

Crompton Greaves Ltd. Vs. Sky Cell Communication Ltd. and ors.

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Court : Chennai

Decided On : Mar-27-2001

Reported in : [2003]115CompCas832(Mad)

Judge : R. Jayasimha Babu and ;K. Gnanaprakasam, JJ.

Acts : Companies Act - Sections 256; Arbitration and Conciliation Act - Sections 9

Appeal No. : O.S. Appeal Nos. 390 to 394 of 2000 and 20 to 22 of 2001 and CMP Nos. 19515, 19516, 19560, 19561, 19

Appellant : Crompton Greaves Ltd.;sky Cell Communication Ltd. and ors.

Respondent : Sky Cell Communication Ltd. and ors.;hanumantha Rao Peria and ors.

Advocate for Pet/Ap. : C.A. Sundaram, ;P. Chidambaram and ;C. Harikrishnan, Sr. Advs., ;Narmadha Sampath, ;Karthick Seshadri, ;Elizabeth Seshadri, ;N. Ganapathy, ;S. Elambharthi and ;S. Elamarathi, Advs.

Disposition : Appeals allowed

Judgement :

R. Jayasimha Babu, J.

1. These appeals are directed against the common order dated 08-12.2000 made on several applications for injunctions and interim directions filed by plaintiffs in C.S. Nos. 930 and 931 of 2000 on the original side of this court concerning the affairs of a cellular mobile telephone company, which holds a licence for providing such service in Tamil Nadu.

2. Sky Cell Communications Limited (Sky Cell) was incorporated initially as a private company at Delhi on 03.03.1992 with the main object of owning and operating cellular mobile telephone system in India. On 27.10.1995, the word 'private' was deleted from its name, as by then, the company had become a public company under Section 43A of the Companies Act. The registered office of the company was later shifted to Chennai.

3. A joint venture agreement (JVA) was entered into on 12.08.1992 among Sky Cell, Crompton Greaves Ltd. (Crompton), Bellsouth International (Asia/Pacific) Inc., Atlanta, USA, (Bellsouth) Millicom International Cell SA incorporated in Luxembourg (Millicom) and DSS Enterprises Private Limited (DSS), having its registered office at Delhi. DSS formerly known as Daljit Singh and Sons Private Limited has been the advisor to Bellsouth in its business activities in India in terms of an agreement dated 15.07.1986 as amended by a supplement agreement on 10.07.1993, under which DSS is entitled to receive and has been receiving \$3,000 per month as fee from Bellsouth. Under the JVA, it was agreed that CGL would have 40% of the shares of Sky Cell, Bellsouth 25%, Millicom 25% and DSS 10%. In view of the policy of the Government of India, which required mobile cellular licensees to have not more than 49% of foreign equity participation, the shareholding pattern was changed to 40.5% by CGL, 10.5% by DSS and 24.5% each by Bellsouth and Millicom. Though the JVA dealt, inter alia, with such matters as restrictions on transfer of shares held by the partners of Sky Cell, composition of Board of directors, manner of exercise of its powers, quorum for meetings of the Board and the AGM, those restrictions were not incorporated in the articles of association of Sky Cell. The JVA has not so far been terminated.

4. The present paid up capital of Sky Cell is Rs. 62.22 crores. The company has not made any profit since inception and has incurred losses of a high magnitude

year after year. The loss incurred for the year 1999-2000 was Rs. 41.51 crores, for the year 1998-99, it was Rs. 26.62 crores and for the year 1997-1998. it was Rs. 41.24 crores. The interest and the financing charges paid by the company in the year 1999-2000 were Rs. 21.36 crores. The company has a secured debt of about Rs. 100.6 crores and unsecured debt of over Rs. 45.00 crores. Payment to a foreign equipment supplier for equipments supplied in 1995-96 is yet to be made in full and over \$1 million is still outstanding. The company is said to have a customer base of about 40,000 subscribers in Chennai and its market shares is about forty percent.

5. Under the JVA, CGL was given the right to nominate five directors of whom one was to be the managing director and another the Chairman of the company, Millicom and Bellsouth were to have two directors each and DSS, one director. The company from its inception has regarded Section 256 of the Companies Act as being applicable to it. The JVA requires that the voting rights attached to the shares held by the partners should be so exercised as to ensure the election of the directors nominated by the other shareholders.

6. Sky Cell secured a licence from Government of India for providing mobile telephone services in the city of Madras under the licence dated 30.11.1994, which licence was subject, to among, other conditions, the condition that the change in the shareholding pattern of licensee was not to be effected without the approval of the Government of India. The cap of 49% for foreign equity participation in the telecommunication sector continues to be the policy of the Government and has been given a statutory character by the regulations framed by the Reserve Bank of India, viz., Foreign Exchange Management (transfer or Issue of Security by a Person Resident Outside (India) Regulations, 2000, under Section 6(3)(b) read with Section 47 of the Foreign Exchange Management Act (Central Act No. 42 of 1999) which came into force on 1.6.2000 ; Schedule 1 to those regulations deals with Foreign Director Investment Scheme. The cap of 49% foreign direct investment is laid down in Annexure B to that Schedule.

7. The shareholders of the company, having regard to the severe strain on their own financial resources in having to keep funding this loss-making company, had

approached their bankers ABN Amro in 1998 to find a buyer to whom the shareholders could divest shareholdings at the most advantageous price. Bellsouth took the initiative in suggesting ABN Amro Bank as the suitable agency to find a buyer. A letter dated 8 July, 1998, was sent by it to all the shareholder in that regard. An agreement with ABN Amro was also drawn up on 10.07.1998. The collective effort was subsequently abandoned in favour of bilateral deal between the shareholder and the prospective purchase.

8. Bellsouth as a result of such bilateral negotiation entered into an agreement with the other foreign shareholder, Millicom. In January, 1999, Bellsouth gave a notice to all the other shareholders that it proposed to sell its 24.5% share in Sky Cell for a purchase price of \$ 10 million, plus 50% of the capital gain, if any, realised on any subsequent resale of the shares during the two year period after the closing of the initial sale, and that the shares were to be sold on those terms to Millicom. CGL as also the other shareholders had no objection for such sale. The consent of all the shareholders for such sale was recorded at the meeting of the Board of directors subsequently held on 14.12.1999. The sale, however, did not fructify. Bellsouth thereafter wrote a letter on 12.01.2000 to Millicom stating therein that their agreement dated 24.02.1999 contemplated closing by 31.12.1999, but that the closing did not occur, and therefore, the agreement stood terminated. Bellsouth, however, reiterated that it was still considering the possibility of selling its shares, and welcomed any discussion regarding the same with Millicom.

9. In October, 1999, CGL and DSS together agreed to sell their shareholding to Bharti Tele Ventures Ltd. (Bharti), a subsidiary company of Bharti Telecom Ltd. which either director or through its subsidiaries is providing mobile cellular telephone services in Delhi, Himachal Pradesh, Andhra Pradesh and Karnataka and is also providing fixed telephone services in Madhya Pradesh. Bharti has a paid up capital of about Rs. 105.00 crores of which about 62% is held by Bharti Telecom Ltd. and 33.48% is held by foreign investors.

10. A memorandum of agreement dated 5.10.1999 was entered into among CGL, DSS and Bharti, for the sale of 51% stake in the company made up of CGL's stake of 40.5% and DSS stake of 10.5%. Under that agreement, the enterprise value of

Sky Cell was fixed at Rs. 390 crores, enterprise value being the value of the enterprise calculated on the basis of discounted future cash flows or the present cost of setting a similar enterprise with similar advantage or other method agreed to by the parties. The net equity of all the issued and paid up shares was to be ascertained after deducting the liabilities of the company from the enterprise value. the value per share was thus determined at Rs. 38 per share. That agreement was supplemented by a further agreement dated 01.11.1999 wherein the pendency of proceedings before the Company Law Board on account of disputes among the shareholding of DSS was referred to and the time for completing the sale extended. In that supplementary agreement it was provided that Bharti was not bound to purchase the shares of CGL or DSS separately at its own option.

11. The shares of DSS, however, could not be sold as DSS was indebted to a French bank, CAI, in the sum of about US \$1.4 million plus interest for which Millicom had also stood guarantee, and the consent of Millicom for the sale of DSS shares which was essential in terms of the escrow agreement drawn up among Bharti, DSS, CAI, and Deutsche Bank was not forthcoming.

12. On 25.11.1999, CGL entered into an agreement with Bharti for the sale of its 45.5% stake, at the price set up in the agreement dated 05.10.1999. Millicom by their letter dated 18.02.2000 informed Sky Cell that they had no objection for the sale of CGL's share to Bharti. Millicom also stated in that letter, inter alia, that --

'Millicom has previous experience of working with Bharti in New Delhi and believes that this change in ownership will be good for the business of Sky Cell. Our previous experience with Bharti has been very positive and their obvious commitment to the telecommunications sector in India makes them an appropriate partner to the business.'

DSS also gave its consent for the sale of CGL's shares to Bharti.

13. Bellsouth in response to the transfer notice issued by Sky Cell at the instance of CGL and DSS, by their letter dated 09.12.1999 addressed to Sky Cell, stated that they were not interested in purchasing the shares held by CGL and DSS even though under the JVA, the other shareholders had a preferential right to buy when

an existing shareholder was desirous of selling its shares. Bellsouth further proceeded to state that it was not consenting to the transfer of shares held by CGL and DSS to Bharti, and, according to Bellsouth, it did not have sufficient information about the business of Bharti and about those who ran that company.

14. The Department of Telecommunications (DoT) by letter dated 16.2.2000 informed Sky Cell that it had no objection to Bharti replacing CGL in Sky Cell subject to the conditions stated therein, which, inter alia, required that there be a cap of 49% on foreign equity, and the management control of the licensee company shall remain in Indian hands.

15. Bellsouth, though it was desirous of selling its own shares and was unwilling to buy the shares held by CGL, with a view to prevent the sale of CGL's shares to Bharti, filed applications OAs No. 103 and 104 of 2000 on the original side of this court in February, 2000, under Section 9 of the Arbitration and Conciliation Act on the ground that it had consented for the transfer. In its reply to the counter filed in that proceedings, Bellsouth took the stand that its was not against transfer per se, but that it had not been provided with all the information required by it about Bharti, for it to regard Bharti as an acceptable joint venture partner. On 06.04.2000, a learned Single Judge of this court made an order on those applications, and directed all the four shareholders to meet at the office of Sky Cell at Chennai on the 3 May, 2000, and try to resolve their differences, as the JVA required such an effort being made before arbitration could be resorted to. The parties were directed to maintain status quo for a period for four months, if they were unable to resolve their differences. At that meeting, it was agreed in principle that Bellsouth, CGL and DSS would sell their shares in Sky Cell to Bharti. CGL preferred an appeal against the order of 06.04.2000. That appeal was subsequently withdrawn. Bharti also obtained leave to appeal, and it also subsequently did not pursue that appeal.

16. During the pendency of that application of Bellsouth in this Court, DSS filed a suit in the Court of Additional Judge, Delhi, against Sky Cell, CGL and others on 29.03.2000 and obtained an ex parte injunction valid till April, 2000, against the sale of CGL's shares to Bharti. The filing of that suit and the orders subsequently obtained in that suit were not disclosed to this court, nor was it made known to

CGL, Sky Cell and Bharti till 26.08.2000 at the meeting the Board of Sky Cell held on that day. Bellsouth though aware of that suit also had not disclosed the pendency of that suit.

17. On the 4 May, 2000, CGL wrote a letter to Bellsouth stating that it had been advised that instead of a single agreement among Bharti, CGL, Bellsouth and DSS, it was advisable that Bellsouth, DSS and CGL enter into separate agreements with Bharti, as the enterprise value being mentioned in the three agreements were not the same -- the enterprise value as between CGL and Bharti being lower than that agreed to as between Bharti and Bellsouth and Bharti and DSS, and that would cause difficulties to CGL in explaining to its shareholders as to why it had accepted a lower enterprise value. Another reason given for preferring to enter into a separate agreement, was the fact that Satwant Singh was involved in number of litigations with his relatives, and if one single agreement were to be entered into, the whole matter may get delayed. Thereafter, separate agreements were drawn up. The enterprise value mentioned in the agreement between Bharti and CGL was \$ 106 million, in the agreement between Bellsouth and CGL, it was \$ 115 million, and it was \$ 109 million in the agreement between DSS and Bharti.

18. Bellsouth acting through their advocates conveyed to Sky Cell in 24 May, 2000, their approval of the letter to be sent by Sky Cell to DoT regarding the sale of the shares held by Bellsouth in Sky Cell to Bharti. That letter sent by Sky Cell to DoT on 26.05.2000, inter alia, stated that --

'Bellsouth has decided to focus predominantly in North and South America and has accordingly agreed, in principle to sell its entire 24.5% shareholding in the company to an Indian company - M/s Bharti Tele Ventures Limited, a part of Bharti Enterprises, a leading telecom group in India, upon the terms of an agreement to be finalised between them.'

19. DSS also having authorised Sky Cell to secure the approval of DoT for the sale of its shares to Bharti, a letter seeking such approval was sent by Sky Cell to DoT on the same lines as in the case of Bellsouth. Letters on the same lines, duly approved by the advocates for Bellsouth and by DSS, were sent also to ABN Amro

Bank and ICICI.

20. Several drafts to the agreement to be entered into between Bharti and Bellsouth were exchanged. The eleventh version was prepared on 17.06.2000. The enterprise value mentioned in the draft was \$ 115 in equivalent to about Rs. 500 crores. The value of Bellsouth's shares worked out to about \$ 115 million equivalent to about Rs. 500 crores. The value of Bellsouth's shares worked out to about \$ 18.5 million. The agreement, however, was not executed. On 11.7.2000 -- DSS sent a letter to Sky Cell stating that it did not consent to the sale of shares of Bellsouth to Bharti. On 13.7.2000, a majority of the members of the Board of Sky Cell approved a circular resolution consenting to the sale of Bellsouth and DSS shares to Bharti. Subsequently, Bellsouth by their letter of 7 August, 2000, informed Bharti that Bellsouth was no longer negotiating with Bharti for variety of reasons including the lack of consent of other shareholders to the proposed transaction between Bellsouth and Bharti. Bellsouth through their advocates on 5 August, 2000, informed CGL that -

'...Bellsouth has not, either prior to or after the shareholders meeting of 3 May, 2000, consented to any transfer of shares by CGL to Bharti.',

and placed on record their refusal to consent to such transfer.

21. On 13 July, 2000, notice convening the annual general meeting of Sky Cell to be held on 23 August, 2000, was sent to the shareholders. The ordinary business to be transacted at the meeting was to consider and adopt the balance sheet as of 31 March as also the profit and loss account, to appoint directors in the place of K.K. Nohria and B.M. Suri who were retiring by rotation and had also offered themselves for re-appointment. the special business was to consider the appointment as directors P.H. Rao and David Harris representing CGL and Millicom, respectively, and who had been appointed in casual vacancies earlier as directors. Nohria and Suri were nominees of CGL, and Nohria had been on the Board of Sky Cell from its inception.

22. On the 7 August, 2000, a supplemental agreement was entered into between CGL and Bharti for the sale of the entire 40.5% stake held by CGL in Sky Cell to

Bharti. That supplemental agreement was entered into even though, earlier, CGL had taken the stand that the agreement of November, 1999, had lapsed in a proceeding instituted by Bharti in the Bombay High Court in arbitration proceedings No. 113 of 2000 which application had come to be dismissed on 19.4.2000. By the supplemental agreement, the parties agreed that the agreement of November, 1999, read with agreement of 7 August, 2000, would bind the parties thereto. The enterprise value of the company was fixed at \$ 106 million in that agreement. The net equity value was to be ascertained after deducting the liabilities as on the date specified in the agreement subject to certain exclusions, revisions and adjustments. 40.5% and that net equity value were to be the price payable to CGL. The entire amount payable to CGL under the agreement was also paid by Bharti. The agreement also provided that in the event of Bharti not buying the shares, and a third party being allowed to buy its shares at the instance of Bharti, as also in the event of the court directing the sale of those shares to a person other than Bharti, and in such sale, the enterprise value was to be taken at a figure higher than \$ 106 million and upto \$ 150 million one-third of such surplus would be paid over to CGL, and in the event of the enterprise value being higher than \$ 150 million, one-half of the surplus would be paid to CGL.

23. The agreement between CGL and Bharti, inter alia, required that during the period CGL is required to continue to act as a shareholder of Sky Cell, it would do so in accordance with the instructions of, and for the benefit of Bharti. It was also agreed that alternate directors, all of who were nominees of Bharti, would be appointed for the directors representing CGL on the Board of Sky Cell. The managing director was to continue till replaced by a person appointed by Bharti.

24. On the same day, namely, on 7 August resolutions were circulated to the directors of Sky Cell seeking their approval for the transfer of the entire shareholding of CGL in favour of Bharti. That circular resolution was approved by all the five directors representing CGL and by Mr. Unni, the director nominated by ICICI on the Board of the company. Six of the 11 directors having approved the resolution, the transfer was recorded in the books of Sky Cell, and Bharti's name entered in the register of members in the place of CGL. That fact was also later reported to the Registrar of Companies. Circular resolutions for appointing

alternate directors to four of five directors representing CGL were also approved by majority of the directors on the 7 August, 2000.

25. On 5 August, 2000, Bharti instituted a suit in the High court at Delhi in CS No. 1727 of 2000 against Bellsouth for an injunction restraining Bellsouth from selling its shares to anyone other than Bharti. This suit is the first of the three suits filed by Bharti in the Delhi Court. Interim injunction was obtained by it on 28.08.2000. A review petition to review that order, is said to be pending in that High Court. Later, on 6 September, 2000, Bharti filed Suit No. 1957 of 2000 against DSS and in the suit, DSS has given an undertaking that it would not alienate the shares held by it in Sky Cell. Later, on 28 September, Bharti filed Suit No. 2002 of 2000 against Sky Cell, CGL, DSS, Bellsouth and Millicom. That suit is, inter alia, for a declaration that the annual general meeting and Board meetings of Sky Cell purported to have been held under the Chairmanship of Satwant Singh were not legal and of no effect. In the suit filed by Bharti against Bellsouth, it has been alleged that the reason of Bellsouth not completing the sale of its shares to Bharti is on account of the interest evinced by another foreign cellular operator to acquire 51% stake of Sky Cell for the enterprise value of around US \$ 145 million. It has been alleged that in the hope of clinching such a sale with aid of Millicom and DSS, Bellsouth has been creating obstacles in the affairs of Sky Cell and in the matter of transfer of CGL's shares to Bharti

26. On 23 August, 2000, annual general meeting of Sky Cell is claimed to have been held by the two rival camps each one giving a different version of what transpired at that meeting. According to the version of CGL which version is supported by Bharti, the meeting was attended by P.H. Rao, the managing director, Satwant Singh of DSS, David Harris, nominee of Millicom, K.L. Jain, an alternate director to B.M. Suri and Mr. Anil Nayer, alternate director to S.M. Trehan, B.M. Suri and Trehan are directors representing CGL. So far as the shareholders are concerned Satwant Singh represented DSS, Raman Sharma, Bellsouth, Sudhir Khullar, Bharti and Davis Harris, Millicom. The minutes of that meeting entered in the minute books maintained under Sections 193 to 195 of the Companies Act show their presence. It also shows that the directors' report was adopted, the directors who were to be re-elected were re-elected, the auditors re-

appointed, and that Rao and Harris were appointed as directors. The records maintained by Sky Cell also contain the authorisation filed by the persons representing the several shareholders who voted at the meeting. According to the records maintained by the company, was presided over by P.H. Rao in the absence of the Chairman, K.K. Nohria.

27. The minutes relied upon by Satwant Singh, Bellsouth and Millicom show the names of four persons as having attended that meeting - Satwant Singh, David Harris, Raman Sharma and Venkataraman, the Company Secretary. It is recorded therein that Satwant Singh was elected as Chairman by show of hands and the Company Secretary withdrew from the meeting with the minute book on the instigation of P.H. Rao, K.L. Jain, Anil Nayar and Khullar and that they also withdrew from the meeting. The accounts are shown to have been adopted. Resolutions for re-appointment of Nohria and Suri as also the resolution for appointment of Rao as director as shown to have been not moved at all, but nevertheless put to vote by show of hands and rejected. The resolution for appointing Harris and that for re-appointment of a auditors are shown to have been passed unanimously by show of hands.

28. Thereafter, a Board meeting which had been convened on 11 August, but had been adjourned to 19 August at the premises of Bharti at Delhi and was again adjourned to 26 August at the same venue, was held. Here again, there is serious dis-agreement as to what transpired at that meeting. According to the version of CGL supported by Bharti, the meeting was presided over by Mittal, alternate director to Nohria, but some of the directors including Satwant Singh, Harris and some strangers who had been brought into the meeting was being adjourned to the Oberoi Hotel. The point of agreement between the two camps with regard to the meeting is the fact of Satwant Singh had brought to that meeting a copy of the order made by the Additional District Judge, Delhi, restraining Sky Cell from confirming the resolution of 7 August, 2000 transferring the CGL's share of Bharti. It is not disputed that pendency of the suit filed by DSS in the High Court had not been disclosed to CGL, Bharti or Sky Cell and none of the orders made therein had been made known to them or to this court where proceedings had taken place earlier, to which DSS and CGL were parties.

29. The only director who is not identified with one or the other camp, Mr. Unni, nominated by ICICI on the Board of Sky Cell, is shown to have been present in the minutes drawn by both groups. A letter from Mr. Unni was produced before this court in the course of the hearing of these appeals, which states that he attended the meeting of the Board of Sky Cell held on 26 August, 2000, at New Delhi as a nominee director of ICICI Ltd., and that he subscribes to the minutes of that meeting signed by Rajan B. Mittal and sent to Mr. Unni, by the Company Secretary, Venkataraman. He has further stated in that letter that those minutes reflected the true and correct picture of discussions and deliberations of that meeting.

30. The version of Satwant Singh is that, at that meeting, besides Satwant Singh and Harris, three others - Sharma, Sachdeva and Bhaduri were present as alternate directors to the directors representing Bellsouth and one of the directors representing Millicom. A notary is also said to have been present. The minutes produced by Satwant Singh purport to record that, even before the adjournment alleged to have been made from the office of Bharti to Oberoi Hotel, Satwant Singh was appointed as the Chairman of the Board by majority. The meeting, which is said to have been continued at Oberoi Hotel, is said to have resolved to appoint Satwant Singh as the managing director and conferred upon him the power to conduct legal proceedings on behalf of Sky Cell, gave him the power to terminate the appointment of the Chief Financial Officer, Venkataraman, to write to the banks and others that Satwant Singh should be recognised as Chairman and the managing director, and that all bank accounts of Sky Cell are to be operated only under his authority. The appointment of Sharma, Sachdeva and Bhaduri as alternate directors is said to have been made under circular resolutions sent by Satwant Singh on 24.8.2000 which resolutions are said to have been approved by majority on 25 August, 2000. The resolutions are said to have been affirmed at the meeting on 26 August. The minutes relied on by Satwant Singh is not part of the company's minute book of the Board meetings. It is to be found in a new file, the only other minutes being that of 08.12.2000 meeting held after the order of the Single Judge, now in appeal. The notary who is shown to have been present at the meeting has not filed any affidavit.

31. The order of the Additional District Judge, Delhi, which had been produced by Satwant Singh on 26 August, 2000, at Bharti's Office, where the Board meeting even according to Satwant Singh, had commenced, was carried in appeal by CGL and Bharti in FAO No. 346 of 2000 and the orders of the District Judge were in those appeals, set aside by the Delhi High Court on 13.09.2000 and the parties were directed to maintain status quo. Status quo as on the date so far as the shares held by CGL were concerned was that the transfer of those shares to Bharti (SIC) proved by a majority of the directors of Sky Cell and the transfer had been recorded in the books of Sky Cell.

32. The Company Law Board (CLB) had also been brought into picture by the institution of a petition under Section 409 of the Companies Act by the managing director of Sky Cell, Rao, who had filed that petition on 22 August and on which an order had been made on 24 August, 2000, that the resolutions to be passed on 23 August are subject to further orders made by the CLB. CLB on 1.9.2000 restrained both the parties from holding any meeting of the Board of directors till the matter was disposed of by CLB. That petition before the CLB was finally dismissed on 13.10.2000 on the ground that the petition was not maintainable.

33. Bellsouth on 12.09.2000, DSS on 09.10.2000 and Millicom on 04.11.2000 sent notices to CGL alleging breach of the JVA by CL, and stating that they would resort to arbitration, if the breach was not remedied in 30 days time. CGL after the receipt of those notices instituted CS No. 884 of 2000 on the original side of this court contending therein that there was no arbitrable dispute as, on 03.05.2000, consent had been given by Bellsouth also for sale CGL's shares to Bharti. An ex parte injunction against initiating arbitration proceedings was obtained which has since been vacated by the learned Single Judge.

34. On 28 November, 2000, Satwant Singh claiming to be acting as the Chairman and the managing director issued a notice convening a meeting of the Board of directors on 08.12.2000. The agenda, inter alia, included an item regarding the appointment of additional directors. After the issue of that notice, Suit No. 930 of 2000 was instituted in this court by Satwant Singh claiming to act as the managing director of Sky Cell and authorised to institute the suit pursuant to the Board's

resolutions of 26 August, 2000. The suit was brought in the name of Sky Cell. The reliefs sought in the suit are - for a declaration that defendants 1 to 3 P.H. Rao, K.K. Nohria and B.M. Suri, ceased to be the directors with effect from 23 August, 2000; for a declaration that the 6th defendant, Venkataraman, ceased to be an employee of Sky Cell with effect from 26 August, 2000, and for an injunction against all the defendants including defendants 4 and 5 - Rajan Bharti Mittal and K.L. Jain, alternate directors to Nohria and Suri, from acting as directors or representing the company in any manner. Interim orders in line with the relief sought for in the plaint were also sought by the plaintiff.

35. CGL also came to this court on the heels of Satwant Singh and filed Suit No. 931 of 2000 claiming to have instituted that action in discharge of its fiduciary duty towards Bharti to whom it had sold the shares, and which sale was being claimed to be void by Bellsouth and DSS. The reliefs sought in that suit were - for a declaration that the annual general meeting of Sky Cell held on 23.08.2000 and the Board meeting held on 26.08.2000 under the Chairmanship of Satwant Singh were illegal and void, for declaration that the notice dated 28.11.2000 for a Board meeting on 08.12.2000 issued by Satwant Singh was void and for an injunction against DSS, Bellsouth, Millicom, their nominee directors and agents from holding any Board meeting on 08.12.2000 or on any other day for considering the agenda circulated by Satwant Singh. Interim orders, injunctions and directions in line with the plaint prayers were also sought.

36. On 08.12.2000 -- a learned Single Judge of this court, who considered the applications filed in C.S. No. 630 and 631 of 2000 made a common order restraining defendants 1 to 6 in CS No. 930 of 2000 from acting as directors of Secretary and claiming to represent the company in any manner. He also permitted the Board meeting convened for 08.12.2000 to be held, to consider the agenda that had been circulated except as regards items of the agenda which concerned the appointment of additional directors and consideration of legal proceedings in relation to the company.

37. On the same day in the evening, a meeting of the Board under the Chairmanship of Satwant Singh was held. The others shown to have been present

in the minutes signed by Satwant Singh on 16.12.2000, which minutes are in the file which earlier contained only the minutes of the disputed 26.08.2000 meeting are, David Harris, nominee of Millicom, John Hartman of Bellsouth, Raman Sharma shown as alternate director to M. Nalbone of Bellsouth and P. Bhaduri shown as alternate director to Sally Choo of Millicom. The minutes produced at the time of hearing the appeals, that CGL's actions constituted material breach of the JV, that Sky Cell should treat the JV as having been cancelled in relation to CGL, that the other shareholders should claim damages from CGL and Bharti, and a resolution that Sky Cell issue notice of termination of JVA to CGL, through Satwant Sing. Another resolution was recorded authorising Satwant Singh to convene an EGM for removing the two directors, Dasgupta and Trehan, nominees of CGL on the Board of Sky Cell.

38. On 12.02.2000, a Division Bench of this court directed the maintenance of status quo as on 07.12.2000 till 13.12.2000. A further order was made by the Bench on 20.12.2000, inter alia, directing the continuance of status quo as on 07.12.2000, directing that resolution passed at the meeting of 08.12.2000 be not implemented that no Board meetings be held; and that statement of accounts of Sky Cell be furnished to all directors once in five days; till the disposal of the appeal.

39. We have heard learned senior counsel Shri Harikrishnan, C.A. Sundaram and T.V. Ramanujam, in support of the case pleaded by the appellants and Shri P. Chidamabaram, who presented the case for the plaintiff in CS No. 930 of 2000 which in fact is the case of Bellsouth, Millicom and DSS, their respective counsel having adopted his arguments.

40. The real issue in these appeals is as to whether Bellsouth, DSS and Millicom acting under the nominal leadership of Satwant Singh are entitled to the assistance of this court in their attempts to gain complete control of Sky Cell excluding from the Board of Sky Cell all the directors who represented CGL on 22.08.2000 along with their alternates and by keeping out the Chief Commercial Officer and Company Secretary of Sky Cell who has been holding the office since 1995.

41. The case pleaded by them rests on the JVA by which all of them swear, the minutes of the AGM of Sky Cell said to have been held on 23.08.2000, and of the Board meeting of Sky Cell said to have been held on 26.08.2000 with Satwant Singh as Chairman. They also rely on CGL's claim that it has ceased to be a member of Sky Cell by reason of the completed transfer of its shares to Bharti. It is also their case that the transfer of CGL's shares to Bharti is void under article 7.6 of the JVA as the written consent of Bellsouth has not been given for that transfer, and that the dispute raised by them regarding the validity of that transfer is arbitrable under the Clause 21 of the JVA which provides for arbitration of all disputes among the JVA partners concerning the JVA and its provisions, at London, by a panel of three lawyer arbitrators in accordance with the Rules of International Chamber of Commerce.

42. The core of the dispute between the parties is the validity of transfer of CGL's shares to Bharti.

43. That CGL has contracted to sell its shares to Bharti; that it has received the price therefor; that none of the other shareholders were interested in purchasing those shares; that DSS and Millicom had earlier given their consent for such sale; that there is nothing said by any shareholder against the suitability of Bharti to become a member of the company, Bharti being admittedly a leading telecom group in India; that the DoT had approved the substitution of CGL, by Bharti in Sky Cell and while doing so, had required that 49% cap on foreign equity in Sky Cell be maintained and that the management of Sky Cell remain in Indian hands; that the transfer had been approved by way of a circular resolution signed by a majority on the Board of Sky Cell including the director nominated by ICICI; that the name of Bharti had been entered in the register as the member of Sky Cell; and that the transfer was not in violation of articles of association of Sky Cell as the Board had not nominated any other outsider to buy those shares, cannot be seriously disputed.

44. The claim made by DSS belatedly, after having given its consent for the transfer, that it was willing to buy CGL's shares in clearly lacking in bona fides, as DSS itself had been eager to sell its shares, and was not possessed of the means

to effect any such purchase DSS having been unable to fund even its own purchase of Sky Cell shares for which loan had been obtained from a foreign bank for which Millicom stood guarantee. By reason of DSS's inability to discharge its financial obligations to Millicom -- the sale of DSS's shares to Bharti had not been completed.

45. Bellsouth, whose lack of written consent for this sale has been put forth as the principal reason for it. DSS and Millicom regarding the sale as void, had itself agreed in principle to sell its shares to Bharti, which it has accepted as being a leading telecom group in India. Bellsouth had on 9.12.1999 only wanted to be satisfied about Bharti's suitability to be inducted as a member of Sky Cell, before giving its consent for the sale. It had in its reply to the counter to its petition under Section 9 of the Arbitration and Conciliation Act, which culminated in the order dated 06.04.2000, stated that it was not against transfer per se, but that it did not have information about Bharti to make up its mind. By 3.5.2000, it obviously had such information, had accepted that Bharti would be suitable as a member of Sky Cell, and had agreed in principle to sell its own stake to Bharti. That it had also orally agreed to the sale of CGL's shares to Bharti is evident from the statement in the letter sent through its advocate of 5 August, 2000 to CGL that '... prior to or after the shareholders meeting of 3 May, 2000. ...' it had not consented to the transfer of CGL's shares. It is significant that, it was not the stand of Bellsouth that at that meeting it had not agreed to the sale of CGL's shares.

46. The restrictions of transfer of partner's shares set out in Article 3.6 and 7.6 of the JVA requiring the written consent of other shareholders are not incorporated in the Sky Cell's articles of association, even though Sky Cell is a party to the agreement. Transferability of shares in a company is governed by the provisions of the Companies Act and the articles of association of the company. Shares are movables and are meant to be freely transferable subject to the restrictions, if any, permitted by the Companies Act, provided such restrictions are incorporated in the articles. A company has no inherent power to refuse transfer. It can be only be for a reason for which transfer can be refused, under its articles of association.

47. The apex court in the case of Laxmi Tea Co. Ltd. v. Pradip Kumar Sarkar has held that a company has no inherent right to refuse to register the transfer of its shares. In the case of V.B. Rangaraj v. V.B. Gopalakrishnan : the Supreme Court at paragraph 6 of the judgment has observed thus (para 8 at page 13 of Comp LJ):

'Whether under the Companies Act or Transfer of Property Act, the shares are, therefore, transferable like any other movable property. The only restriction on the transfer of the shares of a company is as laid down in the articles, if any. A restriction which is not specified in the articles is, therefore, not binding either on the company or on the shareholders. The vendee of the shares cannot be denied the registration of the shares purchased by him on a ground other than that stated in the articles.'

The Supreme Court in that case referred with approval to the relevant passages from the well-known Works on Company Law by Gore Borwne, Palmer and Pennington as also to Halsbury which stated that a shareholder has the right to transfer his shares when and to whom he pleases, that any restriction in that right must be contained in the company's articles, and that such restrictions must be construed strictly.

48. It is, however, the case of Bellsouth supported by DSS and Millicom that the transfer is void under Article 7.6 of the JVA as the Sky Cell is a party to that JVA. Whether DSS and Millicom after having given their written consent for the transfer, and Bellsouth after having given its oral consent at the partner's meeting on 3 May; and even after having accepted Bharti's suitability to be a member of Sky Cell, and even after having failed to give any tenable reason for Bellsouth's written consent not being given, can succeed in establishing their case, especially, in light of the fact that the company's articles do not require the written consent of other shareholders for the transfer and the law in India is that the restrictions should be the articles, is for the arbitrators to decide in the event of the matter being referred to arbitration.

49. Bellsouth, DSS and Millicom cannot now assert that CGL has ceased to be a member, having regard to their own stand that the transfer is void. The JVA had not been terminated when the AGM was held on 23.08.2000, even though there is

more than one version of what happened at that AGM. That JVA is even now in force. These three shareholders have asserted emphatically that every provision of the JVA binds each one of the parties thereto. They had under the JVA, in Article 9(1)(e), the duty to vote on their shares to elect individuals nominated by other shareholders. Their purported vote against the resolutions for the reappointment of Nohria and Suri and the appointment of Rao was clearly in breach of the JVA. They cannot now ask for the assistance of the court to protect their violation of the JVA and enable them to gain complete control of the company by neutralising the rights of the holder of 40.5% of the company's shares, under the JVA. Injunctive relief is not meant to protect breach, but is granted when justified, to prevent breach of contract.

50. If the transfer in favour of Bharti is accepted by Bellsouth, DSS and Millicom, they could not have legitimately prevented Khullar who represented Bharti at the AGM on 23.08.2000 from exercising the voting rights in respect of 40.5% of shares under the articles and claim the rights accorded to CGL under the JVA. According to the minutes, relied on by them, Khullar was a stranger.

51. The minutes of the AGM provided by Satwant Singh cannot prima facie be accepted as legal and enforceable.

52. The Board meeting of Sky Cell held on 26 August at Delhi admittedly commenced at Bharti's office. Satwant Singh's claim that it was adjourned and continued at the Oberoi Hotel cannot prima facie be believed. Mr. Unni, the nominee of ICICI and the only non-partisan director on the Board has, in his letter produced at the time of hearing of these appeals, categorically stated that the minutes of the meeting signed by Mittal correctly represents the discussions and decisions at that meeting. That minutes is to be found in the minute book regularly maintained by the company under Section 193 of the Companies Act, and is presumed to be true unless shown otherwise.

53. It is also admitted that a typed resolution of adjournment was placed at the meeting which indicates a prior plan to stage the drama of adjourned meeting. Persons who had no place in a Board meeting such as a notary whose presence had not been required by the Board, are shown to have been present. Persons

shown to have taken part in the supposedly adjourned meeting, as alternate directors, were persons who were not alternate directors at the time of AGM or earlier. The resolution for their appointment had been circulated by Satwant Singh who by himself had no authority to do so. Their very status as alternate directors being seriously questionable, decisions allegedly taken with their participation cannot prima facie be regarded as legal and binding on Sky Cell.

54. Satwant Singh is whom to have been appointed as Chairman and also as the managing director at that meeting, and conferred with authority to dismiss the Company Secretary and chief financial officer, and also to bring suits on behalf of the company. He can derive no authority or status by reason of anything purported to have been done at that meeting which prima facie was not a lawful meeting of the Board of directors of Sky Cell. The actions taken by him on the basis of powers purportedly given at the meeting are prima facie actions which do not, in any way, bind Sky Cell.

55. The dismissal of Venkataraman by Satwant Singh on the basis of an alleged resolution at that meeting is prima facie not valid. Venkataraman is entitled to continue to function as Chief Financial Officer and Company Secretary.

56. Satwant Singh cannot hold himself out as the Chairman and Managing Director of Sky Cell, as he has prima facie not been lawfully appointed to that position. The right claimed by him to manage the company is not one which can be protected by an injunction, as no such right has accrued to him in law. Such a right cannot be recognised on the basis of self serving record created by him which record also does not establish that a lawful meeting of the Board of Sky Cell had taken place on 26 August, 2000, under his Chairmanship. The Suit No. 930 of 2000 brought by him in the name of Sky Cell prima facie would not bind Sky Cell.

57. The balance of convenience also is clearly in favour of interim reliefs being refused in the application for such reliefs filed by Satwant Singh in the name of Sky Cell. By refusing such reliefs, the Board of Sky Cell as constituted prior to the disputed AGM would be enable to function. Bellsouth, DSS and Millicom would continue to have their directors on that Board, and the representation due to all the partners under the JVA would be given. The directors representing CGL as on that

date would continue with their alternates. The other three shareholders can continue to claim their rights under the JVA by duly recognising the rights of the fourth shareholder. CGL and Bharti have at no time sought to exclude the directors representing the other three shareholders. It is the other shareholders who claim a right to exclude all representation for the 40.5% of the shares in Sky Cell, and who claim to have held parallel AGM and Board meetings.

58. Bellsouth and its adviser DSS have no long-term commitment to Sky Cell. They have been eager to sell their stake in the company at least since the year 1999. Bellsouth wanted to sell to Millicom in that year and DSS to Bharti. The sales did not (SIC). In the following year, they agreed in principle to sell to Bharti; but later backed out apparently with a view to extract a higher price from Bharti. CGL's nominees on the Board of Sky Cell are required to act on behalf of Bharti under their agreement of 7 August, 2000. Bharti admittedly, is a subsidiary of a leading telecom company and has demonstrated its commitment to Sky Cell by bringing in additional funds -- paying Rs. 4.00 crores to the DoT and by negotiating for supply of new equipment for Nokia, in spite of the fact that balance payment for past supply is still outstanding. Bharti has also reiterated its commitment to the JVA and readiness to abide by the same. The Board with the alternate directors to CGL's nominees would exercise its powers in accordance with the JVA which requires the affirmative vote of directors representing each of the partners in respect of certain business matter and major investment decisions. The interest of Sky Cell as also of the partners would thus be adequately protected.

59. The business in which Sky Cell is engaged is highly competitive. Loss of market share would erode the value of the company, which has been continuously suffering monetary loss year after year. Bellsouth is not eager to fund expansion or upgradation which costs several crores of rupees. DSS does not have the means to do so. Millicom which initially accepted Bharti's entry has apparently been lured into the Bellsouth's camp for reasons best known to it.

60. Satwant Singh's suit in the name of Sky Cell and interim reliefs sought therein are also wholly lacking in bona fide. It is obvious that the strategy of Bellsouth and DSS aided by Millicom is to neutralise 40.5% of the shares of Sky Cell, not give

any representation for those shares on the Board of Sky Cell using the office Chairman and managing director, gain managerial and financial control of Sky Cell, induct additional directors on the Board of Sky Cell, and then divest their holding together so that their buyers can gain control of over 51% of the shares, give the go by to the JVA, and obtain complete control of the company. One of the items in the agenda for the meeting on 08.12.2000 convened by Satwant Singh is the induction of additional directors. The minutes of the meeting of his group held on 08.12.2000 includes a resolution to convene an extraordinary general meeting to remove two directors representing CGL, their other directors according to Satwant Singh have ceased to the directors on 23.08.2000. It has been point out by Bharti in the pleading filed in their suit against Bellsouth, that the reason for Bellsouth not closing the sale in favour of Bharti was an offer by a foreign telecom operator to acquire 51% stakes in Sky Cell by valuing Sky Cell at an enterprise value of \$145 million.

61. Satwant Singh, Bellsouth, DSS and Millicom cannot be allowed to abuse the process of the court for their private gain. It is clear that despite the records of the parallel AGM and Board meeting on which they rely, they are not in control of the Sky Cell which continues to be run by the managing director and whose day to day affairs are being looked after by him, the Chief Financial Officer and the technical and marketing personnel. Satwant Singh's group is seeking to use the court to dislodge the managing director, the Chief Financial Officer, and the nominee directors of CGL, obtain control of the records and bank accounts of Sky Cell, and control over the employees of the company.

62. It has been the declared policy of the Government of India to limit foreign direct investment in the telecommunication section to 49% of the equity in the Indian company. That policy has been given statutory character by the regulations framed by Reserve Bank of India under the Foreign Exchange Management Act. The object is to ensure managerial control of the company remaining in Indian hands. The strategy adopted by Bellsouth, DSS and Millicom, if allowed to succeed, would defeat that policy. The DoT, moreover, while giving its consent for the transfer of shares to Bharti has expressly stipulated that managerial control of the company should remain in Indian hands.

63. Although Satwant Singh is apparently an Indian national, he is in reality the Trojan horse through which Bellsouth aided by Millicom is seeking to gain control of Sky Cell. Singh's company DSS has been, since 1986, retained adviser on a monthly fee of \$ 300 to Bellsouth and has been advising them on their Indian business. He has been acting in a manner calculated to advance the interest of Bellsouth. Though DSS was itself eager to sell its stake in Sky Cell, DSS, to help Bellsouth, formally objected to sale of Bellsouth's share to Bharti, so that Bellsouth could offer that as an excuse for not closing the sale. Satwant Singh's company is the weakest of the four partners with 10.5%. Singh cannot do anything in Sky Cell without the support of Bellsouth and Millicom. DSS is also indebted of Millicom which has guaranteed the loans obtained by DSS to acquire a stake in Sky Cell. Satwant Singh and DSS thus are not independent agents but are wholly dependant upon Bellsouth and Millicom for getting anything done in the Board of Sky Cell. Allowing Singh to be the Chairman and the managing director is to allow Bellsouth and Millicom to be in effective managerial control of the company. The court aid cannot be invoked for bringing about such a situation.

64. Satwant Singh appears to be a seasoned litigant, but not a fair litigant. He resorted to the Court of the Additional District Judge at Delhi in March, 2000, to aid Bellsouth's effort and give it a second line to fall back on in the event this court vacating the injunction against CGL. He did not disclose these proceedings to Sky Cell, CGL or Bharti till 26.08.2000 when he wanted to rely on another order from the same court obtained behind their back to stall the confirmation of CGL's sale to Bharti.

65. The real leading actor in the legal battle in this court for gaining control of Sky Cell, is Bellsouth. Its object is apparently to extract a higher price for its stake in Sky Cell. It also considered that CGL has obtained, what counsel termed as 'sweet-heart deal'. Whether the JVA contemplated the exercise of the right given to the partner in relation to the shares of other partners for such a purpose, even when the suitability of the buyer for becoming a member of Sky Cell is accepted is a matter to be considered by the arbitrators, if arbitration takes place. It is the case of the appellants that the refusal of written consent can only be for a good reason and cannot be arbitrary, whimsical or motivated by a desire to use it as a

bargaining chip to extract a higher price for the partners' own shares, especially, when Bellsouth has categorically stated that it was not interested in buying CGL's shares.

66. The legality of CGL's transfer to Bharti in relation to the JVA cannot be decided in this proceeding. CGL's claim that it owes a fiduciary duty to Bharti under its agreement of 07.08.2000, however, must be accepted having regard to the terms of that agreement. CGL's claim with regard to the AGM held under the Chairmanship of Rao shows the participation of Khullar representing Bharti. Such participation would be proper if Bharti had become a lawful member of Sky Cell. The exercise of the voting rights attached with the 40.5% of the stake, which was in CGL's name, however, is in accordance with the JVA. Harris, the nominee of Millicom, was also appointed as director as recorded in the minutes relied on by CGL and Bharti.

67. While holding that the plaintiff in CS No. 930 of 2000 is not entitled to any interim relief for want of a prima facie case, lack of bona fides, and balance of convenience being against the grant of any such relief, we cannot lose sight of the need to provide for the proper management of the company during the pendency of these two suits 930 and 931 of 2000. In suit No. 931 of 2000 CGL has asserted that Singh is an interloper who is wrongfully claiming to be the Chairman and the managing director with power to manage the company, take custody of its records and bank accounts, and convene to hold meetings of the Board of Sky Cell. We have found that Singh cannot be regarded as having been lawfully appointed as Chairman and the managing director and that the company continues to be managed by Rao as managing director. With a view to ensure that control of the Board of Sky Cell is not usurped by one or the other camp, we consider it appropriate to appoint a neutral competent third party as, Chairman of the Board of Sky Cell. Mr. Justice K.A. Swami, former Chief Justice of this High Court, is appointed as Chairman. He shall preside over all meetings of the Board of Sky Cell. He shall not vote on any of the resolution except in case of a tie.

68. The Board of directors of Sky Cell shall comprise of all those who were directors immediately prior to the disputed AGM of 23.08.2000. Persons who had

been appointed as alternate directors prior to that date shall also be entitled to function as such. The powers of the Board with regard to the business activities of the company shall be exercised in conformity with the JVA. Meetings of the Board may be convened only with the consent of the Chairman. The Board meetings shall be held normally at Chennai, and when permitted by the Chairman at any other place. All the directors as also the officers and staff shall provide all the information, records and assistance as may be desired by the Chairman. All the travel, lodging and other expenses shall be met by the company. The Chairman shall be paid remuneration of Rs. 60,000 per month.

69. Persons connected with foreign companies who are business competitors of the JVA partners shall not be given any access to the Sky Cell's record, and no technical or managerial information concerning Sky Cell divulged to them.

70. This arrangement shall remain in force till the award, if any, in the arbitration, if initiated, attains finality. In the event of arbitration not taking place, this arrangement shall remain in force during the pendency of the two suits 930 and 931 of 2000, unless the parties resolve their differences earlier and report the same to this court.

71. The impugned order of the learned Single Judge is set aside, and these appeals are allowed with costs throughout subject to the directions given in this judgment.

72. C.M.Ps. No. 19515, 19516, 19560, 19561, 19573, 19574 of 2000 and 1276 to 1281 of 2001 are closed.