

Devaraj Dhanram Vs. Firebricks and Potteries Pvt. Ltd. and Others

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Court : Karnataka

Decided On : Aug-28-1991

Reported in : [1994]79CompCas722(Kar); 1991(4)KarLJ148

Judge : Kedambadi Jagannatha Shetty, J.

Acts : [Companies Act, 1956](#) - Sections 397, 398 and 402

Appeal No. : Company Application No. 994 c/w 868 of 1989, in Company Petition No. 77 of 1989

Appellant : Devaraj Dhanram

Respondent : Firebricks and Potteries Pvt. Ltd. and Others

Advocate for Def. : H.G. Raghavan, Adv.

Advocate for Pet/Ap. : Dyaya Holla, Adv.

Judgement :

Kedambadi Jagannatha Shetty, J.

1. This company application is filed by the respondents seeking an order as follows :

This hon'ble court may be pleased to permit the respondents to give effect to the resolution dated August 3, 1989, passed at the extraordinary general meeting held

on August 3, 1989, minutes whereof has been filed along with the statement of objections as annexure R-23 to the company petition.

2. In the application the respondents have averred that the petitioner in the company petition filed an Application No. 868 of 1989, praying for grant of temporary injunction to restrain them from holding the extra-ordinary general meeting on August 3, 1989. This court passed an order dated August 1, 1989, which reads as follows :

'The respondents may hold the general meeting, any resolution passed thereat shall not be given effect to or acted upon until this court otherwise directs. It is also clarified, that by the holding of the general meeting and the passing of the resolution no equity will be built up in favour of respondents Nos. 2 to 6. Any claim by respondents Nos. 2 to 6, any commitment that may result by virtue of the passing of the resolution, financial or otherwise, shall be at the risk of respondents Nos. 2 to 6. The petitioner is free to attend the general meeting or absent himself if he so chooses or so advised. Accordingly, the said petition of the petitioner-applicant was disposed of.'

3. Pursuant to that a meeting was held on August 3, 1989. All the shareholders of the company were present. The petitioner was absent. It is averred that the company at its general meeting held on August 3, 1989, unanimously gave consent to the proposal to transfer 2,719 equity shares of Rs. 100 each, in favour of Mr. R. N. Shetty for a consideration of Rs. 7.031 per share. The extract of the minutes of the extraordinary general meeting held on August 3, 1989, has been annexed to the application. It is further averred that the action taken by the respondents is absolutely legal and proper and the petitioner has no right to withhold the transfer of shares by the respondents in favour of Mr. R. N. Shetty. It is further averred that the transfer of shares in favour of Mr. R. N. Shetty is not only beneficial to the respondents but also to the company and the workers. The proposed transferee has agreed to immediately bring funds for the purpose of meeting the immediate financial requirements of the company. In fact, for want of funds, the workers are put to great hardship. Steps taken by the respondents seeking to transfer 2,719 equity shares of Rs. 100/- each, of the company in

favour of Mr. R. N. Shetty, are in accordance with law and the provisions of article 37 of the articles of association. Though the petitioner, has absolutely no right to claim a right of pre-emptive purchase of shares belonging to the respondents, he has been offered the option to purchase the same. It is clear from article 37(1) of the articles of association no right of pre-emptive purchase is available to petitioner. It permits transfer of shares to a person, who is not a member of the company provided the consent of the general meeting is obtained. It is further averred that the consent of the general meeting has been taken on August 3, 1989. There is absolute compliance with article 37(1) and the general meeting has been convened and held in accordance with law. It is, therefore, prayed that the respondents be given permission to give effect to the resolution passed by the general meeting on August 3, 1989, as per exhibit P-23. It is averred that in spite of the transfer of shares in favour of Mr. R. N. Shetty no right of the petitioner is being jeopardised. The petitioner will continue to hold 15 per cent. of the shares of the company as he now does. Even the petitioner's position as joint managing director of the company will not be disturbed. It has been offered by Mr. R. N. Shetty at the same rate. In spite of the said offer the petitioner did not want to accept the offer and the petitioner cannot on that pretext obstruct the transfer of shares by the respondents. It is further averred that all through and it is within the knowledge of the petitioner, he has been actively participating in each of the negotiations in spite of transfer of shares. Earlier in this case, has taken a very exact attitude, for reasons best known to him, to obstruct the transfer of shares of the respondents in favour of Mr. R. N. Shetty, who has offered the highest price of the share value. The petition is motivated by mala fide conduct. If the resolution is not permitted to be given effect to, the respondents are likely to suffer irreparable loss and injury, which cannot be adequately compensated in terms of money. The company is facing grave financial crisis and with the passage of every day the liability of the company is increasing enormously in addition to the defaults being committed in fulfilling the statutory liabilities owing to want of finances.

4. This application was resisted by the petitioner by filing his objection statement, wherein he has contended, inter alia, that the respondents hold 85 per cent of the equity shares of respondent No. 1-company and have indulged in several acts of oppression and mismanagement detrimental to the petitioner and also to the

interests of respondent No. 1-company including using physical violence against the petitioner's son. The respondents have also indulged in several acts of malversation besides misappropriating more than Rs. 16 lakhs from the funds of respondent No. 1-company.

5. It is further averred that the respondents have agreed to the sale of their 2,719 equity shares of respondent No. 1-company to a third party without offering the same, in the first instance, to the petitioner in violation of the articles of association of respondent No. 1-company, specifically article 37, which has made the petitioner file the company petition.

6. It is further stated that at the extraordinary general meeting of respondent No. 1-company held on August 3, 1989, the respondents passed an ordinary resolution authorising the sale of their 2,719 equity shares in respondent No. 1-company to a third party. The effect of the said resolution will be to transfer the ownership of about 85 per cent. of the equity shares of respondent No. 1-company to an outsider.

7. The effect of such a transfer of shares will amount to handing over the ownership and control of respondent No. 1-company to a third party outsider, and this court has also observed that it would be desirable to explore means of keeping the control of the respondent-company, after examining the merits of the pleadings and holding an enquiry, if necessary.

8. It is further averred that if the respondents are permitted to give effect to the resolution passed at the extraordinary general meeting held on August 3, 1989, as sought in the company application the very petition itself will become infructuous as the respondents will then cease to have any connection with respondent No. 1-company and will consequently escape their liability for the relief sought in the main petition. In the petition, it has been alleged that the respondents have misappropriated more than Rs. 16 lakhs from the funds of respondent No. 1-company. If the respondents are permitted to give effect to the said resolution they will escape their liability on this account, causing a huge loss to respondent No. 1-company.

9. It is further stated that article 37(v) of the articles of association of respondent No. 1-company prohibit the transfer of shares available for transfer unless they are offered in the first instance to the other members of the company pro rata of their respective shareholding. It further provides that if such a member refuses to take the shares so offered the shares must be offered to any other member and only on his refusal, to a third party.

10. It is further reiterated that a plain reading of exhibit N filed along with the main petition reveals that the respondents in total violation of article 37(v), have first offered the shares available for transfer to a third party and then turned around and made a show of offering the same to the petitioner.

11. The petitioner further submits that the respondents, without making a proper valuation of the said shares, have sought to coerce the petitioner into paying an exorbitant amount for the said shares by holding out that the third party has offered such an amount. Further, the respondents have called upon the petitioner to pay the entire consideration for the 2,719 shares, amounting to Rs. 1.91 crores within ten days of the offer being made, whereas the third party, Sri R. N. Shetty, has been permitted to pay for the purchase of the said shares in instalments over a period of time.

12. It is further stated that these acts of the respondents, as described above, apart from being oppressive to the petitioner, are also unjust and inequitable, and the petitioner has sought in the main petition that this court direct the respondents to offer the shares available at a price to be fixed by this court.

13. It is further stated that if the above company application is allowed, the very petition will become infructuous.

14. In traverse of the other allegations contained in the company application by the respondents, the petitioner states that the under taking filed by the respondents was merely a ruse to prejudice the mind of this court as is evident from the fact that the application has now been filed seeking to give effect to the resolution passed at the extraordinary general meeting held of August 3, 1989, hereby, nullifying the very undertaking given by them to the court.

15. The petitioner further denied that the transfer of shares to Sri R. N. Shetty is beneficial to the respondents and the company and its workmen. It is not correct that the workmen of the company will benefit because the said Sri R. N. Shetty has agreed to immediately bring the funds for the immediate financial requirements of the company as even to the knowledge of the respondents, the said funds are proposed to be brought in to pay off and discharge the workmen of the company. The petitioner has contended that the respondents in seeking to transfer the 2,719 equity shares to a third party is lawful and proper and that the petitioner has no pre-emptive right to purchase the same are false and the same has been denied. (sic)

16. The petitioner did not admit the allegations made in para 8 of the respondents' application. It is specifically denied that the company petition is motivated by mala fides. It is denied that the respondents are likely to suffer from irreparable loss and injury which cannot be compensated in terms of money, if they are not permitted to give effect to the said resolution.

17. It is further stated that it is true that the company is facing grave financial crisis and that the liability of the company is increasing. It is also admitted that the company is defaulting in the matter of statutory liabilities and duties. But the petitioner has stated that this situation has been brought about solely due to the acts of malversation and misappropriation indulged in by the respondents, and that it is the acts of mismanagement of the respondents that have led to the property of the company being damaged and led to waste. The alleged resolution passed in the invalid extraordinary general meeting would not solve the problems faced by the respondent-company; on the contrary, it would only create more problems. As such, the petitioner prays to dismiss the company application of the respondents.

18. The petitioner has filed the company petition under Section 397 and 398 of the Companies Act and sought for removing the oppression and to pass such an alternative affairs of the company (sic). The main ground urged by the petitioner is that the mutual trust and confidence has been lost between the parties and there has been a deadlock. All the respondents have got together and are refusing to see reason and are refusing to permit the applicant to rectify the affairs of the

company. There has been total lack of probity in the conduct of the affairs of the company by respondents Nos. 3 and 4, who are managing the affairs of the company. The company is, therefore, liable to be wound up on the just and equitable ground. In the alternative it is stated that the affairs of the company are being conducted in a manner prejudicial to the public interest and also in a manner oppressive to the petitioner. It is averred in the petition by the petitioner that the company was mainly incorporated for purposes of acquiring the factory land and premises at Yeshwanthpur, belonging to Standard Tile and Clay Works Ltd., which was running a factory, incorporated with the main object of manufacture of tiles, fire bricks, refractories, mosaic tiles, etc. This factory was originally founded by the petitioner's father and respondents Nos. 2 to 5. Respondent No. 6 was the wife of the late V. L. Dhanram. The petitioner was looking after as director of the company on May 8, 1959, and, subsequently, he was elected as a director on June 25, 1960. He became the joint managing director of the company on December 31, 1969, and he continues to hold the post of joint managing director even now. From 1969, the petitioner was solely in charge of running of the factory of the company situated at Yeswanthpur. The respondents were not taking any interest in the running of the factory. It is mainly because of the petitioner's hard work put in by him that the company was making profits and the respondents were enjoying the fruits of the hard work that was put in by the petitioner. During the periods of 1983-84 and 1984-85, due to failure of the monsoon and competition from other tile manufacturers outside the State of Karnataka and also due to recession, the sales of the company started declining. In the year 1985-86 due to illegal strike resorted to by the employees of the company, the company had to perforce close its factory.

19. It is further averred that when once the company sustained losses due to recession and illegal strike resorted to by the employees of the company, the petitioner sent circulars to the respondents informing them about the financial crisis face by the company and exhorting them to cut down the expenses which were being reimbursed by the company. It is further stated that the respondents were upset by their inability to get remuneration without work during early 1987, that the third respondent, who was the joint managing director of the company along with the petitioner from 1969, took over the reins of administration of the

company with the active support of the other respondents and ousted the petitioner from the management of the company though the petitioner continues to hold the designation of joint managing director of the company. There was an incident on October 29, 1988, when the son of the petitioner was sent to collect the personal correspondence of the petitioner lying in the factory of the company, and he was abused and assaulted by respondents Nos. 3 and 4. After the administration was taken over by the third respondent, the financial position of the company has deteriorated. The respondents started under invoicing the products of the company and started making money on the side and the total amount thus siphoned off by respondents Nos. 3 and 4 ran into over Rs. 10 lakhs, and they are liable to reimburse the amount. Respondents Nos. 3 and 4 sold a lot of raw materials and some sales have not been accounted for and the amount of loss sustained by the company as a result of the amount thus siphoned off by the third respondent in this manner is over Rs. 5 lakhs which they are liable to make good to the company. It is also alleged in the petition that respondents Nos. 3 and 4 have also sold some of the machinery of the company, which was not properly accounted for in the books of the account of the company. The loss sustained by the company as a result of the sale of machinery is over Rs. 2.3 lakhs and they are liable to make good the same to the company. In fact, the fourth respondent had written a letter on February 8, 1988, falsely claiming to be the joint managing director of the company offering to sell the refractory and ceramic unit of the company.

20. It is further averred that after the third respondent has taken over the management of the company, he has failed and neglected to convene the annual general meeting to prepare the balance-sheet and profit and loss account and to file the returns with the Registrar of Companies. As a result of the Registrar of Companies has issued notices calling upon the company to show cause why action should not be taken for prosecution under the relevant provisions of the Companies Act. It is further stated that the respondents have been wholly mismanaging the affairs of the company and they have been trying to utilise the employees' gratuity fund for the purpose of paying the income-tax and other taxes of the company. It is further stated that the respondents, who constitute the majority of the shareholders of the company have been oppressing the petitioner

in various ways. They have totally precluded the petitioner from attending the factory and from exercising his rights as a member of the company and he has been prevented from inspecting the records of the company. They also stopped paying the provident fund contributions on behalf of the petitioner. It is further alleged that the respondents not being satisfied with the misappropriation and malversation of funds of the company have now thought of selling the land of the company which is situated on the main Bangalore-Tumkur Road and which is very valuable. In this regard they have contacted several bankers. The auditor of the company has been totally misusing his position as an auditor of the company and has been conniving with the respondents in siphoning off the funds of the company and misrepresenting the true facts of the accounts and protecting the false figures. The respondents have now found a buyer for purchase of the land and factory as a going concern in Mr. R. N. Shetty, and have convened a meeting on July 3, 1989, to consider proposals for disposal of shares in favour of third parties and based on alleged offers received by them from third parties. The petitioner attended the meeting and in the meeting the respondents informed the petitioner that one Sri R. N. Shetty has offered to purchase the entire shareholding of the respondents at a rate of Rs. 7,031 per share and that they are inclined to sell the same in favour of Sri R. N. Shetty. The petitioner informed the respondents that since the company is a private limited company and since the articles of association of the company forbid sales of shares in favour of third parties, without offering the same to the existing shareholders the respondents cannot sell the shares in favour of Sri R. N. Shetty. Further, the petitioner has also requested the respondents to show him the offer made by Sri R. N. Shetty. The respondents, however, refused to show the offer made by Sri R. N. Shetty (sic). However, the respondents informed the petitioner that if he wishes to know the contents of the offer made by Sri R. N. Shetty. The respondents further informed the petitioner that they are, however, willing to sell the shares in favour of the petitioner provided he pays the value of the shares of the respondent at the rate of Rs. 7,031 per share within a period of ten days. It is stated that on July 6, 1989, the petitioner received a sale notice under the signature of the third respondent dated July 3, 1989, wherein the petitioner was again informed of the offer made by Sri R. N. Shetty to purchase the entire shareholding of the respondents at the negotiated

price of Rs. 7,031 per share.

21. The said letter specifically indicated that the board has received a written sale notice jointly from either shareholders who are none other than the respondents conveying their intention to transfer their entire shareholding of the company to Sri R. N. Shetty or his nominees at the negotiated price of Rs. 7,031. As per the said letter the petitioner was called upon to pay the value of the entire shareholding of the respondents at the rate of Rs. 7,031 per share which aggregates to nearly Rs. 1.91 crores within a period of ten days from the date of receipt of the letter. It was made clear to the petitioner that if the offer is not accepted, the same would be sold in favour of Sri R. N. Shetty, or his nominees. It is further stated that even before the petitioner responded to the sale notice, the third respondent sent a notice dated July 8, 1989, convening the extraordinary general meeting of the shareholders of the company on August 3, 1989, to pass an ordinary resolution, resolving that the consent of the members be accorded for the proposed transfer of 2,731 shares of the company by the respondents in favour of Sri R. N. Shetty at the rate of Rs. 7,031 per share. The petitioner further submits that he wrote a letter to the third respondent requesting him to furnish certain clarifications and also the letter of offer made by Sri R. N. Shetty in order to facilitate the petitioner to make his offer to purchase the shares belonging to the respondents. The respondents were also in the said letter, requested to furnish a copy of the minutes of the board meeting dated July 3, 1989. In reply, thereto, the third respondent wrote a letter dated July 19, 1989, furnishing only a few of the clarifications sought for and clearly stating that they have already shown the letter of offer made by Sri R. N. Shetty to the petitioner. On July 24, 1989, the petitioner sent a letter calling upon the respondents again, to furnish the letter of offer made by Sri R. N. Shetty and the payment details and modalities of transfer of assets of the company and other particulars. In the said letter, the petitioner has stated that the value of the share is not Rs. 7,031 per share. The petitioner has submitted that the respondents are bent upon selling their shares to Sri R. N. Shetty even though the same is contrary to the Companies Act, and the articles of Association of the company.

22. Respondents Nos. 3 and 4 filed their counter controverting all the allegations of the petitioner. In the counter it has been stated that the facts alleged by the

petitioner do not entitle the petitioner to ask for an order of winding up of the first respondent-company under section 433(f) of the Act and consequently, the petitioner is not entitled to any relief under the provisions of sections 397 and 398 of the Act. The allegation that after 1969, the petitioner was solely in charge of running the factory of the company situated at Yeshwanthpur is absolutely false, and incorrect. All the directors of the company are whole time directors except the sixth respondent, namely, wife of late V. L. Dhanram Mudaliar, and mother of the petitioner and respondents Nos. 2 to 5. Respondents Nos. 2 to 5 have been taking active interest not merely in the management of the company as directors of the board but also in the day-to-day running of the factory. The directors were attending to the specific responsibilities assigned to them from time to time by the board. At the board meeting held on February 7, 1970, the following assignment of work was agreed to between the directors namely, respondent No. 3 staff, labour and mosaic department, petitioner-sales promotion, respondent No. 4, accounts and purchase, respondent No. 2, general administration and respondent No. 5, mines. The claim made by the petitioner apart from being vain, is false to his own knowledge. It is admitted by the respondents that there were difficulties faced by the company never recovered from the crisis that befell the company during these years. The position became worse with the fixation of minimum wages to workers employed in the tiles industry which burden was almost impossible for the company to bear. This position was not peculiar to the company but was the general trend in the tiles industry itself. The statement that the respondent used to take profits of the company periodically even though they were not taking any interest in the work as well as the business of the company is a false one, and a malicious allegation made by the petitioner to suit his own selfish interest. In fact, the company declared dividends at the rate of 5 per cent. last during the financial year ending June 30, 1984. The only drawings which the directors of the company including the petitioner have been making is towards salary and reimbursement of expenses as decided by the board from time to time. So far as the remuneration payable to the directors of the company namely, respondents Nos. 3 to 5, is concerned the same has been drawn only upto August, 1988, and subsequent to that date, none of the respondents Nos. 3 to 5 have drawn any amount from the company towards salary. In fact, the petitioner has also drawn his salary last on

August 2, 1988, of a sum of Rs. 1,840 being the salary for the month of July, 1988. The grievance made, therefore, that the respondents periodically have taken share of profits from the company without taking any interest in the work, is absolutely false and the same is denied. It is stated by the respondents that the petitioner has been throughout guilty of unauthorised and wasteful spending of the company's funds which also contributed to the financial crisis faced by the company. In so far as the expenses are concerned, it is necessary to state that the petitioner has drawn petrol expenses on the company's account up to January, 1989. The only expenses borne by the company so far as respondents Nos. 2 to 5 are concerned is towards petrol and no other expense is being reimbursed.

23. It is stated that the averments made in para 9 of the petition are baseless and untenable. Since the company was not in a position to meet various statutory obligations, viz., payment towards taxes, payment to workers, payment towards ESI, gratuity, provident fund, etc., and put all of them to great hardship and it also exposed the respondents and the petitioner to criminal prosecution under various laws. In fact, on account of the crisis faced by the company, it became inevitable for the company to dispense with the services of forty-seven workers and thereby compelled to incur large additional financial burden by way of terminal benefits. It is in the context of this deteriorating situation that the respondents set about to find ways and means not merely to relieve themselves of the burden but also to reduce the hardships that the workers and others who had dealing with the company were compelled to face on account of the financial crisis. While the respondents were making a constructive approach towards finding a solution to the vexed financial crisis the company was going through, the petitioner revealed in being non-co-operative and has always adopted an obstructive attitude without any constructive or positive suggestions to enable the company and the directors to tide over the crisis. The contentions of the petitioner that the respondents are responsible for preventing the petitioner from taking part in the management of the company is absolutely false and misleading. Further, the averment of the petitioner that the respondent took over the reins of administration of the company with the active support of the other respondents and ousted the petitioner from the management of the company at a time when admittedly the company was in a crisis discloses utter ignorance of the petitioner of natural human conduct. It is needless to state

that human conduct shies away from crisis. Respondents Nos. 2 to 5 were throughout in the active management and administration of the company and the question, therefore, of the respondents taking over the administration of the company does not arise. It is also not correct to say that the petitioner was in the exclusive management and control of the company with respondents Nos. 2 to 5 being mere inactive directors. The various correspondence between the company and the statutory authorities and business transactions disclose the active participation of respondents Nos. 2 to 5 in the matter of the management business and administration of the company. On the contrary, it is the petitioner who has avoided shouldering responsibility required of a joint managing director of the company and it is he who has remained away from the company being unable to face a crisis situation. It was the petitioner who actively encouraged internecine squabbles within the company creating discord between the labour and management. The petitioner has caused serious interference in the administration of the company by illegally withholding the documents pertaining to the company including the statutory books, namely, minutes books, regarding the proceedings of the meetings held by the board of directors of the company. In fact, even today, the petitioner is in possession of the said minutes book. On account of want of the minutes book it became necessary for the directors to open a new minutes book for the purpose of recording the minutes of the meeting of the board of directors on and with effect from July 3, 1989. The allegation that the son of the petitioner was sent to collect the personal correspondence of the petitioner lying in the factory of the company and that he was assaulted by respondents Nos. 3 and 4 and by the son of the fourth respondent which resulted in the filing of a police complaint by the petitioner is absolutely false. It was the petitioner's son who at the instigation of the petitioner sought to create a law and order situation in the factory by instigation the workers to rebel against the management. In order to avoid any untoward incident within the factory the respondent protested against such unwarranted interference by the son of the petitioner. Taking advantage of this protest made by the respondents Nos. 2 to 5, against the unwarranted and unlawful interference and the exercise of extra legal powers by the son of the petitioner, the petitioner filed a false police complaint.

24. The allegation that the fourth respondent started taking part in the business of the company along with the third respondent, is wholly uncalled for and all through respondents Nos. 2 to 5 have been in the management and administration of the company.

25. It is further averred that the other allegation regarding under invoicing of the products and regarding making money on the side is wholly uncalled for. At no point of time prior to the present petition did the petitioner make any grievance at any meeting of the company or elsewhere regarding alleged acts of misappropriation of the company's funds as alleged. Significantly, the petitioner has failed to give any details in this regard as the petitioner is well aware that the allegations are without any substance.

26. It is further contended by the respondents that further allegation made in the petition that the third and fourth respondents have siphoned off amounts to the extent of Rs. 10 lakhs and that the same is liable to be reimbursed to the company is false apart from being baseless and defamatory. The other allegation that the raw materials have been sold by respondents Nos. 3 and 4 and that in the books of accounts only nominal amounts have been shown and some sales have not been accounted for is absolutely false and incorrect. Whatever sales were made of raw materials which was unnecessary to be retained in the company on account of closure of mosaic tiles section in 1986 have been accounted for in the books of accounts fully and properly and at no time has this been questioned or objection raised by the petitioner and it is specifically denied that the third and fourth respondents are liable to make good a sum of Rs. 5 lakhs or any other amount.

27. It is further contended that the allegation in the petition that respondents Nos. 3 and 4 have sold machinery belonging to the company which has not properly been accounted for in the book of account of the company is absolutely false and incorrect. No machinery of the company has been sold. The letter dated February 8, 1988, has been signed by the fourth respondent inviting for a discussion with the directors of the company. If the intention of the fourth respondent was to act in any manner opposed to the interest of the company or clandestinely, the fourth respondent would not have invited for discussion with the directors of the

company.

28. It is further contended that the allegation that after the reins of management were taken over by the third respondent from the petitioner in the year 1987, the annual general meeting of the company was not convened is not correct. The company has held an annual general meeting in December, 1987. However, the accounts of the company could not be considered as the trading and profit and loss account and the balance sheet could not be completed on account of the hostile attitude of the petitioner towards the chartered accountant of the company resulting in the chartered accountant refusing to associate himself with the company. Thereafter, it became necessary for the respondents to persuade the chartered accountant to continue and now accounts are under finalisation. The letter of the Registrar of Companies referred to him the petition, has been suitably replied to by the petitioner himself by his letter dated October 3, 1988. The grievance of the petitioner regarding the non-completion of the accounts is wholly uncalled for, and the petitioner himself is to be blamed for the defaults enforced on the respondents. The allegation that there has been any financial impropriety committed by utilisation of the employees' gratuity fund for the purpose of the company is a totally misleading and false statement. The fact of the matter is that the gratuity is payable to employees at the time of cessation of their employment. The company has a gratuity scheme operating through the Life Insurance Corporation of India and premiums are paid regularly by the company. Upon an employee ceasing his employment with the company, gratuity becomes payable immediately, but, however, the settlement of the claim by the Life Insurance Corporation of India takes a couple of months. These facts are well within the knowledge of the petitioner and in fact, the petitioner himself has drawn such cheques for transfer of funds from the gratuity fund to the company. The attempt now to misuse and misinterpret the documents filed as exhibits J and K is, therefore, mala fide. The cheque dated February 5, 1988, was sent to the petitioner for his signature as one of the trustees of the employees' gratuity fund. The petitioner at no point of time prior to filing of the petition, raised any objection for the drawal of the cheque. In fact, two payments of Rs. 10,000 and Rs. 20,000 have been transferred from the gratuity fund to the company by means of a cheque bearing No. 112405, dated May 19, 1981, both drawn on Vijaya Bank,

Bangalore, where the trust funds operate its accounts. These cheques have been signed by the petitioner himself. These transfers have also been made in the circumstances as stated above. The documents filed as exhibits J and K do not reveal any financial impropriety as sought to be made out. The allegation that they have totally precluded the petitioner from attending the factory and from exercising his rights as a member of the company is absolutely false and incorrect. In fact, the petitioner has been participating in the affairs of the company as joint managing director of the company and no right of the petitioner as a member of the company has been in any manner affected by any conduct of the respondents. In fact, on August 3, 1988, the petitioner himself, has issued notice calling for the meeting of the board of directors on August 6, 1988. The statement that the respondents have refused to pay the remuneration of the petitioner is also not true. The fact of the matter is that there are no funds available with the company for the payment of the petitioner's remuneration and no director of the company except the second respondent has drawn any money from the company towards remuneration. The allegation that the respondents have been refusing to convene the meetings, both general meetings as well as the board meetings of the company, despite repeated requests and demands in this regard by the petitioner is absolutely false and incorrect. On the contrary, the petitioner not merely has been coming to the factory; his activities in the factory, have not stopped with mere inspection of the records but have extended further, in that the petitioner has wrongfully taken away several books of the company including the minutes book of the board of directors' meetings. He has also retained in his hands several account books, vouchers, etc., and he has failed to return the same in spite of the request in that regard. The letter dated September 22, 1988, clearly discloses the conduct of the petitioner in this regard. In fact, the petitioner is liable to be proceeded against under section 630 of the Companies Act and appropriate action is being taken in this regard.

29. The allegation that there has been any oppression on rights of the petitioner as member of the company is absolutely false and incorrect. On the other hand, it is the petitioner who has been instigating the workers of the company to revolt against the respondents.

30. The allegation of the petitioner that there has been misappropriation or malversation of funds of the company by the respondents is absolutely false. It is not true to say that there has been any thought of selling the land of the company with regard to exhibit L. It does not disclose in any manner or contemplate transfer of the property belonging to the company. The petitioner is misleading this court by referring to exhibit L. As is clear from exhibit L itself, what is envisaged is transfer of shares belonging to the shareholders which has nothing to do with the property of the company as such. It is needless to state that the shares of the shareholders in the company are the private property of the shareholders and they are entitled to deal with the same in any manner they like within the provisions of law. Neither the percentage of the shareholding of the petitioner nor the petitioner's right as a member of the company will be affected in any manner by the respondents dealing with their shares in such a manner as they deem fit. The only consequence would be that the petitioner will find himself in a different company of shareholders. That is an inevitable consequence in respect of which the petitioner can make no grievance. It is not open to the petitioner to make false and baseless allegations against the auditor of the company without making him a party to the petition. Those allegations are liable to be struck off from the proceedings. It was the petitioner who brought in the firm of T. Sriram to act as auditor of the company. At no point of time prior to these proceedings has the petitioner raised any objections against T. Sriram and Company working as auditors of the company.

30. It is stated that the company has been facing severe financial crisis on account of various factors and also faced with demands from several statutory authorities, namely, the income-tax authorities, sales tax authorities, entry tax authorities, provident fund authorities, E.S.I. authorities, etc., for payment of dues failing which the company and the directors were threatened with prosecution. Immediate statutory payment required to be made and not paid aggregates Rs. 5,18,008.91. The liabilities are increasing day by day. In addition to these statutory payments, there are also dues payable to the workers. In fact, the terminal benefits have not been paid to several workers, whose services have been terminated. On the one hand, the company is not generating enough funds to sustain itself, on account of various factors, outside the control of the company and on the other, the liabilities have mounted enormously and continue to mount every day.

31. It is averred that over the last few years, efforts have been under way for transferring the shares held by the members of the company and several offers were received from an NRI group. USA., to take over the company and its assets. The petitioner himself has actively participated in the matter of negotiations with this group. The NRI group was represented by Mr. B. V. Satyanarayana. The board of directors approved a draft of the letter to be sent by the auditor of the company. viz., T. Sriram and Co., on April 20, 1987. The petitioner also has approved of this action by a letter, approved by the board of directors to be sent by the chartered accountants to Mr. B. V. Satyanarayana, which is filed as annexure R-9.

32. Though the petitioner at the meeting of the board of directors held on April 20, 1987, agreed for continuation of negotiations with Mr. B. V. Satyanarayana and also subscribed his consent to a resolution of the same date, the if a firm offer is not secured by Mr. Devaraj from others better than the offer from Mr. B. V. Satyanarayana within a period of one months from April 20, 1987, the board was authorised to accept the offer of Mr. B. V. Satyanarayana. Later, the petitioner sent a letter on April 28, 1987, to the auditor of the company taking objection to his having written to the said B. V. Satyanarayana on specious and false please totally contrary to what he had agreed to on April 20, 1987.

33. The petitioner again wrote to the said B. V. Satyanarayana on June 3, 1987, that neither the auditor of the company nor other directors the company had any authority to bind him.

34. It is obvious from this letter of June 3, 1987, that the petitioner only expressed his intention not to sell his shares in respect of which he has stated that others had no authority to bind him.

35. The petitioner has not raised any objection in so far as the transfer of shares belonging to the respondents is concerned. It is clear from the letter of the petitioner dated April 28, 1987, to the chartered accountants of the company that the petitioner had no intention whatsoever of buying the shares of the company himself in exercise of any purported right under the articles of association of the company which the petitioner is now putting froth as a plea for maintainability of

the present petition before this court. In the context of the withdrawal of the petitioner from his commitment as stated above, the respondents wrote to Mr. B. V. Satyanarayana on June 5, 1987, offering their Share holding to B. V. Satyanarayana. The petitioner continued to be obstructive without being constructive and, therefore, the group of B. V. Satyanarayana withdrew their offer. It is stated by the respondents that all these clearly go to show, the design of the petitioner obviously was to put obstruction (sic) to claim for additional payment to which he is legitimately not entitled. It was really a case of minority shareholder oppressing the majority shareholders. However, the respondents continued to find a way out of the predicament in which they found themselves which was making to tethering a white elephant without means to maintain the same. At that point of time an offer was received by the respondents from a certain Mr. R. N. Shetty, an industrialist, having several industries in the manufacture of tiles and ceramics, including an industry under the name and style of Murudeshwar Ceramics Ltd., one of the leading manufacturers of ceramic tiles in the country. He offered to purchase the shares at Rs. 7,031 per share. The offer made discloses the following salient features :

- (a) take over of the shareholding of the respondents, viz., 2,392 shares;
- (b) payment of Rs. 7,031 per share;
- (c) sale of shares with the approval of the general body of the company as required under article 37 of the articles of association of the company;
- (d) sale of shares to be free from charges, encumbrances, attachments or court proceedings;
- (e) payment of Rs. 50 lakhs as advance and the balance within a period of six months after the management of the company is placed in the control of R. N. Shetty or his nominee. For the balance price, R. N. Shetty has undertaken to give a bank guarantee;
- (f) that R. N. Shetty is willing to meet the requirements of the company to pay ESI., P.F. arrears, sales tax and settlement of workers dues (Rs. 20 lakhs

approximately);

(g) offer is open till August 15, 1989;

(h) the said offer is also available to the petitioner.

36. It is further stated that the petitioner for no good reason has not co-operated with the respondents in the matter of the offer received from Mr. R. N. Shetty. The respondents being exasperated with the unreasonable conduct of the petitioner since 1987, had no other alternative but to take steps in accordance with law for the exercise of their rights as shareholders of the company in regard to what is essentially their private property, namely, shares of the company. The record of events from 1987 clearly discloses the mala fide intention of the petitioner in this obstructive conduct. The petitioner has no intention of acquiring any of the shares belonging to the respondents. Significantly, no such offer is made even in the petition. All that the petitioner is interested in is his being paid a large sum of money over and above what is paid to other shareholders and this petition is filed only to extort this amount by putting obstacles in the way of the respondents. With regard to transfer of shares reference is invited to the relevant provisions of the articles of association of the company. Article 37 governs the conditions attaching to the transfer of shares of the company. Article 37(i) envisages transfer to a person other than a member of the company only upon sanction in that regard being obtained by the company in its general meeting. Article 37(v) provides for a first offer to be made to the other members pro rata of their respective holdings and on their refusal to take the same to any other member and on his refusal to a third person. In accordance with the requirement of article 37(iv), respondents Nos. 2 to 6 together with other shareholders in the aggregate holding 2,719 shares, wrote a letter to the company on June 19, 1989, making an offer as required by article 37(iv).

37. It is further stated that pursuant to the offer letter dated June 19, 1989, as stated above, the third respondent as joint managing director of the company convened the meeting of the board of directors on June 26, 1989. The agenda, inter alia, included the consideration of proposal for disposal of shares held by the

existing members of the company based on the offers received from the third parties and to decide the future course of action to be followed in accordance with the rules and regulation of the company. A meeting of the board of directors was held on July 3, 1989. The deliberations of the meeting of the board of directors held on July 3, 1989, have been recorded in the minutes book opened. After ad detailed consideration, it was decided to convene a meeting of the company on August 3, 1989, thereby providing for a clear twenty-one days' notice as required by law. The contention of the petitioner that shares must be offered to the existing members including himself was noted and, as opined by the majority, it was decided to hold a meeting of the company as indicated by article 37(v) as Mr. R. N. Shetty, to whom shares were proposed to be transferred in terms of offer dated June 19, 1989, was not an existing member of the company. Pursuant to the resolution passed by the board of director of the company in terms of resolution passed, sent a letter to the petitioner giving a first option to purchase all or any part of the shares offered for sale at a rate not less than Rs. 7,031 per share, and the petitioner was required to communicate his acceptance within ten days.

38. The minutes of the meeting of the board of directors held on July 3, 1989, was well within the knowledge of the petitioner, who attended the meeting and has signed the draft minutes and the sale notice dated July, 3, 1989, and the request of the petitioner of a copy of the minutes of the board of directors of the company held on July 3, 1989, is, therefore, a specious one. In fact, the petitioner himself inspected the minutes which were recorded on July 3, 1989, itself, and this fact has been stated in the letter dated July 19, 1989. Having done so, the petitioner has subsequently moved this court with the above company petition filed on July 27, 1989. Pursuant to the order passed on August 1, 1989, by this court, the general meeting was held on August 3, 1989, as scheduled and the petitioner was absent.

39. It is further submitted that they have fulfilled all the requirements of law for effecting transfer of their shareholding of 2,719 shares in the first respondent-company to Shri R. N. Shetty. The objection now raised by the petitioner to effecting such transfer is untenable both on facts and in law. The allegation that the offer made by R. N. Shetty was not disclosed to the petitioner is absolutely

false. In fact, it was openly disclosed at the board of directors of the meeting held on July 3, 1989. The question of giving a copy of the offer made to the petitioner did not arise since strictly speaking, the offer was made to respondents Nos. 2 to 5 in their personal capacity as shareholders of the company and the petitioners had no right to know the terms and conditions on which the respondents had agreed to transfer their shares to R. N. Shetty. The question of petitioner trying to make an offer after knowing the terms and conditions of the offer made by Sri R. N. Shetty does not arise in law as what is contemplated by article 37 even if applicable, is that the petitioner could accept the offer of sale made by other members. Significantly, the articles of association of the company did not provide for valuation of the shares to be made by any other party. The offer contemplated by article 37 is one which only requires acceptance by other members and there is no provision in the articles for the petitioner to make a counter offer. If the petitioner is not willing to accept the offer as made by the other members, then the petitioner is deemed to have refused to accept the offer and other provisions of article 37 will then apply to the case. As such, the grievance that the petitioner is entitled to know the terms and conditions of offer made by Sri R. N. Shetty with a view to make his own offer is not borne out by any provisions of the Companies Act and the articles of association of the company or any other sources. It is further submitted that there is not attempt on the part of the respondents to pressurise the petitioner to pay Rs. 7,031 per share. There is no compulsion. It is open to the petitioner either to accept the offer or not to accept it. Moreover, there is no intention on the part of the respondents to press the petitioner. The allegation of oppression is imaginary. The conduct of the petitioner is absolutely unfair and not vice versa. There is no case made out by the petitioner for winding up the company under section 433(f) of the Companies Act.

40. Learned counsel appearing for the respondents (application in C.A. No. 994 of 1989) has submitted that pursuant to the meeting held on August 3, 1989, all the shareholders present, except the petitioner, unanimously gave consent to the proposal of transfer of 2,719 equity shares of the respondents in favour of Mr. R. N. Shetty. The action taken is legal and in accordance with the provisions of the Act and the articles of association. The transfer of shares in favour of Mr. R. N. Shetty is not only beneficial to the shareholders but also to the company and the

workers. The proposed transferee has agreed to immediately bring funds for the purpose of the immediate financial requirements of the company. The articles of association do permit transfer of shares of the company to a third party, though the petitioner has no right to claim a right to pre-emptive purchase of shares belonging to the respondents, he has been offered the opportunity to purchase the shares which he did not purchase either entirely or any portion of the shares. There has been complete compliance with article 37(v) of the articles of association in taking steps to transfer the shares of the respondents to a third party. He has further pointed out that the petition of the petitioner is motivated. In spite of the offer made to him to purchase the shares, he did not accept it, but he has with ulterior motive put obstruction for the transfer of shares. The petitioner's petition is motivated by mala fide conduct.

41. Therefore, the respondents' counsel submitted that if the resolution dated August 3, 1989, is not given effect to, the respondents-applicants would suffer irreparable loss and injury, which cannot be adequately compensated in terms of money. If the shares are transferred to Mr. R. N. Shetty, the industrialist, who has agreed to bring additional funds immediately to make statutory payment as and to the workers dues and that the company would be rejuvenated. The apart, it would in no way affect the shareholding of the petitioner in the company.

42. Learned Counsel, Mr. Udaya Holla, appearing for the petitioner has strenuously argued that the application of the respondents deserves to be dismissed in limine for more than one reason. Firstly, he submitted that the company petition filed by him is under section 397 and 398 read with section 434(e) of the Companies Act. The allegations contained therein are of a serious nature such as oppression of the minority shareholder the petitioner, by the respondents the majority shareholders. There is deadlock in the management of the company due to the recalcitrant attitude of the respondents and their action preventing the petitioner from participating in the management of respondent No. 1-company. The respondents have misappropriated and siphoned off the money of the company for their advantage. The respondents, who are directors are liable to make good the loss caused to the company. He has further submitted that if their shares are transferred to the third party, during the pendency of the petition, it

would be difficult to bring them to book to cough up and thus to make good the loss caused to the company.

43. He further submitted that there was no proper compliance with the provisions of article 37(v) of the articles of association in passing the resolutions in the extraordinary general meeting of the company as the shares of the members of the respondent-company cannot be transferred to the outsider as the company is a private company a quasi-partnership. The respondents have offered to sell their shares to the third party within out offering their shares in the first instance to the petitioner which is in violation of the articles of association of the respondent-company.

44. The respondent's counsel, Mr. Raghavan, has pointed out that the petitioner himself, had prior to the filing of the company petition under sections 397 and 398, taken steps to sell the shares of the company to a third party he cannot now contend that the respondents' shares cannot be transferred to a third party and that it is in violation of article 37(v) of the articles of association.

45. Let me now consider the respective contentions of the parties. In order to decide the questions involved, it would be necessary to examine whether the petitioner has made out a prima facie case under sections 397 and 398 read with section 403 of the Companies Act.

46. In the company petition, the petitioner has alleged the oppression of the minority shareholder, the petitioner, by the respondents, the majority shareholders. The commission and omission in the management of the company by the respondents alleged in the petition have been countered by the respondents by filing detailed objection statement. One of the allegations of the petitioner has that though he was the joint managing director even since 1969, he was suddenly excluded from participating in the management, and he further alleged that there was a scuffle with his son when he went to the factory to collect the private correspondence, and there has been complaint to the police and apart from this solitary instance of the petitioner's son alleged to have been assaulted by someone in the factory, the petitioner has not stated any instances by which he was prevented by the respondents from discharging his duties or functioning as

joint managing director. The respondents have unequivocally stated that the conduct of the petitioner is such that he himself brought about a situation of not attending any meeting or participating in the management of the affairs of the company.

47. The other allegations are that the their respondent has taken over the reins of management of the company, and caused financial loss. The respondents siphoned off about Rs. 10 lakhs and they are liable to make good the loss. Further, it has been alleged that respondents Nos. 3 and 4 have sold the raw materials and the actual received has not been shown in the books of account and this has caused loss to the company to the extent of Rs. 5 lakhs and further alleged that the respondents have sold machinery belonging to the company, totally they caused loss of Rs. 2 to 3 lakhs. In support of this allegation the petitioner produced the letter written by the joint managing director. The said letter was sent to the prospective buyers to come and discuss the matter with the directors. The respondents in their objections have categorically stated that no machinery was sold. The letter was sent to the prospective purchasers to come and discuss the matter and the machinery was not sold at all and such question of causing loss of Rs. 2.3 lakhs does not arise. Except baldly stating that the machinery of the company was sold which in fact was denied, there is no material document produced or specific statements made by the petitioner as and when and to whom the machinery was sold. These bald allegations cannot be countenanced.

50. It is the case of the petitioner that there was no general body meeting called after 1987 and the balance-sheet and profit and loss account and filed no returns with the Registrar of Companies. This inaction and failure to call the annual general meeting was attributed to the third respondent on the ground that he had taken over the management of the company. This is plainly uncharitable for the reason that there is no material placed by the petitioner how and when the third respondent had taken over the management of the company. The respondents have denied the allegation in entirety and stated that at no time the third respondent had taken over the management of the company. Further, in their objection statements they have stated that the annual general meeting was held in December, 1987, but the accounts could not be finalised due to the hostile attitude

of the chartered accountants and later the accounts were finalised. The letter of the Registrar was suitably replied by the petitioner himself by letter dated October 3, 1988, as per annexure R-2. When the default notice was issued by the Registrar of Companies, the petitioner addressed a letter to the respondents disowning director in charge of the affairs of the company at all relevant time.

51. The narration of events as emerging from the statements of the petitioner and respondents go to show that non-filing of returns and emergent issue of notice by the Registrar of Companies was due to circumstances not brought about by the respondents. This isolated act of non-filing of returns for which the respondents are not wholly responsible which is contrary to law may not necessarily and by itself support the inference that the law was violated with mala fide intention or that such violation was hindrance or harsh and wrongful.

52. The petitioner's allegation that the respondents have committed financial impropriety by utilising the employees' gratuity fund, has been stoutly denied by the respondents. It is stated by the respondents that the petitioner at no point of time had raised any objection to the drawal of cheques. The petitioner himself has transferred two payments of Rs. 10,000 and Rs. 20,000 from the gratuity fund to the company by means of cheques dated May 19, 1981, and November 8, 1985, and the cheques have been signed by the petitioner. Thus, the documents filed by the petitioners E, J and K, do not reveal any financial impropriety by the respondents. When the petitioner himself is a party to such transfers of gratuity fund, he is estopped from contending that the respondents have committed financial irregularities. The transfer of funds and the payments made to the employees cannot be said to be in violation of any Act or has been made in violation of law with mala fide intention.

53. The petitioner further alleged in paragraph 16 of the petition that the respondents have now thought of selling the land of the company, and in that regard the respondents have contacted the parties. The petitioners has produced exhibit L, containing the terms and conditions pertaining to the sale. The respondents have in their counter specifically denied this by saying that there has been no thought of selling the lands of the company. Further, with reference to

exhibit L, it is stated that what is envisaged in the said document is the transfer of shares belonging to the shareholders which has nothing to do with the property of the company as such.

54. On a bare perusal of the said document it is obvious that it was not for the sale of land of the company as alleged by the petitioner. It was for the sale of their shares giving particulars of the petitioner. It was for the sale of their shares giving particulars of the property owned by the company giving a graphic picture as to the value of shares. The petitioner's allegation is very vague. There is no suggestion or any material particulars given by the petitioner to show that there had been sale of the company land. In view of this fact, I do not think that the petitioner has prima facie established oppression by the majority shareholders.

55. Then coming to paragraphs 17, 18, 19, 20 and 21 of the petition, the allegations appear to be the principal grievance of the petitioner. It is the case of the petitioner that the respondents have found a transferee for their shares in Mr. R. N. Shetty, and the respondents convened the meeting on July 3, 1989, to consider proposal for disposal of shares in favour of Mr. R. N. Shetty. The petitioner attended the meeting and opposed the sale of shares to the outsider as the company is a private company and the articles of association forbid the sale of shares in favour of a third party, without offering the same to the existing shareholders. The petitioner further alleged that the respondents, however, informed the petitioner that they are willing to sell their shares at the rate of Rs. 7,031 per share which was the price offered by Mr. R. N. Shetty. In paragraphs 18 and 19 of the petition, the petitioner alleged that he was called upon to pay the value of the respondents' share at Rs. 7,031 per share within ten days from the date of receipt of the letter and subsequently, the third respondent sent a notice dated July 8, 1989, convening the annual general meeting of the shareholders on August 3, 1989, to pass the resolution resolving that the consent of the members be accorded for the proposed transfer of 2,719 shares by the respondents in favour of Mr. R. N. Shetty.

56. The respondents have countered the allegations of the petitioner by stating that the company has been undergoing severe financial crisis on account of

various factors including labour trouble, fixation of minimum wages, high cost of inputs like clay, coal and recession in the market and a state was reached when it was almost impossible to run the company without incurring heavy loss. The company was faced with demands from several statutory authorities, namely, the income-tax authorities, the sales tax authorities, the entry tax authorities, the provident fund authorities and the ESI authorities for payment of dues. The company was not able to generate enough funds to sustain itself. The liabilities have mounted enormously. In that context, the petitioner and respondents deliberated the matter and realised that the only alternative was to hand over the company to a third party by selling en bloc all the shares to the third party. Over the last few years efforts were made but they could not get any party to purchase the shares of the company.

57. There was one offer from the NRI group from the USA to take over the company and its assets. The petitioner himself has actively participated in the matter of negotiations with the NRI group, which was represented by B. V. Satyanarayana. The board of directors approved the draft of the letter to be sent by the auditor of the company, T. Sriram and company, on April 20, 1987. The petitioner has approved the said action. In response a letter was received from the said B. V. Satyanarayana on April 26, 1987, making of final offer, limited for acceptance within the stipulated period. The copy of the letter is annexure R-11. The petitioner suddenly wrote a letter on April 28, 1987, to the auditor of the company, having written to the said B. V. Satyanarayana on a false plea totally contrary to what he had agreed to on April 20, 1987. The copy of the letter is annexed as annexure R-12. As the petitioner has withdrawn from his commitment and adopted obstructive methods, the groups of B. V. Satyanarayana withdrew their offer.

58. The respondents have further stated that there was another offer from Sanmar Finance Services Ltd. In the negotiation with that group, the petitioner was represented separately by his chartered accountant. From the letter dated August 18, 1988, of Sanmar Finance Services Ltd., it is clear that the petitioner has claimed special status in the company. The petitioner has withheld the title document illegally with a view to extorting more money for himself. The copy of the

letter is produced by the respondents as annexure R-16. Thus, though the petitioner agreed to sell the shares of the company and had, in fact, taken steps to find the buyer, when the actual purchaser of shares came forward with definite offer, he on one or other pretext, mainly claiming a special status in the company, obstructed the sale of shares, resulting in withdrawal of offer by the purchaser.

59. It is stated by the respondents that they had found such a situation on account of the obstructive conduct of the petitioner. However, they were able to find a purchaser for the shares of the company in a leading industrialist, Mr. R. N. Shetty. The offer of Mr. R. N. Shetty is incorporated in his letter dated June 1, 1989, which discloses the payment of Rs. 7,031 per share and he would purchase all the shares of respondents. That apart he would bring sufficient funds to meet the requirements of the company to pay the ESI, PF claims, sales tax and settlement of workers dues.

60. It is clear that the petitioner himself was taking active steps to sell the shares of the company to a third party. But he later on resiled from the agreement to sell the shares to the third party and started obstructing the sale of shares. It is not alleged by the petitioner that the sale of shares of the respondents in any way affects his shareholding or reduces his shareholding.

61. The respondents' counsel, Mr. Raghavan, has submitted that the petitioner's allegation in the petition does not show that the conduct of the respondents-majority shareholders was oppressive to the petitioner, the minority shareholder. In fact, there is no allegation much less any material particulars in the petition to show that the conduct of the respondents, the majority shareholders was burdensome, harsh and wrongful. It is well-settled law that mere lack of confidence between the majority shareholders and the minority shareholders would not be enough to show that there was oppression of the minority shareholders.

62. I have carefully considered the allegations contained in the relevant paragraphs of the petition and the annexures to which my attention was drawn by Mr. Udaya Holla, learned counsel for the petitioner. The grounds of petition are wide ranging but broadly alleged that the petitioner was not consulted with the respondents' transaction, that the respondents had assumed control of the

company and had excluded the petitioner from involvement in the affairs, and the company accounts were irregular and defective. By way of defence the respondents have categorically denied each and every allegation and pointed out with material that the petitioner was not excluded from involvement in the affairs of the company and their approach were not irregular, they have been running the business and affairs of the company along with the petitioner.

63. What the court is to see whether the respondents intended to harm the petitioner, but whether the 'reasonable bystander' observing the consequences of the conduct complained of would regard it as having unfairly prejudiced the petitioner's interest.

64. I do not think that the allegation or facts stated in the petition and the annexure to it do prima facie establish that the conduct of the respondents-the majority shareholders, was prejudicial as well as unfair to the petitioner. The petitioner has not made out a prima facie case to justify in holding that there is a cause of action for maintaining the petition under section 397 of the Act.

65. That takes me to the application of the respondents seeking an order to permit them to give effect to the resolution dated August 3, 1989. This court, while admitting the company petition, passed an order on the company application filed by the petitioner to hold the annual general meeting and pass the resolution but not to give effect to or act upon it until this court otherwise directs. The annual general meeting was held on August 3, 1989, and the resolution was passed unanimously giving consent to the proposal to the transfer of 2,719 shares of Rs. 100 each, in favour of Mr. R. N. Shetty. The respondents have contended that the steps taken by them seeking to transfer the shares is in accordance with law and the provisions of article 37 of the articles of association.

66. The petitioner's counsel, Mr. Udaya Holla, has argued that the petitioner has a right of pre-emptive purchase and he was deprived of the opportunity of buying the shares, and the respondents have taken steps to transfer to an outsider. Mr. R. N. Shetty, without offering the same in the first instance to the petitioner in violation of the articles of association of the respondent-company, specifically article 37.

67. The next contention of the petitioner's counsel was that the effect of violation authorising the sale of 85 per cent. of shares of the company to the outsider which is not permissible for essentially the company is a family owned company.

68. It was next contended by Mr. Udaya Holla, the petitioner's counsel, that article 37(v) of the articles of association of the respondent-company prohibits the transfer of shares to the outsider for it would have the effect of handing over the ownership and control of the company to a third party.

69. In support of his contention of pre-emptive right, he relied not on the passage contained in Palmer's Company Law, twenty-third edition, page 282, which reads as follows :

'Secondly, in private companies, the articles often provide a non-statutory pre-emption right in favour of the remaining shareholders if a shareholder is desirous of disposing of and transferring his shares. The object of this non-statutory pre-emption right is to preserve the character of the private company as a 'close corporation' and to prevent an unwelcome outsider from buying himself in to the company and taking it over.'

70. To appreciate the argument of Mr. Holla that there is a pre-emption clause in the articles of association, it would be better to refer to article 37 of the articles of association which reads as follows :

(i) No member shall transfer any of his shares to any person except with the sanction of the company in the general meeting, unless the said person is already a member of the company and is approved by the director. Shares may also be transferable to an infant or minor provided either his or her father is alive to represent him or her as guardian, or any person appointed by a competent court to do so to represent him or her as his or her guardian.

(ii) Shares may be transferred at any time by a member to his or her father or mother or to any lineal descendant of such father or mother, or to his wife or her husband and any share of a deceased member may be transferred by his executors or administrators to the widow or widower or any such relative as

aforesaid of such deceased member being a cestui que trust or special legatee thereof and shares standing in the name of any deceased member maybe transferred to or placed in the names of the trustees of his will and upon any change of trustees, may be transferred to the trustees for the time being of such will, subject to the sanction of the company in the general meeting and approval of the directors. During the lifetime of a member, he can nominate who the successors of his shares shall be and such nomination shall be registered in the books of the company. These nominations shall be revocable.

(iii) The directors in their discretion may refuse to sanction or to register the transfer of any share to any person who in their opinion is undesirable in the interest of the company to be admitted to membership; but such right of refusal shall not be exercisable in the case of any transfer made pursuant to clauses (i) and (ii) of this articles, except for the purpose of ensuring that the number of members does not exceed the limit prescribed by article 3. The directors may refuse to register any transfer of shares on which the company has a lien.

(iv) In order to ascertain whether any member is willing to purchase case of his death or insolvency proposing to transfer the same shall give notice in writing to the company that he desires to sell the same. No sale notice shall be withdrawn except with the sanction of the directors.

(v) Shares which are available for transfer shall, except in the cases noted above, be offered in the first instance to the other members pro rata of their respective holdings and on their refusal to take the same to any other member and on his refusal to a third person.'

71. The clause 37 of the articles of association has several parts. Firstly, that no member shall transfer any of his shares to any person except with the sanction of the company in the general meeting, unless the said person the sanction of the company in the general meeting, unless the said person is already a member of the company and is approved by the director.

72. Article 37(ii) speaks of the transfer of shares by the member to his stated relations and to his nominees.

73. Article 37(iii) speaks of the authority of the director to refuse to sanction or register the transfer of any share to any person who in their opinion is undesirable in the interest of the company to be admitted to membership.

74. This clause, however, enjoins the transfer of shares to the outsider provided, in the opinion of the director, he could be admitted as a member of the company.

75. Clause (iv) envisages issuance of notices to ascertain whether any members is willing to purchase the shares.

76. Clause (v) makes it clear that the shares available or transfer except the cases noted above, may be offered to the other members pro rata of their respective holdings and on their refusal to offer it to any other member and on this refusal to the third party.

77. This article of the private company provided that any member interested in transferring his shares should inform the directors who should take the shares equally between them, the reference to the directors as a reference to the members, who constitutes as directors. It is argued by learned counsel for the petitioner that there was no offer to the petitioner, who constituted a minority shareholder, by the respondents before transferring the shares to a third party.

78. Learned counsel for the respondents, Mr. Raghavan, has pointed out that the petitioner himself earlier had taken steps and negotiated for sales of shares of the company to outsiders and later he resiled from it for obvious reasons.

79. In answer to the contentions of the petitioner that the respondents did not offer the shares to the petitioner before they were sold to the third party, the respondents have stated that in accordance with the requirement of article 37(iv) they together with other shareholders, namely, B. Dayakar, B. Prabhakar and Lakshmikrishna, all of whom together in the aggregate held 2,719 shares wrote a letter to the company on June 19, 1989, making an offer as required by article 37(v) annexure R-19. Pursuant to the said notice, a board meeting was convened on June 26, 1989, which decided to convene a further meeting on July 3, 1989, to consider the letter dated June 19, 1989. The petitioner attended the meeting and

raised objections that the shares must be offered to the existing members including himself. In the said meeting the offer made by R. N. Shetty was discussed and pursuant to the resolution passed in the said meeting, the third respondent sent a letter to the petitioner giving him the first offer to purchase all or any part of their shares offered for sale at a rate not less than Rs. 7,031 per share. It is relevant to note at this state that all the 85 per cent. of shareholders-respondents had offered to sell the shares giving option to the petitioner-holder of ramming 15 per cent. shares of the company to purchase all the shares or any portion of the shares of the respondents and other shareholders giving him 10 days' time for acceptance.

80. The petitioner having received the offer dated July 3, 1989, wrote a letter on July 6, 1989, to the third respondent after a lapse of a week seeking clarification in respect of various points raised by the petitioner. To which a reply was sent by the respondents on July 19, 1989, giving all the required particulars, including further extension of time for acceptance or rejection of the offer made to him till July 31, 1989. The petitioner replied to it on July 24, 1989, stating that 'I would like to place on record that I do not believe that the price of Rs. 7,031 for equity share, as offered by Mr. R. N. Shetty, reflects the true value of the assets of the company or the best market value thereof. I had repeatedly insisted at all meetings of the board attended by me that any proposal to sell shares of the company should be given the widest possible publicity both here and abroad so as to maximise the gain to the shareholders of the company'.

81. Further, the petitioner has sought the details of payments condition of the value of the shares of Mr. R. N. Shetty. From these correspondence, what emerges is that the petitioner was offered the option to purchase either all or any portion of the shares of the respondents. But the petitioner did not exercise his right to purchase. On the contrary, he contended that the price offered by Mr. R. N. Shetty to purchase the equity shares is not a real value, they would have fetched more price, if the offer to sell the shares of the company had been given wide publicity. The contention of the petitioner that this pre-emptive right was defeated in not offering the shares to him and there has been violation of statutory mandate of article 37(v) of the articles of association is unsustainable.

82. The petitioner's counsel had relied upon the decision of the Supreme Court in *Bishan Singh v. Khazan Singh*, : [1959]1SCR878 . In the Supreme Court decision, it is observed that (at page 841) :

'(1) The right of pre-emption is not a right to the thing sold, but a right to the offer of a thing about to be sold This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase, i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant a superior or equal right being substituted in his place.'

83. The principle of law laid down in the above case to which I adhere, has no application by its own terms. In this case, the petitioner has not exercised his right of pre-emption, despite being offered the shares which were proposed to be sold to Mr. R. N. Shetty, who offered to purchase the shares of the respondents. That apart, the petitioner is of the view that the price of the equity shares offered is not the real value, but they would fetch higher price indicating therein, that he would also sell his shares if the terms were higher than those offered by Mr. R. N. Shetty. As noticed earlier the petitioner himself had taken steps to sell the shares of the respondent company to NRIs.

84. Mr. Raghavan, learned counsel appearing for the respondents, has submitted that even if article 37 of the articles of association of the company contains machinery for giving effect to the pre-emption rights of other members it does not require the shares to be offered to the other members at a fair value certified by the auditors or the directors of the company, as such the petitioner to whom the offer to purchase was made cannot complain of the adequacy or otherwise in the fair value at which it would be offered to him, nor can the court enquire into the correctness of the valuation. In this case, that question does not arise, for the petitioner did not accept the offer to purchase the shares and did not exercise his

pre-emptive right.

85. In my opinion, the contentions of the respondents' counsel, Mr. Raghavan, are well founded. The petitioner has not, prima facie, established that he being the minority shareholder, was constrained to submit, which is unfair to him, as a result of some overbearing act or attitude on the part of the respondents, majority shareholders.

86. It is well-settled law that in order claim the relief under section 397, a conduct which lacks in probity, conduct which is unfair to and which causes prejudice to the petitioner in exercise of his legal and proprietary right as shareholder, must be shown to exist. Refer to the decision on *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, : [1981]3SCR698 .

87. The Supreme Court in *Hind Overseas P. Ltd. v. Raghunath Prasad Jhunjhunwalla* [1976] 46 Comp Cas 91 also pointed out that (at p. 107) :

'There must be material to show when 'just and equitable' clause is invoked that it is just and equitable not only to the person applying for winding up but also the company and to all shareholders. The company court will have to keep in mind the position of the company as a whole and the interest of the shareholders and see that they do not suffer in a fight for power that comes between two groups.'

88. In my judgment, the petitioner has not established a prima face case to a claim for relief under sections 397 and 398, read with section 402(f) of the Act.

89. When the petitioner has failed to establish a prima facie case to claim the relief for which he filed the petition, the injunction order obtained by him from this court in Application No. 868 of 1989 has to be vacated. It is true that in this case there is restriction on the transfer of shares to a third party, but these restrictions are not an absolute bar to the transfer to the third party, for article 37 of the articles of association permits the transfer of shares to a third party.

90. The petitioner has been given the option to purchase all the shares or a portion of the shares of the respondents but he did not do so.

91. In my view, the requirements of article 37 of the articles of association have been fully complied with and the rights of the respondents, majority shareholders, to transfer the shares to Mr. R. N. Shetty, the outsider, cannot be questioned, challenged or denied on the ground that there was no compliance with the articles of association of the company.

92. In the result, the respondents' application No. 994 of 1989, is allowed.

93. There will, therefore, be an order in terms of prayer in Application No. 994 of 1989.

94. Each party other than respondent No. 1 pay his own costs.

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