

Dr. Jayanta Kumar and Ors. Vs. Astha Nursing Home Private Limited and Ors.

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Court : Kolkata

Decided On : Sep-14-2016

Judge : Soumen Sen

Appellant : Dr. Jayanta Kumar and Ors.

Respondent : Astha Nursing Home Private Limited and Ors.

Judgement :

IN THE HIGH COURT AT CALCUTTA CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE BEFORE: THE HONBLE JUSTICE SOUMEN SEN A.C.O. No.74
of 2016 A.P.O. No.190 of 2016 DR. JAYANTA KUMAR & ORS. VS. ASTHA
NURSING HOME PRIVATE LIMITED & ORS. For the Petitioners : Mr. Mr. Mr. Mr.
Mr. S.N. Mookherjee, Sr. Adv., Ratnanko Banerjee, Sr. Adv., Aniruddha Roy, Adv.,
Nirmalya Dasgupta, Adv., Dibanath Dey, Adv. For the Respondents : Mr. Jishnu
Saha, Sr. Adv., Mr. Zeeshan Haque, Adv., Mr. Debobrat Upadhyay, Adv. Heard
On :

12. 07.2016, 03.07.2016, 10.08.2016, 17.08.2016, 24.08.2016, 31.08.2016
Judgment On :

14. h September, 2016 Soumen Sen, J.

:- This appeal is directed against an order passed by the Company Law Board, Kolkata Branch on 9th May, 2016 in a proceeding arising out of Sections 111A, 235, 284, 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956. The control and management of one Astha Nursing Home being the respondent No.1 was the subject matter in the company proceeding initiated by the present appellants before the Company Law Board. The petitioners claim to be the majority shareholder of the respondent No.1 Company. The removal of the petitioners from the Board of Directors and reducing the petitioners to minority was challenged in the said proceeding. The petitioners Nos. 1 to 7 along with the respondent No.2 are the founder directors of the respondent No.1. They were the original subscribers to the Memorandum of Understanding of Association of the respondent No.1 Company. The petitioners Nos.1 to 5, 7 and 8 are Doctors by profession. The respondent No.2 was entrusted with the construction of the Nursing Home building and the set up of the Nursing Home. The required funds were generated by obtaining bank loans and also by raising share capital from the petitioners and the respondent No.2 who were the only contributories to the company. The petitioner No.8 was appointed as a director of the company with effect from 20th June, 2009. The dispute arose after 31st May, 2013. Prior to 31st May, 2013 the issued and paid up capital of the company was Rs.20.80 lacs consisting of 2,08,000 equity shares of Rs.10/- each out of which the petitioners together hold 1,04,750 shares. The appointment of the respondent Nos.3 and 4 in the Board of Directors of the Company and allotment of 5776 shares to the respondent No.3 in the Board meeting held on 31st May, 2013 has triggered off the filing of the company petition before the Company Law Board. The petitioners alleged that by reason of the allotment of the aforesaid shares, the shareholding of the respondents has increased from 49.65% to 51% thereby reducing the petitioners from majority to minority. Moreover, the removal of the petitioners Nos. 1 to 8 from the Board of Directors of the Company and issuance of the shares in favour of the respondent No.3 are in violation of Article 6B of the Articles of Association of the Company. At the time of incorporation of the said Company on 24th January, 2005 the authorized share capital of the respondent No.1 was Rs.50,00,000/- divided into 5,00,000 equity shares of Rs.10/- each and prior to 31st May, 2013, the issued, subscribed and paid up share capital was

Rs.20,80,000/- comprised of 2,08,000 equity shares of Rs.10/each, out of which the petitioners together hold 1,04,750 equity shares. The respondent No.1 Company, since inception, has been carrying on the business of running a Nursing Home and the principal assets and/or fixed assets of the company is the land, structure and building situated at the premises of the Registered Office of the Company. Before the Company Law Board, the petitioners alleged that the petitioners reposed their faith on the respondent No.2 for the purpose of construction of the Nursing Home and the setting up of the Nursing Home. The respondent No.2 in breach of such confidence without obtaining any consent from the petitioners allotted a space about 250 sq.ft. to his relative to run a Cafeteria at the premises of the Nursing Home, without any advance or consideration. Besides, another portion of the Nursing Home premises, comprising of about 500 sq. ft is occupied the respondent No.5 himself towards a medicine shop without obtaining any consent from any of the petitioners at any point of time. In addition, the respondent No.2, in an illegal and wrongful manner, unilaterally occupied a portion of the premises of the Nursing Home comprising of 150 sq. ft to run a separate Godown without obtaining consent from the petitioners. The entire electrical connection of the Nursing Home without any cost or expenses being paid either by the said relative of the respondent No.2 or the respondent No.2 himself. The respondent No.2 also has opened a diagnostic centre within a distance of 500 meters from the Nursing Home and the respondent No.2 has run a comparative business from the said centre where ECG and other facilities are provided and thereby diverting the patients from the Nursing Home. The respondent No.2 wrongfully and with mala fide intention filed two sets of Form 32 annexing therewith a copy of the purported Memorandum of Understanding (MOU) dated 1st June, 2010, removing the petitioners No.1 to 8 from the Board of Directors of the respondent No.1 company and also appointing the respondents Nos.3 & 4 as Directors in the Board of the Company. The petitioners contended that the removal of the petitioners Nos.1 to 8 and the appointment of the respondents Nos.3 & 4 have been illegally and wrongfully done with a view to reduce the petitioners from majority to minority to get control and the management of the petitioners. The petitioners alleged that no notice convening any General Meeting was issued either by the shareholder or by the Board, as required under Section 284 of the

Companies Act. Inasmuch as no such notice has been filed with the Registrar of Companies. In addition, the respondents have filed one Form No.2 showing allotment of 5,776 equity shares of and in the respondent No.1 company in the name of the respondent No.3 and also, no notice for the purpose of allotment of such shares was ever served upon the petitioners Nos.1 to 8, who are the Directors and also the shareholders of the respondent No.1 Company. It was pleaded that there was no need of raising any funds by way of share capital in the company at the relevant point of time. Inasmuch as no opportunity of acquisition of shares was granted to the petitioners, who are the shareholders of the company, before allotment of shares to the respondent No.3. No resolution was passed at any General Meeting of the Company either for the removal of the petitioners Nos.1 to 8 from the Board of the Company or for appointment of the respondents No.3 & 4 in the Board of Directors of the Company or for the aforesaid issue and allotment of shares in favour of the respondent No.3. It was alleged that the respondents Nos. 2 and 3 have colluded and conspired between themselves to make material changes in the shareholding and also, in the constitution of the Board of Directors of the respondent No.1 Company in order to oust the petitioners from the control of the company. The respondent No.2 thereby has acted in breach of his fiduciary duty towards the company and its shareholders. The respondent Nos.2 and 3 contested the proceeding in which they have denied the allegations made by the petitioners. The said respondents contended that the petitioner is liable to be dismissed as the petitioners have come with unclean hands and have suppressed the material facts. The contention of the respondents appear to be that the respondent No.2 was the instrumental in the construction and setting up of the Nursing Home. The petitioners were not in a position to manage the company and due to lack of attention to the affairs of the company by the petitioners, the company was unable to generate enough funds to meet its commitments and had run a huge liability. At this stage, the petitioners approached the respondent No.3 for taking over the management of the Company and also for looking after the affairs of the company in its entirety. Accordingly, an MOU dated 1st June, 2010 was entered into between the respondent No.3 (Mr. Shiv Sharma) and the company and pursuant thereto for appointment of the respondent No.3 as a Director of the Company with effect from 14th May, 2013

and consequently, the entire management of the Nursing Home was handed over to the respondent No.3. Thereafter, in discharging the obligations pursuant to the terms of the said MOU dated 1st June, 2010, the respondent No.3 had arranged necessary funds for discharging of the existing liabilities of the company as on 31st May, 2010. In terms of the said MOU, the respondent No.2 repeatedly requested the petitioners to resign from the Board of Directors of the Company so as to facilitate him to be in the management of the Nursing Home. In spite of such requests, the petitioners have refused to resign. Consequently, in order to implement the terms of the MOU dated 1st June, 2010, the respondent had filed Form 32 showing the removal of the petitioners as Directors under Section 284 of the Companies Act, 1956, as the petitioners had agreed to be removed as Directors, which is recorded in the said MOU dated 1st June, 2010 and the respondents had merely given effect to the terms of the MOU in showing that the petitioners no longer remained as Directors of the Company. The respondent No.2 injected funds in the Company when the Company was in need of funds, and such infusion of funds were treated as Share Application Money, which would be evident from the Balance Sheet of the Company as on 31st March, 2011. Since the company was running short of funds and requires additional fund to overcome financial difficulty, the company entered into a MOU dated 1st June, 2010 with the respondents No.2 & 3. Under the MOU, the respondent No.3 invested Rs.45 lacs in the company. The Company with the aforesaid fund could come out of the difficulty. Sheet was signed by the petitioners also. The said Balance More so, such funds had been utilized by the Company is out of its financial difficulties. Now, once the Company to come out of its financial difficulties, the petitioners have racked up few issues which are non-existent in order to initiate the instant proceedings. The respondent justified allotment of 5776 shares in the Board Meeting held on 31st May, 2013 in favour of the respondent No.3 for the purpose of giving effect to the MOU dated 1st June, 2010. With regard to the other issues, it was contended that the Cafeteria let out to Mr. Milan Kumar and the said Milan Kumar had been paying rent to the Company since 2008. The company has also let out a shop for setting up a medicine shop to the respondent No.2 for which the said respondent is paying rent. The petitioners have filed an affidavit dated November 10, 2006 before the Notary Public, Asansol directing that they have

permitted the said respondent to rent the medicine shop within the Nursing Home premises. The Godown is being utilized by the company for its own benefit. The ECG Centre which is run and managed by the relative of the respondents No.2 & 3, is not opposite to the Nursing Home, but is at a distance of at least 1 Km. From the hospital. The petitioner No.6 runs an ECG Centre at a closer vicinity than that of a diagnostic centre which is managed by the relative of the respondents No.2 & 3. The petitioners, who were the Doctors, are recommending the patients to the ECG Clinic of the petitioner No.6. Mr. S.N. Mookherjee, the learned Senior Counsel appearing on behalf of the petitioner submits that the Company Law Board has relied on two Memorandum of Understandings which purportedly records that the persons named in the Memorandum of Understanding would infuse funds in the company whereas the record would show that Inox Advisory Pvt. Ltd., Heaven Consultancy Pvt. Ltd., Kanupriya Agency Pvt. Ltd., Shiv Darbar Vinimay Pvt. Ltd. and Adarsth Pratishtan Pvt. Ltd. have paid a sum of Rs.10,00,000/- by Chq No.014549 on 3rd June, 2010, Rs.10,00,000/- by Chq No.014492 on 3rd June, 2010, Rs.10,00,000/- by Chq No.015005 on 3rd June, 2010, Rs.5,00,000/- by Chq No.014467 on 4th June, 2010 and Rs.10,00,000/- by Chq NO.016849 on 10th June, 2010 respectively in aggregate sum of Rs.45,00,000/- and subsequent thereto the entire amount was repaid to the said five companies on 31st December, 2011, 23rd April, 2011, 4th February, 2011, 4th February, 2011 and 4th February, 2011 respectively and, accordingly, the consideration for issuance of shares in lieu of such payments could not and does not arise and there was no material before the Company Law Board for which the Board could arrive at a conclusion that the shares issued in favour of the respondent No.3 or other entities on the basis of the Memorandum of Understanding, the authenticity of which the petitioners dispute is contrary to record and such finding is perverse. Mr. Mookherjee has relied upon the decision of the Honble Supreme Court in Kamal Kumar Dutta & Anr. Vs. Ruby General Hospital Ltd. & Ors. reported at (2006) 7 SCC613 and Dale Carrington Investment Pvt. Ltd. & Anr. Vs. P.K. Prathapan & Ors. reported at (2005) 1 SCC212 to emphasize that in absence of any resolution and disclosure of any materials in justification of allotment of shares in favour of the respondent No.3 are liable to be set aside and the Company Law Board should have declared such transfer as

illegal and restored the majority of the petitioners in the Board. Mr. Mookherjee further submitted that the Company took loan from the Bank of India, Chirkunda Branch of about Rs.245 lakhs and the Company had and still been paying regularly the monthly instalments and no default has been committed. In fact, prior to 2010, there were irregularities in paying monthly instalments when the Company was under active management of the respondent No.2, but subsequently, when the petitioners came in control of the Company, the Company started regular payment of instalments to the Bank and till date no default has taken place and as on December, 2015, approximately a sum of Rs.60 to Rs.62 lacs is due and payable to the bank. The respondent No.3 was never a party to any MOU and no agreement was reached between the petitioners and the respondent No.3 at any point of time. It is submitted that the aforesaid amount of Rs.45 lakhs was received by the company against a proposed arrangement from some companies who invested money in the company towards share application money and as the said arrangement did not materialize, the Company repaid the entire amount of Rs.45 lacs to such investors. In fact, the purported document, being the MOU dated 1st June, 2010 alleged to have been executed with the respondent No.3, as alleged by the respondent No.2 was never raised in any of the Board Meetings subsequent to such alleged execution and at no point of time the respondent No.2 raised any issue with regard to the execution of the MOU or for allotment of any share to the respondent No.3. It is submitted that the induction and/or appointment of the respondents No.3 and 4 as Directors of the Company was in violation of the provisions laid down in Section 284 read with Section 169 of the Companies Act, 1956. The Form 32 filed with the ROC with regard to the appointment of the respondents No.3 & 4 is incomplete and the necessary documents and resolutions were never adopted by the Company. It was further submitted that the said Form 32 was filed and it is only on the basis of an alleged MOU which is illegal. The allotment of shares is also contrary to Article 6B of the Articles of Association of the Company. Mr. Mookherjee has relied upon the decision in Claude-Lila Parulekar (Smt) Vs. Sakal Papers Pvt. Ltd. & Ors. reported at (2005) 11 SCC73 and also in the case of John Tinson & Co. Pvt. Ltd. & Ors. Vs. Surjeet Malhan (Mrs.) & Anr. reported at (1997) 9 SCC651 wherein it was held that any allotment contrary to the Articles is void.. It is being argued that there was no

need for raising any fund by way of share capital by the Company at the relevant point of time or no such requirement was ever made known to the petitioners who were the Directors and shareholders at that point of time. Also, no opportunity of acquisition of shares was granted to the petitioners who were the existing shareholders in the company before allotment of shares in favour of the respondent No.3 and such allotment was made with a malafide object to take control of the Company by the respondent No.2. In support of such argument, reliance has been placed to the decision in the case of Dale Carrington Investment Pvt. Ltd. (supra), to state that the fact of issue and allotment of shares to the respondents Group without any offer being made to the petitioners, is an act of oppression.. In addition, it has been held in Dale Carrington Investment Pvt. Ltd. (supra) that the act to convert a majority shareholder into a minority shareholder has been considered to be an act of oppression and mismanagement both within the meaning of Sections 397 & 398 of the Companies Act, 1956. Per contra, Mr. Jishnu Saha, learned Senior Counsel appearing on behalf of the respondent No.2 submitted that there are two distinct Groups in control of the Company. The Board of the Company was comprised of nine directors out of which eight directors from the Doctor Group and one director from the Sharma Group. Notwithstanding the fact that the respondent No.2 was only one of the nine directors of the respondent No.1 Company, the petitioners have all along acknowledged his contribution to the company and in this regard the learned Senior Counsel has referred to Paragraphs 6.2 and 6.4 of the Petition and Paragraph 6 of the rejoinder and submitted that the pleadings would show that the petitioners acknowledged the fact that at the time of inception and commencement of the company it was all along understood by and between the parties and the respondent No.2 that there shall be a collective effort and equal participation of all the parties in running the management and day to day affairs of the company. Since the incorporation of the company till the commencement of the operation of the Nursing Home the petitioners all along reposed their utmost faith and trust on the respondent No.2 for the purpose of construction of nursing home building and setting up of nursing home. It is contended that the petitioners are busy doctors. respondent No.2 is an established and successful The businessman particularly with management and administrative skills of running and maintaining hospitals/nursing homes.

Considering this, the Doctor Group joined hands with the Sharma Group and they kept their faith and trust upon the respondent No.2 in the construction and setting up the Nursing Home. For such purpose, the respondent No.2 has enjoyed his independence and freedom in setting up the Nursing Home. Respondent No.2 was the person instrumental in the construction and setting up of the Nursing Home and this fact has also been acknowledged by the petitioners. The understanding was such that the respondent No.2 being an industrialist will take care of all financial transactions and issues relating thereto and petitioners being doctors by profession will render professional services only. After commencement of business the company was not able to generate enough funds to meet its financial commitments to its bankers as the petitioners were neither finding adequate time to look after the affairs of the company after attending to their professional duties nor allowing the respondent No.2 to run the Nursing Home as agreed amongst them. The respondent No.2 being the only director from Sharma Group did not have final say although he was a founder member. The respondent No.1 company started incurring losses which resulted in non-payment of bank dues and by March, 2010 the respondent No.1 Company had an outstanding Bank loan of Rs.189.56 lacs. The petitioners, thereafter, approached the Sharma Group with a proposal to take over management of the company on certain terms which were recorded in a Memorandum of Understanding dated 1st June, 2010. Although the said MOU was executed by the petitioners with the respondent No.3, a brother of the respondent No.2, the same signified an agreement by and between the Doctor Group and the Sharma Group with regard to the running of the Nursing Home. The said MOU provided that on and from the date of execution of the said document itself, the Sharma Group would take over the day to day management of the Nursing Home and their decision in this regard would be final and binding on the petitioners. The same further provided that the shareholding of the Sharma Group would be increased to 51%. The corresponding obligation on the part of Sharma Group was to invest and/or arrange sufficient funds to pay back bank term loans that were overdue and to subscribe for 5776 equity shares of and in the respondent No.1 Company. Under the said MOU, the Sharma Group shall take advice from Doctor Group for taking any major decisions on behalf of the respondent No.1 Company. The object of the said MOU was clearly to increase

the shareholding of the Sharma Group from 49.65% to 51%, cessation of petitioner Nos.1 to 8 from the Board of the company and appointment of the respondent No.3 and 4 on the Board to give them majority control over the affairs of the company so as to prevent the Doctor Group from interfering with the day to day conduct of the business of the respondent No.1 company and consequently to also induct the other directors to enable the constitution of the Board of the respondent No.1 upon removal of the petitioner Nos. 1 to 8 as directors. This was with the object of ensuring that the Sharma Group had the control of the entire management of the respondent No.1 Company, which by reason of the pre-occupation of the Doctor Group with their profession had led to the financial trouble of the company. Accordingly, the respondents agreed to invest moneys into the company to take care of the overdue liability of the bank, without which the bank had threatened to take possession of, inter alia, the nursing home premises and its equipments. In terms of the obligations undertaken by the Sharma Group under the said MOU it caused investment of Rs.45 lacs to be made into the respondent No.1 company for making payment of the overdue liability to the banks. Such amount was invested through loans organized by the Sharma Group from aforesaid five entities. Moneys were brought in as loan as capital induction would have to be against issuance and allotment of shares of corresponding value, which would disturb the agreed shareholding ratio of 51:49 agreed by and between the Sharma Group and the Doctors Group as recorded in the MOU. That the Sharma Group brought in such loans aggregating Rs.45 lacs, which in turn were used to repay the dues of the banks. The aforesaid sums were spent by the respondent No.1 Company for making payment to its bankers, which payments were made by the company by cheques issued under the signatures of the petitioner Nos.1 and 3. The aforementioned loans aggregating Rs.45 lacs were repaid by the company only on 4th February, 2011, 23rd April, 2011 and 31st December, 2011, respectively. The loans were repaid to the entities from which the same were received without any interest. The Sharma Group as such clearly performed all its obligations under the MOU, thereby obliging the petitioners to perform their obligations under the same as well. Despite being obliged to perform their obligation under the MOU, the petitioners did not do so. It is in these circumstances that in order to give effect to the MOU the Sharma Group was

compelled to issue and allot the said 5776 shares in the name of the respondent No.3 thereby increasing the shareholding of the Sharma Group in the Company to 51%, and to appoint the respondent Nos.3 and 4 as directors upon removing the petitioners from the Board. That the Sharma Group was entitled to do so in terms of the MOU cannot be and has not been questioned. The Sharma Group was forced to take such steps in view of the wrongful and illegal refusal on the part of the petitioners to allow the Sharma Group to take over day to day functioning of the respondent No.1 Company without any interference from the petitioners, both by increasing its shareholding to 51% and by taking control of the Board of the Company. Although the said MOU was executed by the petitioners with the respondent No.3, the same signified an agreement by and between the Doctors Group and Sharma Group with regard to running of the Nursing Home and the object of the said MOU was clearly to increase the shareholding of Sharma Group, cessation of the petitioners No.1 to 8 from the Board of the Company and appointment of the respondents No.3 & 4 on the Board to give them majority and control over the affairs of the Company. In addition, despite being obliged to perform its obligation under the said MOU, the petitioners did not do so and it is in these circumstances, in order to give effect to the said MOU, the Sharma Group was compelled to issue and allot the said 5,776 shares in favour of the respondent No.3 increasing the shareholding of Sharma Group from 49.65% to 51% and also to appoint the respondents No.3 & 4 as Directors upon removing the petitioners from the Board of the Company. There can be no doubt that the said MOU was entered into in the interest of the respondent NO.1 Company. In this regard, the learned Senior Counsel has referred to the decision in *Jaladhar Chakraborty & Ors. Vs. Power Tools & Appliances Co. Ltd. & Ors.* reported at (1994) 79 Comp. Cas. 505:

1992. (2) CLT64(HC) to argue that under Sections 397 and 398 of the Companies Act, 1956, the interest of the Company must be considered to be paramount. It was argued that there cannot be any doubt that the MOU dated 1st June, 2010 was in the interest of the respondent No.1 Company upon the shareholders of the Company recognizing the fact that the overall management of the company was required to be handed over to the Sharma Group. It was submitted that in considering the applications, under Sections 397 and 398 of the Companies Act,

1956, the interest of the company must be considered to be paramount. In this regard reference was made to the following decisions: a) Mohanlal Ganpatram & Anr. Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. & Ors. reported at AIR 1965 Guj 96 (Paragraph 53); b) Nanalal Zaver & Anr. Vs. Bombay Life Assurance Co. Ltd. & Ors. reported at AIR 1950 SC 172 (Paragraph 27); c) Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors. reported at (1981) 3 SCC 333 (Paragraph 121,

111) It was submitted that the petition is liable to be dismissed on the ground of suppression as the petitioners have deliberately suppressed the MOU dated 1st June, 2010 and deliberately misrepresented the facts in connection therewith. The facts would reveal that even by accepting that a MOU had been entered into with one of the members of the Sharma Group, namely, the respondent No.3, the petitioners alleged that upon the respondent expressing a desire to invest in the respondent No.1 Company, a MOU was prepared and executed on 1st June, 2010. Subsequently, realizing that there was something wrong with the MOU, the same was not, however, given effect to and it was understood and accepted by the parties that the said MOU had lost its force and stood terminated. The said paragraphs, according to the learned Senior Counsel, represent a deliberate attempt on the part of the petitioners to avoid the MOU of 1st June, 2010 with the conscious knowledge that the said MOU had not only been executed but also been given effect to. The petitioners realizing the implication of the said MOU with the mala fide object disclosed an alleged minutes of a meeting of the Board of Directors dated 27th November, 2010 which purports to record that the Board of Directors were surprised to find that a sum of Rs.45 lacs have been injected in the Company. It was argued that the content of the said minutes are untrue and the document is forged as would be evident from the letter of the petitioner No.3 in the letter head of the company to the Manager of the Bank of India, Chirkunda Branch on 26th August, 2010 acknowledging the fact that the company had deposited a total sum of Rs.45 lacs with the bank and on the basis thereof had prayed for a repayment holiday for a period of nine to ten months. On a comparison of the MOU dated 1st June, 2010 disclosed by the petitioners with the MOU disclosed by the Sharma Group in their reply, it would appear that the terms of both the documents are essentially the same. The documents disclosed by the Sharma

Group contain signatures of most of the petitioners. In view of the positive evidence that in performance of the obligations under the said MOU the Sharma Group made available a loan of Rs.45 lacs to the company, which the company used to make payment to the bankers and in the absence of any evidence whatsoever to suggest that the MOU was abandoned, there can be no doubt that the statements made by the petitioners in paragraphs 6.8 and 6.9 of the company petition were made deliberately with the object of suppressing the true facts and further mislead this Honble Court. This in itself is good enough ground for rejection of the company petition and in this regard reliance was placed on the decisions:(a) Sangramsingh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad & Ors. reported at (2005) 11 SCC314(Paragraph 196, 197, 198); (b) S.P. Chengalvaraya Naidu Vs. Jagannath & Ors. reported at (1994) 1 SCC1(Paragraph 6). It was submitted that the agreement is sacrosanct and an agreement entered into between the two groups of shareholders who are essentially the partners in the company must be honoured. The directors are required to act in good faith. The shareholders are essentially the partners in the company and their actions should bind the company. The respondent No.1 is a partnership of two groups of shareholders and in such a case the principles of partnership have been applied which requires that the shareholders must act in good faith and the principles of uberrimaefidei is applicable. In this regard the learned Senior Counsel has relied upon the case of O'Neill & Anr. Vs. Phillips and Ors. reported at (1999) 2 All ER961wherein the House of Commons held that for the purpose of Section 459 of the 1985 Act (which is equivalent to Sections 397 and 398 of the Companies Act, 1956), although a member of a company would not ordinarily be entitled to complain of unfairness unless there had been some breach of the terms on which he had agreed that the company's affairs should be conducted, equitable considerations might make it unfair for those conducting the affairs of the company to rely on their own strict legal powers. That would be so where the exercise of the power in question would conflict with the promises the parties had exchanged, and it was not necessary that such promises should be independently enforceable as a matter of contract. In view of the shareholding of the respondent No.1 company, even prior to the issuance and allotment of the said 5776 shares, there can be no doubt whatsoever that the company was in the nature of partnership between the

Doctors Group, the petitioners and the respondent No.2, who represents the Sharma Group. As such, the consideration of equity clearly prevents the petitioners from relying on their strict legal right in opposing the issuance and allotment of the said 5776 shares in favour of the Sharma Group and in appointing Additional Directors to the Board of the company upon removing the petitioners therefrom, particularly as allowing the petitioners to do so would amount to allowing the petitioners to take advantage of their own wrong and further as the same would not effect to the petitioners to escape their obligations under the agreement entered into with the Sharma Group by questioning the acts of the Sharma Group, done with the object of giving effect to the MOU of 1st June, 2010, which MOU was executed in the interest of the respondent No.1 company. Apart from being disentitled to any order in the company petition in the facts and circumstances as stated hereinabove, the petitioners can in any event not seek any relief in the same as their acts have clearly been without probity. In this regard the learned Senior Counsel has relied upon the following decisions:(a) Anugraha Jewellers Ltd. & Anr. Vs. K.R.S. Mani & Ors. reported at (2002) 111 Comp. Cases 501 (Mad) (Paragraphs 8,9,17,18); (b) Dalip Singh Vs. State of Uttar Pradesh & Ors. reported at (2010) 2 SCC114(Paragraph

2) (c) Vishnu Kumar Agarwalla & Anr. Vs. Sreelall Foreign Money Changers P. Ltd. & Ors. reported at (2008) 142 Comp. Cas. 15 (Paragraph 15); (d) Draegerwerk Aktiengesellschaft Vs. Usha Drager P. Ltd. & Anr. reported at (2007) 137 Comp Cas. 569 (Paragraph

17) The contention of the respondents based on the said decision was that if a petitioner has acted without probity and against the interest of the company, even though certain acts have been done by the respondents in violation of procedural provisions of the Companies Act, 1956, the Court will refuse to grant any relief to such petition. The MOU of 1st June, 2010 was executed in the benefit of the company. Despite having admitted the execution of the said MOU, the petitioners have, however, attempted to suppress material facts and made false statements with the object of acting contrary to the terms of the said MOU. Such false and misleading statements clearly demonstrate the intention of the petitioners to act against the interest of the company. Inasmuch as the petitioners acts lack probity,

they are in any event not entitled to any relief in the instant company petition. The nerve centre of the litigation is Astha Nursing Home Pvt. Ltd. It emerged from the pleadings that there are two principal groups who are trying to establish control and the management of the said Nursing Home. This is apparent from the fact that the respondent No.2 all throughout before the Company Law Board has asserted that he is representing all the respondents. The corporate shareholders do not come and say that they are not supporting the respondent No.2 in this litigation. Even if it is assumed that the respondent No.2 does not represent Sharma Group but the support of the other respondents of the actions of the respondent No.2 is clear and implicit. The dispute centres around a Memorandum of Understanding. There are two Memorandum of Understanding disclosed in the proceeding in which the surname Sharma. is common but the first name is different, namely, Sanu Sharma in the first agreement and Shiv Kumar Sharma in the second agreement. The respondent No.2, both before the Company Law Board and before this Court, has relied upon the Memorandum of Understanding dated 1st June, 2010 and in no uncertain term unabashedly and without pretention submitted that the allotment of shares in favour of the respondent Nos.3 and 4 is to give effect to the said Memorandum of Understanding. The Doctor Group, on the other hand, has denied the existence of the said agreement and submitted that only a draft agreement was prepared in which Sanu Sharma of Durgapur was the first party and the petitioner along with the respondent No.2 are the second party. The said agreement, however, was not given effect to. The respondent No.2, in short, contended that the Doctor Group has acted in breach of the Memorandum of Understanding dated 1st June, 2010 and it was incumbent upon the Doctor Group as well as the respondent No.2 to discharge and fulfil the obligations adumbrated in the Memorandum of Understanding dated 1st June, 2010. In order to appreciate the said argument it is necessary to refer to the Clauses of the Memorandum of Understanding which are:1. That the party of First part shall take over the entire management of nursing home with effect from 01.06.2010. For day to day running of Nursing home, decisions taken by the party of first part in binding on party of Second Part. But for taking any major decisions, the party of first part shall taken advice from party of second part for better functioning of company.

2. That the party of First part shall take over all existing liabilities of company as on 31.05.2010 and shall liable to pay the said liabilities in time as per term decided with creditors.

3. That the party of First part shall hold 51% equity shares of the company and balance 49% shares shall continue to be held by existing shareholders and their relatives.

4. That the existing directors and its relatives holding 49% of equity shares of the company cannot sell its holding. If any persons holding the said shares want to exit from the company, then he/she is bound to transfer its holding in company to party of first part only.

5. That the party of first part shall not pay any dividend or interest on investment made by party of second part for establishing the said nursing home during the first year of its operation but the party of First part shall liable to pay interest at bank fixed deposit rate (at floating rate) to party of Second part on total investment other than share capital made party of Second part, till this amount is refunded.

6. That the party of First par shall invest sufficient fund to initially repay bank term loan overdue and other over dues liabilities. Further, the party of First part shall invest sufficient fund for development of the company.

7. That the party of Second part will form a Doctors committee for better running of the nursing home and for the development of individual departments.

8. That all the directors and its relatives can increase their shares whenever he/she wishes to. It is not in dispute that the said Memorandum of Understanding has been signed by some of the doctors. The Memorandum of Understanding was entered into on 1st June, 2010. Under the said Memorandum of Understanding, Shiv Kumar Sharma individually would hold 51% equity shares of the company and balance 49% shares would be held by the existing shareholders and their relatives. Shiv Kumar Sharma would take over the management from 1st June, 2010 and would also take over all existing liabilities of company as on 31st May, 2010. Shiv Kumar Sharma shall also be liable to pay liabilities in time as per term

decided with creditors. Shiv Kumar Sharma shall invest sufficient fund to initially repay bank term loan overdue and other overdue liabilities. Moreover, Shiv Kumar Sharma shall invest sufficient fund for development of the company. There was no material placed before the Company Law Board as to the liability existing as on 1st June, 2010. It appears that on 16th June, 2010, the Bank of India wrote a letter to the Nursing Home seeking certain informations and details in order to enable the Bank to submit the proposal for sanction of further loan by competent authority. Prior thereto it appears that the Company between 1st June, 2010 and 10th June, 2010 deposited a sum of Rs.45 lacs with a request for holiday period of nine to ten months. A further request was made to increase the cash credit limit by Rs.15 lacs in order to enable the smooth running of the Nursing Home. Mr. Jishnu Saha, the learned Senior Counsel has laid much stress on the payment of these Rs.45 lacs. It appears from the balance sheet disclosed for the relevant year that the said amount was treated as share application money. The petitioners are pretentious in not acknowledging the source of the fund although it appears that the fund had come to the till of the Company and was certainly utilized. However, the fact remains that the said money was repaid by the company between 4th February, 2011 and 31st December, 2011 without any interest. Mr. Saha has argued that the said amount was arranged by Shiv Kumar Sharma through various companies and this infusion of fund has helped the company to wriggle out of its financial problems and enable the company to meet its existing liabilities. However, this claim of the respondent No.2 is unsubstantiated. Moreover, the agreement contemplates that the respondent No.2 would take over all existing liabilities as on 31st May, 2010 and shall be liable to pay the said liabilities in time. There was no evidence before the Company Law Board that Shiv Kumar Sharma has infused any amount or he had arranged for the funds or that he had taken over all the existing liabilities as on 31st May, 2010 and was allowed to take over the management of the said company. It is true that the entire loan was repaid without any interest and the bank might have extended the repayment holiday which certainly has benefitted the company to some extent but the fact remains that the said fund was taken out from the company which cannot be viewed as an act for the benefit of the company since the company became poorer by Rs.45 lacs and the same is against the spirit of alleged MOU. There was no correspondence

between the respondent No.2 and 3 with the petitioners or with the company alleging that the infusion of fund had taken place on the basis of Memorandum of Understanding and the Company was benefitted by the said amount and further sums were invested in the company by Shiv Kumar Sharma. This aspect of the matter is important when a plea of legitimate expectation is raised to justify an allotment of shares dehors the articles in favour of the respondent Nos.3 and 4. The respondent No.2 has failed to disclose any document between December, 2011 till the impugned Board resolution that any further sum was invested by the respondent No.2 or its alleged Group. It is an admitted position that no notice was ever served upon any of the shareholders of the company before the impugned resolution was passed. Mr. Jishnu Saha, the learned Senior Counsel in this regard has submitted that no notice is required in such a situation when all the shareholder directors of the company have consented to and agreed to the terms contained in the Memorandum of Understanding by which they have unequivocally admitted taking over the control and management of the respondent No.1 by Shiv Kumar Sharma. Mr. Saha tried to draw inspiration from the two decisions of the Chancery Division, namely, *Cane v. Jones & Ors.* reported at 1980 (1) WLR1451 and *In re Duomatic Ltd.* reported at 1969 (2) Ch 365 that where the transactions are intra vires and honest, and especially if it is for the benefit of the company it cannot be upset if the assent of all the shareholders is given to it. It matters in the least whether the assent is given at different times or simultaneously. In that case absence of holding any meeting and passing any resolution would be unnecessary. When such a plea is raised, the Court would expect that the respondent is able to demonstrate that the terms of the agreement were worked out and the party in whose favour the shares have issued, has acted for the benefit of the company. The repayment of Rs.45 lacs with no further infusion of fund and/or taking over the liability of the respondent No.1 at the relevant time or even prior to the impugned Board resolution does not show that the issuance of shares in favour of the respondent Nos.3 and 4 are in the best interest of the company. Moreover, the respondents have failed to establish that the company was in financial doldrums and Shiv Kumar Sharma has saved the company with the infusion of the fund and thereafter made further investment for the development of the company. The Company does not appear to be in bad

shape inasmuch as the bank loans are being repaid. The doctors have given their personal guarantees in consideration of the bank agreeing to grant loan. The respondents are unable to show that entire liability including bank loan was taken over by the respondent No.3 or Sharma Group. The learned Senior Counsel submitted that although the agreement refers to Mr. Shiv Kumar Sharma but in effect the true intent and spirit of the agreement was that Sharma Group would control 51% equity shares of the company. It is now immaterial as it appears that Shiv Kumar Sharma or Sharma Group did not fulfil its obligation under the MOU inasmuch as the MOU does not contemplate complete exit of the Doctors Group from the management inasmuch as they have right to increase their shares whenever they desire. There cannot be any doubt that the Court ought not to confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provision of the section and that in certain situations the Court is not powerless to do substantive justice between the parties, the facts of this case do not merit such a course of action to be taken and return a finding in favour of allotment of shares. The claim of respondent No.3 is in the nature of specific performance of an alleged MOU. As alluded above there is a failure on the part of the respondent No.3 or Sharma Group to fulfil its obligation and at the time of allotment of shares the Company was not in need of fund. Moreover, there has been wrongful usurpation of authority by the respondent No.2. The right to claim relief under Section 397 of the Companies Act, 1956 has been recognized in *Ramashankar Prosad & Ors. Vs. Sindri Iron Foundry (P) Ltd. & Ors.* reported at AIR1966 Cal 512. The act of appointing new additional directors by altering the articles of association of the company with the object of completely upsetting the control and management of the company's affairs constitutes an act of oppression. It is settled law that it is not open to the directors of a company to issue and allot shares in a manner by which an existing majority of shareholders are reduced to a minority. The court will scrutinize with particular circumspection any such issue or allotment and unless it is satisfied beyond reasonable doubt that such issue was unavoidable and was resorted to as an express and emergency measure with an object of fundamental importance, e.g., saving the existence of the company, it will not allow the existing balance of power in the company to be disturbed. In *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan* reported at (2005) 1 SCC212their

Lordships with regard to oppression held that if a member who holds the majority of shares in a company is being reduced to the position of minority shareholder in the company by mala fide act of the company or by its Board of Directors, such act must ordinarily be considered to be an act of oppression against the said shareholder and what relief should be granted would depend on the facts of the case. The facts of the present case at hand are almost akin to the case referred to above. Allotment of additional shares to the respondent Nos.3 and 4 was made with the objective to gain control by becoming a majority shareholder. The said allotment is not in the interest of the Company and no legal procedure prescribed in the articles of association was followed. The Company Law Board although held that the removal of the petitioner Nos.1 to 8 as directors under Section 284 of the Act was done in contravention of the provisions of the Companies Act, 1956 and also against the principle of legitimate expectation dismissed the company petition. The allotment is also in violation of Article 6B of the Articles of Association. In view thereof the appeal succeeds. The Board Resolution dated May 31, 2013 and consequent allotment of shares in favour of the respondent Nos.3 and 4 are set aside. The judgment dated May 9, 2016 is set aside. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on usual undertaking. (Soumen Sen, J.)

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