

incable Net (Andhra) Limited, Vs. Apaksh Broadband Limited and ors.

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SooperKanoon Citation : sooperkanoon.com/48215

Court : Company Law Board CLB

Decided On : Dec-17-2007

Reported in : (2008)142CompCas860

Judge : K Balu

Appellant : incable Net (Andhra) Limited,

Respondent : Apaksh Broadband Limited and ors.

Judgement :

1. The petitioners collectively constituting 40% of the total number of members of M/s APAKSH Broadband Limited ("the Company") aggrieved on account of certain acts of oppression and mismanagement in the affairs of the Company, have invoked the provisions of Sections 397, 398, 402 & 403 of the Companies Act, 1956 ("the Act"), seeking the following reliefs: a) to direct the Company to incorporate the Shareholders Agreement dated 04.06.2005 (SHA) in the Memorandum and Articles of Association of the Company; b) to reconstitute the board of directors of the Company and provide that all decisions on policy and other key matters be decided by the board of directors at a meeting whereat only one nominee from each of the groups of the first petitioner and AKSH Broadband Limited (AKSH), apart from Andhra Pradesh Technology Services (APTS) nominee are present; c) to appoint a Chartered Accountant to investigate into the investments made by AKSH towards the share capital of the Company; d) to appoint a team of Chartered Accountant(s)/Chartered Engineer(s) to evaluate the quantum of work done by AKSH; declare that the investments of AKSH over and above the said quantum of work to have been issued without consideration and consequently annul the said shares and direct the modification of the shareholding of the Company; and e) to vest the day-to-day administration of the Company in a Committee of directors comprising of a nominee from each of the groups, namely the petitioners, AKSH and APTS. The Government of Andhra Pradesh conceived a project to create a state telecommunications network linking all the 23 districts, by means of a single consolidated network known as "AP Broadband Network", offering triple play for voice, video and data. Towards this end, APTS awarded the project in favour of AKSH being the lowest bidder, with a stipulation that the actual implementation of the project would be carried out by a special purpose vehicle, pursuant to which the first respondent Company came to be incorporated. The first respondent Company, AKSH and APTS have entered into an agreement on 21.04.2005 for development, implementation, operation and maintenance of the project. By virtue of this agreement, the Government of Andhra Pradesh would provide "free right of way" to AKSH worth about 2000 crores in order to serve the citizens of the State through a high speed digital broadband network. In terms of the agreement dated 21.04.2005, a agreement for Engineering, Procurement & Construction of the Project ("the EPC Contract") has been executed on 10.05.2005 between the first respondent Company and AKSH for the purpose of implementing the project. Thereafter, the first petitioner and AKSH had on 04.06.2005 entered into a Shareholders Agreement (SHA), in terms of which the first petitioner and its group was to acquire 7,40,00,000 shares of Rs. 5/- by paying Rs. 37 crores, thereby holding 21.10% of the equity capital of the Company. AKSH was to acquire 64.60% of the equity capital of the Company by subscribing to 22,60,00,000 equity shares of Rs. 5/- amounting to Rs. 113 crores. APTS was to acquire 14.30% of the equity capital of the Company. Under the EPC contract, the implementation of the

entire project was entrusted to AKSH at a total cost of Rs. 370 crores. The entire broadband work was to be maintained by AKSH, for which the Company would pay a sum of Rs. 2 crores every month to AKSH to ensure that the broadband network becomes operational and functioning. The main grievances of the petitioners are that (a) AKSH being a majority equity shareholder and EPC contractor totally mismanaged the funds and operation of the Company; (b) the implementation of the project is at dismal level; and (c) the delay in the implementation of the project was due to various serious acts of commission and omission on the part of AKSH, which are stoutly denied by the respondents.

3. Shri S. Ravi, learned Counsel, while initiating his arguments, in support of the petitioners, raised the following preliminary issues: o AKSH is not only a majority shareholder in the Company but also EPC contractor. AKSH now stands, duly merged itself with AKSH OptiFiber Limited (AOFL) one of its group companies, being a listed public limited company, with necessary approval of the respective High Courts and the merger has become effective. The petitioners have sought certain reliefs against AKSH and in view of its merger with AOFL the latter becomes a necessary party and accordingly AOFL came to be substituted in the place of AKSH in the main petition.

o There are several disputed questions of fact involved in the present proceedings. The facts on record would not be sufficient to establish the acts of oppression and mis-management in the affairs of the Company, but require oral evidence for deciding the case on hand as under: a) to establish that no tangible work under EPC contract has been performed by AKSH; b) to prove the mismanagement of funds and activities of the Company at the instance of AKSH; c) to establish the circumstances under which the disputed payments were made by the second petitioner through a number of cheques signed and issued by him; d) to weigh the veracity of the statements raised in the counter by the respondents; e) to bring out the collusive course of action adopted by the respondents 2-5 and 6, with a view to eliminate the petitioners from the Company; f) to prove that the first petitioner had furnished all the securities to the sixth respondent as envisaged in Intercorporate Deposit Agreement ("ICD Agreement") and that the first petitioner had not defaulted any of the terms of the ICD Agreement; and g) to show that the second petitioner gave periodically cheques towards payment of AKSH on the instructions of the respondents on the bonafide impression that the respondents are conducting the business in the best interests of the Company.

o It is absolutely essential to adduce oral evidence to establish the case of the petitioners, in the absence of which true facts would not emerge. It is settled law, as affirmed by the Andhra Pradesh High Court in Sri Ramadas Motor Transport Limited v. Karedla Suryanarayana Rao (2002) Vol. 110 CC 193 that in an appropriate case, the CLB has powers to allow the parties to let in oral evidence to prove their case. The petitioners would suffer loss, if they are not permitted to let in oral evidence, establishing their stand in the present proceedings.

o The respondents have produced before the CLB a number of documents along with the counter affidavit dated 06.02.2007 as well as the surrejoinder filed on 11.07.2007. However, the petitioners are disputing the genuineness and correctness of most of such records, particulars of which are furnished in a memo dated 31.07.2007 filed by the petitioners.

o The petitioners carried out inspection of several documents in August 2007, pursuant to the order of the Bench. AKSH made available the invoices for the years 2005-2006 and 2006-2007, out of which a large number of invoices are missing and there are invoices unsupported by lorry receipts. In some cases delivery was reportedly taken, but names of persons were not available to ascertain who actually took delivery of the goods, covered by those invoices. In some invoices, stamp of the Company which took delivery is missing, but only contains purported signatures and some were qualified, such as, subject to verification. There is huge difference in value of goods as reflected in the invoices when compared to the cost mentioned in the corresponding delivery challans. In some invoices, price of the same goods is varying. Most of the lorry receipts do not carry the endorsement of commercial tax department at check posts, despite the fact that goods had passed through at least three States. The transporters, in some cases, have taken 25 days for

transportation of the goods to Hyderabad, as against 3-4 days. The lorry receipts and invoices now produced for inspection are fabricated for the purpose of the present company petition. AKSH, reportedly supplied cables worth Rs. 114 crores, which are not supported by the invoices and all the invoices produced are bogus documents. No goods worth Rs. 114 crores as claimed by AKSH have been supplied under the EPC contract.

o The petitioners have produced a copy of the unsigned letter dated 14.06.2007 addressed by Managing Director, APTS Limited, in favour of the Secretary II, IT&C Department, Government of Andhra Pradesh, disclosing the irregularities in supply of the materials by AKSH. It speaks of the physical verification conducted by APTS Engineers, the project status etc under EPC contract. The main grievances of the petitioners that AKSH had dumped inferior quality cables, inflated the invoices, raised bogus invoices and failed to achieve any connectivity inspite of spending huge monies can be established by summoning the said letter dated 14.06.2007, as sought in C.A. No. 183 of 2007.

o As per the SHA the first petitioner has to bring in Rs. 37 crores, out of which Rs. 22.20 crores constituting 60% has been contributed during the period between May 2005 and May 2006. AKSH has contributed Rs. 88.14 crores representing 77% as against Rs. 13 crores, in terms of the SHA. While the petitioners account for 0.01% of the fully paid up shares, the respondents hold 57% of the fully paid up shares of the Company. The second petitioner is the only residential director and always acted in consultation with the second respondent and never acted independently. The entire monies brought in by way of share capital amounting to Rs. 110.34 crores have been withdrawn by AKSH exercising its controlling interest in the Company towards purported supply of equipments and materials under the EPC Contract against bogus bills. The actions of the respondents lack bonafides and fairness in conduct and probity. The second petitioner at the behest of AKSH had signed the cheques, as borne out by the e-mail correspondence between the parties thereby enabling AKSH to withdraw the amounts under bonafide impression that actual supplies were made and services rendered by AKSH. The petitioners' mere non-statement in the company petition of the signing of cheques by the second petitioner will not materially affect the case. The concession regarding "free right of way" could be obtained by AKSH on account of the efforts putforth by the petitioners 1 & 2. The Government of Andhra Pradesh provided the facility of free right of way only on 10.08.2007 by its G.O. dated 10.08.2007, which belies the assertion of the respondents regarding the connectivity provided by AKSH. By virtue of utilization of an aggregate amount of Rs. 100 crores, 25% of the project work ought to have been completed, achieving connectivity at least in six districts. Nevertheless, AKSH has not even achieved a single triple play connectivity in any place as per the EPC contract. AKSH has fraudulently inflated its bills, supplied defective fibre optic cables, raised invoices and withdrawn the money. The work allegedly executed and services rendered under the EPC Contract are not supported by any tangible evidence except for the self serving invoices, which do not bear acknowledgements from authorized persons for the materials received and services rendered. The second petitioner never checked the materials supplied by AKSH. All the invoices, lorry receipts etc., are bogus and make believe documents, which are cooked up for the purpose of, the company petition. The acknowledgements have been obtained from low cadre employees of the Company, which cannot be relied upon, as all the signatures appear to have been done at one and the same time. The supply of cables is only on paper and AKSH dumped defective, sub-standard and non-functioning cables in its own godowns, without obtaining the endorsement or acknowledgement from the second petitioner on any of the invoices or challans.

o AKSH has produced a series of statements disclosing the particulars of stock of materials lying with various contractors.

These statements are unsigned by any one and must be ignored.

Similarly, the statements of contractors on record cannot be linked to supply of materials to the Company. These statements cannot have any evidentiary value and are liable to be ignored. The insurance policies relied on by AKSH cannot prove the existence of goods, in the absence of the stock register maintained by the Company. The auditors' report dated 10.07.2006 forming part of the balance sheet for the year ended

31.03.2006 would indicate that no physical verification of fixed assets has been carried out. AKSH has played fraud on the petitioners, APTS and the Government of Andhra Pradesh by siphoning away the entire funds, at the project implementation phase itself and benefited AOFL by supplying poor quality fibre cables through AKSH to the Company's project. AOFL invoiced AKSH for Rs. 75 crores, while the latter invoiced the Company for over Rs. 110 crores. The auditors' certificate dated 05.02.2007 reduced by AKSH certifying supply of equipments and materials by KSH under the EPC Contract during the years 2005-2006 and 2006-2007 (upto 30.09.2006) for an aggregate sum of Rs. 152 crores inclusive of project management fees is under serious dispute. AKSH was not regularly paying the contractors for the work done towards implementation of the project. The outstanding bills presently account for Rs. 9 crores, for payment of which no action has been taken by AKSH, inspite of the intervention of the Government of Andhra Pradesh. The second petitioner was constrained to arrange funds for some of the contractors in excess of Rs. 60 lakhs and paid salaries to the employees which can be produced by adducing oral evidence. These misdeeds of the respondent Nos. 2 to 5, apart from being oppressive and illegal are against the interests of the Company. The petitioners could not have ventilated their grievances before the Company, as the respondents are the majority shareholders. If the work executed by AKSH is evaluated, it would be evident that AKSH has overdrawn an amount of Rs. 82.6 crores from the Company. AKSH never had the capacity to execute the EPC Contract.

o The respondents 2 to 4 acting on behalf of AKSH have called for a board meeting of the Company in December, 2006, for the purpose of, inter alia, issuance of notice of forfeiture of shares on account of the payments due towards last call payable on partly paid up shares held by the petitioners, on account of the fact that the petitioners have been repeatedly raising the issue of non-performance of the EPC Contract, siphoning of moneys and supplying of sub-standard cables under the EPC Contract. The inconsistency of payment of call money due on the partly paid up shares of the petitioners, inspite of pointing out the serious lapses in the work performed under the EPC Contract is indicative of the malafide intention of AKSH. o The petitioners group pledged their shares in the Company with the sixth respondent, a company under the control of the third respondent to raise finances towards subscription of their share of equity capital in the Company. As against the loan amount of Rs. 33 crores, which ought to have been released, the sixth respondent has so far released to the petitioners only an amount of Rs. 11.10 crores. The sixth respondent colluding with the respondents 2 to 5 is refusing either to release the balance loan amount or the proportionate number of shares out of the total shares pledged with them to raise finance with any third party so as to pay the second and final call money, demanded by the Company. In the meanwhile, if the shares of the petitioners are forfeited, they will be put to irreparable loss. The petitioners have made serious allegations against the sixth respondent, which are to be answered by them and therefore, the sixth respondent even though not a shareholder becomes a necessary party to the present company petition. The respondents are insisting for payment of second and final call amount of Rs. 14.77 crores by the petitioners, with a view to divert the said amount. The first petitioner is ready and willing to pay the final call money after evaluation of the work performed by AKSH by a team of Chartered Accountants/Chartered Engineers, without which any further investment of monies in the Company will be prejudicial to the interests of the petitioners. AKSH has produced copies of the correspondence exchanged between the second petitioner and the sixth respondent and produced copies of the communication dated 27.12.2006 said to have been sent by the sixth respondent to the first petitioner and the postal acknowledgement of the second petitioner as not claimed, which would show that the sixth respondent is an extended arm of the respondents 2 to 5. These aspects would disclose the collusive course of action being adopted by the respondents 2 to o The board of directors of the Company decided at a meeting in May 2006 that there would be two signatories one from the group of the respondent 2 to 5 and the other from the first petitioner group in respect of all financial transactions. However, the respondents have fabricated the minutes, thereby facilitating the operation of the bank account by directors only of the respondents group. The respondents are keen in excluding the petitioners totally from the management of the Company with the object of canceling the marketing agreement, which was entered into between the Company and the first petitioner.

o AKSH, inspite of the specific direction given by the Bench on 20.03.2007, failed to bring in its call arrears,

under the pretext of status quo order passed by the High Court of Andhra Pradesh, in the appeal proceedings initiated by the petitioners against the interim order of the Bench. AKSH issued three cheques in favour of the Company towards call arrears for an aggregate sum of Rs. 24.83 crores, but issued 'stop payment' instructions to the Bank on account of the 'status quo' order passed by the Andhra Pradesh High Court. Nevertheless, AKSH failed to give proof of sufficient balance in its account. The fact of the matter is that AKSH issued cheques, without adequate funds to its credit, which is violative of the order dated 20.03.2006, directing AKSH to bring in its share of final call money amounting to Rs. 25 crores, without waiting for payment of the final call money by the petitioners. AKSH failed to seek any clarification pursuant to the order of status quo passed by the High Court, with a view to delay payments payable towards the share capital. Furthermore, the Bench directed on 20.03.2007 that the operation of the Bank account of the Company must be by the nominee director of APTS, whereas the respondents have opened by means of an alleged circular resolution dated 02.04.2007 without even circulating the alleged resolution to the second petitioner, two accounts with Dhanalakshmi Bank Limited, in the name of the Company, one of which is operated by the second respondent in violation of the order of the Bench.

o At the board meeting held on 06.05.2006, it was decided to have a new registered office of the Company and further resolved that the first floor and fifth floor of this office shall be used by the first petitioner, to which the second petitioner and respondent Nos.

2 to 4 were parties. The Company paid a security deposit of Rs. 18 lakhs for its new registered office premises, which included an amount of Rs. 4.5 lakhs in respect of the first and fifth floors forming part of the same registered office premises taken for the first petitioner. This amount of Rs. 4.5 lakhs paid on behalf of the first petitioner was to be adjusted by the Company by raising a debit note in terms of the relevant clause of the lease agreement, which has never been done by the Company despite the fact that the second petitioner has already raised a credit note for Rs. 4.5 lakhs and therefore, the aforesaid security deposit was left unadjusted.

o The shareholders' rights and their rights under the EPC Contract are inseparable, as borne out by the terms of the EPC Contract. AKSH failed to implement the project as stipulated in the time schedule forming part of the EPC Contract. No Acceptance Certificate for any set of broadband connections has been produced as envisaged in Clause 12.3.5 of the EPC Contract. The petitioners, as shareholders of the Company, in exercise of their statutory rights under Section 397/398, have questioned, the mismanagement of the funds of Company by the majority shareholders of the Company in the name of the EPC Contract, which can be adjudicated and reliefs granted by the CLB. Therefore, the petitioners have locus to file the present petition and cannot be relegated to any other alternate remedies. No other forum can decide the issues, which are raised in the main petition, since the Company, which has to take action against AKSH, is under the management of the nominees of AKSH. AKSH cannot and would not sue itself. The Company is controlled by AKSH and therefore, cannot question the malpractices in supply of the materials by AKSH under the EPC Contract. If the EPC Contract was given to any other contractor, the Company would have filed civil suit for appropriate reliefs. In these circumstances, the petitioners' action to set aside the EPC Contract constituting an exception to the rule in *Foss v. Harbottle* is maintainable under law. Even if the disputes are referred to the arbitrators, in terms of the arbitration clause contained in the EPC Contract it will not serve any purpose, since the Company is controlled by AKSH. Thus, the shareholders of the Company can approach the CLB for remedying their grievances arising out of the EPC Contract. The first petitioner has complained of the grievances raised before the CLB in his communications dated 22.08.2006 and 01.11.2006 addressed to the Company prior to filing of the company petition which were neither replied by AKSH nor assessed the monies spent by AKSH towards implementation of the project. AKSH must render accounts, bring back the monies misappropriated by it and also contribute its part of the unpaid share capital, for which the Bench may appoint a team of Chartered Accountants to evaluate the quantum of work done by AKSH and assess the monies spent by AKSH. No revenue is being generated by the Company with the reported investment of Rs. 110 crores in the Company. The Company has not started its business and hence selling of one's shares to the other shareholder on valuation of the shares of the Company does not arise. The first petitioner has entered

into a marketing agreement with the Company, while AKSH got the benefit of EPC Contract. The first petitioner has genuine interest in the marketing agreement, which is attempted to be cancelled by the respondents in respect of which appropriate remedies will be worked out by the petitioners.

o The CLB has wide powers under Section 402(e) of the Act to set aside the third party contract. AKSH has no capacity to execute the contract and therefore, the EPC Contract may be terminated by resorting to Clause 24 of the EPC Contract. Therefore, the EPC Contract may be entrusted to any of the reputed contractors and AKSH can also reap the benefits of the EPC Contract. It has been held in *Shoe Specialities Private Limited v. Standard Distilleries and Breweries Private Limited (1997) Vol 90 CC 1* that while the court acting under Sections 397, 398 read with Section 402 of the Companies Act, has ample jurisdiction and very wide powers to pass such orders and give such directions as it thinks fit to achieve the object; there would be no limitation or restriction on such power that the same should be exercised subject to the other provision of the Act dealing with normal corporate management or that such orders and directions should be in consonance with such provisions of the Act. The provisions bring out the very wide nature of the power conferred on the court and the object that is sought to be achieved by the exercise of such power, with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder and the object sought to be achieved by those sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction limitation on the exercise of the court's power. The CLB will not go by technicalities but grant relief, doing justice in the present matter and therefore, reliefs can be appropriately moulded, redressing the grievances of the petitioners.

4. Shri Raghavan, learned Senior Counsel, while opposing the company petition submitted: o The EPC Contract is a Turnkey Project for a total value of Rs. 370 crores given by the Company to AKSH, which is solely responsible for implementation and completion of the Contract, as borne out by articles 3(a) (b), 4.1 and 6.1.1 of the agreement dated 21.04.2005.

The EPC Contract has been signed on behalf of the Company by the second petitioner. Article 10 empowers AKSH to appoint subcontractors) to execute portions of the EPC contract. The Government of Andhra Pradesh would provide free right of way including free right of way on AP Transmission Corporation electricity poles and other low tension distribution poles. AKSH is to provide progress report periodically on the implementation of the project as envisaged in Article 11. Article 16 specifies that failure of AKSH to complete the implementation of the project as specified in the EPC Contract, would amount to an event of default, consequences of which are enumerated in article 17 of the contract, thereby providing inherent protection against any default by AKSH to the Company. APTS is not a party to the CLB proceedings and therefore, EPC Contract cannot be cancelled, since it would adversely affect APTS. By virtue of article 18, any dispute arising out of the contract, may be referred to arbitration. The notification dated 10.08.2007 providing right of way by the Government of Andhra Pradesh in favour of AK.SH would show that APTS will not cancel the contract. In view of this, the unsigned letter of APTS dated 14.06.2007 obtained illegally by the petitioners does not assume any relevance at all.

o All the grievances set out in the company petition arising out of the contractual obligations under the EPC Contract, with respect to which mis-management is alleged by the petitioners, do not in any way relate to rights of the petitioners as shareholders and fall outside the scope of Sections 397 and 398, whereas, in a petition under Section 397/398, it is the right of a member that could only be agitated in terms of the decision in *M.L. Thukral and Ors. v. Krone Communications Limited and Ors. (1996) Vol. 86 CC 643*. The Karnataka High Court, while affirming this decision of the CLB in *M.L. Thukral and Anr. v. Krone Communications Ltd. and Ors. (1996) Vol. 86 CC 648* reiterated that the CLB was more than fully justified in having refused to exercise jurisdiction in respect of the distributorship agreement, because it is totally and completely extraneous to the main dispute. The present petition, being a motivated one to ensure that the respondents are not cancelling the marketing agreement entered with the petitioners is liable to be dismissed. The petitioners wantonly do not want to pay the call money, but at the same time solely desirous of protecting the marketing agreement, against its cancellation, which cannot be remedied in a Section 397/398 petition. None of the allegations

made in the main petition does in any manner constitute an act of oppression and mismanagement, within the meaning of Section 397/398.

The petitioners, being only shareholders of the Company cannot enforce rights of the Company against AKSH, especially when the right of evaluation of work under the EPC Contract is vested with the Company and not with its shareholders. The EPC Contract contains the requisite mechanism for evaluation of the project work and resolution of disputes thereunder, which cannot be the subject matter of a petition under Section 397/398 of the Act. The prayer for appointment of a team of Chartered Accountants/Chartered Engineers to evaluate the quantum of work done by AKSH as the EPC Contractor is outside the scope and purview of a petition under Section 397/398. It was held in *Johnson v. Gore Wood and Co.* (2001) 1 BCLC 313 that where a company suffers losses caused by a breach of duty owed to it, the company alone may sue in respect of that loss.

No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding, where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. Therefore, if the Company suffers losses on account of AKSH, the same cannot be raised by the petitioners before the CLB. Entering into and termination of commercial agreements are purely within the purview of the board of directors and, in their commercial wisdom, they may do whatever they consider appropriate. The courts cannot intervene in these matters, unless otherwise they fall within the parameters of the provisions of Sections 397/398 and therefore, there is no scope for the CLB to intervene in the matter of the EPC Contract between a shareholder and the Company.

o During the pendency of the present proceedings, AKSH has been merged with AOFL, which does not in any manner affect the EPC Contract. The rights and obligations of AKSH under the EPC Contract remain affected after merger and the Scheme of Merger provides a suitable clause to this effect.

o Article 5 of the SHA specifies the shareholding pattern of the Company in the ratio of 64.6%, 21.1% and 14.3% to be contributed by AKSH, first petitioner and APTS respectively. Accordingly, the first petitioner has to bring in Rs. 36,97,50,000 out of which a sum of Rs. 22,20,00,000 has been remitted towards its share of the capital.

AKSH has contributed Rs. 88,14,25,000 and yet to contribute Rs. 24,83,25,000. APTS has to contribute its share of capital only on fulfillment of the conditions stipulated in article 5.4.2 of the SHA and after the remittance of the remaining equity contribution by the first petitioner and AKSH and no loans can either be raised by AKSH unless and until all the shareholders bring in their share of equity contribution. The project is at an implementation stage and therefore, the only income to finance the payment of the bills under EPC Contract is by way of infusion of equity and therefore, it is absolutely necessary to induct further equity into the Company by the first petitioner an amount of Rs. 14,17,50,000 and AKSH Rs. 24,83,25,000. AKSH is ready and willing to contribute its remaining share of equity contribution and AKSH had in fact issued cheques in April 2007 for an aggregate sum of Rs. 30.83 crores to the Company towards its call money contribution. However, in view of the order dated 01.05.2007 of the Andhra Pradesh High Court ordering status quo as on 30.04.2007, AKSH was constrained to issue stop payment instructions in respect of those cheques issued by it. There are no two accounts opened in "Dhanalakshmi Bank" but only one account has been opened, which is being operated by a nominee of APTS, on account of the second petitioner obstructing the operation of the Company's account with Corporation Bank by lodging objections, in disregard of the validly passed board resolutions.

o The sixth respondent, a company owned and controlled by the third respondent, is not a shareholder of the Company, but lent monies to the first petitioner pursuant to a separate agreement between the petitioners

and the sixth respondent. The respondents 2 to 5 have no control over the affairs of the sixth respondent. The contribution of funds by the first petitioner towards share application money in the Company was done partly through the equity of the first petitioner subscribed by the respondent Nos. 2 & 3 and partly by inter corporate deposits provided to the first petitioner by the sixth respondent. The first call money paid by the first petitioner was financed through the inter-corporate deposits provided by the sixth respondent to the first petitioner. Any loan agreement between the first petitioner and the sixth respondent and its performance thereunder fall outside the ambit of a petition under Section 397/398. The sixth respondent is neither a necessary nor a proper party and therefore, he is liable to be struck off from the array of parties. The first petitioner has not been able to raise funds on its own, without the support of the respondents, to make their equity contribution in the Company and has always been dependent on the respondents. Thus, the first petitioner has not contributed any amount from their own coffers towards the share capital of the Company. The petitioners 2 to 4 hold 50000 shares of Rs. 5/- each and their stake in the Company is only Rs. 2,50,000/-. As on the date of filing of the petition, 7,38,75,000 shares of the first petitioner are partly paid up, namely, Rs3/- per share and the balance final call due at the rate of Rs. 2/- per share amounting to Rs. 14,77,50,000/-, has not been paid, despite extending time till 28.08.2006 for the first time and thereafter till 25.11.2006 at the request of the first petitioner, compelling the Company to convene a board meeting in December 2006 for the purpose of giving a final notice to the first petitioner and AKSH to pay the call due on the shares held by them, failing which the shares on which the call money were due to be forfeited, as envisaged in Clause 39 of the articles of association of the Company. The petitioners do not intend to pay the balance contribution that remained payable on the partly paid up shares, which is detrimental to the interest of the Company, while the respondents group has already made payments in excess of their obligation vis-a-vis the petitioners. However, the board meeting of December, 2006 came to be postponed on the request of the nominee of APTS. The present petition is with a view to thwart the functioning of the Company and prevent it from raising further finance for the project. The board of directors shall be responsible for the management and operation of the Company, which is presently constituted by second petitioner, respondent Nos. 2 to 4, nominees of AKSH and APTS. The consent of AKSH has not been obtained for filing the present petition. There is no authorization empowering the second petitioner to institute the present proceedings on behalf of the first petitioner.

o The second petitioner is a director and Vice-Chairman, who is in charge of the day-to-day management of the Company. The second petitioner is also a member of the managing committee to monitor the project implementation and chaired several board meetings of the Company, but never deliberated any of the grievances set out in the main petition. The minutes of various board meetings signed by the second petitioner as Chairman, do not reveal any objection raised by any of the petitioners on account of defective supply of cables, as complained before the CLB. There are no grievances alleging any mismanagement in the affairs of the Company. The second petitioner was solely operating the bank account and paid monies amounting to over Rs. 92 crores for the work performed under the EPC Contract against bills/invoices raised by AKSH by way of cheques signed by the second petitioner on behalf of the Company.

o There is, therefore, no need to examine the witnesses, as claimed by the petitioners. Having suppressed the material facts and having come with unclean hands and therefore, are also guilty of distortion of true and correct facts to sub-serve their dishonest motives, the petitioners are not entitled for any equitable reliefs. The Supreme Court held in S.P. Chengalvaraya Naidu (Dead) by LRs v. Jagannath (Dead) by LRs and Ors. that (a) one who comes to the court must come with clean hands; (b) a litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage he would be guilty of playing fraud on the court as well as on the opposite party; (c) a person whose case is based on falsehood, has no right to approach the Court; and (d) fraud avails all judicial acts, ecclesiastical or temporal. The High Court of Karnataka in Srikanta Datta Narasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises Private Limited (1991) Vol. 72 CC 211 categorically held that the relief under Sections 397 and 398 is an equitable relief, which is entirely left to the discretion of the company court and they will be granted only to persons who approach the Court in good

faith and the parties who apply for equitable reliefs must come with a clean record and hands. The communications of the second petitioner on record do not complain of the grievances set out in the company petition but various other issues in the affairs of the Company, namely, payment of commission, internet loss, Cisco Service poles, cable TV equipments, financial indiscipline etc.

o The audited balance sheet for the period ending 31.03.2006 of the Company and the invoices of AKSH submitted to the Company during the period 2006-2007 disclose the work done by AKSH amounting to Rs. 131 crores. The CLB cannot be made to verify the vouchers made available by ASKH. As per the accounts for the period ended 31.03.2006, AKSH is a creditor in the books of the Company after adjustment of the advance given by the Company to AKSH in terms of the EPC Contract.

The Company owes an amount of Rs. 62 crores to AKSH towards supply of the materials and work done under the EPC Contract, which can be appropriated and set off from and out of the amounts due to AKSH from the Company, in the light of article 59 of the articles of association of the Company. The audit of accounts for the year 2005-2006 have been duly conducted by M/s Suresh & Co., which is confirmed by the second petitioner in his communication dated 05.03.2007 addressed to M/s S.R. Batliboi and Associates. The audit report of M/s Suresh and Co. reflects the assets in the form of cables and other equipments held by the Company. The auditor's report dated 10.07.2006 shows that the Company has maintained proper records showing full particulars, including quantitative details and situation of fixed assets and during the year management has carried out physical verification of fixed assets. No material discrepancies were noticed on such verification. The balance sheet for the year ended 31.03.2006 has also been signed by the second petitioner. The report of M/s. Suresh and Co. on the particulars of cables and accessories as well as the value thereon, is not disputed by the petitioners. The schedule-3 forming part of the balance sheet and profit and loss account for the year ended 31.03.2006 shows a net block fixed assets of Rs. 118 crores, which include cables and other accessories of Rs. 94.43 crores. The second petitioner was taking care of the Company and is not maintaining any inventories and there is no need to verify the stock register by the CLB. The statutory auditors' certificate on verification of the ledger extract for the period upto 30.09.2006 of the Company in the books of AKSH discloses the value of work performed by AKSH under the EPC Contract. The monies paid by the Company to AKSH are actually for the work carried out and the materials supplied by AKSH under the EPC Contract. The auditors' certificate dated 05.02.2007, based on the ledger account of the Company in the books of account of AKSH would reveal that AKSH supplied materials and rendered services to the Company during the period 2005-2006 & 2006-2007 upto 30.09.2007 to a tune of Rs. 152 crores. The payments to the contractors are kept pending, since the reconciliation and verification of the work have not been done by the contractors. AKSH never fraudulently inflated the bills or dumped any defective fibre optic cables. All the materials supplied by AKSH have been duly verified and the petitioners' charges are baseless. The plea of the petitioners that 25% of the EPC Contract of Rs. 370 crores ought to have been completed with the amount of Rs. 100 crores withdrawn by AKSH, whereas, not even a single district or the Secretariat has achieved the connectivity is not logical. No petition can be entertained on speculative premises and with the object of engaging in fishing expedition and making a roving enquiry as held in *Ashok Kumar Pandey v. The State of West Bengal* (2004) 1 L.W. (CrL) 369. The plea of fraud put forth by the petitioner is not only required to be specifically pleaded but also to be proved, as held by the Supreme Court in *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad and Ors.*

o The second petitioner did not allow M/s S.R. Batliboi & Associates, statutory auditors appointed at the annual general meeting held on 02.08.2006, to conduct the audit of accounts and even questioned the validity of their appointment, as statutory auditors of the Company on the ground that the accounts had already been audited by M/s. Suresh & Co. When the nominee of APTS at the board meeting held on 09.03.2007 stressed for audit of the accounts for the year ended 31.03.2006, the second petitioner opposed the proposal on the pretext that audit for the relevant period had already been completed. The second petitioner did not permit the auditors to inspect the books of account of the previous year, thereby creating hurdles in the functioning of the Company. All the books are in custody of APTS. The refusal on the part of the petitioners to

carry out the audit of the accounts of the Company by M/s S.R. Batliboi & Associates is unfair and prejudicial to public interest.

o The registered office of the Company originally located in the residential locality has been shifted to a commercial place, as borne out by a rent agreement dated 20.05.2006 executed by the second petitioner and paid a sum of Rs. 18 lakhs as security deposit, out of which Rs. 4.5 lakhs was paid, misusing his position as director for the benefit of the first petitioner, since the first petitioner was the other tenant in respect of the other portion of the new registered office. This amount of Rs. 4.50 lakhs is still outstanding without being settled by the first/second petitioner.

o The concession providing right of way to AKSH, valuing Rs. 2000 crores was granted on account of the policy decision of the Government of India to permit laying optical fibre cables along the High Ways free of charge, as borne by the judgement dated 06.04,2005 of the High Court of Andhra Pradesh passed in W.P. No. 927 of 2005, wherein the first petitioner; AKSH and Government of Andhra Pradesh were parties and the G.O. dated 10.08.2007 of the Government of Andhra Pradesh providing free right of way to AKSH for implementation of the EPC Contract and the petitioners cannot take credit for obtaining the right of way to AKSH. The EPC Contract came to be awarded in favour of AKSH on account of the extensive knowledge and expertise of AKSH in the area of broadband networks, telecommunication and information technology and not on account of the efforts of the petitioners as claimed by them. Thus, the second petitioner having made personal gains, has been acting prejudicially to the interest of the Company.

5. I have considered the pleadings and arguments of learned Senior Counsel for the parties. The main issue for consideration is whether the grievances complained of by the petitioners warrant intervention of the Company Law Board, in exercise of the powers under Sections 397 & 398 read with Section 402 of the Act. All the preliminary issues, being inter twined with series of contentious issues raised before me will appropriately be dealt along with the merits of the main petition. At this point of time it is relevant to observe that when the respondents sought to modify the ex parte interim order made on 05.12.2006, whereby it was directed that any decision that may be taken at the board meeting of 08.12.2006 on inter alia the forfeiture of shares of the petitioners in relation to the partly paid shares, shall not be implemented without the leave of this Bench, it was felt, on affording an opportunity of hearing to both the sides, that any such restraint order on the lines of the order dated 05.12.2006, will only contribute towards imminent stoppage of the project, causing prejudice to the interests of the Company and consequently the public at large.

Accordingly, the interim order restraining the Company passed on 05.12.2006 from implementing the board resolution in relation to the forfeiture of shares as proposed at the board meeting held on 08.12.2006 came to be vacated on 20.03.2007, subject to the petitioners contributing the required funds towards the final call money by 30.04.2006, however, granting liberty in their favour, to approach the Company in the event of any further time that may be required by the petitioners to ensure compliance with the modified order of the Bench.

It was further simultaneously directed, that AKSH would bring in its share of final call money amounting to Rs. 25 crores. Against this order dated 20.03.2007 modifying the interim order dated 05.12.2006, the petitioners have preferred an appeal in C.A. No. 1036/2007 in C.A.No. 918/2007 in C.P. No. 9/2007, before the High Court of Andhra Pradesh, wherein, it was directed in the light of the representations made on behalf of the parties that there is no hurdle for the CLB to proceed with the hearing of the company petition by virtue of the pendency of the appeal before the High Court. The CLB shall proceed according to its own schedule of hearing of the main petition. This Bench, therefore, proceeded with the hearing of the main petition from time to time on merits and accordingly the order is being pronounced.

The acts of oppression and mismanagement complained of in the affairs of the Company on account of the respondents are as under: o The petitioners, at the behest of AKSH, offered their partly paid up shares of the Company along with personal properties in favour of the sixth respondent, to raise the finances to the tune of

Rs. 33.10 crores for subscribing towards their share of equity capital in the Company. However, the sixth respondent colluding with the respondents 2 to 5 released only a part of the loan amount of Rs. 11.10 crores and not the balance amount of Rs. 22 crores, thereby incapacitated the petitioners from raising further funds.

o AKSH had withdrawn, out of the equity capital of Rs. 110 crores put into the Company by the petitioners and AKSH, about Rs. 100 crores, without performing any tangible work and the work done for the Company is not equivalent to Rs. 100 crores. There is not even a single triple play connectivity that has been established as per the EPC Contract in any place, whereas by having drawn an amount of Rs. 100 crores, AKSH ought to have completed 25% of the work, namely, at least six districts should have achieved connectivity.

o AKSH initiated steps, with ulterior motive, to merge itself with AOFL, a listed company belonging to AKSH, without even a proper notice of the amalgamation scheme and without approval of the ATPS and Govt. of Andhra Pradesh (6.16), which is violative of the executed agreements.

o AKSH fraudulently inflated the bills, dumped defective fibre optic cables in their own godowns, raised invoices and withdrawn monies to the tune of Rs. 100 crores, without achieving any connectivity and tangible work on ground. AKSH is obliged to open a bank guarantee of Rs. 50 lakhs in terms of the EPC Contract, which has not been complied with.

o The respondents 2 to 5 by holding majority stake as well as interested parties in the EPC Contract are playing fraud by siphoning the funds of the Company at the project implementation stage itself. The respondents 2 to 5 have been acting in disdain without even obtaining the views of the other stake holders. AOFL supplied and dumped poor quality and substandard fibre cables through AKSH to the Company's project. Those cables are defective and non-functioning.

o AKSH has not settled a number of bills of the contractors running into nine crores of rupees.

o The respondents 2 to 5, with a view to prevent the petitioners from questioning the issues of non-performance of the EPC Contract, siphoning of monies and supply of sub-standard cables by AKSH, have proposed at the board meeting held on U8.12.2006 to forfeit the shares of the petitioners.

o The respondents 2 to 5 proposed to shift the registered office of the Company, without making alternative arrangements for housing the registered office and cancel the agreements on the premises that they are entered into without proper authorization.

o The respondents have caused the statutory records including the minutes books containing the proceedings of all the meetings of the board of directors and general body of the Company, to disappear, so as to fabricate the minutes and other records and alter the very course of the events of the Company.

o The respondents have fabricated the minutes, thereby facilitating the operation of the bank account by directors only of the respondents group, which could be averted on account of the dispute raised with the Bank by the petitioners. This would show that the respondents are keen in excluding the petitioners from the lay-to-day management of the Company.

o The real motive of the respondents is to cancel the marketing agreement, which was entered into between the Company and the first petitioner. AKSH on this pretext is proposing to cancel the EPC Contract, avoid all the penalties under the EPC Contract and Service Level Agreement.

The genesis of the main grievances of the petitioners, when closely looked at, stems out of the agreement dated 21.04.2005, the EPC Contract dated 10.05.2005 and the SHA dated 04.06.2005, the essential features of which would attract utmost relevance in order to appreciate the pros and cons of the elaborate arguments advanced on behalf of the parties, which are summarised herebelow: o The agreement is subject to fulfilment of several conditions stipulated therein, which shall include issuance of Government Orders for right of way by Government of Andhra Pradesh (Article 4).

- o AKSH, as the principal shareholder shall implement the project in a timely and cost effective manner (Article 5.1).
- o The Company shall ensure that the project is implemented as specified and in terms of specifications given in Schedule I (Article 5.4).
- o If the Company fails to complete the project as specified in the project plan, it shall pay liquidated damages as per Schedule V, save in the case of any delay on account of a Force Majeure Condition (Article 9).
- o The Government of Andhra Pradesh shall provide free right of way facilitating the implementation of the project in terms of the agreement. (Article 10.1).
- o The parties to the agreement shall constitute a Project Implementation (PIC), which will oversee the implementation of the project (Article 12.1.1).
- o The role and responsibilities of PIC are specified (Article 12.1.2).
- o The Company shall provide progress reports giving information on implementation of the project at specified intervals (Article 12.2.1).
- o The Company shall develop and maintain a web based on line Management Information system giving the project implementation status (Article 12.2.2).
- o APTS is entitled to check at any time on the implementation of the project with necessary assistance of the Company, for which the detailed modalities are elaborately spelt out (Article 12.3).
- o Events of default on the part of the Company and consequences of such events of default which shall include the termination of the EPC contract and replacement of AKSH as the EPC Contractor with another party are enumerated (Articles 24 & 25).
- o Any dispute arising out of the agreement, if not resolved amicably, within the stipulated time, the parties may refer the dispute to arbitration in the specified manner (Article 27).
- o All the circumstances for termination of the EPC contract and the consequences thereof are set out (Articles 29 & 30).
- o While dealing with the scope of the EPC contract, it is stipulated that the project is implemented as specified and as per specifications given in Schedule I, forming part of the EPC contract (Article 3).
- o All the payments under the EPC contract will be made as listed in Schedule IV, against the periodic invoices raised by AKSH, which shall be complete in all respects and payments shall be made within seven days of receipt of the invoices (Article 5).
- o AKSH shall submit to the Company a detailed programme of work towards implementation of the project, including district wise plan, upon which the latter will approve the programme within the specified time (Article 8).
- o If AKSH fails to implement the project as agreed, it is liable to pay the Company liquidated damages, as per Schedule III (Article 9).
- o AKSH shall on regular basis provide progress reports on implementation of the project and shall develop and maintain a web based online Management Information system giving the project implementation status (Article 11).
- o The Company shall be entitled at any time to check on implemenn of the project (Article 11.2).

- o AKSH shall provide a Performance Bank Guarantee for Rs. 50 lakhs, in favour of the Company, which shall be valid during the currency of the EPC contract (Article 12).
- o Events of default on the part of AKSH and the consequences of such events of default are specified, which shall include termination of the EPC contract and payment of liquidated damages of beyond Rs. 500 lakhs (Article 16 & 17).
- o Any dispute arising out of the EPC contract, if not resolved amicably within the stipulated time, the parties may refer the dispute to arbitration in the specified manner (Article 18).
- o The capital structure of the Company, the contribution of the shareholders towards their share of the capital and the manner in which the shareholders shall subscribe to the shares of the Company are specified (Article 5).
- o Article 6 specifies the role and responsibilities of the shareholders of the Company, namely, AKSH, APTs and the first petitioner are enumerated. Accordingly AKSH will enter into the EPC contract with the Company for complete turnkey execution or implementation of the project in the specified manner. AKSH will be responsible for completion of the project by the Company in terms of the EPC Contract (Article 6).
- o The constitution of the board of directors of the Company is spelt out. The Board of Directors of the Company shall be responsible for the management and operation of the Company for determining the overall policies and objectives of the Company (Article 8).
- o In the event of any dispute arising out the SHA shall be referred to arbitration in the specified manner (Article 18).

The grave charges levelled against AKSH in relation to supply of poor quality and substandard, defective and non-functioning fibre optic cables, fraudulent withdrawal of several crores of rupees against fictitious invoices, non-achieving of any single triple play connectivity, non settlement of the bills of contractors, etc., are undoubtedly and directly flowing on account of the breach of the terms of the agreement dated 21.04.2005, the EPC contract dated 10.05.2005 and the SHA dated 04.06.2005. The cumulative effect of these contracts is that AKSH shall implement the project in terms of the bid in a timely and cost effective manner, failure of which attracts payment of liquidated damages and replacement of AKSH as the EPC contractor or termination of the EPC contract. There is a device at periodical intervals for carrying out the implementation of the project. The Project Implementation Committee, wherein the second petitioner, being a member is responsible to monitor periodically the progress achieved towards implementation of the project, including the maintenance of online Management Information System in this behalf. The Company shall make payments to AKSH under the EPC contract provided the invoices are complete in all respects. Dispute resolution mechanism by way of arbitration is already in place. The main reliefs for appointment of a team of Chartered Accountants to evaluate the quantum of work done by AKSH, replacement of AKSH as the EPC contractor, termination of the EPC Contract and investigation into the investments made by AKSH are squarely covered under the aforesaid agreements and the EPC contract, contemplating appropriate remedial measures for the purported breach of agreements as well as the EPC contract. There is no scope in the present proceedings for adjudication of the various disputes arising on account of breach of the contractual obligations as agreed among the shareholders, especially when they do not in any way relate to the rights of the petitioners as shareholders. In a proceeding under Section 397/398 the acts of oppression and mismanagement complained of must affect the person concerned in his capacity or character as a member of the company and such conduct can be oppressive only when it is burdensome, harsh, and wrongful, involving an element of lack of probity and fair dealing to members in matters of the proprietary right as shareholders. The project has been awarded by APTS in favour of AKSH to be implemented by the first respondent Company, which is closely held by the petitioners as well as AKSH. According to the petitioners their rights as shareholders and their rights under the EPC contract are interwoven, while it is strenuously contended by the respondents that it is only the Company and not the petitioners, being shareholders of the first respondent Company can invoke the

jurisdiction of the CLB for the alleged breach of the terms of the EPC contract, by AKSH. The general rule as laid down in *Foss v. Harbottle* (supra) is that in the case of an injury to the corporation, it is for the corporation to sue in its own name and individual shareholders cannot assume to themselves the right of suing in the name of the corporation. The effect of the rule in *Foss v. Harbottle* (supra) is that the minority shareholders cannot complain of any irregular act, which is bound to be agitated by the majority. In this context the decision in *Johnson v. Gore Wood and Co.* (supra) cited by Shri Ragnavan, learned Senior Counsel, assumes relevance, wherein it was held that where a person suffers losses caused by breach of duty owed to the Company, it alone can sue in respect of those losses. Nevertheless, there are certain circumstances constituting the exceptions to the rule in *Foss v. Harbottle* (supra), which are approved by the courts, whereby minority shareholders' actions are permissible in their own name, but for the benefit of the company. Where the reliefs sought against oppression and mismanagement ultimately go in aid of the company, the reliefs provided by the statute in case of oppression would also constitute an exception to the rule in *Foss v. Harbottle* (supra). It will not, therefore, be just and equitable to deny the statutory right of the petitioners, being minority shareholders under Section 397/398, which will not however encompass the grievances resulted on account of breach of the contractual obligations between the parties. Even otherwise, any order terminating the EPC contract without notice to APTS will be against the principles of natural justice. Nevertheless, it shall be seen whether the petitioners have acted diligently in claiming the discretionary reliefs and further whether they have approached this Bench in good faith in order to work out the rights within the framework of the Act.

The petitioner's good faith has to be tested by their conduct in the present proceedings and therefore, must have come with a clean record and the persons who seek equity must do equity and must come with clean hands, without which they will not be entitled for any equitable relief under Sections 397 and 398.

6. It is on record that the Company has conducted as many as ten board meetings during the period between 14.02.2005 and 08.12.2006, out of which the second respondent chaired eight board meetings, transacting the business relating to the affairs of the Company including the issues relating to the project covered under the EPC contract. However, none of those board minutes discloses any of the grievances raised by the second petitioner before the CLB. The Company had paid several crores of rupees during the period between 10.06.2005 and 23.05.2006 in favour of AKSH by means of as many as eight cheques signed by the second petitioner reportedly towards supply of materials and rendering of services by AKSH under the EPC contract. It is relevant to observe that the board meetings were held on 01.07.2005, 17.09.2005, 30.11.2005, 15.12.2005, 04.03.2006, 10.07.2006 and 08.12.2006, after release of the funds in favour of AKSH by the Company under the EPC contract. Nevertheless the charges presently levelled by the petitioners on defective supply of the cables, siphoning of the Company's funds against fictitious bills, etc. have been neither raised nor deliberated at any of the aforesaid board meetings. The second petitioner neither put forth all these charges at the annual general meeting of the members of the company held on 02.08.2006, whereas the board of directors of the Company, which included the second petitioner thanked, among others, AKSH for their co-operation in the directors' report, forming part of the annual report for the year 2005-2006. The second petitioner in his communication dated 22.08.2006 addressed to AKSH while complaining of non-payment of commission to the first petitioner, other issues relating to internet loss, supply of switches, cable TV equipment, spoke of for the first time the financial indiscipline adopted by AKSH by taking away huge amounts on the same day when the share application monies were credited to the account of the Company.

Nevertheless, the accusation relating to supply of defective and substandard materials as well as siphoning of funds against bogus invoices by AKSH, which are rather very serious nature have not been raised therein. The second petitioner has raised for the first time in his communication dated 01.11.2006 the irregularities purportedly indulged at the instance of AKSH, just before the initiation of the present company petition filed on 04.12.2006. There are communications from the Company addressed to APTS in April, May and August 2006 pursuing for right of way permission and allotment of land to locate Network Operations Centre, from wherein it could be ascertained that sincere efforts are being put forth by the Company for the speedy

implementation of the project, whereas there was no complaint made by the second petitioner before filing of the company petition on serious charges presently levelled against AKSH save the lone communication stated supra. Though, the petitioners have produced the complaints of a number of contractors made in September and November 2006, there is no material to show that the claim of the contractors has been at any time placed before the board of directors of the Company, for appropriate remedial action on the part of AKSH.7. The Managing Committee was constituted on 24.05.2006, with among others, the second petitioner as a member, for monitoring the project implementation. The minutes of the meeting of the Managing Committee of the Company dated 20.11.2006 would reveal that the Committee deliberated (i) AKSH's outstanding payments to the contractors; and (ii) all the issues raised by the IT Secretary in his communication, wherein it was assured on behalf of the second respondent that the second respondent would make some payment to the contractors within a week days time and further that the second respondent would answer all the Issues in a meeting with the IT secretary in person as soon as possible. However, there are no details regarding the issues raised by the IT Secretary in his communication, which came to be discussed at the meeting of the Management Committee. The second petitioner is a party to the deliberations took place at the meeting of Managing Committee as borne out by the minutes of the meeting, signed by the second petitioner. There is nothing to suggest that the second petitioner raised at the aforesaid meeting the serious issues in relation to supply of poor quality and sub-standard materials while implementing the project or siphoning of monies to a tune of Rs. 100 crores by AKSH at the implementation stage, against the fictitious invoices or any other substantial charges set out in the company petition. The Management Committee meeting was held on 20.11.2006, just two weeks prior to filing of the company petition on 04.12.2006.

Nevertheless, the minutes of the Management Committee meeting are silent on every one of the petition mentioned allegations save the default committed by AKSH towards the contractors. There is nothing whatsoever to show that the second petitioner being a director in charge of the day-to-day management of the Company and forming part of the Project Implementation Committee, ever exercised due diligence either in monitoring the progress of the project or in making payments to AKSH in terms of the EPC contract. In this connection, the e-mail correspondence exchanged on 13.03.2006 between the second petitioner and second respondent would indicate that the second petitioner made the payment on mere asking by the second respondent, but payments ought to be made only when the invoices are complete in all aspects as stipulated in Article 5 of the EPC contract. The sequence of events would indicate that the second petitioner has submitted to the conduct complained of without protest and has acquiesced in the alleged mis-appropriation of funds of the Company and further found to be a mute spectator of the alleged illegalities on the part of AKSH.8. In the light of the principles enunciated by the Supreme Court and the High Court of Karnataka in S.P. Chengalvaraya Naidu (Dead) by LRs v. Jagannath (Dead) by LRs and Ors. (supra) and Srikanta Datta Narasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises Private Limited (supra) respectively, I am of the firm view that the petitioners must be declined the equitable reliefs, being discretionary in nature, yet considering the grave seriousness of the charges, they are being examined with reference to the documents on record before the Bench. The auditors' report of M/s S. Suresh and Co. Chartered Accountants, dated 10.07.2006 forming part of the annual report for the year 2005-2006 discloses that the Company maintained proper records showing full particulars, including quantitative details and situation of fixed assets. During the year 2005-2006, the management has carried out physical verification of fixed assets. No material discrepancies were noticed on such verification. There are adequate internal procedures commensurate with the size of the Company and the nature of its business, for the purchase of goods and fixed assets and for sale of goods. The auditors have not observed any continuing failure to correct major weakness in such internal controls. The fixed assets listed out in schedule-3, forming part of the balance sheet for the year ended 31.03.2006 include cables and other accessories worth Rs. 94.73 crores. The balance sheet of the Company has been signed by the first petitioner also. The certificate dated 05.02.2007 of the statutory auditors of AKSH would show that AKSH supplied equipments and materials to the Company under the EPC contract to a tune of Rs. 94.43 crores during the period 2005-2006, which is broadly in consonance with the figure of Rs. 94.73 crores, being the value of cables and other accessories held by the Company reflected in

the balance sheet for the year ended 31.03.2005 of the Company. However, the supplies made by AKSH to the Company during the year 2006-2007, as certified by the statutory auditors of AKSH are not taken cognisance, in view of the disputes raised by the petitioners. The e-mail communication dated 25.11.2006 from APTS emanated ten days prior to the petitioners approaching the CLB would indicate the deficiencies in implementing the EPC contract and non-payment to the contractors by AKSH. The Communication dated 04.12.2006 addressed to the second petitioner by an employee of AKSH on non-receipt of materials despite of receipt of as many as 78 invoices amounting to Rs. 62.19 crores, does not assume any significance in view of the fact that the company petition has been signed on 02.12.2006, two days prior to the said communication, and further that the company petition has been filed on 04.12.2006.

Similarly, APTS has given on 19.01.2007, after initiation of the present proceedings, a notice of default on AKSH for its failure to complete the project by 31.12.2006 and obtain the NLD licence, invoking the relevant clauses of the EPC contract and sought to rectify the events of default within the time stipulated therein. All these developments have arisen out of breach of the contractual obligations and that too subsequent to the date of the main petition and therefore, would be relevant for the purpose of only moulding reliefs, if any.

9. M/s S.R. Batliboi & Associates, Chartered Accountants appointed at the annual general meeting held on 02.08.2006 to audit the accounts of the Company for the year 2006-2007 were not permitted to visit any of the previous year's books/numbers as reflected in their e-mail dated 07.12.2006. It is further evident that the second petitioner objected to the audit to be carried out by M/s S.R. Batliboi & Associates, since the same was already conducted by M/s Suresh & Co., Chartered Accountants, as borne by his letter dated 05.03.2007 addressed to M/s S.R. Batliboi & Associates. It is observed from the minutes of the board meeting dated 09.03.2007 in relation to status of audit of accounts and the arguments advanced in this regard on behalf of the respondents, which remained un-repudiated, that all the books and records and computer systems containing the Company's data have been already shifted to the premises of APTS on 12.03.2007 for the purpose of auditing the accounts for the period 2005-2006 and 2006-2007, which is yet to be commenced by M/s S.R. Botliboi & Associates, pursuant to the disputes between the parties. While the second petitioner refused to permit M/s S.R. Batliboi & Associates, Chartered Accountants, to audit the accounts of the Company for the year 2006-2007, which would also involve physical verification of fixed assets, he is seeking in the present proceedings to appoint a team of Chartered Accountants, to evaluate the quantum of work done by AKSH and thereby the second petitioner adopted contradictory approach, which is not appreciable on his part.

AKSH is yet to contribute Rs. 25 crores towards the equity capital of the Company, out of the total of Rs. 113 crores required to be brought in by it, while the first petitioner had already contributed Rs. 22.2 crores and is to bring in an amount of Rs. 14.8 crores. The board of directors of the Company at its meeting held on 24.05.2006 resolved to make a call for payment of balance call money at Rs. 2/- per share on equity shares of Rs. 5/- each due from the shareholders, upon which the first petitioner was served with a call notice dated 29.05.2006 for payment of the balance call money of Rs. 14,77,50,000/- due on 7,38,75,000 equity shares. In response to the said call notice, the first petitioner in its letter dated 21.08.2006, sought extension of time for payment of the last call on its shares, which became due on 28.08.2006, by another term of three months owing to the unforeseen circumstances that the expected funds could not be mobilised to meet the demand of the Company. The first petitioner in yet another communication dated 25.11.2006, sought for a further period of six months on the ground that the sixth respondent had failed to release the balance inter corporate deposit of Rs. 21.9 crores in terms of the agreement dated 25.03.2006. The first petitioner further accused the second respondent for obstructing the release of the balance amount of inter corporate deposit amount for personal reasons. In the meanwhile, the board of directors of the Company at the meeting held on 08.12.2006, proposed to take necessary action in terms of articles of association of the Company to consider and issue notice of forfeiture to the shareholders who have not paid final call money on shares, which was however restrained at the instance of the petitioners, by an order dated 05.12.2006 by this Bench. The second petitioner for the first time at the board meeting held on 09.03.2007 after filing of the company

petition found to have raised all the serious acts of mismanagement in implementation of the project. On an overall assessment of the developments leading to the present company petition, it is perhaps on account of the inability on the part of the petitioners to meet the demand of the Company towards unpaid call money on the partly paid up shares held by the first petitioner, the second petitioner is belatedly raising the various serious issues in relation to non implementation of the project under the EPC contract. At this juncture, it will not be irrelevant to point out that respondents, on conclusion of the arguments, expressed their willingness and readiness for evaluation of the quantum of work done by AKSH and for verification of the equipments and materials supplied by AKSH towards implementation of the project under the EPC contract, which was also acceptable to the petitioners, however, subject to the stipulation that the petitioners would bring in the final call money only on completion of the evaluation process, whereas the respondents made it absolutely clear that these two processes will be independent of each other and not inter dependent. This would show that the petitioners are only keen in verification of supply of the cables and other accessories supplied by AKSH under the EPC contract but not to meet the demand of the Company on account of the final call money payable by them.

10. All the accusation pointed out at the sixth respondent on account of its failure to fulfill its obligations under the inter corporate deposit agreement in favour of the first petitioner which disabled it to pay the final call money, being the internal disputes between the first petitioner and the sixth respondent and not in the affairs of the Company can in no way be raised in the present proceedings on the ground that such an act on the part of sixth respondent would constitute an act of oppression. The collusion pleaded by the petitioners on the part of AKSH with sixth respondent will neither arise for consideration.

11. The apprehension of the petitioners on account of the probable cancellation of the marketing agreement at the instance of AKSH, not affecting the rights of the petitioners qua shareholders is not amenable to the jurisdiction of the CLB, in the light of the judgment of the Karnataka High Court rendered in M.L. Thukral and Ors. v. Krone Communications Limited and Ors. (supra) justifying the order of the Company Law Board in having refused to exercise the jurisdiction in respect of distributorship agreement. Having come to the conclusion that the CLB cannot exercise its equitable jurisdiction to adjudicate the disputes raised by the petitioners, emanating from the EPC contract, for the reasons elaborated elsewhere, the requirement of oral evidence for the deciding the case before me does not arise and therefore, the decision of the High Court of Andhra Pradesh in Sri Ramadas Motor Transport Limited and Ors. v. Karedla Suryanarayana and Ors. (supra), wherein, it was held that when the CLB exercises judicial functions the elementary principle of adjudicatory process is observance of rules of procedure, i.e. pleadings supported by oral and documentary evidence and the respective parties have to get into the witness box to prove their case and also subject themselves to cross-examination to test the correctness or the veracity of his case apart from proving the authenticity of the documents, will be of little assistance to the petitioners. Similarly there is no need either to summon the unsigned letter dated 14.06.2007 of APTS, copy of which has been produced by the petitioners, without disclosing the source of acquiring such letter, or go into the disputed invoices and other contentious documents produced by the respondents, which are already found to be the outside purview of the present proceedings and which would be relevant only to prove the non implementation of the project as per the EPC contract.

12. The very wide powers possessed by the CLB by virtue of Section 397/398 read with Section 408 of the Act as elaborately dealt by the Madras High Court in Shoe Specialities Private Limited v. Standard Distilleries and Breweries Private Limited (supra) can in no way be exercised on account of the fact that the main grievances of the petitioners are already not found to be remediable in the present proceedings.

13. The misunderstanding which arose on account of the financial obligations as envisaged in the rental agreement for shifting the Company's registered office is being appropriately remedied. The admitted position is neither the petitioners nor the respondents, brought in the final call money in terms of the order dated 20.03.2007 of this Bench, which is however, under challenge before the High Court of Andhra Pradesh, in view of which, I am not inclined to go into the merits of the charges that AKSH had issued cheques towards

the final call money, without any funds in the bank account to its credit and also the justification putforth by AKSH that, in view of the status quo order of the High Court in the pending appeal, funds are not brought by AKSH, in terms of the above cited order of this Bench.

14. In view of the foregoing conclusions, the petitioners are not entitled for the reliefs claimed before the CLB and therefore, it is left to the collective wisdom of the directors of the first respondent Company to take such action as they deem fit in the day-to-day affairs of the Company, particularly with reference to evaluation of the quantum of work completed by AKSH, supply of the equipments and materials under the EPC contract, investments made by AKSH towards the share capital of the Company, realization of the final call money from the shareholders of the Company, recovery of the security-deposit from the first petitioner covered under the rental agreement, settlement of pending bills of the contractors, audit of accounts of the Company etc., which are within the lawful domain of the board of directors of the Company. Ordered accordingly. In view of this, all the interim orders stand vacated.

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