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Court : Company Law Board CLB

Decided On : Feb-28-2002

Reported in : (2003)117CompCas380

Judge : S Balasubramanian, K Balu

Appellant : Devaraj Dhanram

Respondent : Firebricks and Potteries (P.) Ltd.

Advocate for Pet/Ap. : Shri. Arvind P. Datar

Judgement :

1. The petitioner holding 15 per cent shares in Firebricks and Potteries (P.) Ltd. ('the Company') has filed this petition under Section 397/398 of the Companies Act, 1956 ('the Act') alleging various acts of oppression and mismanagement in the affairs of the company and has sought for consequential reliefs. The facts of the case are that the company is a private limited company previously closely held by the petitioner and respondents 2 to 5 who are his real brothers and his mother. The company was incorporated in 1943 by the father of the petitioner. The subscribed capital of the company is Rs. 3,25,000 consisting of 3,250 shares of Rs. 100. While the petitioner held and still holds 15 per cent shares in the company, balance shares were held by the other family members. In the year 1986, the petitioner was holding the office of Joint Managing Director. The main object of the company was to manufacture tiles, firebricks, refractories, mosaic tiles, etc. The company owns nearly 17 acres of land. Due to failure of monsoon

and also competition from other manufacturers, the business of the company was affected during the years 1983-84 and 1984-85. In view of the dire financial position of the company, the shareholders were exploring the possibilities of sale of the company. Sometime in 1989, respondents 2 to 5 and the mother decided to sell all their shares constituting 85 per cent to the sixth respondent at a price of Rs. 7,031 per share and this proposal to sell the shares was to be considered by EOGM on 3-8-1989. The petitioner filed a petition under Section 397/398 before the Karnataka High Court challenging the proposal as being against the pre-emptive rights of the petitioner to acquire the shares in terms of Article 37 of the articles of association of the company. The Court passed an interim order to the effect that while the EOGM could be held, the decision taken thereat should not be implemented. Later on, a Single Judge of that Court permitted the company to implement the decision of sale of 85 per cent shares to the sixth respondent, the order of which was taken on appeal to the Division Bench which upheld the order of the Single Judge. On an SLP filed by the petitioner before the Supreme Court, the same was dismissed. While the proceedings were pending before the High Court, the petitioner filed an application seeking for permission to withdraw the petition on the ground that subsequent to the filing of the petition, there had been further acts of oppression and mismanagement and seeking liberty to file a fresh consolidated petition before this Board. On considering this application, the Court passed an order on 9-11-1998 allowing the withdrawal of the petition with liberty to re-institute the proceedings latest by 30-11-1998. Accordingly, this petition was filed before this Board on 27-11-1998. The main complaint in the petition is that in transferring the 85 per cent shares to an outsider, the company had acted in contravention of the provisions of the articles. There are also allegations of mismanagement/misappropriation of the funds/assets of the company by the respondents.

2. Before dealing with the arguments of the counsel, it is essential to extract Article 37 of the articles of association of the company, the interpretation of which would be essential to adjudicate the main allegation in the petition. Article 37 reads as follows :-- "37 (i) No member shall transfer any of his shares to any person except with the sanction of the company in general meeting, unless the said person is already a member of the company and is approved by the Directors. 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 of law to represent him or her 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 shares 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 cestuique trust of special legatee thereof and shares standing in the name of any deceased member may be transferred to or placed in the names of the trustee 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 general meeting and approval of the directors. During the life time of a member, he can nominate who the successor of his shares shall be and such nomination shall be registered on the books of the company. These nominations shall be revocable.

(iii) The Directors may in their discretion refuse to sanction or to register 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 article, except for the purpose of ensuring that the number of members does not exceed the limit prescribed by Article No. 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 the shares, the person whether a member or his legal representatives in 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." 3. Shri Arvind P. Datar, appearing for the petitioner

submitted:- The sale of shares by the respondents 2 to 5 had been done in a clandestine manner to deprive the petitioner of his right under the Article 37. As per Article 37(v) all shares available for sale should be offered to other members pro rata meaning thereby that every shareholder has a pre-emptive right to acquire shares which are offered for sale.

Therefore, without such an offer even the general body cannot approve of the sale to an outsider in terms of Article 37(0- In other words, Article 37(i) does not override the provisions of Article 37(v). No sale of shares could be made without following the procedure prescribed under Article 37(iv). Even though, the respondents, in the reply admitted the position as above, yet now they are taking the stand that if the general body approves the sale of shares to an outsider in terms of Article 37(i), there is no need to comply with the provisions of Article 37(iv) & 37(v). This stand is not supported by the terms of articles. The right of pre-emption provided in the articles is a superior right. Even in Palmer's Company Law Vol. I, this superior right has been recognized. It has been held in Shanta Genevieve Pommeret v. Sakal Papers (P.) Ltd. [1990] 69 Comp. Cas. 65 that transfer of shares to an outsider in contravention of the pre-emptive rights of a shareholder is null and void and this Board itself has held in Indian Dairy & Allied Services (P.) Ltd., In re [1994] 2 SCL 327 (CLB-Delhi); that transfer of shares in contravention of the pre-emptive rights in the articles constitute oppression. On the same proposition, he relied on a few other cases also. Even though, the Karnataka High Court in dealing with interlocutory application has held that the company had complied with the provisions of articles, he submitted that, the decision is not binding on the CLB. Referring to the decisions in Arjun Singh v. Mohindra Kumar AIR 1964 SC 993, State of Andhra Pradesh v. Kokkiligada Meeraiah AIR 1970 SC 771 and Vishnu Traders v. State of Haryana 1995 Supp. (1) SCC 461, he submitted that findings on an interlocutory application are not res judicata in other proceedings and as such the findings of the Karnataka High Court are not binding on the CLB.4. He further submitted that in those proceedings, the respondents had completely suppressed the fact that even before the shareholders had issued a notice of sale to the company on 19-6-1989, they had already entered into an agreement with the sixth respondent on 9-6-1989, in which the complete modalities relating to transfer, the price at which they were to be transferred, the

closure of the company, retrenchment of workers, etc., had already been agreed to. This agreement was not disclosed to the High Court and as a matter of fact when the petitioners filed an application before this Bench seeking for a copy of this agreement, in the reply, the company had denied existence of any agreement. However, the petitioners have filed a copy of the agreement on 14-2-2001. A reading of the agreement would indicate that the transferor-shareholders had practically sold the company itself to the sixth respondent as early as on 9-6-1989. As per terms of paragraph 3.2 of the agreement, the transferor-shareholders had also undertaken not to enter into any agreement for sale of the shares to anyone else.

Further, they had also agreed to take an advance of Rs. 25 lakhs to be kept in escrow with the Vijaya Bank, Race Course Road, Bangalore.

Therefore, having fully completed the sale agreement, the notice issued to the petitioner giving him option to purchase the shares is nothing but a sham notice which has no legal validity at all. If this agreement had been produced before the High Court, there is every possibility that the High Court would have taken different view in giving its finding. In short, the respondents had played a fraud on the High Court and any order obtained by means of fraud is a nullity as held United India Insurance Co. Ltd. v. Rajendra SinghState of Maharashtra v. Dr. Budhikota Subba Rao 5. He further submitted : Even though, the company was doing well, it closed down the factory in the year 1985-86 due to failure of monsoon, severe competition from other tile manufacturers and strike resorted to by the employees. At this point of time, the third respondent who was the Joint Managing Director tookover the management of the company with the active support of the other family shareholders which resulted in further deterioration in the financial position of the company. These respondents misappropriated the funds of the company by not properly accounting for sale of raw materials as well as machinery belonging to the company aggregating Rs. 7 to 8 lakhs. They also indulged in financial impropriety utilizing Employees Gratuity Fund for paying income-tax and others liabilities of the company. Notwithstanding the dire financial position of the company, they drew huge amounts of money towards perks and remuneration and they did not convene annual general meetings as well as Board meetings. In spite

of these allegations of fraud against these respondents, they have not chosen to take part in these proceedings and as such these allegations should be deemed to have been established against them. On this proposition, he relied on Lohia Properties (P.) Ltd. v. Atmaram Kumar 6. Shri Datar further submitted : After the respondents 6 to 9 took over the company after the purchase of the majority shares, they have been indulging in various acts of mismanagement by diverting funds and properties of the company. They have stopped the business of manufacture of tiles and ceramics and have converted the use of the property from industrial use to residential and commercial uses at an exorbitant cost of Rs. 76 lakhs. The respondents have constructed a showroom at a substantial cost on the land belonging to the company and leased out the same to an entity belonging to them in breach of their fiduciary duties as directors. It has been held in Elgindata Ltd. [1991] BCLC 959 that use of company's assets for personal benefit is an act of oppression. Further, the respondents have not established that the company derived any benefit by such an act which is incumbent on them in terms of the decision in Pierce Leslie & Co. Ltd. v. Miss Violet Ouchterlong Wapshare AIR 1989 SC 849. The expenses incurred for this purpose are unrelated to the object of the company. They did not obtain the approval of the Board for any of these decisions. Further, they have also removed stock and machinery and other assets belonging to the company during the period between 1989-90. Presently, respondents 6 and 7 are taking steps to construct buildings on the land of the company which is contrary to the main object of the company and as such the basic structure of the business has changed. They have also taken steps to sell a portion of the land located on the main Bangalore-Tumkur Road which is very valuable. Further, the petitioner holding 15 per cent shares as director of the company has been completely excluded from decision-making.

7. Accordingly, Shri Datar prayed for a declaration that the transfer of 2,719 shares by the respondents 2 to 5 to the other respondents is illegal and void that these shares should be directed to be transferred to the petitioner and that an investigation into the affairs of the company should be ordered for the period 1989 onwards and that the respondents 2 to 9 should be surcharged for misappropriation of funds of the company.

8. Shri K.G. Raghavan, the counsel appearing for the respondents, while reiterating the averments made in counter-statement, pointed out that prior to disputes between the parties, the entire shareholding of the company was held by the petitioner with his brothers-respondents 2 to 5, mother and other family members. The company was constrained to suspend its business operations in the year 1985-86 on account of, inter-alia, recession in the market, labour problems and accumulated statutory and other liabilities. Consequently, the company was looking for a prospective purchaser to takeover the assets in the interest of all the members. He drew our attention to the negotiations and proposals made with one Shri B.V. Satyanarayana and Sanmar Financial Services Limited as early as in the years 1987 and 1988. He pointed out that the petitioner was also actively involved in the negotiations for sale of the assets of the company. Against this background, sixth respondent came forward in June 1989 to purchase the impugned shares from respondents 2 to 5 and, accordingly, he sent a letter of offer dated 1 -6-1989, which was followed by an agreement dated 9-6-1989 between the respondents 2 to 5 and the respondent No. 6. The said agreements were subject to certain terms and conditions which included compliance with Article 37 of the articles of association of the company. He further pointed out that Article 37(1) prohibits transfer of shares by a member to an outsider, unless such transfer is sanctioned by the company in general meeting. If the shareholders in general meeting accord sanction, a member is empowered to transfer his holdings to outsiders. He urged that the second part of clause (i) and clause (ii) is not relevant to the present case. Clause (iii) of Article 37 speaks of discretion of the Board of Directors to refuse sanction or register transfer of any share. Clause (iv) details the procedure to be followed to ascertain whether any member is willing to purchase the share. This clause, according to Shri Raghavan, will apply only when the offer by an existing member is made and there is no sanction by the shareholders in general meeting for transfer in favour of a non-member. Under clause (v) shares which are available for transfer save, mentioned under clauses (i) and (ii) should be offered at the first instance to other members pro rata of their respective holdings and upon their refusal to accept the shares to any other member and on his refusal to a third person. This clause gives pre-emptive right to a member. However, this pre-emptive right will not be available, if

the shares are transferred to a non-member with approval of the shareholders in a general meeting and also in the case of transfer by a member to the persons specified in Clause (ii) . He emphasized that there is no ambiguity on account of Article 37 if it is read as a whole, and in the sequence, as it is framed. Even if there is ambiguity, he pointed out the courts are inclined to interrupt the articles giving the shareholders freedom to transfer and in support of his view he placed reliance on Pennington's Company Law, 5th edition page 372. Accordingly, the respondents 2 to 5 had every right to transfer their shares as they deemed fit. He further submitted that notwithstanding the fact that Article 37(v) is not applicable, yet, the company, by way of abundant caution gave notice to the petitioner in terms of this article, but, instead of accepting the offer, he approached the High Court. Shri Raghavan invited our attention to the following sequence of the events to show that the company had complied with the requirements of Article 37, both in letter and spirit: a. An offer was made by the sixth respondent by a letter dated 1-6-1989 (Annexure R-15) to the respondents 2 to 5 and other family members to buy impugned shares at rate of Rs. 7,031 per share.

b. The respondents 2 to 5 addressed a letter dated 19-6-1989 (Annexure R-16) to the company to find out buyers for their shares and notifying the offer made by the sixth respondent.

c. The company had convened a Board meeting on 3-7-1989, and considered the request made by the respondents 2 to 5 to sell their shares and resolved to convene a general meeting on 3-8-1989 for obtaining sanction of the general meeting to transfer the shares to the outsiders.

d. The company by letter dated 3-7-1989 (Annexure R-18) made an offer to the petitioner giving him the first option to purchase all or any part of the impugned shares at a rate of not less than Rs. 7,031 per share, within 10 days.

e. The petitioner by his letter dated 13-7-1989 (pages 54 and 55 of Vol. II) sought for certain clarifications/particulars and sought for some more time to accept the offer.

f. The company by its letter dated 19-7-1989 clarified the issues raised by petitioner and extended the time till 31-7-1989 for communicating the petitioner's acceptance.

g. The petitioner by his letter dated 24-7-1989 (pages 58 & 59 of Vol. I) advised the company that the price of Rs. 7,031 per share offered by the sixth respondent did not reflect the true value of the assets of the company or market value and sought for further details.

h. Without waiting for a response to this letter, the petitioner approached the High Court of Karnataka on 27-7-1989, and failed to exercise the right of pre-emption to purchase the impugned shares.

9. Shri Raghavan pointed out that the company had not only offered the shares to the petitioner to purchase them at the rate of Rs. 7,031 per share under Article 37(v), but also obtained sanction of members in the general meeting for transfer of shares in favour of the respondents 6 to 9, being non-members, in terms of Article 37(i). He further pointed out as and when the members accord sanction in terms of Article 37(i) the right of pre-emption under Article 37(v) becomes redundant and the company is empowered to register the transfer in favour of an outsider.

According to him, the right of pre-emption is a weak right in support of which he relied upon following decisions : Bishan Singh v. Khazan Singh AIRRadhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi AIRLRS v. Chet Ram [1971] (1) SCC 12.

10. Shri Raghavan pointed out that the Single Judge and Division Bench of the High Court of Karnataka have already given a categorical finding that the company had complied with the procedures laid down in the articles of association of the company in the matter of transfer of shares and the SLP filed on this finding had been dismissed by the Apex Court. This categorical finding would bar the petitioner on the principle of res judicata to reagitate the same issue and would also mean that there is an estoppel by order or judgment.

11. Shri Raghavan denied the acts of the oppression alleged prior to the year 1989 and urged they have become irrelevant, especially when the business activities of the company remained suspended since the year 1985. Shri Raghavan emphasized that agreement dated 9-6-1989 were not required to be disclosed to the High Court, especially when the petition was not concerned with the said agreement, in view of the fact that the petitioner has no right of pre-emption under Article 37. He urged that non-production of the agreement with the transferee-respondents does not amount to a fraud played by them, more so the letter of offer dated 19-6-1989 of the shareholders did contain the price offered by the sixth respondent and also the said agreement was produced pursuant to the order of the CLB. The agreement dated 9-6-1989 contained the basic terms and conditions of the letter of offer dated 1-6-1989 of the respondent No. 6. He further pointed out that the agreement dated 9-6-1989 was subject to, among other things, obtaining the sanction of the shareholders of the company under Article 37 before effective transfer of shares.

12. He further submitted : There has been no plea of oppression against the respondents 6 to 9 subsequent to the transfer of shares. On the other hand, after taking over the management by the respondents 6 to 9, all the statutory formalities were completed, statutory liabilities were paid and the dues of the employees were settled. Board meetings of the company are being held regularly with notice to the petitioner as also the AGMs and the petitioner continues as a director notwithstanding his being in minority. However, the petitioner has been a stumbling block for the progress of the company. The company could generate income by way of leased rental after prolonged years of suspended activities of the company. The petitioner has been obstructing the attempts made by the respondents for development of company's properties by objecting such proposals in the Board meetings.

The petitioner having failed before the High Court of Karnataka as well as the Apex Court, has approached the CLB on the very same averments and for similar reliefs. The petitioner is indulging in forum shopping and, hence, the petition should not be entertained as has been held by this Board in A.P. Jain v. Faridabad Metal Udyog (P.) Ltd. [1999] 95 Comp. Cas. 76' (CLB - New Delhi).

13. Summing up his arguments, Shri Raghavan submitted that in view of the High Court finding that the company had complied with Article 37, no order relating to the shares should be passed in regard to the shares. Insofar as other allegations against the respondents 6 to 9, he submitted that in view of the company having ceased its operations, these respondents had to take some other activities to keep the company alive and as such these acts cannot be acts of mismanagement.

Accordingly, he sought for dismissal of the petition.

14. We have considered the pleadings and arguments of the counsel.

Considering the fact that the disputes between the parties have been going on for over a decade, we suggested to the parties to amicably resolve the disputes. Even though it was generally agreed by the parties that a certain portion of the land could be transferred to the petitioner in proportion to the shares held by him in consideration for the shares, yet due to differences in relation to the identification of the portion of the land, the compromise efforts could not succeed and the petitioner was not willing to sell his shares to the respondents for cash consideration. Accordingly, the matter was heard on merits.

15. The first aspect to be noted with regard to the Article 37 is that, unlike the articles of a normal (P.) Ltd. Co., this Article does not provide for any mechanism for determining the fair value of the shares and it appears that in the absence of such a provision, the shareholder who proposes to sell the shares, could himself fix the price for the shares. This aspect becomes essential in deciding the issue before us.

In interpretation of an Article of a company which has various sub-clauses, a harmonious and meaningful construction has to be attempted at. From a reading of the Article 37 as a whole, it is evident that there is no bar in transferring the shares among the members and to the linear descendants of the members. It is also evident that when the shares are transferred among the members, the selling member is entitled to decide the member to whom the shares are to be sold. Article 37(iv) would come into play only when a selling shareholder is unable to decide the member to whom the shares are to be sold. In that case, he has to

issue a notice to the company to ascertain as to which of the member is willing to purchase the shares.

Thereafter, as per Article 37(v), the company has to offer the shares to all the shareholders on a pro rata basis and in case no shareholder is willing, the shares could be offered to a third party. However, Article 37(i) provides for exemption from the provisions of articles 37(iv) and (v) by getting a sanction of general body for sale to an outsider. The learned counsel for the petitioner vehemently put forward an argument that Article 37(j) cannot have precedence over articles 37(iv) and (v). We are unable to agree with this contention. A reading of the articles would indicate that the supremacy of the general body has been recognized in permitting a member to transfer shares to a non-member. The sequences of the various sub-clauses also would indicate that the procedures prescribed in the articles are to be followed in the sequence as they are framed. This is evident from the fact that in Article 37(iii) it has been specifically provided that the director shall not exercise to refuse admission of any one as a member if the transfer had been effected pursuant to clauses (i) and (ii) of Article 37. Likewise in Article 37(v) also it has been specifically mentioned that the pro rata offer is to be made 'except in cases noted above.' Therefore, it is beyond doubt that the sub-clauses in the Article 37 have to be construed in the same sequence in which they have been framed. Assuming for argument's sake that the Article 37(v) has to have precedence over Article 37(0, then the latter Article becomes infructuous, as Article 37(v) provides that if no one accepts the offer of sale, then, such shares could be sold to an outsider. Thus, once the shareholders approve the transfer of shares to a non-member in terms of Article 37(i), the question of pro rata offer does not arise.

16. However, this interpretation has become academic in facts of this case. From the sequence of events as elaborated by the learned counsel for the respondents and noted at paragraph 8 ante, it is seen that on 19-6-1989, the respondents 2 to 5 addressed a letter to the Board indicating therein that these respondents were desirous of selling their shares for a-price not less than Rs. 7,031 per share and requested the Board to ascertain whether any other member was willing to match this price. In that letter, they have also mentioned that the sixth respondent was

prepared to buy the shares at that price. The tenor of the letter indicates that it was a notice in pursuance of Article 37(iv). In the Board meeting held on 3-7-1989, the said letter was placed before the Board and this meeting was attended by the petitioner. In that meeting, the proposal to convene a general body meeting to get its sanction for sale to an outsider in terms of Article 37(v) was discussed and it was decided to convene a meeting for this purpose on 3-8-1989. It was also resolved that letters be addressed to all the shareholders inviting offers for the purchase of the shares at a rate not less than Rs. 7,031 and that the offer was to be kept open for a period of 10 days from the date of offer. We find from the minutes, that in spite of the decision of the Board to make offer to the shareholders, yet the petitioner had protested against the methodology adopted by the Board and had not, thus, given his consent to the resolution. In accordance with this resolution, a letter of offer was issued to the petitioner on 3-7-1989 giving him 10 days time for remitting the price in full for all the shares that the petitioner desired to buy. In that letter, it was also specifically stated that in case the petitioner did not accept the offer, the shares would be sold to the sixth respondent. Thereafter, on 8-7-1989, the company issued a notice for convening a general body meeting on 3-8-1989 to consider the sale of shares to the sixth respondent. Along with the notice, an explanatory statement pursuant to the Section 173 of the Act had also been enclosed, wherein it was stated that in view of the dire financial situation of the company, the shareholders had been attempting to sell the shares for a good price for quite sometime but without any success and that the sixth respondent had come forward to purchase the shares from the shareholders for a sum of Rs. 7,031 per share and that the petitioner had also been offered these shares for the same price and that in case the petitioner did not exercise his option, the shares would be sold to the sixth respondent. In response to this notice dated 3-7-1989, the petitioner sent a reply on 13-7-1989. In this letter, the second para reads 'I note that, in terms of the articles of association of the company, the Board of Directors has offered me the first option to purchase all or any part of 2970 equity shares of the company, proposed to be sold by eight shareholders, at the rate of Rs. 7,031 per share.' Having thus categorically admitted that the company had complied with the provisions of Article 37 (which now he vehemently complains that it has not been done so), he had sought certain

clarifications/details to enable him 'seriously consider the very generous offer made to me by the Board and take suitable action thereon. He had also sought for extension of the stipulated period of 10 days for accepting the offer. In response to this, the company, while furnishing some of the details sought for by the petitioner, also extended the period of validity of the offer up to 31-7-1989. By a letter dated 24-7-1989, the petitioner had expressed that the price of Rs. 7,031 as offered by the sixth respondent did not reflect true value of the assets of the company or the best market value thereof and he had also complained that the Board had not accepted his earlier suggestion of giving a wide publicity for sale of shares which could have maximized the gains to the shareholders. In that letter, he had also sought for various details regarding the terms and conditions of the offer made by the sixth respondent. He has ended the letter with the caution that pending making the details sought for by him, the company should not take any precipitate action to dispose of the shares. Without waiting for any reply to this letter, the petitioner filed company petition 77 of 1989 before the Karnataka High Court and obtained an interim order by which the company was permitted to hold the EGM but was restrained from taking further action in terms of the resolution passed in that meeting. Thereafter, in the EOGM held on 3-8-1999, the general body approved the sale of 2719 shares to the sixth respondent at Rs. 7,031 per share.

17. From the sequence of events and on his own admission of the petitioner in his letter dated 13-7-1989, we find that the company had fully complied with the terms of the articles 37(iv) and 37(v) and had also resorted to the provisions of Article 37(i). In other words, the shareholders/the company had fulfilled the requirements of both articles 37(v) and 37(i) in selling the shares to a non-member. In view of this, we find that the petitioner cannot have any complaint that the provisions of Articles have not been complied with and as a matter of fact, it had doubly complied with the provisions of the articles. In this connection, it is also necessary to mention that in addition to the compliance with the provisions of the articles, the sale had been effected with the approval of the High Court -both Single Judge Bench as well as Division Bench and confirmed by the Supreme Court. Even though, it was contended that interlocutory orders need not be considered to be res judicata, in the present case, we find that the order of the Single Judge was on a substantive application filed by the respondent for vacation of the earlier interim

order and that this order, on challenge was upheld by the Division Bench with a detailed judgment and upheld by the Supreme Court. It does not appear to us that these orders were passed on a prima facie view, considering the manner in which both the Single Judge as well as Division Bench had analysed the entire facts of the case, and came to the conclusion that the shareholders/ the company had complied with the provisions of the articles. These findings rather being prima facie findings, appear to be categorical findings. Thus, according to us, the issue relating to the sale/compliance with the provisions of Article 37 had reached a finality at the High Court level itself. Therefore, there would have been nothing to adjudicate on the same issue now, but our findings are similar to that of the High Court.

18. Shri Datar vehemently argued that the respondents had suppressed very relevant documents in the proceedings before the High Court.

According to him, the agreement dated 9-6-1989 that was entered into between the shareholders and the sixth respondent was very relevant and if these documents had been disclosed to the High Court, it would have given a different finding on the compliance with Article 37. It is a settled law that if any order is obtained by suppressing material documents or by fraudulent means, such an order has no validity and can be recalled or set aside on a review by the Court which made the order.

However, we note that the petitioner had filed an affidavit dated 28-8-1995 in the proceedings before the Karnataka High Court complaining that the agreement dated 9-6-1989 had been suppressed from him and he could know that only from another agreement dated 26-9-1991 in which the agreement dated 9-6-1989 had been referred to. In the affidavit, he had also sought the permission of the Court to produce an agreement dated 26-9-1991. There is nothing on record to show whether this application was pressed by the petitioner during the period from the date of filing and till he withdrew the said petition from the High Court. Anyway, in the present case, since the proceedings before the High Court had been withdrawn with liberty to reagitate the same, it will not be appropriate for us to speculate what view the High Court would have taken if the documents had been

produced before it. Since the entire matter is before us and the documents are placed before us, we shall examine as to whether this agreement could have a bearing on our findings as recorded in earlier paragraphs. By this agreement, eight of the shareholders, including the respondents 2 to 5, entered into an agreement on 9-6-1989 for sale of 2,392 shares held by them to R.N. Shetty and Co. This is a comprehensive agreement casting obligations on the part of the transferors, the transferees and the company. As per this agreement, a sum of Rs. 25 lakhs was to be paid at the time of the agreement to the transferors but to be kept in Vijaya Bank in Escrew till the transferors arranged to have the sanction of the general body in terms of the articles of association. The total consideration payable was to be paid within a period of one year after fulfilment of the obligations by the transferors within a period of six months. According to the learned counsel for the petitioner, in view of this agreement, there had been a concluded contract between the transferors and transferees and, therefore, the offer notice given to the petitioner was nothing but a sham notice. It is not uncommon that agreements are entered into subject to fulfilment of certain conditions and till those conditions are fulfilled, there cannot be a binding agreement. In the present case, in spite of the fact that various terms relating to the company had been incorporated in the agreement, yet the agreement would have reached a finality and would have become enforceable, only when the condition relating to getting the general body consent in terms of Article 37 had been obtained for transfer of shares as stipulated in clause 7 of the agreement. Before passing the resolution, the petitioner was given an offer, before the expiry of the period of which, the petitioner moved the High Court. We could have found some substance in the arguments of the petitioner if he had accepted the offer even before the general body passed the resolution and the other shareholders/the company had, relying on this agreement, rejected the acceptance of offer by the petitioner. Now that the agreement is before us, for reasons recorded above, our finding on the compliance with the provisions of the Article 37 would not have been different from what we have already decided. In other words, in interpreting the provisions of Article 37 and compliance thereof, the agreement is not a relevant factor to be taken into account, in view of the very specific provision in the agreement that the transferors had to comply with the provisions of the articles before the transfer of

shares could be effective.

19. Even though, it was not argued, the petitioner has raised an issue in the petition, that in a family company, shareholders could not have sold the shares to an outsider. This stand of the petitioner, we find is not tenable inasmuch as there is ample evidence by way of documents that even the petitioner was interested in finding out a buyer for the company, in view of the dire financial position of the company.

Further, from the letters written by him in response to the offer made, we find that the petitioner was questioning the quantum of consideration for the shares. We have already indicated earlier that the articles has not provided for any method of valuation of the shares and, therefore, the shareholders were at liberty to sell the shares at a negotiated price and if the petitioner really felt that the price of Rs. 7,031 was inadequate, he should have jumped at the chance of acquiring of the shares in terms of the offer made to him. Shri Datar pointed out that on an inspection of the records in the Registrar's Office, it was found that the land price at the relevant period was much higher than the value at which the price of Rs. 7,031 per share was arrived at. As we have already noted, the articles do not indicate the method of valuation of shares and for exercising the pre-emptive right, the valuation of land has no consequence. No doubt, we find some justification in his claim that while the transferors had been given one year time to the sixth and ninth respondents for paying the consideration for the shares, the petitioner has given only 10 days time. Yet, it is to be noted that when he sought for time in his letter dated 13-7-1989, he had not specified the time he desired to have and rather he only requested for 'some more time'. In his later letter dated 24-7-1989 also, after the company had given time up to 31-7-1989, he had not sought for extension of time. On the whole, from the date of offer on 3-7-1989 up to 31-7-1989, the petitioner had more than 25 days time and yet at no point of time, he had even indicated that he was interested in accepting the offer and that he required further time in which case, we would have found that there was justification in the petitioner's claim that he had been treated differently from that of the respondents 6 to 9. We also note that even before the High Court, he did not seem to have made any offer that he was interested in purchasing the shares,

especially when the Court had directed that resolution of EOGM should not be implemented. Thus, as far as the transfer of shares is concerned, we do not find any merit in the contention of the petitioner that either the provisions of Article 37 had not been followed or that the whole exercise of offer had been done in a deceitful manner. While coming to this conclusion, we also note that even though, there were eight transferors, the petitioner impleaded four of them.

20. As far as allegations of the petitioner in regard to the affairs of the company prior to 1989 and against the respondents 2 to 5, we do not find that any of the allegations is substantial in nature. Further, it is on record that these respondents assumed control of the company only in 1986 by which time, the operations of the company had come to standstill. Further, at this distant point of time, without any documentary evidence on these allegations, it is not possible to adjudicate on the same.

21. In regard to the allegations relating to the period thereafter and against the respondents 6 to 9, we find from the petition itself that between 1992 and 1996, in view of the various objections raised by the petitioner, the company/respondents 6 to 9 had not taken any decision in regard to properties of the company. In other words, the petitioner knowing fully well that the company was not doing any business right from 1986 did not allow the respondents/major shareholders of the company to take any decision beneficial to the company till 1996. Even the allegations relating to the properties of the company, the main allegation as per the petition is that respondents 6 to 9 had not taken the approval of the Board or the shareholders in dealing with the property of the company. When it is in the knowledge of the petitioner that the company has ceased its operation and the only valuable asset of the company is the land in possession, we do not consider that the attempts made by the respondents in developing this land for alternative uses or leasing out of the same for earning the revenue to the company could be considered as either mismanagement or oppression.

The petitioner has questioned the leasing of land to R.N. Shetty & Co, by a lease deed dated 25-6-1998 and also an agreement with the same firm dated 25-6-1998 for establishing a show-room on the ground that the sixth respondent has parted

with the property of the company in favour of his own firm. As we have already pointed out that any action taken by the company for the purposes of earning the revenue can never be considered to be an act of mismanagement, but in the present case since the agreement is between the company and another entity of the sixth respondent, the only aspect that has to be examined is whether the lease rental is reasonable and market oriented. In the absence of details on comparable lease rentals, it is difficult to adjudicate on this as to whether any undue benefit has been bestowed on the firm.

However, we do not propose to deal with this issue in details on account of the final directions that we propose to give.

22. The disputes between parties have been going on for over a decade and our prolonged attempts to settle the matter amicably have failed.

Even though, our findings on the allegations reveal that the petitioner has not established either acts of oppression or mismanagement in the affairs of the company, yet considering the fact that he is the only member of the family which established the company in 1944 and carried on the business till 1986, his interest deserves to be protected.

However, he is a minority shareholder holding only 15 per cent shares and in spite of that he has continued as a director even after the respondents 6 to 9 gained control of over 85 per cent of the shares.

From the minutes of the Board meetings, we find that the petitioner is outvoted on most of the occasions. Therefore, it would be in the interest of the petitioner himself that he goes out of the company on receipt of fair consideration for the shares held by him. Accordingly, we give the option to the petitioner either to continue as a member of the company or go out of the company on receipt of fair consideration.

In case he desires to go out of the company on receipt of fair consideration, he should issue a notice to the company/respondent by 28-3-2002 expressing his desire to go out of the company. As far as assessment of the fair value is

concerned, the petitioner will have the option to compute the same on the basis of Rs. 7,031 per share with interest at 12 per cent compounded annually the date on which the payment for the shares of other shareholders was made by the respondents, up to 28-2-2002. Otherwise, he has the option of having the fair value determined by an independent valuer to be appointed by us on the basis of the value of the company as on 31-3-1999 being the proximate date of petition which was filed on 27-11-1998. Accordingly, the following directions are given: In case the petitioner desires to go out of the company, he should issue a notice to the company/respondents indicating as to whether he would like to have the fair price determined on the basis of Rs. 7,031 per share with compounding interest (annually) at 12 per cent or he would like to have the fair value determined by an independent valuer to be appointed by us. Once the petitioner exercises this option, the same will be binding on the company/respondents. In case the petitioner desires to determine the fair value on the basis of Rs. 7,031, the entire consideration should be paid within three months from the date of receipt of communication from him. In case he desires to have the value determined by an independent valuer, he should make an application to this Bench after which this Bench will appoint an independent valuer.

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