit dated 12<sup>th</sup> May 2007 pointed out that respondent no.2 had in fact approved & signed the balance sheet as at 31<sup>st</sup> March 2005 and that he had filed the same with the Income Tax Department on 31<sup>st</sup> October 2005. A photocopy of the balance sheet as at 31<sup>st</sup> March 2005 duly signed by respondent no.2 as the Managing Director was annexed to affidavit of respondent no.5.

20           In response, respondent no.2 filed an affidavit dated 6<sup>th</sup> June 2007. In that affidavit, respondent no.2 changed his stand but confirmed that he had signed one copy of the balance sheet as at 31<sup>st</sup> October 2005, which had duly reflected the increased share capital of 10,00,000 shares and that he had got the said balance sheet filed with the Income Tax Department and that the signed balance sheet was only available with the Income Tax Department. However, he still alleged that the signature on the balance sheet for the year ended 31<sup>st</sup> March 2005 which had been produced with affidavit of respondent no.5 were forged.

21           Appellant no.1 filed a further affidavit dated 3<sup>rd</sup> September 2007 pointing out that the copy of the balance sheet as at 31<sup>st</sup> March 2005 which he had annexed to his affidavit had been obtained from the Income Tax Department and that the allegation of respondent no.2 that his

signature was a forgery was *ex facie* false. Subsequently pursuant to an application made to this Court, the balance sheet as at 31<sup>st</sup> March 2005 which had been filed by respondent no.2 with the Income Tax Department was produced from the custody of the Income Tax Department/the Police which had seized the same in the course of investigations. The said balance sheet for the year 31<sup>st</sup> March 2005 is identical to the photocopies of the balance sheet annexed to the affidavit of respondent no.5 and to the affidavit of appellant no.1. The same bears signature of respondent no.2 as Managing Director and clearly records that the issued capital of the company was 10,00,000 equity shares.

22           Approval of/signature of respondent no.2 on annual returns of respondent no.1 for 2003 and 2004 and on the balance sheet as on 31<sup>st</sup> March 2005, all of which recorded and reflected the increased share capital of 10,00,000 shares of Rs.10/-, clearly establishes that the share capital had been duly increased and new shares duly issued in August 2003 after passing the necessary board resolution and complying with the requirements of the Articles. If it was otherwise respondent no.2 would not have signed the annual returns of respondent no.1, instead would have protested at that stage itself. Even earlier years, respondent no.2 would have protested but he did not. Therefore, the only conclusion that could be arrived at is increase in share capital had the approval of respondent no.2.

23            Respondent no.2 was in management of the company from 2005 and he had ousted appellant no.1 and respondent no.5 from directorship/management control. Accordingly, from 2005, respondent no.2, it has to be concluded, had custody of the original minutes books & other registers of the company. Respondent no.2, otherwise would have raised objections or should have produced correspondence demanding of appellant no.1 to handover the records/minutes book. Respondent no.2, however, did not produce, respondent no.1-company's records and contended that resolutions had not been passed for the issue of the said shares. Significantly respondent no.2 had verified his affidavit dated 6<sup>th</sup> June 2007 as being "true and correct to my personal knowledge and from the records pertaining to respondent company available with me ..".

24            Respondent no.2 has sought to rely on a letter dated 22<sup>nd</sup> August 2000 to support his allegation that the minutes book & record of the company had been handed over to respondent no.5. The letter, however, only refers to a file containing draft minutes and not to respondent company's records. This also exposes the falsity of respondent no.2's case.

25            The CLB has noted appellants' submissions :

(a) that the company's increased turnover and new contracts necessitated additional bank facilities and the banks had insisted on an increase in the company's paid up capital;

(b) that the balance sheets from 1999 to 2004, which recorded the increase in the share application money/ shareholders funds to Rs.100 lakhs, had all been signed by respondent no.2, which established that the increase in capital had been done with the consent and approval of respondent no.2 and respondent no.1;

(c) that respondent no.2 had signed the annual returns of 2003 and 2004 which recorded the increase in the share capital effected in August 2003 and thereafter sought to explain the signatures by a false case that he had only signed blank forms;

(d) that respondent no.2 had signed the balance sheet of 2005, which recorded the increase in the issued capital to Rs.100 lakhs and had also filed the same with the Income Tax Department but had come to Court with a false case that he had not signed the same;

(e) that the said signatures of respondent no.2 on the balance sheet and annual returns established that the share capital had been duly increased after passing necessary resolutions;

(f) that respondent no.2, who had resumed full control of the company from 2005 and had custody of its records and registers, was suppressing/withholding the same and falsely alleging that the shares had been issued without passing the necessary resolutions etc; and

(g) that respondent no.2 had come to the CLB with a false case that he had not approved the increase in share capital and was unaware of

the same till he received the EOGM notice in December 2006 and that he had suppressed material documents and was accordingly not entitled to any relief.

26           Notwithstanding the aforesaid, i.e., recording the submissions of appellants, the CLB held :

(a) that “it would not be just and fair to dismiss this petition at the threshold on the ground of alleged unclean hands of the Petitioner”;

(b) That “it is difficult to give credence to the Respondents explanation and documents relied upon by them which have been challenged to be fabricated & manipulated .. .. the documents referred to and relied upon do not make out a fool proof case .. ..”;

(c) Case of respondent no.2 was that “he noticed the state of affairs only when he removed respondent no.2 and respondent no.4 as directors and when respondent no.3 requisitioned an EGM on 22<sup>nd</sup> December 2006, which sounded the alarm and made the Petitioner inspect the ROCs record.. ..”;

(d) “ In the totality of circumstances of the case the Petitioners contention that blank documents were got signed by him cannot be disbelieved ”;

(e) Respondent no.2 “was only signing as statutorily required being the MD .. ..”;

(f) “The original record of the purported board meetings, notices, minutes, resolutions have not been produced on the pretext that the same are in the possession of the Petitioner instead of being available at the registered office and in possession of the Respondents who are in *de facto* control and management of the affairs of the company”. Though in November 2005 respondent no.2 had taken control of respondent no.1 and petition itself was filed in 2007 and except a letter dated 22<sup>nd</sup> August 2000 no document is produced by respondent no.2. This letter also as noted earlier, only refers to a file containing draft minutes and not to respondent no.1 company's records.

27           The aforesaid findings of the CLB, in my view, are *ex facie* perverse having regard to the fact that :

(a) Respondent no.2 had never disputed signing the balance sheets from 1999 to 2003, which had recorded the increase in the shareholder's funds/share application money by 2002 to Rs.100 lakhs;

(b) Explanation of respondent no.2 for having signed the annual returns of 2003 and 2004, which recorded the increase in share capital, i.e., that he had been pressurized into signing blank annual return forms, was *ex facie* untenable inasmuch as the annual returns had been filled in and printed on the computer and respondent no.2 had signed/initialed every page thereof;

(c) Respondent no.2 had expressly admitted in his subsequent affidavit that his statement in the petition that he had not signed the balance sheet as 31<sup>st</sup> March 2005, which recorded the increased capital of 10,00,00 shares, was incorrect. Respondent no.2 had in his subsequent affidavit confirmed/accepted that he had signed the balance sheet as at 31<sup>st</sup> March 2005 and had also filed the same with the Income Tax Authorities;

(d) That the aforesaid documents/record established that respondent no.2 was at all times aware of the increase in share capital and the fact that the increase in share capital had been duly approved and made. Accordingly case of respondent no.2 that he was unaware of the increase in share capital to 10,00,000 equity shares and only came to know of the same when he received the EOGM notice in December 2006 and took search at the ROC was *ex facie* false and malafide;

(e) That respondent no.2 had come to Court with a false and malafide case and had suppressed material documents. Regarding the balance sheet as at 31<sup>st</sup> March 2005, respondent no.2 had in fact admitted that he had made a false statement in the petition that he had not signed the same; when in fact he had signed the same and filed it with the Income Tax Department.

Petition, in my view, accordingly required to be dismissed in limine on the unclean hands and suppression of facts doctrine;

(f) That it was virtually undisputed that from mid 2005, after respondent no.2 had ousted appellant no.1 and respondent no.5 and removed them as directors, respondent no.2 was in fact in *de facto* control and management of the said company, business and its records and paper.

28           The CLB's order entertaining the petition and declaring the new issue of 8,50,000 shares as null and void, is irrational inasmuch as the records established that respondent no.2 had (a) suppressed material facts and documents; (b) approached the CLB by making statements in the petition that could be termed false and (c) the share capital had been duly increased after passing necessary resolutions and with the knowledge and approval of respondent no.2.

29           Respondent no.2 also made allegations that appellant no.1 had diverted the business and profits of the company. In the petition, it was alleged that on 28<sup>th</sup> March 2001 respondent no.1 had entered into a MOU with M/s. Detector Electronic Corpn USA for absorbing tech for fire and hydrocarbon Gas Detection system and that respondent no.1 had spent money for training in USA & Singapore. On 18<sup>th</sup> December 2001 ONGC had awarded the company a contract for their Uran complex for US \$10,88,063 or at the then rate of exchange, Rs.3.67 Crores. Respondent no.1 completed the project ahead of time. Thereafter, it is alleged, appellant no.1 took over the collaboration with Detector Electronic Corporation, enticed trained employees from respondent no.1 and started bidding through appellant no.3

[Spectron Engineers Pvt. Ltd.] and in 2005 and 2006 diverted several contracts to himself. The contracts according to respondent no.2 were :

(a) A contract with BG Exploration & Production India Limited dated 2<sup>nd</sup> February 2005 for Rs.4.03 lakhs;

(b) A contract with Hyundai Heavy Industries Company Limited dated 31<sup>st</sup> May 2005 for Rs.5.02 lakhs ;

(c) A contract with Oil India Limited Jodhpur which had been earlier undertaken by respondent no.1 till 2002-2003;

(d) A contract with Cairn Energy Limited which had earlier been undertaken by respondent no.1 till 2004; and

(e) By putting in a bid for a Tender re: ONGC Ankleshwar dated 11<sup>th</sup> October 2006.

30 In his affidavit in reply, appellant no.1 had pointed out that there was no wrongful diversion of business or profits. It was the contention of appellant no.1 :

(i) Regarding Detector Electronics, BG Exploration and Hyundai Heavy Industries, appellant no.1 had pointed out in affidavit dated 14<sup>th</sup> February 2007 that the MOU with Detector Electronic was dated 28<sup>th</sup> March 2001 and had been negotiated and signed by appellant no.1; that Detector Electronics had severed relations with respondent no.1 company in June 2004 in view of the interference/involvement of respondent no.2 and had declined to deal with respondent no.1 company; in

these circumstances, appellant no.1 had subsequently negotiated with Detector Electronics and had obtained their support for bidding through appellant no.3 company and Detector Electronics had relied on competence and expertise of appellant no.1 and had forwarded to appellant no.3 company business enquiries from BG Exploration and Hyundai Heavy Industries.

In affidavit of respondent no.2 in rejoinder, these statements of the reply Affidavit have been responded to by mere bald denials;

(ii) Regarding Oil India Jodhpur, it was the case of appellant no.1 that Oil India Jodhpur contract with respondent no.1 had ended in March-April 2006. The Tender process of Oil India re O & M of Gas Refinery at Tanot Rajasthan had accordingly started in March 2006. As respondent no.2 had, by 2005, ousted appellant no.1 and purported to remove him as a director of respondent no.1 company and also filed Form 32, appellant no.1 had decided to participate in the tender through appellant no.3. Respondent no.2 had bid on behalf of respondent no.1 company and had not asked for involvement of appellant no.1. The contract was awarded to appellant no.3.

In the affidavit dated 29<sup>th</sup> March 2007 of respondent no.2 in rejoinder, these statements have not been denied/disputed;

(iii) Regarding Cairn Energy, it was the case of appellant no.1 that respondent no.1 had been executing O & M contracts with Cairn Energy Limited for Rajasthan Oil Field dated 14<sup>th</sup> August 2003 and dated

11<sup>th</sup> February 2004. Due to interference by respondent no.2 Cairn India refused to renew the contract with respondent no.1 after the contract was completed. Appellant no.1 was able to convince Cairn Energy to award the Contract to appellant no.1, which they agreed only if it was not taken up through respondent no.1. Appellant no.1 was constrained to take up the contract through appellant no.3, as otherwise, it would have been awarded to a third party;

(iv) Regarding ONGC Ankleshwar, it was the case of appellant no.1 that respondent no.1 had been executing a power plant for ONGC Ankleshwar. For renewal, ONGC, floated a tender dated 11<sup>th</sup> October 2006. As appellant no.1 had by then been ousted from management and purported to be removed as a director (Form 32 had also been filed), appellant no.1 had put in a competing bid through appellant no.3.

In the affidavit dated 29<sup>th</sup> March 2007 of respondent no.2 in rejoinder, these statements have not been denied.

31 Therefore, I cannot accept that there was any wrongful diversion of business, inasmuch as (i) Detector Electronics had not been willing to deal with respondent no.1 due to the involvement/ interference by respondent no.2; and (ii) the other contracts were bid for/ obtained by appellant no.1 much after respondent no.2 had purported to oust appellant no.1 from respondent no.1 and purported to remove him from directorship and filed Form 32.

32            Respondent no.2 had produced additional documents (i) at Vol III Pg. 728, (ii) At Vol IV Pg.1036 to 1126 alongwith a one page affidavit dated 16<sup>th</sup> October 2007 and (iii) At Vol V Pg.1128 to 1165 alongwith a one page affidavit dated 20<sup>th</sup> December 2007. None of these affidavits, however, had any additional plea or statement on oath.

33            The CLB has in the impugned order, totally failed to atleast consider the aforesaid response/explanations of appellant no.1 and has recorded a bald conclusion that “The specific allegations of diversion of business and funds have not been refuted by respondents”. This is totally incorrect. Therefore, in the aforesaid context and pleadings on record, the said finding of the CLB is *ex facie* perverse.

34            In the petition, averments were made that “funds were taken out of Respondent No.1 in different modes during 1999-2001 and brought back as unsecured loans from outsiders and were finally converted into equity shares”; that appellant no.1 had allegedly misappropriated Rs.1 Crore and Rs.50,00,000/- kept by respondent no.1 in fixed deposits; and that “Many outflows in the Company's Books have been shown which are fictitious having no supportings. One of the many examples is Rs.63.85 Lakhs on 31<sup>st</sup> March 2001 to Barkha Industries Limited whose business is sub brokerage and commission.”, that appellant no.1 had transferred shares of appellant no.3, which respondent no.1 had acquired for Rs.10 Lakhs in 2004 to KSB Engineers on 28<sup>th</sup> December 2004 without receipt of any

consideration.

35 Even in the affidavit dated 29<sup>th</sup> March 2007 in rejoinder, respondent no.2 had provided no further details. Respondent no.2, however, filed an additional four page affidavit dated 6<sup>th</sup> June 2007 in which respondent no.2 had annexed as Exhibit B thereto an unsigned “Note” alleging siphoning of funds. It does not even say who prepared the note. Moreover, it is the case of respondent no.2 that all minute books and documents were taken away by appellant no.1 and respondent no.5. Then how did respondent no.2 prepare this note. In that note, a bald allegation has been made that an amount of Rs.180,18,758/- had been siphoned off from 31<sup>st</sup> March 1999 to 31<sup>st</sup> March 2005 through bogus entries re car hire charges of Rs.180,000/-, Commission of Rs.25 Lakhs and bogus claims of catering contracts of Rs.26 Lakhs to Rs.37 Lakhs per year for 6 years. The only specific allegation made was that the cost of catering would be Rs.80/- per person per day, i.e., Rs.11.68 Lakhs per year for 40 persons, but that appellant no.3 [Spectron Engineers Pvt. Ltd.] had charged Rs.35 Lakhs per year, resulting in an alleged siphoning off of Rs.23-25 Lakhs per year.

Appellant no.1 had responded to these allegations vide the note annexed to his affidavit dated 3<sup>rd</sup> September 2007 and had pointed out that the catering cost of Rs.80/- per person per day alleged by respondent no.2 was unreal and contrary to the record. In fact respondent no.1 company had billed Oil India Rs.210/- per head per day in 1998 and Rs.290/- per head

per day from 2003 for catering services provided to visitors at the site; that in the year 1998-1999 M/s. Tanna Enterprises/M/s. Global Enterprises had charged respondent no.1 company Rs.35.43 Lakhs for catering services; that accordingly billing by appellant no.3 [Spectron] for catering at Rs.26 Lakhs to Rs.36 Lakhs per year for the period 2001-2005, was fully justified and could not lead to any inference of siphoning off money.

36 In the said note, respondent no.2 had also alleged that the fixed deposits of Rs.1.5 Crores were encashed and the amounts siphoned off by fictitious bills in favor of Barkha Inda, KSB Engrs & SCA International, a bogus entry of Rs.19,50,000/- was made of a software sale by M/s. Barkha Inds, which “does not appear to be genuine”, M/s. SCA International had been debited with Rs.397,817/- for commission receivable from it, without any supportings.

Appellant no.1 had responded to these allegations vide note annexed to his affidavit dated 3<sup>rd</sup> September 2007 and had pointed out that the payment to Barkha Inds had been made in the normal course of business and respondent no.2's allegation that the company did not need such service/ software was baseless; that the amount debited to SCA International was the commission earned by respondent no.1 company, i.e., income generated by the company and not money taken from or allegedly diverted from the company; that the fixed deposits were encashed to meet a liability of Rs2.5 Crores of respondent no.1 as on 31<sup>st</sup> March 1998; that the

shares of appellant no.3 held by respondent no.1 company were transferred to KSB Engineers Pvt. Ltd. against receipt of full consideration vide cheque No.762618 dated 30<sup>th</sup> June 2004 for Rs.5 Lakhs and Cheque No.762619 dated 30<sup>th</sup> June 2004 for Rs.750,000/- and that the transaction was carried out with the full knowledge of the board of directors.

37           The Company Law Board has in its order noted these responses at Para 17 : Re - sale of Spectron Shares to KSB engrs , Para 19 : Re - Barkha lnds , Para 20 : Re - SCA International and Para 21 : Re - the encashment of the fixed deposits and at Para 18 : Re - the facts , figures and explanation re catering expenditure. However, thereafter in Para 50 of its order the CLB merely records a bald finding that “As regards the allegation of misappropriation of fund and siphoning off of funds to the Respondents own concerns, the Respondents have failed to refute the specific allegations made in that regard.”

38           It has to be noted that even the allegations of misappropriation and siphoning off by respondent no.2 were generally bald unsubstantiated allegations. Moreover, the CLB has, in the order noted and recorded responses/explanations offered by appellant no.1. Thereafter, without dealing with the same, the CLB has in an error apparent concluded that “the Respondents have failed to refute the specific allegations made in that regard”.

39            In the aforesaid context of facts, allegations and pleadings, the CLB's finding is totally unreasoned, discloses an error apparent and is *ex facie* perverse. The impugned order, therefore, is unsustainable and requires to be set aside and is hereby set aside, with costs.

40            Respondent no.2 to pay a sum of Rs.5 lakhs as cost to appellant no.1.

41            Company appeal accordingly stands disposed. All pending applications also stand disposed.

**COMPANY APPEAL NO.30 OF 2008**

In view of the order and judgment passed in company appeal no.18 of 2008, this appeal also accordingly stands disposed with costs.

Respondent no.2 to pay a sum of Rs.1 lakh as cost to appellant.

**(K.R. SHRIRAM, J.)**