

Beml Ltd. Vs. Beml Midwest Ltd.

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Court : Company Law Board CLB Chennai

Decided On : Jan-23-2009

Judge : K.K. Balu, Member

Appeal No. : C.A. NOS. 24 AND 25 OF 2008 IN C.P. NO. 55 OF 2008

Appellant : Beml Ltd.

Respondent : Beml Midwest Ltd.

Advocate for Pet/Ap. : S.S. Naganand, S. Sriranga, Gupta and Ravi, R. Murari, Ms. Kavitha Kannan, T.K. Seshadri and N. Sakthivel for the Appearing Parties.

Judgement :

1. The petitioner has invoked the equitable jurisdiction of the Company Law Board under sections 397, 398, 402, 403 and 406 of the Companies Act, 1956 ("the Act") with a view to bringing to an end the matters complained of in the affairs of M/s. BEML MIDWEST LIMITED ("the Company") and claiming against the respondents 3 to 5 and 7, the following reliefs :-

(a) to declare that the acts of the respondents 3 to 5 are prejudicial to the interest of the Company and are oppressive against the petitioner and public at large;

(b) to declare that the respondents 3 to 5 have failed in their fiduciary duties towards the Company and direct the respondents 2 to 5 to reimburse a sum of Rs. 11 crore to Company along with interest at the rate of 24 per cent from 1-4-2008

up to date of repayment;

(c) to appoint an investigator to enquire into misfeasance and misdemeanours committed by the respondents 3 to 5;

(d) to appoint a committee of management in supersession of the Board of Directors of the Company and designate Mr. V.R.S. Natrajan, Chairman of the Company as Chairman of the committee of management;

(e) to appoint an independent auditor in the place of the statutory auditor of the Company;

(f) to declare that the incidents narrated constitute oppression of the petitioner, mismanagement of the affairs of the Company and are against the public interest and interest of petitioner-company;

(g) to declare that the respondents 3 to 5 and 7 have violated the provisions of memorandum of association inasmuch as diverting the funds of the Company into a company where respondents 2 to 4 have substantial interest constituting mismanagement and direct respondents 3 to 5 and 7 to repay the amounts defalcated from the funds of the Company in favour of the Company;

(h) to direct sale of shares of the respondents 2 to 5 in the Company to the petitioner or its nominee at the valuation, which may be made by a chartered accountant appointed by this Board; and

(i) to direct action against respondents 3 to 5 for acts of misfeasance and fraud and order recovery of sum due from them as per report of the investigator and punish them.

2. The petitioner apprehending that (a) the respondents 3 to 5 will deal with the capital of the Company for their sole benefit in a manner prejudicial to the interest of the Company; (b) the petitioner's rights will be defeated; (c) the petitioner will suffer irreparable hardship and injury; (d) the Board meetings are being called by persons who have already ceased to be directors of the Company; and (e) there is likelihood of breach of statutory compliances for the year ended 31-3-2008, has

sought for the following interim reliefs :-

(a) to appoint a committee of management by superseding the Board of directors of the Company and designate Mr. V.R.S. Natrajan as Chairman of the committee;

(b) to restrain the Company from holding Board meetings without the consent of this Board and on the agenda to be fixed by this Board;

(c) to restrain the respondents 3 to 5 from representing, acting or holding out as directors of the Company;

(d) to restrain the respondents 3 to 5 from operating bank accounts of the second respondent company; and

(e) to appoint an independent auditor to investigate into affairs of the Company.

3. The applicant-petitioner has taken out an application as early as on 3-10-2008 in C.A. No. 24 of 2008 under Regulations 17 and 44 of the Company Law Board Regulations, 1991 read with order 6 Rule 17 of Code of Civil Procedure, for amending the company petition, by incorporation of certain facts which came to light and some new developments which have taken place, subsequent to filing of the company petition, in support of which, Shri S.S. Naganand, learned Senior Counsel submitted :-

The respondents 2 to 5 and Shri B. Mukunda Reddy, Senior Vice President who is under suspension, caused financial loss to the Company by entering into on forward contracts for export receivables without authority of the Board of directors of the Company. The second respondent has booked the forward contracts through the third respondent without subsisting or anticipated export receivables of the Company merely based on a general contract agreement signed between M/s. General Nice and the Company. The Company already suffered a loss of Rs. 246.40 lakh and is posed with a potential loss of Rs. 902.30 lakh for the period between September 2008 and March 2009 based on the forward contract transactions, in terms of a communication dated 19-9-2008 of the Company's banker. The respondents 3 to 5 and Shri B. Mukunda Reddy are personally liable for such losses of the Company.

The common intention of the respondents 2 to 4 and 7 in defrauding the petitioner and the Company is manifest from several of the documents filed with the Registrar of Companies, particulars of which are set out in the amendment application.

The third respondent has misrepresented the strength of the second respondent and further suppressed the true holding structure and the nature as well as extent of inter-company transactions, establishing the perverse and diabolical financial arrangements between the group companies, the true financial health as well as performance of the second respondent on which the petitioner relied upon and concealed the real net worth of the group companies. The respondents 2 to 5 suppressed the true position of related party transactions, which are stated in detail by the applicant. The manipulated turnover and investment among the various group companies have defrauded not only the applicant but also the Statutory Authorities.

The respondents 2 and 3 were found guilty under section 138 of Negotiable Instruments Act, by the Metropolitan Magistrate Court, Mumbai on 8-8-2008 and thereby they were to suffer simple imprisonment for 4 months, during which time the Shareholders Agreement was finalized between the parties. This was concealed by the third respondent, with a view to defraud the Company.

Shri B. Mukunda Reddy is threatening the officials of the petitioner, who are attending to the matters relating to the Company.

The second respondent dubiously got allotted the shares to itself which ought to have been allotted in favour of the sixth respondent, under a subsisting agreement between the respondents 2 and 6, under the pretext that it was not willing to take up its portion of the shareholding. The grievances of the sixth respondent have been conveyed by the sixth respondent in a communication of September 2008 sent to the Chairman of the Company and the third respondent. The CLB may take cognizance of the wrongful allotment of shares of the sixth respondent in favour of the second respondent, especially when the sixth respondent expressed its willingness to participate in shareholdings of the Company.

The third respondent issued a letter dated 26-7-2008 appointing Shri Birendra Kumar Sinha as Chief Executive Officer (CEO) of the Company and when he reported on 18-9-2008 to the Chairman of the Company, the third respondent, without any authority cancelled the appointment of CEO, which brought the Company's operations to a grinding halt. This move is an effort to reinstate the suspended Senior Vice President.

4. In view of the foregoing, the applicant is claiming the following additional prayers :-

(a) to grant extension of time for holding annual general meeting and exempt the nominee directors of the petitioner from penal provisions, in view of their inability to discharge the duties under the Act;

(b) to allow the nominee directors of the petitioner to run the day-to-day affairs of the Company including operation of bank account till disposal of the petition;

(c) to disqualify and remove the respondents 3 to 5 who are the nominees of the second respondent on the Board of Company on account of various wilful mismanagement of the affairs of the Company, resulting in financial losses, threatening the very existence of the Company, and without prejudice to their personal liability to make good the losses;

(d) to direct the auditors to commence audit of accounts compiled, based on available information;

(e) to recommend for appointment of auditors under section 224(3), read with section 224A(2) in case of continuing failure of auditors to commence audit of accounts compiled, based on available information;

(f) to appoint two nominees of the sixth respondent in place of two nominees of the second respondent as directors on the Board of the Company, pending transfer/allotment of such number of shares so as to make the shareholding of the petitioner at 45 per cent and the sixth respondent at 26 per cent of paid-up share capital of the Company as conceived originally;

(g) to restrain the respondents 2 to 5 from interfering with the conduct of the affairs of the Company;

(h) to restrain the respondents 2 to 5 from indulging in activities/threats prejudicial to the interests of the Company and harmful to nominees of the petitioner;

(i) to restrain the respondents 2 to 5 and their agents and henchmen from unauthorized entry except for inspection based on reasonable notice in writing given to the Company in order to ensure that the documents and records are not tampered with; and

(j) to restrain the respondents 2 and 3 from managing companies including but not limited to the Company under section 203 of the Act, in view of previous conviction by the Court and also in view of dubious financial arrangements within the group companies having significant impact on security of banking facilities extended to the respondents 2 and 7 and other group companies.

5. Pending final decision on the main petition, the applicant prayed for the following additional interim reliefs :-

(i) to direct holding of the Board meeting of the Company by fixing the composition of its Board of directors;

(ii) to authorize the new CEO of the Company, namely, Mr. B.K. Sinha to carry on the day-to-day operations of the Company;

(iii) to direct appointment of independent Statutory Auditors in place of the present Statutory Auditors; and

(iv) to direct holding of annual general meeting of the Company.

All the proposed amendments would aid the CLB, while adjudicating the disputed issues and considering the final reliefs, in order to safeguard the interest of the Company. The CLB in exercise of its equitable jurisdiction may consider the prayer made in C.A. No. 24 of 2008, which is linked to the main issues involved in the Company petition. Shri Naganand, learned Senior Counsel, in support of his legal submissions, on the principles governing amendment of pleadings, cited the

following decisions :-

Ashok Mittal v. Uniworth Resorts Ltd. [2008] 145 Comp. Cas. 67 (CLB - New Delhi) - to show that the CLB, a quasi-judicial authority guided by the principles of natural justice, on the enumerated principles, relating to amendment of pleadings, may in exercise of its power and discretion grant leave to amend the pleadings.

Karedla Suryanarayan v. Sri Ramdas Motor Transport (P.) Ltd. [1998] 92 Comp. Cas. 2751 (CLB - Delhi) - to show that there is no bar to subsequent events being brought on record and being considered by the CLB for the purpose of moulding the reliefs to be granted in case then, petitioner succeeds in the main petition.

Jer Rutton Kavasmaneck v. Gharda Chemicals Ltd. [2000] 23 SCL 71 (Bom.) to show that it is permissible to bring on record by amendment not only the facts pertaining to the events up to the filing of the petition but also subsequent events.

6. According to the respondents, as raised in C.A. No 25 of 2008, no authority of the Board of directors of the petitioner-company authorizing Shri M. Pitchiah to file the present company petition has been produced and the affidavit verifying the company petition does not disclose the authority of Shri M. Pitchiah to initiate the present proceedings on behalf of petitioner-company, The Board of directors of the petitioner-company at the meeting held on 29-4-1999 approved the delegation and sub-delegation of powers, according to which functional directors of the petitioner-company have authority to institute legal proceedings. Shri M. Pitchiah, appointed by virtue of a communication dated 11-7-2008 of Government of India, took charge as Director-Finance of the petitioner-company with effect from 14-7-2008, which is reflected in the Board minutes dated 18-7-2008. The respondents cannot, therefore, question the authority of Shri M. Pitchiah to file the present company petition.

7. Shri Naganand, learned Senior Counsel urged for appointment of a Committee of directors, to manage the affairs of the Company, till disposal of the company petition, for the following reasons :-

The petitioner is a public sector company owned and controlled by Government of India, through Ministry of Defence and is engaged in the business of manufacturing defence equipments and earth moving equipments, rail coaches, etc. The petitioner being profit-earning company has been conferred mini Navarathna status by Government of India.

By virtue of a Share Holders' Partnership Agreement (SHPA) dated 17-9-2005 entered into between the petitioner and the second respondent, it was proposed to incorporate the first respondent-company. This SHPA was followed by a consortium agreement dated 16-12-2005, entered into between the Company under incorporation through the third respondent and the sixth respondent, by which the sixth respondent would be a business partner of the Company. In terms of a Share Holders' Agreement dated 25-9-2006, entered into between the respondents 2 and 6, 26 per cent of the issued, subscribed and paid-up share capital of the Company would be on account of the sixth respondent. The remaining 74 per cent of the shares was to be held by the petitioner holding 45 per cent and the second respondent holding 29 per cent. Nevertheless, the second respondent has not so far transferred any shares in favour of the sixth respondent, as stated supra.

At the Board meeting of the Company held on 16-1-2008 it was resolved that Shri Mukunda Reddy, Senior Vice President and Shri S. Raghu, Deputy Finance Manager of the Company would operate the current account maintained with State Bank of Hyderabad. It was further decided that for payments beyond Rs. 10 lakh, per transaction, prior administrative approval of the Chairman should be obtained which is reflected in the communications dated 1-3-2008 and 3-3-2008 forwarded to the Chairman of the Company for his approval and for payment below Rs. 10 lakh Shri Mukunda Reddy was authorized to give the approval and payments. The subsequent

Board minutes dated 27-6-2008 explicitly disclose the persons authorized and the limits for operation of the bank account and the requirement of approval of the Chairman in case of payment of over Rs. 10 lakh. The State Bank of Hyderabad, on written instructions made on 1-4-2008 by Shri Mukunda Reddy jointly with Shri

B. Raghu, transferred a sum of Rs. 11 crore to the account of seventh respondent, owned and controlled by the respondents 3 and 4, by debiting the account of the Company, without the knowledge and approval of the Chairman of the Company, as required under the aforesaid delegation of powers. The transfer of Rs. 11 crore in favour of the seventh respondent was not for the purpose of any transaction entered into with the seventh respondent or any other Company. This unauthorized transfer of huge amount would constitute an act of mismanagement and thereby funds belonging to the Company came to be transferred illegally to the seventh respondent, resulting in huge losses to the Company. The petitioner came to know about the illegal transfer of funds only in May 2008, upon which the books of account of the Company were inspected through M/s. M.K. Dandekar and Co., Chartered Accountants, whose report clearly indicates that the transfer of funds, not supported by any contract, was in gross violation of the provisions of section 297 of the Act. This section envisages sanction of the Board for entering into contracts with companies, in which directors disclosed interest. In the absence of any contract, the payment of Rs. 11 crore should be deemed to be in the nature of loans to companies under same management, as per section 370/372A, to be settled along with interest.

The seventh respondent claims that it had a contract with M/s. Mahalakshmi Associates for supply of Iron ore mineral from the mines of National Mineral Development Corporation (NMDC) at the agreed price and, it was further allegedly agreed that the seventh respondent would pay M/s. Mahalakshmi Associates towards transportation of the Iron ore mineral from the mines of NMDC to its yard for preservation, in terms of an Assignment Agreement of Sale and Purchase Contract dated 28-1-2008.

The Assignment Agreement dated 28-1-2008 was never produced by seventh respondent. The Note dated 31-3-2008 regarding approval for release of cheque of Rs. 11 crore in favour of the seventh respondent was never approved by the Chairman of the Company and copy of such Note produced before the Bench does not contain any approval of the Chairman of the Company. The seventh respondent obtained the funds from the Company on 1-4-2008 and there is no material showing the date of remittance made by the seventh respondent in favour

of NMDC. The tripartite agreement dated 30-6-2008 reportedly entered into among the respondents 1 and 7 and M/s. Mahalakshmi Associates for supply of Iron ore was neither placed before nor approved by the Board of directors of the Company and, therefore, it cannot be valid in law. It has been held in *Globe Motors Ltd. v. Mehta Teja Singh and Co. (Agencies)* [1984] 55 Comp. Cas. 445 (Delhi) that the approval of the Board of directors of the company is required failing which, such agreement will be invalid on the ground that there is violation of section 299 of the Act. It is only a cooked up document. This agreement has not been witnessed by any one though there is a provision for witnesses in the agreement. The e-mail communications exchanged between the Legal Officer of the seventh respondent and the officer of the petitioner on 25-6-2008 and 26-6-2008 do not show any approval of the petitioner on the agreement for supply of Iron ore. There has been no sale of Iron ore as on 1-4-2008 and the disputed agreement came into existence only in June 2008. Even in the event of according approval by the Chairman as on 30-6-2008, the violation of statutory provisions cannot be ignored. Therefore, mere knowledge of the disputed contract on the part of the petitioner is immaterial. The memorandum of the seventh respondent did not permit it to take up trading in iron ore. The seventh respondent has amended its object clause at the extraordinary general meeting held on 28-6-2008 thereby enabling the Company to carry on iron ore business and Form 23 filed with the RoC would disclose that the notice of the aforesaid meeting has been dispatched on 2-6-2008. Therefore, it is clear that the seventh respondent could engage in the Iron ore business only after June 2008. In view of this plea of the respondents that the materials have been supplied for cash at the prevailing market price is not justifiable and, therefore, cannot claim exemption from applicability of the requirements of section 297(1)(a) of the Act. The general notice of disclosure of interest (Form 24A) received from the respondents 3 and 4 on 29-2-2008 under section 299, for the financial year 2008-09 was placed before the Board of directors only at the Board meeting held on 27-6-2008, on which date details of the contract for supply of iron ore were not placed, thereby violating the provisions of section 299, by the respondents 3 and 4. The transfer of funds from the Company to the seventh respondent is violative of the provisions of sections 295 and 297, which prohibit a public company from making any loan to any director/private

Company, of which any such director is interested, without approval of the Board and Central Government. The respondents 3 to 5, by virtue of participating and benefiting from the amount of Rs. 11 crore transferred from the Company to the seventh respondent, they are guilty of violation of sections 299 and 300 of the Act, which impose obligations on them to disclose their interest at a Board meeting and not to participate in decisions relating to interested companies. There has been no contract/agreement supporting the payment of Rs. 11 crore by the Company and, therefore, such payment has to be treated in the nature of loans to the Companies under the same management as per section 370/372A of the Act, and as loans to directors under section 295. The applicant has made out a prima facie case that the respondents 3 to 5 having acted in violation of sections 295 and 297, vacated office of director as per section 283(1)(h) and 283(1)(i) of the Act. Nevertheless, they are acting as directors of the Company, which is not permitted under law. The Company has already incurred losses in the last financial year on account of the acts of mismanagement at the hands of the respondents 2 to 5 and 7 in the affairs of the Company and is, therefore, unable to participate in several tenders, thereby losing out market operations. In view of several acts of misconduct of the respondents 2 to 5 and 7, the nominees of the petitioner on the Board of the Company may be authorised to conduct the Board meetings of the Company, as required under section 285 of the Act, more so when the petitioner's nominees being public servants must necessarily ensure proper conduct of the business of the Company without violating any mandatory provisions of law. In civil suits, the aggrieved persons while claiming main relief of injunction always claims by way of interim relief the very same prayer which is granted by the Courts, depending upon the facts of each case. The respondents, therefore, cannot contend that the applicant is barred from praying for appointment of a committee of management, even though the very same relief has been claimed by way of one of the main reliefs. The CLB applying the rule of equity, may pass appropriate orders appointing a committee of management to carry on the affairs of the Company.

8. Shri R. Murari learned counsel, while opposing the prayer of the applicant submitted :-

The Applicant has not filed any document along with the company petition to establish that Shri Pitchiah is Director-Finance of the petitioner, having the requisite authority to file the present company petition. The verifying affidavit is silent in regard to the authority vested in him by the Board. The absence of any of these material is fatal for maintainability of the company petition.

The petitioner, under the guise of the amendment application, is attempting to introduce new matters, which are unconnected with the main petition. The additional reliefs are not related to the proposed amendments. There are no new developments, after filing of the present company petition, justifying any amendment thereof. The proposed amendments are nothing to do with the transfer of Rs. 11 crore by the Company in favour of the seventh respondent. The amendment relating to forward contracts said to have been entered into by the respondents 2 to 5 and Senior Vice President without any authority of the Board of directors of the Company and the consequent losses suffered by the Company as set out in paras 40.1 and 40.2 of the amendment application had taken place prior to the company petition, with new cause of action, in which event, the decision in Ashok Mittal's case (supra) cannot be relied on by the applicant, especially when the principles elucidated therein are inapplicable to the facts of the present case. This Board in T.N. Narendra v. Lakeside Medical Centre (P.) Ltd. [2007] 137 Comp. Cas. 786 (CLB - Chennai) disallowed the prayer for amendment, since such amendment involved a new case. The documents listed out in para 40.3 do not in anyway relate to the grievances made in the main petition. The alleged fraud attributed towards the respondents 2 - 5 and 7 are new facts but supported by the various records which are related to the period prior to the filing of the company petition. The claim of the applicant that the respondents 2 to 5 suppressed the true position of related party transactions thereby, misrepresenting the true financial position of the second respondent, apart from making out a new case is supported by a large number of documents furnished in para 40.4, which are dated before the company petition. Consequently, the purported manipulation of the turnover and investment among the various group companies, defrauding the applicant and the Statutory Authorities, as claimed in para 40.5 cannot be incorporated by way of amendment to the company petition. The conviction of the respondents 2 and 3 under section 138 of the Negotiable Instruments Act was prior to the main petition

and is under challenge by them. The applicant has not chosen to reveal as to when it came to know about the aforesaid conviction of the respondents 2 and 3. The applicant cannot, therefore, contend that the Share Holders Agreement has been vitiated by fraud as introduced in para 40.6 of the application. The charges levelled against Shri B. Mukunda Reddy in para 40.7 of the amendment application cannot be permitted, without Shri B. Mukunda Reddy being a party to the present proceedings. The allegations made in regard to the sixth respondent in para 40.8 are based upon the communications, bearing the date of the company petition. The grievances raised in para 40.9 on account of cancellation of the appointment of a CEO of the Company are alien to the main charges involved in the company petition. The additional reliefs introduced by way of amendment are not related to the additional grounds sought to be incorporated in the main petition. The applicant failed to claim such new reliefs at the time of filing the petition itself. The applicant has claimed one of the reliefs for the sixth respondent, which is not one of the main reliefs claimed in the main petition.

The CLB can grant relief on the basis of the case pleaded in the petition and as proved by the aggrieved shareholders. In view of this settled legal proposition, the amendments sought to be introduced by the applicant cannot be entertained. The interim relief for appointment of a committee of management is also the main relief which has been claimed in the company petition. The Supreme Court in *Bank of Maharashtra v. Race Shipping and Transport Co. (P.) Ltd.* [1995] 83 Comp. Cas. 478 deprecated the practice of granting interim orders which practically gave the principal relief sought in the petition and, therefore, the interim relief for appointment of management committee which would amount to granting the final relief claimed in the main petition cannot be granted.

The tripartite agreement dated 30-6-2008 entered into between the Company, the seventh respondent and M/s. Mahalakshmi Associates, for supply of minerals came to be executed after approval of the draft agreement and on incorporating the modifications suggested on behalf of the petitioner as brought out by the e-mail communications exchanged on behalf of the petitioner, the second respondent and the seventh respondent on 25-6-2008 and 26-6-2008. The seventh respondent had received Rs. 11 crore from the Company on 2-4-2008,

out of which (i) a sum of Rs. 49,50,000 was paid on 2-4-2008 to M/s. Mahalakshmi Associates; (ii) a sum of Rs. 39,91,350 on 3-4-2008 to M/s. Mahalakshmi Associates; and (iii) a sum of Rs. 9,78,45,000 on 4-4-2008 to NMDC, which are supported by the statement of the bank account of the seventh respondent and the communication dated 26-11-2008 issued to the seventh respondent by its banker.

The Board of directors at the meeting held on 16-1-2008 authorised Shri B. Mukunda Reddy, Senior Vice President and Shri B. Raghu, Finance Manager to operate the bank account jointly. The directors deliberated at the said meeting the issues in relation to imposing of a limit of Rs. 10 lakh per transaction, beyond which administrative approval of the Chairman was contemplated. Nevertheless, the directors, at the time of passing necessary resolution did not choose to incorporate any limit while operating the bank account jointly by Shri B. Mukunda Reddy and Shri B. Raghu. This is evident from the subsequent Board resolution dated 27-6-2008 by which there has been a change in authorization for operation of the bank account introducing limits as specified therein. Therefore, the transfer of Rs. 11 crore from the account of the Company to the seventh respondent by the authorized signatories is within the authority bestowed on them by virtue of the aforesaid Board resolution. The transfer of Rs. 11 crore from the account of the Company to the seventh respondent cannot be violative of the provisions of section 295 as well as section 297 of the Act, as put forth by the applicant, but it could attract only either of the two sections. The Company never lent an amount of Rs. 11 crore to the seventh respondent, whereas goods were supplied to the Company and, therefore, the question of applicability of the provision of section 295, requiring the previous approval of the Central Government does not apply to the disputed transaction between the Company and seventh respondent. The report dated 22-8-2008 of the Chartered Accountants, obtained by the applicant discloses the reported violations of the Act by the respondents 3 and 4. The further statement of the Chartered Accountants, that in the absence of any agreement, the payment of Rs. 11 crore is in the nature of loans to the companies under the same management as per section 370/372A, is contrary to their earlier observations that "Goods procured under this contract are stated to have not been sold as on the date of this report".

The consent of the Board of directors of the Company as required under section 297 does not apply in view of supply of the materials by the seventh respondent in favour of the Company by way of cheque which would amount to cash, at prevailing market price, as contemplated in clause (a) of sub-section (2) of section 297. Even otherwise, if no consent is accorded by the Board as required under section 297(1), anything done in pursuance of the contract is voidable at the option of Board, whereas the Board of directors of the Company in the present case has not chosen to cancel the impugned agreement. The requirement of section 299 of the Act on disclosure of interest by any director has been duly complied with by respondents 3 and 4 through lodgment of notices in Form No. 24A dated 29-2-2008 with the Board of directors of the Company as envisaged in section 299(3)(a). There is no reason for the respondents 3 and 4 to violate section 300, since the disputed contract was not placed before the Board of directors of the Company. The office of director of either the third respondent or the fourth respondent has not become vacate, since neither the respondent, the fourth respondent nor the seventh respondent accepted any loan from the Company in contravention of section 295 of the Act.

9. Shri T.K. Seshadri, learned Senior Counsel, pointed out that the company petition has been filed on 15-9-2008, whereas the amendment application came to be filed without any loss of time on 3-10-2008 and thereby there has been no delay whatsoever in seeking appropriate amendments by the applicant. The action under section 397/398 is a representative action and the cause of action is constituted by acts of oppression and mismanagement in the affairs of the Company. By virtue of the present amendment, the company petition is not being substituted and no prejudice will be caused to the respondent, while the prayer of the applicant for amendments is favourably considered in the light of the principles involved in order 6 Rule 7 of CPC. The proceedings are only in the initial stage and in the interest of the principles of natural justice, the proposed amendments are required to be favourably considered. The respondents 3 and 4 ceased to be directors of the Company, in view of violation of the provisions of section 297 and, therefore, the CLB may constitute an interim Board for managing the affairs of the Company.

10. I have considered the submissions of learned Counsel for the parties. The issues which arise for my consideration are - (a) whether Shri M. Pitchiah does enjoy any authority of the petitioner-company to institute the present proceedings; (b) whether the amendments sought to be introduced by the applicant are permissible in the facts of the present case; and (c) whether the prayer for appointment of a committee of management, to carry on the day-to-day affairs of the Company is justifiable, in view of the rival claims of the parties.

Issue No. 1

The petitioner-company is a public sector enterprise, owned and controlled by Government of India and is engaged in the business of manufacturing defence and earth moving equipments, rail coaches and other technology as well as trading activity. The directors of the petitioner-company are appointed by the President of India, as envisaged in clause 97 of the articles of association. The President was pleased to appoint Shri M. Pitchiah, as Director (Finance) on the Board of directors of the petitioner-company, in terms of a communication dated 11-7-2008 of Government of India, for a period of five years. The extract of minutes of the meeting of the Board of directors of the petitioner-company, dated 18-7-2008 would show that Shri M. Pitchiah has taken charge on 14-7-2008 as Director (Finance). The Board of directors of the petitioner-company at the meeting held on 29-4-1989 approved delegation and sub-delegation of powers, according to which (serial No. 61) a functional director is also authorized to institute legal proceedings on behalf of the petitioner-company. The Guidelines on Corporate Governance for Central Public Sector Enterprises issued by Government of India from time to time, as modified up to June 2007 stipulate that every Board of public sector enterprise should have full time Functional Directors, not exceeding 50 per cent of the actual strength of the Board, which shall include the representation of Director (Finance). It is, thus, made clear that Director (Finance) in a Public Sector Enterprise would be a functional director, forming part of the Board of directors of such Enterprise, which is reflected in the extract of minutes of the Board of directors dated 7-1-2006 of the petitioner-company. Shri M. Pitchiah, being a Functional Director, covering functional area of finance, has powers to institute the legal proceedings, inclusive of the present company

petition, on behalf of the petitioner-company. This issue is answered accordingly.

Issue No. 2

The jurisdiction to allow or not to allow the proposed amendments would depend upon the real question in controversy, with reference to the original lis raised or defence taken by the parties. The essential grievances forming part of the main petition are: Shri R. Mukunda Reddy, Vice President and Shri B. Raghu, Deputy Manager (Finance) of the Company at the behest of the respondents 3 to 5 had transferred a sum of Rs. 11 crore, from the current account of the Company, without the knowledge and approval of the Chairman of the Company, in contravention of the Board resolution dated 16-1-2008 of the Company, in favour of the seventh respondent, a company substantially owned and controlled by the respondents 3 and 4. The Company did not have any transaction with the seventh respondent, warranting payment of any such money to the seventh respondent. The unauthorized and deceitful transfer of funds belonging to the Company in favour of the seventh respondent constitute an act of mismanagement in the affairs of the Company. The payment was made without proper records and supporting evidence, in excess of the powers delegated by the Board of directors of the Company and in gross violation of the provisions of sections 295 and 297 of the Act, prohibiting a public limited company from advancing of any money to any director/private limited company, in which the director is interested without the approval of the Board and Central Government. The inspection carried out by the Chartered Accountants brought to light an agreement dated 30-6-2008, purportedly entered into by the Company with the seventh respondent and one M/s. Mahalakshmi Associates, thereby camouflaging the illegal payment and providing a semblance of legality to such illegal drawing of money by the respondents 3, 4, 5 and 7. The aforesaid agreement is fabricated for the purpose of overcoming the act of mismanagement of dishonestly removing Rs. 11 crore from the company's funds, resorted to by the respondents 3 to 5 in connivance with Shri B. Mukunda Reddy. The respondents 3 to 5 are running the Company as of their own, without the authority of the Competent Authority. Any further acts and misdeeds on the part of the respondents 3 to 5 are detrimental to the interest of the Company and its shareholders. The exercise of powers by the directors solely

for personal aggrandizement of the respondents 3 to 5 and not for the benefit of the Company, being oppressive to the minority shareholders must be denounced. The respondents 3 to 5 would continue to misuse their position and authority and further commit acts of misfeasance, detrimental to the interest of the company. They are indulging in and are continuing to indulge in various acts of mismanagement in the affairs of the Company. The conduct of the respondents 3 and 4 with reference to their antecedents, was not disclosed to the petitioner, nor was the petitioner aware of the same, while he started dealing with them, in support of which, the petitioner cited certain specific alleged fraudulent acts of the respondents 3 and 4. The respondents 2 and 6 entered into a Share Holder's Agreement dated 25-9-2006, which provides, inter alia, the 26 per cent of the issued, subscribed and paid-up capital of the Company would be towards the account of the sixth respondent. The second respondent till date has not transferred any shares in favour of the sixth respondent, despite its willingness to subscribe for shares, as per the SHA dated 25-9-2006. Nevertheless, the third respondent for achieving his ulterior motives, has given an impression that the sixth respondent is not interested in subscribing to the shares, and account of such subterfuge 55 per cent of the shares of the Company stands in the name of the second respondent. This is also contrary to the agreement dated 25-9-2006. In the present backdrop of grievances, the petitioners have now sought to amend the pleadings, thereby claiming additional prayers both interim and final which must be examined in the light of the representative nature of action, upholding the paramount interest of the Company.

The grievances sought to be introduced into the pleadings by way of amendment, pursuant to the losses potential and accrued - reportedly suffered by the Company, based on certain formal contracts booked without any proper mandate of the Board of directors and attributed towards the respondents 3 to 5 and Shri B. Mukunda Reddy, in terms of paras 40.1 and 40.2 of the amendment application, in my view, are only to substantiate, elucidate and expand the pre-existing facts, already contained in the main petition, namely, unauthorized acts of the respondents 3 to 5, as set out therein. The losses already suffered by the Company and the potential losses which may be imminent, by virtue of the unauthorized contracts entered into with M/s. General Nice and State Bank of

Hyderabad, now claimed by the petitioners are yet another instance of acts of the respondents without proper mandate of the Board of directors, which, however, do not amount to a new case or substitution of a new cause of action or mutually destructive allegation of facts forming part of the original pleadings, or any alteration of the real matter in controversy, in spite of the forward contracts dating prior to the main petition.

All the documents proposed to be relied and enlisted in para 40.3 of the amendment application to establish the common intent of the respondents 2 to 4 and 7, defrauding the petitioner and the company are found to be in relation to the acts of mismanagement, already reflected in the main petition. The CLB being a quasi-judicial authority, guided by the principles of natural justice, is not to deny any opportunity to produce documents at pre-trial stage, namely, before commencement of arguments in the main petition to prove the existing pleadings. The related party transactions, said to have been suppressed by the respondents 2 to 5, as elaborated in paras 40.4 and 40.5, throwing light on the conduct of the parties concerned, cannot be disallowed, by declining amendment of the pleadings, in view of the equitable and, therefore, discretionary character of the CLB's jurisdiction under section 397/398 of the Act, to adjudicate the complaint of the petitioner, as made in the main petition.

The amendment proposing to bring on record the issue of conviction of the respondents 2 and 3 in a criminal proceeding, by the Court of Metropolitan Magistrate, Mumbai, which took place in August 2005, at the time when the Shareholders Agreement was finalized, will not prejudice them, since they will have full opportunity of meeting the allegations of the petitioner, as may be amended in terms of para 4.06 of the amendment application. The amendments introducing the events on the alleged threats posed by Shri B. Mukunda Reddy, against the officials of the petitioner (para 40.7) and cancellation of the appointment of the new CEO (para 40.9) are subsequent events, but they are in relation to the affairs of the Company, which are otherwise necessary for the proper determination of the contentious issues between parties and for the purpose of framing the reliefs, as held in Karedla Suryanarayan's case (supra) and after meeting the principles of natural justice. The subsequent events can be

brought on record as permitted by the Bombay High Court in Jer Rutton Kavasmaneck's case (supra), thereby, avoiding multiplicity of judicial proceedings and safeguarding the paramount interest of the Company.

The grievance of the sixth respondent on account of the purported unlawful allotment of its shares to the second respondent conveyed to Chairman of the Company, as on the date of filing of the main petition, which is sought to be incorporated by amending the pleading (para 40.8), does relate to the existing fact which are already pleaded in the original pleadings. The argument that the additional reliefs are new and not related to the additional grounds urged to be incorporated in the main petition, do not merit any consideration, especially when, the unlimited power of the CLB under sections 397, 398, read with section 402, of the Act are not restricted to the reliefs sought by the applicant. The vast powers would encompass any appropriate relief, that brings to an end the acts complained of by the aggrieved shareholders, provided any case is made out as per law.

In view of my foregoing conclusions, on the amendment of pleadings, in the present case and after due application of the propounded legal proposition, summarized, on the strength of various decisions of the Supreme Court and different High Courts in Ashok Mittal's case (supra). I am inclined to allow the prayer of the applicant for amendment of the main petition as claimed in C.A. No. 24 of 2008, rejecting the opposite plea that the proposed amendments would "constitute a totally new case arising of a new cause of action as well as totally new reliefs all of which are totally beyond the scope of the Petition" and thereby this issue is answered in the affirmative.

Issue No. 3

According to the petitioner, the transfer of Rs. 11 crore made on 1-4-2008 from the account of the Company by Shri B. Mukunda Reddy, and Shri B. Raghu, without approval of the Chairman of the Company, as required under the delegation of powers, in favour of the seventh respondent, which is substantially owned and controlled by the respondents 3 and 4, is in gross violation of the provisions of sections 295 and 297 and thereby the respondents 3 to 5, nominees of the second respondent vacated the office of director as per section 283(1)(h) and 283(1)(i), of

the Act, apart from violating sections 299 and 300 of the Act, which are strongly denied by the respondents.

The power for operating the bank account of the Company is embodied in the resolution forming part of the Board minutes dated 16-1-2008, the relevant portion of which runs as under :-

“It was further stated that a Current Account with the State Bank of Hyderabad is required to be opened for operating the working capital sanctioned by the Bank. The Board considered the proposal and expressed that powers for operating the account jointly be up to a limit of Rs. 10 lakh per transaction and beyond this would require prior administrative approval of the Chairman.”

After discussion the Board passed the following resolution :-

“RESOLVED THAT a Current Account of M/s. BEML Midwest Ltd., having its registered office at 8-2-684/3-55, Banjara Green Colony, Road No. 12, Banjara Hills, Hyderabad - 500 034 be and is hereby opened with M/s. State Bank of Hyderabad, Overseas Branch located at Somajiguda, Hyderabad and operated jointly by Shri B. Mukunda Reddy, Senior Vice President and Mr. B. Raghu, Finance Manager and are authorized to sign all cheques or other orders for all payments drawn, accepted or made, to act upon any instruction given relating to that Account and that a copy of the foregoing resolution be sent to the Bank and they be requested to act thereupon.”

Shri B. Mukunda Reddy and Shri B. Raghu are jointly authorised, by virtue of the aforesaid Board resolution, to sign all cheques of the Company, whereas the requirement of prior administrative approval of the Chairman, case of any transaction in excess of Rs. 10 lakh, is reflected only in the recitals forming part of preamble to the aforesaid Board resolution. The power of the authorized signatories is not free from ambiguity, especially when the resolution is silent about the administrative authority of the Chairman, in case of a limit beyond Rs. 10 lakh per transaction. It is, therefore, absolutely required to be seen as to how the bank account has been operated since 16-1-2008 by the authorized signatories, when the amount exceeded beyond Rs. 10 lakh per transaction. It is on record that

the Senior Vice President has forwarded to the Chairman of the Company on 1-3-2008, a list of consolidated payments of above Rs. 10 lakh per transaction, covering the period from 28-1-2008 to 29-2-2008, which involved an aggregate sum of Rs. 23.38 crore paid in favour of as many as 28 customers. The consolidated list forwarded by Shri B. Mukunda Reddy to the Chairman on 31-3-2008 on similar lines, set out the payments made to 48 customers, involving a total sum of Rs. 71.16 crore for the period between 1-3-2008 and 31-3-2008. Both these communications have indicated the non-receipt of confirmation from the Chairman. The Senior Vice President and Deputy Manager were seeking approval from the Chairman of the Company for release of cheques, in respect of payments beyond Rs. 10 lakh per customer, in their communications dated 3-3-2008, 7-3-2008, 10-3-2008, 16-3-2008, 23-8-2008, 25-8-2008, 28-3-2008 and 30-3-2008, involving an aggregate amount of Rs. 70.26 crore in respect of 48 customers of the Company. It is, thus, observed that the authorized signatories have been obtaining prior administrative approval of the Chairman before release of cheques in case of every financial transaction of beyond Rs. 10 lakh. I am, therefore, of prima facie view that the transfer of Rs. 11 crore on 1-4-2008 by Senior Vice President and Deputy Manager, from the account of the Company in favour of the seventh respondent, is contrary to the spirit of the Board resolution of 16-1-2008, as aided by the preamble and the consistent practice adopted by the persons authorized by the Board of directors to operate the bank account, unless the original of the communication dated 31-3-2008 of the Senior Vice President and Deputy Manager (Annexure - 10), containing prior approval of the Chairman or any other concrete evidence is produced before the Bench.

The controversy on account of vacation of office of director by the respondents 3 to 5 is wholly dependent upon whether (i) the respondents 1 to 3 either by themselves or by any person for their benefit, or on their account, or any firm in which they are partners or any private company of which they are directors, accepted any loan, or guaranteed or offered security for a loan, from the Company in contravention of section 295, as specified in section 283(1)(h); and (ii) the respondents 1 to 3 acted in contravention of section 299, as contemplated in section 283(1)(i) of the Act. The answer to these charges revolves around the transfer of Rs. 11 crore effected from the Company's account to the seventh

respondent, which is shrouded with serious controversies, as brought out by the rival claims of the contesting parties. According to the respondents 2 to 5, . . . “the petitioner Company was using the first respondent Company as a tool to enable it to achieve its own targets, and whenever it fell short of its targeted turnover of iron ore, it has compelled the first respondent Company as well as the Manager-cum-Senior Vice-President of the Company to procure huge quantities of iron ore. In the said context, the seventh respondent was having a contract with one M/s. Mahalakshmi Associates for supply of 60,000 metric tonnes (+ or - 10 per cent) of Iron Ore lumps of 63-64 grade from the mines of National Mineral Development Corporation (NMDC), which is a Central Government organization, at the market prevailing fixed price of Rs. 2,965 per WMT on ex-mine basis, and it was also agreed therein, that the seventh respondent would pay M/s. Mahalakshmi Associates Rs. 125 per MT for transportation of the said Iron Ore mineral from the Mines Head of the NMDC to its yard for preservation. For this purpose, the seventh respondent had entered into an Assignment Agreement of Sale and Purchase Contract dated 28-1-2008. The said Assignment Agreement dated 28-1-2008 is filed herewith as Annexure No. 8. The Chairman of the Company who was at all times, well aware of the said contract, had, therefore, requested the respondents 3, 4 and 7 for reassignment of the said contract in favour of the first respondent Company, which they had agreed to in good faith with a fond hope that the said Chairman with his influential position and status would lead the first respondent to a laudable heights. Pursuant to the said inducement, Annexure No. 8 contract was sacrificed by the seventh respondent in favour of the first respondent and consequently the sum of Rs. 11 crore was transferred on 2-4-2008, from the first respondent Company to the seventh respondent at the instructions of the said Chairman of the first respondent Company for enabling the reassignment and enforcement of the aforesaid contract dated 28-1-2008. Out of the said amount, the seventh respondent had directly paid Rs. 9,78,45,000 to the NMDC towards the cost of 33,000 MTs of Iron Ore at the agreed prevailing market price of Rs. 2,965 per MT and also paid a sum of Rs. 45,50,000 to M/s. Mahalakshmi Associates towards transportation charges from the mines head of NMDC to its yard, for its storage and preservation, which includes watering and related expenses, etc., which was also the then prevailing market rate and further

paid an amount of Rs. 29,35,350 towards VAT and Rs. 10,56,000 towards royalty to the State Government. Thus, the total sum that was spent was Rs. 10,67,88,000 and the balance amount of Rs. 32,13,650 from and out of the transferred sum of Rs. 11 crore was refunded by the seventh respondent to the first respondent Company vide cheque bearing No. 673100 dated 30-4-2008, drawn at SBH Overseas branch, Somajiguda, Hyderabad for a sum of Rs. 28 lakh and by another cheque bearing No. 055018 dated 13-6-2008 a sum of Rs. 4,13,650. Thus, the funds transferred by the first respondent to the account of the seventh respondent were used for the purpose for which it was intended and was duly accounted. There was admittedly no hidden profit or benefit of any kind that accrued to the seventh respondent. The petitioner, as further asserted by the respondents, was not only aware but also had clearly affirmed the said transaction, in terms of a series of communications exchanged between them, which ultimately led to the tripartite agreement dated 30-6-2008, entered into between the respondents 1, 7 and M/s. Mahalakshmi Associates, at the behests of the Chairman of the Company and thereby the transaction in question is not violative of sections 295, 297 and 299 or any other section of the Act, in which case the respondents 3 to 5 could never vacate office of director as per section 283(1)(h) and 283(1)(i) of the Act. At the same time, the specific case of the petitioner is that the Chairman of the Company neither had the knowledge nor approved any contract with M/s. Mahalakshmi Agencies. The agreements are fabricated to subserve the interest of the respondents and the transfer of Rs. 11 crore in favour the seventh respondent lacked prior approval of the Chairman, in terms of the Board resolution dated 16-1-2008. Consequently, the respondents 3 to 5 are guilty of violation of sections 295, 297, 299, attracting the disqualification of section 283(1)(h) and section 283(1)(i) apart from sections 300, 370 and 372A of the Act, as elaborated by Shri Naganand, learned Senior Counsel, appearing for the petitioner. The plea of violation of law cannot be decided as an abstract principle of law, divorced from facts, as every violation has to be determined, which is entirely a question of fact. Therefore, the impugned transfer of funds and the consequent vacation of office of director by the respondents 3 to 5, involving a mixed question of law and fact as well serious plea of fraud and fabrication of records, having a larger impact on the major dispute raised in the Company

petition, can be adjudicated only while the main petition is disposed on its own merits and not at this interlocutory stage. For these reasons, I am constrained at present not to go into the issue of vacation of office of director by the respondents 3 to 5 as per section 283(1)(h) and 283(1)(i) of the Act, and, therefore, the prayer of the petitioner for appointment of a committee of management in supersession of the Board of directors, to carry on the day-to-day affairs of the Company, till disposal of the main petition, is declined. This issue is, accordingly, answered in the negative.

11. In view of my foregoing conclusions and in exercise of powers under section 403 of the Act, it is ordered as under :-

(i) The petitioner will file amended petition, incorporating all the amendments, claimed in C.A.No. 24 of 2008, by 19-2-2008 and serve a copy on the respondents, who will file additional reply by 10-3-2008. The petitioner will be at liberty to file rejoinder, if any, by 25-3-2008. The main petition will be heard on 30-3-2008 at 2.30 PM.

(ii) Any major decision that may henceforth be taken by the Board of directors of the Company, will be subject to outcome of the main petition.

12. With the above directions, both Company applications (C.A. Nos. 24 of 2008 and 25 of 2008) and the prayer for interim reliefs, as claimed by the petitioner stand disposed of. Liberty to apply.

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