Descon Ltd. Vs. Dpsc Ltd.

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Court : Company Law Board CLB Kolkata

Decided On : Oct-19-2009

Judge : S. Balasubramanian, Chairman

Appeal No. : C.P. NO. 16 (KOL) OF 2008

Appellant : Descon Ltd.

Respondent : Dpsc Ltd.

Advocate for Pet/Ap. : S.N. Mookherjee, D. Basak, M. Bhattacharya, S. Raycl, Ms. Bina Gupta and Gaurav Singh for the Petitioner A.K. Ganguli, Soumen Sen, Arindam Guha, Sandeep Mahapatra, Nitin Kala and Mohinder Singh for th

Judgement :

S. Balasubramanian, Chairman

1. The petitioner-DESCON holds 32.31 per cent. shares in the first respondent-company, viz., DPSCL. The second respondent-andrew (AYCL) holds 7.12 per cent.; its group companies-respondents Nos. 3 and 4, collectively hold 8.08 per cent. shares and the financial institutions-respondents Nos. 5, 6 and 7, collectively hold 42.56 per cent. shares. andrew had become a sick company and in the scheme framed by the BIFR for revival, one of the stipulations was that andrew should disinvest its investments in other group companies. In view of this stipulation, andrew has to disinvest its holding of 7.12 per cent. in DPSCL. Accordingly, it had initiated steps for disinvestment of these shares. The financial

institutions and the third and fourth respondents holding shares have also joined in the exercise of disinvestment. Thus, the total percentage of shares that has come for disinvestment is 57.76 per cent. DESCON has challenged this proposed sale as oppressive to itself on various grounds and has filed this petition seeking for a direction to the company that without first offering the shares to DESCON, the shares should not be sold to anyone; that directions should be given to these respondents to sell their shares to DESCON at a fair price ; that there should be no change in the board of DPSCL without the consent of the petitioner and also for a declaration that all steps taken by these respondents so far for the sale of their shares are null and void.

2. When the petition was mentioned on November 4, 2008, certain interim reliefs were sought. Since the respondents were not present on that day, with the view to give them an opportunity of hearing before considering the interim reliefs, while adjourning the matter to November 18, 2008, I also directed maintenance of status quo with regard to shareholding and the board in the meanwhile. This order was taken on appeal before the Calcutta High Court which directed that the matter should be disposed of quickly. AYCL filed C.A. No. 597 of 2008 seeking for vacation of the order dated November 4, 2008. By an order dated December 3, 2008 (DESCON Ltd. v. DPSC Ltd. [2009] 149 Comp. Cas. 281 (CLB)), I disposed of the application with the direction that the disinvestment process could go on and that AYCL was free to finalise the bid subject to final order of this Board. I had also directed that Shri Radhakrishnan would continue to be the managing director as long as DESCON remained as the single largest shareholder. This order was also taken on appeal before the Calcutta High Court. While restoring C.A. No. 597 of 2008, the High Court also allowed the bidding process to go on stipulating therein that the bidding process would be subject to the final decision of this Board in the present proceeding. AYCL filed a special leave petition against this order and the Supreme Court could dispose of the special leave petition in the following terms : "Leave granted . . . Having heard learned counsel on both sides, we are directing that the bidding process will go on. In that process, respondent No. 1 will also make its bid . . . Before commencement of the bidding process, the advertisement will be modified by incorporating therein a clause giving particulars of the proceedings pending before the Company Law Board vide C.P. No. 16 (Kol.) of

2008 . . . Accordingly, we hereby modify the impugned order only to the limited extent of directing deletion of the following paragraph in the impugned order of the High Court : 'It is, however, made clear that if the disinvestment process continues and concluded as aforesaid, then the continuation or conclusion thereof will not confer any right on or create any equity in favour of the intended bidders or participants in any manner and the same will be subject to the order or decision of the Company Law Board in the pending proceedings'. . . 'We hereby direct the Company Law Board to expeditiously hear and dispose of C.P. No. 16 (Kol.) of 2008, preferably, within three months' . . . 'Civil appeals are disposed of accordingly'." Accordingly, the petition was heard and arguments were concluded on September 7, 2009.

3. Shri Mookherjee appearing for the petitioner submitted : DPSCL was incorporated in 1919. DESCON was incorporated in March, 1995, by DPSCL as a measure of diversification. Prior to incorporation of DESCON, DPSCL proposed to raise Rs. 15 crores for sub-station equipment by way of a right issue. A ten rupees share was to be issued at a premium of Rs. 60 per share. At that time, AYCL held 44.7 per cent., shares along with two other group companies. Since these companies did not have funds to subscribe to the right shares, the board of AYCL decided to renounce 75 per cent. of the right shares in favour of DESCON. Thus, DESCON became a shareholder of DPSCL with 29.8 per cent. shares. Presently, DESCON is the largest single shareholder with 32.5 per cent. in the company. AYCL is not a shareholder of DESCON. Even though the company is a listed company, yet for all practical purposes, it is a closely held company as nearly 80 per cent. of the shares are held by less than ten shareholders. In a board meeting held on December 26, 1998, the board of DESCON decided that since these shares had been renounced by AYCL, in the case of DESCON desired to sell the shares, the first offer should be given to AYCL. This was done only because DESCON belonged to the same group.

4. With a view to make AYCL as a shareholder of DESCON, in an extraordinary general meeting held on April 9, 1999, it was resolved to issue and allot 1,73,713 equity shares constituting to 26 per cent. to AYCL on a preferential basis. On the basis of that resolution, an offer was made to AYCL on April 9, 1999. Since in its

inspection report dated May 9, 2001, the Registrar of Companies pointed out that the allotment of shares on a preferential basis at par would not be in the interest of the company as the net value of the share was Rs. 306.50, on May 22, 2001, the board of DESCON decided not to proceed with the allotment. The decision of the board was communicated to AYCL on June 29, 2001. Even though, AYCL contended that it had accepted the offer by a letter dated June 11, 1999, yet, DESCON had not received the said acceptance letter. It is to be noted that when the board decided not to allot the shares, the board of DESCON consisted of the employees of AYCL even though it was not a shareholder.

5. On September 28, 2001, in the annual general meeting, DESCON passed a resolution to amend its articles to provide for buy-back of its shares. In October, 2001, AYCL filed a suit C.S. No. 504 of 2001 before the Calcutta High Court challenging the amendment to the articles and also for specific performance in relation to the preferential shares. By an order dated October 3, 2001, the High Court restrained the company from giving effect to the resolution for a week. By another order dated October 10, 2001, the High Court recorded the submission of counsel for DESCON that if any action relating to buy-back of shares was to be taken, DESCON would follow the related provisions of the Companies Act and that in case DESCON proposed to transfer its holding, it would give the first option to AYCL. The injunction was not continued. By another order dated July 16, 2003, the High Court confirmed the earlier order dated October 10, 2001, on the ground that the said order would protect the interest of both the sides. The main ground on which reliefs in that suit were sought was that DESCON was within the same group as that of AYCL. The said order still continues. Since DESCON was in need of funds, in an extraordinary general meeting held on June 9, 2006, it was resolved to issue shares to venture capitalists up to a maximum of 49 per cent. to raise an amount of Rs. 35 crores. Rs. 10 shares were to be issued at a premium of Rs. 600. On September 30, 2006, AYCL filed an interlocutory application and obtained an ex parte order of injunction restraining DESCON from giving effect to the said resolution. This application was dismissed by an order dated November 17, 2006, on the ground that DESCON was not a group company. The appeal filed by DESCON was dismissed by the Division Bench of the High Court by an order dated February 8, 2008. AYCL filed a special leave petition against the order

which was dismissed by the Supreme Court on August 31, 2008. In the meanwhile, DESCON raised funds by pledging its shares in the company, the fact of which was reflected in the annual report for the year 2005-06. Even though in a board meeting held on December 10, 2007, DPSCL approved the pledging of the shares held by DESCON for raising funds, the nominees of AYCL did not object to the same. However, on December 18, 2007, AYCL moved an interlocutory application and an ex parte ad interim order was passed by the High Court restraining DESCON from selling, transferring, encumbering the shares held by DESCON.

6. The AYCL made a reference under the SICA before the BIFR, which, by an order dated September 20, 2004, declared AYCL as a sick company. By an order dated October 30, 2007, the BIFR sanctioned a scheme. In terms of the scheme, AYCL was to disinvest the shares held by it in all its group companies including that of DPSCL in which AYCL holds 7.12 per cent. shares. Instead of disinvesting only the shares held by it of 7.12 per cent. shares in the company, DPSCL also joined the LIC, United India Insurance and other group companies holding shares in DPSCL for disinvestment. The total percentage of shares for disinvestment comes to 57.1 per cent. On November 21, 2007, AYCL published an advertisement in The Times of India seeking to appoint an advisor for sale of these shares. On August 8, 2008, the AYCL again issued an advertisement in various newspapers inviting bids for sale of 57.17 per cent. shares to a single strategic investor. On August 18, 2008, the DESCON filed a contempt application against AYCL on the ground that its proposal to disinvest was in violation of the order of the High Court dated February 19, 2008, wherein it had directed that the status of the shares in question should not be changed, without the leave of the court. DESCON is the single largest shareholder in DPSCL with 32.31 per cent. shares. Even though the BIFR has directed only andrew to disinvest its shares in DPSCL, even the financial institutions holding over 40 per cent. have joined hands and they have proposed to sell over 57 per cent. shares collectively held by them to an outsider by inviting bids. Being the largest single shareholder, these shares should have been offered to DESCON. It has the legitimate expectation to be offered the shares. Not only the shares have not been offered to DESCON, it was also not consulted about the proposed investment. In addition, with the view to exclude

DESCON from participating in the bids, in the memorandum of proposed sale of shares, AYCL has fixed a sum of Rs. 1,000 million as the minimum net worth for participating in the bids, which net worth, DESCON does not have. Thus, while denying the right of exercise of legitimate expectation, DESCON has been denied even the opportunity of participating in the bid process. Further, having decided to disinvest its shares, AYCL has also obtained, from the High Court, an order of injunction against DESCON from disposing of the shares held by it in DPSCL. This injunction would deny DESCON from participating in the open offer which the successful bidder has to make in terms of the SEBI Take Over Code. Since DESCON is the largest single holder in DPSCL, it not only has the legitimate expectation of being offered the shares, even on equity DESCON has such a right. DESCON is willing to purchase the entire 57 per cent. shares on a fair price to be determined by an independent valuer. Therefore, AYCL should be restrained from proceeding with the disinvestment process. Further, andrew is trying to remove Shri Radhakrishnan from the position of managing director of DPSCL. He is the nominee of DESCON and has been the managing director of DPSCL from 2003 onwards and his removal would prejudicially affect the interests of DESCON and as such the respondents should be restrained from removing him as the managing director.

7. He further submitted : It is to be noted that in the meeting held on October 19, 2005, with the Secretary of the Ministry, a unanimous decision was taken that the shares held in the DPSCL by DESCON, AYCL and financial institutions would not be sold. In that meeting, DESCON affirmed its commitment that the right of first refusal would be with AYCL in respect of the shares held by DESCON in the company. As indicated in paragraph 6 of the scheme sanctioned by the BIFR, the face value of 7.12 per cent. shares held by DPSCL in DESCON is only Rs. 13 lakhs. However, in the scheme it is projected that the expected realisation would be Rs. 76.21 crores. No doubt this amount includes the expected realisation by the sale of shares held by AYCL in other two group companies, since there is no break up, it is difficult to assess the expected realisation from the sale of DPSCL shares alone. Since in paragraph (v)(e) of the scheme stipulating that AYCL shall not make any investment or obtain any asset without the prior approval of the BIFR, DESCON cannot even honour its commitment relating to right of' first refusal

vested with AYCL.

8. Shri Mookherjee further submitted : In so far as the bid process is concerned, the advertisement issued by the company for appointment of advisor did not indicate the process of disinvestment. Even the letters relied on by AYCL dated November 19, 2007, January 16, 2008 and February 1, 2008, addressed to the managing director of DPSCL did not indicate the process of disinvestment. Even the advertisement issued by AYCL on August 8, 2008, did not prescribe any qualification for the bidders. Only when it obtained the conditions/terms of disinvestment procedure from the website of AYCL, DESCON came to know that conditions were such that DESCON was not even qualified to participate in the bid. The disinvestment in favour of a third party is completely against the interests of the company and is also highly oppressive to DESCON which is the single largest shareholder and which is willing to acquire these shares. When AYCL is obligated to sell only its 7.17 per cent. shares, it has roped in the financial institutions to offer majority shares only for self interest and to get a higher price for the shares. By this, a 32 per cent. shareholder is being foisted with a new majority and unfortunately, DESCON has no role to decide as to who should come as the majority. Through Radhakrishnan, DESCON is controlling the affairs of the company and there is no allegation of mismanagement. In a closely held company, creating a new majority without the consent of the largest shareholder, which is also in control of the management of the company, is highly oppressive especially when the same is done for self interest. Interest of the company has been completely ignored. The new majority would not consider the equitable right of the minority to manage the company. It is to be noted that in spite of various proceedings initiated by AYCL against DESCON, DESCON is standing by its commitment regarding the right of first refusal of AYCL, in spite of the fact that AYCL cannot exercise its right of first refusal due to the BIFR scheme restraining AYCL to acquire further shares. DESCON cannot participate in the open offer that the chosen strategic investor has to make in terms of the Take Over Code in view of the restraint order obtained by AYCL from the High Court against DESCON from selling its shares. It appears that even the Government is not happy with the decision of AYCL to rope in the financial institutions. In its letter dated August 11, 2008, addressed to CMD of AYCL, the Ministry of Heavy Industry has pointed out

that the proposal of divesting 57.17 per cent. was against the decision of the cabinet which has permitted the sale of only 7.12 per cent.

9. Shri Mookherjee further submitted : The entire process of disinvestment appears to have started much before the date of sanction of the scheme by the BIFR as is evident from the affidavits filed by the United India Insurance and the LIC. In its affidavit, the LIC has disclosed a letter dated August 24, 2007, addressed to AYCL. In that letter it has referred to a letter of AYCL dated August 4, 2007, regarding disinvestment. DESCON was never aware of the letters of either August 4, 2007 or August 24, 2007. From the minutes of the LIC investment committee meeting dated June 21, 2007, it is seen that in a meeting held on March 9, 2007, with the Secretary of the Ministry, the LIC was asked to decide on acquiring the stake of AYCL or divest its holding along with AYCL. This meeting was prior in time to that of the BIFR scheme dated October 30, 2007. This would show that the scheme of the BIFR is not the reason for disinvestment. It is to be noted that even though the company is a listed company, it is a closely held company and therefore when AYCL offered the shares to LIC which is only a financial institution and is also not in management, fairness demanded that when AYCL decided to divest, it should have offered the shares only to DESCON. This meeting was not disclosed in the suit filed by AYCL against DESCON even though the chairman of AYCL was present in that meeting. This material fact had been suppressed only with a view to deny a right of DESCON to demand the shares.

10. Learned counsel further submitted : AYCL has raised various issues regarding the maintainability of the petition:

(1) Prior suit filed by AYCL against DESCON. The subject-matter of the suit is entirely different. The suit was only against DESCON and the company was only a pro forma defendant. Other shareholders are not parties to the suit.

(2) The disinvestment is in terms of the BIFR scheme and as such in terms of the SICA, the Company Law Board has no jurisdiction to interfere with the scheme of the BIFR. The BIFR scheme relates only to the shares held by AYCL and not in respect of shares held by financial institutions and the scheme does not specify the mode of sale or to whom the shares should be sold.

(3) No right of pre emption in favour of DESCON as articles do not provide so : DESCON's claim for the shares is based on legitimate expectation and in view of the fact that DESCON was promoted by DPSCL itself and that when the right offer was made to the shareholders, AYCL and its associates jointly decided not to accept the offer and renounced the same in favour of DESCON. When DESCON has accepted the first right of refusal in favour of AYCL, in all fairness AYCL should reciprocate the same. DESCON is the single largest shareholder and in the management. The LIC was given the offer even though it does not have pre-emption rights and the LIC holds less shares than that of DESCON. AYCL could not have started the process which would disturb the existing management.

(4) Delay, knowledge and acquiescence : There can be no estoppel against the statute. The right under section 397/398 is a statutory right and the said right cannot be defeated on these grounds. Even otherwise, the first advertisement dated November 21, 2007, did not indicate that DESCON would be excluded from the bidding process. Even though AYCL has relied on the three letters dated November 19, 2007, January 16, 2008 and February 1, 2008, to attribute knowledge to DESCON about the disinvestment process, yet, none of these letters indicate that DESCON would be excluded. Only from the website, on August 8, 2008, DESCON found that it had been made: ineligible to participate in the bidding process and this petition was filed before the closing date for the bids.

(5) Since the Supreme Court has already permitted DESCON to participate in the bidding process, nothing survives in the petition; the order of the Supreme Court is only an interim order and therefore it cannot stand in the way of final adjudication especially when the Supreme Court itself has directed that the Company Law Board should hear and dispose of the petition. Therefore, the Company Law Board has to deal with the merits of the case. In a proceeding under section 397/398 of the Act, the interests of the company is paramount. In the bidding process, the company is not involved at all. The seller should be more interested in getting the highest price and DESCON is prepared to match the highest offer. Since the nominees of AYCL and the financial institutions are on the board, by disinvesting the shares, they would be bringing in a new management creating conflict of interest. It is to be noted that most of the employees of DESCON are former

employees of AYCL.

11. Summing up his arguments, Shri Mookerjee submitted that the Company Law Board should take into consideration the following important facts in moulding the reliefs:

(1) DESCON was promoted as a measure of diversification of DPSCL.

(2) DESCON subscribed to the equity of DPSCL when others did not have funds.

(3) The company now needs funds for expansion but the same has been put on hold for want of funds.

(4) AYCL is not in a position to acquire the shares held by DESCON nor it is in a position to fund the company.

(6) DESCON is the largest shareholder and in control of the management.

(7) There has been a history of close association between DESCON, the company and AYCL.

12. The effect of the proposed sale through bid process to induct a third party with majority shares would result in ouster of DESCON from the management. No outgoing shareholder can decide as to who should manage the company especially when the existing single largest shareholder is managing the company especially when there is no allegation of mismanagement. Therefore, to ensure that the company continues to be under the control of DESCON, AYCL and the financial institutions should be directed to sell 57.1 per cent. shares to DESCON on a fair value to be determined by an independent valuer or the option should be given to DESCON to match the highest offer to be received in response to the bid process.

13. Shri Mookherjee relied on the following case in support of his submissions :

Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad [2005] 123 Comp. Cas. 566; [2005] 11 SCC 314 : The interest of the company vis-a-vis the shareholders must be uppermost in the mind of the court while granting relief (paragraph 181). In a

given case, the court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties (paragraph 199).

Lammertz Industrienadel GmbH v. Altek Lammertz Needles Ltd. [2009] 148 Comp. Cas. 669 (CLB) : Relying on Chander Mohan Jain v. CRM Digital Synergies P. Ltd. [2008] 142 Comp. Cas. 658 (CLB), the majority shareholder holding 70.4 per cent. shares was directed to exit the company by selling his shares to minority shareholder who was in the management of the company.

M.S.D.C. Radharamanan v. M.S.D. Chandrasekhara Raja [2008] 143 Comp. Cas. 97; [2008] 6 SCC 750 (page 106 of 143 Comp. Cas.) : "The function of a Company Law Board in such matters is first to see as to how the interest of the company vis-a-vis its shareholders can be safeguarded . . . The Company Law Board may not shut its doors only on sheer technicality even if it is found as of fact that unless the jurisdiction under section 402 of the Act is exercised, there will be a complete mismanagement in regard to the affairs of the company". The jurisdiction of the Company Law Board is much wider and directions can be given even contrary to the provisions of the articles . . . The court has ample powers to pass such orders as it thinks fit to render justice and such order has to be reasonable.

Bhau Ram v. Baij Nath Singh, AIR 1962 SC 1476 : The question of constitutionality of law of pre-emption in favour of a co-sharer has been upheld by a number of High Courts. A right of pre-emption based on co-sharership is a reasonable restriction on the right to acquire, hold and dispose of property and is in the interest of the general public. In the present case, the company is a closely held company and therefore, the principle applied to a co-sharer should be applied to uphold the claim of pre-emption right in favour of DESCON.

Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] 1 All. ER 1126 (PC) : In this case, it has been held that allotment of majority shares to an outsider with the view to reduce the majority of an existing shareholder is a breach of fiduciary duties of the directors. In the present case also, by the bid process, AYCL is proposing to induct an outsider with majority shares.

Kamal Kumar Datta v. Ruby General Hospital [2006] 134 Comp. Cas. 678; [2006] 7 SCC 613 : When a material change is brought about in the management to the detriment of the interest of the main promoter, it is squarely covered under section 398(1)(b) of the Act. In the present case, even though DESCON is the largest single shareholder, all the negotiations between AYCL and financial institutions had taken place behind the back of DESCON.

Gurmit Singh v. Polymer Papers Ltd. [2005] 123 Com. Cas. 486 (CLB) : In this case, even though the company was a listed company, since it was being managed as that of a closely held company, the principles applied in case of closely held companies were applied to grant relief.

O'Neill v. Phillips [1999] 97 Comp. Cas. 807 (HL) (page 814) : "there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith . . . One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law."

Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp. Cas. 743 ; AIR 1981 SC 1298 : Section 397 warrants the courts in looking at business realities of the situation and does not confront them into narrow legalistic view . . . The utmost good faith is due from every member of partnership towards other members . . . The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary right as a shareholder. In the present case, AYCL had given the offer to sell its shares to the LIC, it should have made similar offer to DESCON as the company is a closely held company.

14. Shri Sen, advocate, appearing for AYCL submitted : There is no allegation of oppression and/or mismanagement in the petition. Therefore, this petition should be dismissed on demurrer. The claim of DESCON that the shares should have

been offered to it is on the ground that it forms part of AYCL group. However, in the suit before the Calcutta High Court, it had taken a stand that it did not belong to the group and this contention has been upheld by the Calcutta High Court. The admitted position is that there is no pre-emption clause in the articles of the company. DESCON became a shareholder of the company only because AYCL renounced its right of shares with the stipulation that in case DESCON were to transfer these shares, the first right of refusal should be given to AYCL. In 1999, DESCON offered 1,73,713 equity shares accounting to 26 per cent. shares of DESCON to AYCL by way of preferential allotment. However, the board of DESCON decided not to allot the shares even though AYCL had accepted the offer. Having refused to allot the shares on preferential basis, now DESCON has inducted a venture capitalist. This would show that DESCON has not acted in a fair manner towards AYCL. Therefore, even equity is not in favour of DESCON.

15. Shri Sen further submitted : When the advertisement inviting bids was published in newspapers on August 8, 2008, DESCON filed a contempt application before the Calcutta High Court on August 18, 2008, seeking for more or less similar reliefs as in the petition including for restraining AYCL from taking further action. When it did not get any relief, DESCON filed this petition on November 4, 2008 and obtained an ex parte order from the Company Law Board without disclosing the fact that the High Court did not grant any interim relief. From the sequence of events, it is apparent that DESCON was never opposed to the process of disinvestment initiated by AYCL. By a letter dated November 19, 2007, Shri Radhakrishnan being the managing director of the company, was informed of the decision of AYCL to disinvest its shares along with the LIC and the United Indian Insurance and that it had been proposed to appoint an advisor for conducting the disinvestment to a strategic buyer. Another letter was written by AYCL to the company on January 16, 2008, intimating that M/s. Deloitte have been selected as the advisor and that the company should co-operate with M/s. Deloitte by providing all information. Again on February 1, 2008, another letter was written to Shri Radhakrishnan referring to his discussion on disinvestment that all data required by M/s. Deloitte should be furnished. These letters would show that Shri Radhakrishnan was fully aware of the disinvestment process started by AYCL. DESCON has suppressed these letters in the petition only to claim that it

was never aware of the initiation of the process of disinvestment. As observed by the Company Law Board in its order dated December 3, 2008, his knowledge has to be imputed as the knowledge of DESCON as Shri Radhakrishnan is also the managing director of DESCON. If at all DESCON was interested in the shares, it should have either protested against the proposal to select a strategic investor or should have demanded the right of pre-emption and could have asked for fair valuation. After the process had started, DESCON cannot question the same. Therefore, the conduct of DESCON in filing this petition is questionable. In paragraph 197 of Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad [2005] 123 Comp. Cas. 566; [2005] 11 SCC 314, the Supreme Court has held that the court may refuse to grant relief where the petitioner does not come to court with clean hands which may lead to a conclusion that the harm inflicted upon him was not unfair and that the relief granted should be restricted.

16. Shri Sen further submitted : When DESCON had taken a stand before the High Court that it did not belong to the group of AYCL, it has no right to ask for the shares now on the ground that it belongs to the same group. It is to be noted that even though DESCON claims to be in the management of the company, it has not made a pie of investment in the company after acquisition of shares as is evident from the fact that there is no averment in the petition about any investment made in the company. Even, the claim that the company is under the control of DESCON on the ground that Radhakrishnan is the nominee of DESCON is factually incorrect. Shri Radhakrishnan is only a paid employee as is evident from the fact that by a letter of appointment dated January 25, 2003 (annexure AF), he was appointed as a whole-time director with the designation as director and chief executive on certain terms for a period of five years.

17. Shri Sen further submitted : The claim of DESCON that it holds 32 per cent. shares in DPSCL is in dispute. These are the shares which were renounced in favour of DESCON by AYCL with an understanding that andrew would be allotted 26 per cent. shares in DESCON and as a matter of fact 26 per cent. shares in DESCON had been offered to andrew by AYCL of preferential allotment, which, even after acceptance by AYCL have not been allotted, AYCL has already filed a civil suit seeking for a direction to DESCON to allot 26 per cent. shares in favour of

AYCL. That suit is still pending. Therefore, when DESCON is holding 32.31 per cent. shares in trust for AYCL, DESCON cannot have any legitimate right over these shares. The process of disinvestment started in October, 2007 in pursuant to the order of the BIFR on October 30, 2007, sanctioning a scheme of revival of andrew with the stipulation that it would disinvest shares held by it. The financial institutions, namely, respondents Nos. 5, 6 and 7 collectively holding 42.52 per cent. shares in DPSCL also decided to disinvest. Similarly, respondents Nos. 3 and 4 being group companies of andrew holding 8.80 per cent. also joined. Thus, the total percentage of shares proposed for disinvestment is 57.17 per cent. The very fact that DESCON never opposed the disinvestment process which started in October 2007, the petition should be dismissed for delay and acquiescence.

18. Learned counsel further submitted : In so far as the grievance of DESCON that andrew has obtained an injunction against DESCON in disposing of its shares is concerned, that the order has no connection with the disinvestment process. Since DESCON was holding 32.31 per cent. shares in DPSCL in trust for andrew and since andrew came to know that DESCON was proposing to sell/alienate or encumber the renounciated shares, andrew filed an interlocutory application in the pending suit for an injunction against DESCON and by an order dated December 18, 2007, the Calcutta High Court did so. On appeal by DESCON, by an order dated February 19, 2008, the Division Bench of the Calcutta High Court, directed that the status of the shares in question in DPSCL should not be changed in any manner whatsoever without the leave of that court. In view of this order, alleging that the disinvestment proposal is in violation of this order, DESCON filed a contempt application. In so far as the allegation that the terms and conditions stipulated for disinvestment are with a view to disqualify DESCON from participation in the bid is concerned, this allegation is baseless. This stipulation that the prospective bidder should have a net worth of Rs. 1,000 million has been made only with a view to ensure that the bidders are financially sound and not with the view to exclude DESCON from participating. Anyway, now that the Supreme Court has permitted DESCON to bid for the shares, this grievance no longer survives.

19. Summing up his arguments, Shri Soumen Sen submitted that the petition not only suffers from delay and acquiescence but also is an abuse of the process of the court and as such the petition itself deserves to be dismissed at the threshold and the question of granting any relief does not arise.

20. Shri Ganguli, senior advocate, supplementing the arguments of Shri Sen, submitted : In a proceeding under section 397/398, the conduct of the parties is very relevant. In spite of the pre-emption rights vested in AYCL, DESCON pledged the shares. Similarly, after AYCL had agreed to subscribe to the preferential allotment, DESCON refused to allot the shares. When the shareholders approved preferential allotment, the board of directors had no powers to refuse allotment that too on the basis of the observation of the Registrar of Companies that shares were being issued at par instead of at the net value. It is rather a strange situation that while DESCON wants to buy the shares for which bids have been invited, for want of funds, it has pledged the shares held by it in the company. The petition is obviously on behalf of the venture capitalist whom DESCON has recently inducted as a shareholder. There are three grounds on which the petition has been founded. First is that DESCON is a group company of AYCL and therefore, DESCON should be offered the shares. It is to be noted that the articles of the company do not provide for any pre-emption rights. The second is that since it holds 32 per cent. shares in the company and as the company is a closely held one, DESCON has the legitimate expectation that AYCL and other financial institutions should offer their shares to DESCON. The third ground for seeking direction to AYCL and the financial institutions to sell their shares to DESCON is that the company is under the management of DESCON. None of the three grounds has any merit. When it claimed before the High Court that DESCON was not a group company, which contention has also been accepted by the High Court, the very foundation on which the petition has been made falls. Even its claim that it holds 32 per cent. shares cannot be accepted as clear title to these shares is under dispute. DESCON's claim that the company is under its management is on the ground that Shri Radhakrishnan, being its nominee, is the managing director of the company. First, there is no evidence that DESCON has nominated Shri Radhakrishnan and second just because he is the managing director, it does not mean that he is in control of the management of the company. It is the board of

directors which manages the company and the admitted fact is that the majority directors are not the nominees of DESCON. Therefore, the entire foundation on which the claim for the impugned shares has been made must fail.

21. Shri Ganguli further submitted : AYCL has to sell the shares held by it in view of the BIFR scheme. The financial institutions joined in AYCL for the purpose of getting the maximum price for their investment. The stand of DESCON that AYCL cannot buy the shares held by DESCON in view of the BIFR scheme is unfounded. AYCL can always seek permission of the BIFR to acquire the shares of DESCON. Further, DESCON has pledged the shares held by it in the company but had not disclosed this fact. It has only paid part of the loan obtained against the pledge. Even though DESCON claims that it is in the management of the company, yet, it has not funded the company at all. As a matter of fact, it has taken out the money from the company. There is absolutely no foundation for the claim of DESCON that by selling its shares to a third party, AYCL is acting against the interests of the company. Actually, it is DESCON which is acting against the interest of the company by pledging the shares. The reason given for pledging is that DESCON is not financially sound. It has been proved to be so by its inducting a venture capitalist. DESCON does not have resources to buy the shares of AYCL and the financial institutions. Thus, it is quite obvious that someone is behind DESCON and as such this petition is not a bona fide one. DESCON is actually fighting on behalf of someone else.

22. Shri Ganguly further submitted : In a proceeding under section 397/398, relief cannot be claimed as a matter of right. Equitable consideration would override even statutory rights. Further, in such a petition, it is the affairs of a company that has to be examined to find out whether they are being conducted in a manner oppressive to the shareholders. The refusal of a shareholder to sell the shares can never be considered to be in the affairs of a company. Except this grievance, there is no allegation relating to the affairs of the company clearly establishing that the basic requirement to invoke section 397 is missing. The petition is nothing but relating to inter se disputes among the shareholders and as such the petition deserves to be dismissed.

23. Learned counsel further argued : It is to be noted that even in respect of the only allegation in the petition, there had been delay and laches. Even though through Shri Radhakrishnan who is the managing director of both the DESCON and the company, DESCON knew about the proposal of disinvestment by AYCL in November, 2007, this petition was filed only in October, 2008. There has been absolutely no explanation for the delay. It is to be noted that a venture capitalist was inducted in the meanwhile and obviously at the behest of venture capitalist this petition has been filed. Even assuming the claim of DESCON that only on August 8, 2008, it found that it was not eligible to participate in the bid, even then, there is no explanation for the delay up to that date. Obviously, till then, DESCON did not feel oppressed that AYCL and the financial institutions had proposed to disinvest. Even the grievance that it was made ineligible to participate in the bid no longer survives as the Supreme Court has permitted DESCON to participate in the bid. Thus, this grievance also having been redressed by the Supreme Court, nothing survives in the petition.

24. Regarding legitimate expectation, Shri Ganguli submitted : The doctrine of legitimate expectation is applicable only in administrative law. The principle of equitable/promissory estoppel and legitimate expectation go hand in hand. However, this concept is alien to private law. If the relationship between the parties is governed by statutory provisions, they are bound by the same. In case of relationship between shareholders, the same is governed by the articles. Admittedly, the articles of the company do not provide for any pre-emption rights and therefore, any legitimate expectation as claimed by DESCON cannot arise out of the provisions of the articles. In Westfort Hi-Tech Hospital Ltd. v. V.S. Krishnan [2007] 137 Comp. Cas. 151 ; [2007] 2 Comp. LJ 143, the Kerala High Court has observed that the principle of legitimate expectation is unknown in company law. It has further held that legitimate expectation is not the same thing as anticipation and it is different from a mere wish or desire or hope and a mere disappointment would not give rise to legal consequences. On appeal before the Supreme Court against the order of the High Court, the Supreme Court has observed that in the facts of that case, the doctrine of legitimate expectation could not have been applied. Further, in Dr. Mrs. Chanchal Goyal v. State of Rajasthan [2003] 3 SCC 485, the Supreme Court has held that legitimate expectation is not the same as

anticipation and that it is different from a mere wish, desire or hope. In Bagree Cereals P. Ltd. v. Hanuman Prasad Bagree [2001] 105 Comp. Cas. 465 (Cal.), both the Calcutta High Court as well as the Supreme Court have held that if the facts fell short of a case upon which the company court felt that the company should be wound up on just and equitable ground, in that event no relief can be granted in a petition under section 397. Leeds United Holdings plc, In re [1962] 2 BCLC 545, the Chancery Division has held that legitimate expectation cannot be relied on to create rights of pre-emption in relation to shares in a company. In V.B. Rangaraj v. V.B. Gopalakrishanan [1992] 73 Comp. Cas. 201; [1992] 1 SCC 160, the Supreme Court has held that the shares of a company being movable properties, their transfer is regulated by the articles of the company and that any private arrangement restricting the right of a shareholder regarding the transfer and not provided in the articles is invalid. Therefore, the doctrine of legitimate expectation cannot be relied on by DESCON, and it can also not put restrictions on the right of AYCL to sell its shares to anyone of its choice. Further, a very transparent procedure is being adopted by AYCL and the financial institutions, as they are holding shares in public trust to obtain the maximum consideration for the shares.

25. Regarding the procedure adopted for sale of the shares, Shri Ganguli submitted : On October 19, 2005, a meeting was held in the chamber of Secretary, Heavy Industry. In that meeting, the matter relating to a public offer for purchasing the shares in the company at Rs. 70 per share was discussed. This meeting was attended by the managing director of AYCL, DESCON and representatives of the financial institutions. All of them expressed the view that since the price offered was very low, none of them would offer their shares in the public offer. This united decision does not in any way confer any right or legitimate expectation to DESCON that AYCL and the financial institutions, having now decided to disinvest, should offer the shares to DESCON. It is to be noted that AYCL and other financial institutions are Government companies. In view of this, they have to follow a very transparent method of disinvestment by which they get the maximum consideration for the shares. The courts have repeatedly held that the bidding process is one of the most desirable methods of sale of any Government property. In Chint Ram Ram Chand v. State of Punjab [1996] 9 SCC 338, the Supreme

Court has held that one of the fairest means which a State can adopt, without showing any favour in disposing of its property, is to sell it by auction. In the present case, the shares are held by the Government company/institutions. As a matter of fact, in the present case, in its order dated April 13, 2009, the Supreme Court itself has directed that the bidding process should go on and that DESCON will also make its bid. There is no stipulation in that order that the bid process is subject to the outcome of the present proceeding. Even before the date of the petition, 19 parties had submitted their bids. Now that DESCON has also submitted its bid, the Company Law Board should allow the bidding process to go on and DESCON should take its chances.

26. The learned advocate appearing for the LIC submitted that the LIC holds 30.61 per cent. shares in the company and investment committee of LIC decided to divest the entire holding in a transparent process along with AYCL. The very purpose of joining with AYCL is to get maximum consideration for the shares held by the LIC. Therefore, their joining with AYCL in the sale process cannot be considered to be oppressive to DESCON.

27. In rejoinder, Shri Mookherjee submitted : It is wrong to contend that Shri Radhakrishnan is not the nominee of DESCON and that the company is not under the control of DESCON. In paragraph 41(ii) of the reply of AYCL, it is averred that the affairs of the company are controlled by the managing director Shri Radhakrishnan. In paragraph (viii), it is further averred that Shri Radhakrishnan continues to be the managing director of DESCON and he has been controlling the affairs of the company. When DESCON sought for proportionate representation on the board of the company by a letter dated August 3, 2006, by a letter dated August 7, 2006, the company had informed that since Shri Radhakrishan was already the managing director of the company, appointing any further representative from DESCON might not be necessary. This letter itself would indicate that Shri Radhakrishnan has always been considered to be the nominee of DESCON. In so far as the delay and laches are concerned, as early as on February 18, 2008, DESCON had filed an application before the High Court which directed status quo of shares. This shows that DESCON had objected to the process of disinvestment by inviting bids. The allegation that someone else is

behind the petition is not correct. The process of inducting a venture capitalist was initiated as early as in June, 2006. Since AYCL had obtained an injunction against the induction, DESCON could not take any action regarding induction till the injunction was vacated. Once it was vacated, the venture capitalist was inducted during the bidding process. In so far as the allegation that 29 per cent. shares held by DESCON in the company is in clout is concerned, the right of pre-emption in favour of AYCL would arise only when DESCON desires to sell the shares held by it in the company. Pledging of shares does not create any legal right in favour of the pledgee and therefore there is no clout on the 29 per cent. shares. Further, DESCON has already paid a part of the loan and the last date of redemption being September 30, 2009, DESCON still has time to redeem the shares. In so far as the allegation that DESCON has taken loans from the company is concerned, as on date, no loan is outstanding.

28. Learned counsel further submitted : It is on record that the very purpose of inducting DESCON as a shareholder of the company was to use it as a vehicle for diversification. DESCON has been in the management of the company right from the day it became a shareholder. It is to be noted that even before the BIFR order came, AYCL had offered to sell its shares to the LIC. When AYCL had offered its sale to another shareholder, viz., the LIC, in all fairness AYCL should have offered the shares to DESCON. The fairness of conduct should be examined in totality and if it is done so, it would be apparent that the conduct of AYCL has been highly unfair to DESCON. In so far as the doctrine of legitimate expectation is concerned, in Westfort Hi-Tech Hospital Ltd. v. V.S. Krishnan [2007] 137 Comp. Cas. 151 (Ker.); [2007] 2 Comp. LJ 143, the Supreme Court has not held that this doctrine cannot be applied in section 397 proceeding. It has only held that in the facts of that case, this doctrine could not have been applied. The settled law is that creation of a new majority is an act of oppression. In the present case, 57.17 per cent. shares are being offered for sale and anyone who acquires the shares would become the majority. Therefore, it is a clear case of oppression against the minority shareholder, viz., DESCON. If an outsider gains control of the company, the same would be against the company's interest. During the tenure of Shri Radhakrishnan, the performance of the company has substantially improved as is evident from the fact that from Rs. 216 crores in 2000-01, the turnover has gone

up to Rs. 379 crores in 2008-09. The profit also has substantially gone up from loss of Rs. 6 crores to profit of Rs. 10 crores.

29. I have considered the pleadings and arguments of counsel. First, I shall deal with the objection of AYCL on the maintainability of the petition. It has taken a stand that the shares held by DESCON are under dispute and as such the shares are being held by it under trust and it does not have any independent right over the shares. No material has been placed to substantiate this claim. Shares can be said to be in trust only when the consideration has been paid by one but the shares are held in the name of another or shares had been transferred without consideration to be held in trust. The admitted position in this case is that since AYCL did not have sufficient funds to subscribe to the rights shares offered to it by the company, it renounced 75 per cent. of its entitlement to DESCON and it is DESCON which paid the consideration for the shares. Therefore, the concept of trust cannot be applied. If the claim of trust is on the ground that AYCL has pre-emption rights, it is to be noted that pre-emption rights is a contingent right and would become a vested right only when the holder of the shares proposes to sell the shares. Till such time DESGON proposes to sell the shares, the pre-emption right cannot be exercised and on the basis of this right, AYCL can also not demand/force that DESCON should sell its shares to AYCL when DESCON has no proposal to sell the shares. If the claim of AYCL that shares are held in trust because AYCL has filed a case against DESCON for pledging the shares in spite of its preemption rights, DESCON pointed out that there is still sufficient time to redeem the pledge. Therefore, as long as the shares are registered in the name of DESCON in the register of members of DPSCL, AYCL cannot raise any objection on the entitlement of DESCON to exercise rights on the shares. In exercise of the said rights, DESCON has filed this petition and as such the maintainability cannot be questioned on any of these grounds.

30. The next objection is that the sale of shares by a shareholder cannot be in the affairs of a company unless the articles provide for pre-emption rights. I agree with the submission except that there are certain exceptions. Some of the exceptions are doctrine of legitimate expectation, claim on equitable grounds, etc. In the present case, DESCON has invoked the doctrine of legitimate expectation and

also has based its claim for shares on equitable consideration. Whether these grounds are justifiable or not will have to be examined and without examination, the petition cannot be said to be not maintainable.

31. The third ground taken by the respondents is that the petition has been founded on the premises that the DESCON is a group company even though before the High Court, DESCON has taken a stand that it is not a group company and this contention has been accepted by the High Court. This being the case, the foundation on which the petition is founded, has collapsed. I find substance in this submission and therefore, DESCON cannot advance the ground of being a group company for seeking any relief.

32. It has been further contended by the respondents that another foundation for the claim for the shares is that DPSCL is under the control of DESCON as its nominee Shri Radhakrishnan is the managing director. Shri Radhakrishnan is not a nominee of DESCON but he is only an employee of the company as is evident from the letter of appointment dated January 25, 2003. I am inclined to accept this contention. A company can be said to be under the control of a person only if that person has the power and authority to nominate the majority directors on the board. Normally, only a person who has more than 50.01 per cent. shares can have that right/authority. In the present case, the admitted position is that even assuming that Shri Radhakrishnan is the nominee of DESCON, financial institutions, and AYCL have the majority directors on the board. Therefore, it cannot be said that the company is under the control of DESCON.

33. AYCL has alleged that the venture capitalist is behind this petition. It is to be noted that induction of a venture capitalist was decided a long time back and because of the proceeding initiated by AYCL, the induction got delayed and induction took place during the bidding process and as such it could be a coincidence. Further, the venture capitalist does not hold the majority shares of DESCON to allege that the petition is on its behalf.

34. First, I deal with the claim of legitimate expectation. The question as to whether this doctrine can be applied at all in respect of a company has been raised by Shri Ganguly. He relied on the judgment of Kerala High Court in Westfort

Hi-Tech Hospital Ltd. v. V.S. Krishnan [2007] 137 Comp. Cas. 151; [2007] 2 Comp. LJ 143, wherein the High Court has held that the principle of legitimate expectation is unknown in company law. In the appeal, the Supreme Court has only observed that in that case, the doctrine of legitimate expectation could not have been applied. It did not categorically hold that this doctrine cannot be applied in company law. In Astec (BSR) plc, In re [1999] BCLC 59, it has been held that the doctrine of legitimate expectation could be applied to public companies. In a few cases, this Board itself has applied this doctrine in proceedings under section 307/308 depending on the facts of the cases Jagjit Singh Chawla v. Tirath Ram Ahuja Ltd. [2004] 119 Comp. Cas. 385 (CLB); [2004] 47 CLA 276, Gurmit Singh v. Polymer Papers Ltd. [2005] 123 Comp. Cas. 486 (CLB), Scholastica Antony v. Azhimala Beach Resorts P. Ltd. [2007] 139 Comp. Cas. 618 (CLB); [2007] 78 CLA 224 and Dinesh Sharma v. Vardaan Agrotech P. Ltd. [2007] 135 Comp. Cas. 133 (CLB).

35. In O'Neill v. Phillips [1999] 97 Comp. Cas. 807 (HL), cited by Shri Mookerjee, it is observed (page 817) :

"In order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former . . .

In Saul D. Harrison and Sons plc, In re [1995] 1 BCLC 14, 19 (CA), I used the term 'legitimate expectation', borrowed from public law, as a label for the 'correlative right' to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon

reasonable terms. The aggrieved member could be said to have had a 'legitimate expectation' that he would be able to participate in the management or withdraw from the company.

It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was 'correlative' to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application."

36. From the above case, it is evident that to apply the doctrine of legitimate expectation there have to be certain grounds like personal relationship/understanding/agreement, etc., the breach of which would be unfair or unjust. Therefore, in the present case, for invoking the doctrine of legitimate expectation, especially for the claim of the shares of AYCL and the financial institutions, there should have been some sort of either a promise, agreement or at the least an overt act on their part by which DESCON could claim that it was expected that AYCL and financial institutions would divert their shares in favour of DESCON. The admitted fact is that not a piece of evidence has been produced by DESCON to this effect. As rightly pointed out by Shri Ganguly, relying on the judgment of the Supreme Court in Dr. Mrs. Chanchal Goyal v. State of Rajasthan [2003] 3 SCC 485, wherein the Supreme Court has held that legitimate expectation is not the same as anticipation and that it is different from a mere wish, desire or hope. In the present case also, it appears to be only the wish or desire of DESCON that AYCL and financial institutions should divest their shares in favour of DESCON. In the absence of any material to claim legitimate expectation, DESCON could not have raised this issue at all. As rightly pointed out by Shri Ganguly relying on Leeds United Holdings plc, In re [1962] 2 BCLC 545, legitimate expectation cannot be relied on to create the right of pre-emption in shares of a company. Therefore, the claim for the shares on the basis of legitimate expectation cannot be sustained.

37. AYCL has contended that the petition suffers from delay and acquiescence. According to it, Radhakrishnan was aware of the proposal of disinvestment as early as in November, 2007, but this petition was filed only in November, 2008, i.e., after a delay of nearly one year. Even though, Shri Mookheriee pointed out that DESCON had expressed its protest on the decision of disinvestment by filing an appeal on February 18, 2008, against the order dated December 18, 2007 and the High Court directed maintenance of status quo, yet, there is no explanation as to why the Company Law Board could not have been moved immediately thereafter. Normally, for any legal action, there should be a cause of action. In the present case, the cause of action appears to have arisen on August 8, 2008, only because as per the terms and conditions, DESCON had been made ineligible to participate in the bidding process. As a matter of fact, this is what even Shri Mookherjee submitted on November 18, 2008, when interim reliefs were being considered. Even though on November 18, 2008, I was inclined to redress this grievance by allowing DESCON to participate in the bid process, I did not do so since AYCL had already shortlisted certain bidders and the bidding process was reaching a finality. However, the Supreme Court has permitted DESCON to participate and it has already submitted its bid. Therefore, what was relevant at the time of seeking for interim relief, i.e., delay and acquiescence may not be relevant now after the Supreme Court has permitted DESCON to participate in the bid.

38. Assuming that DESCON had/has legitimate expectation, there is nothing on record to show that at any time it attempted to exercise the said right. AYCL has disclosed three letters written by it to Shri Radhakrishnan on November 19, 2007, January 16, 2008 and February 1, 2008, through which Shri Radhakrishnan was made aware of the proposal of AYCL to disinvest its shares along with those of the financial institutions. Unfortunately, these relevant communications had not been disclosed in the petition. In my order dated December 3, 2008, I had observed that the knowledge of Shri Radhakrishnan could be attributed to the knowledge of DESCON as he is the managing director of the DESCON also. However, DESCON did not express any protest nor inform AYCL that DESCON had the legitimate expectation of being offered the shares. I specifically asked Mr. Mookherjee during the hearing as to whether any letter was written to AYCL by DESCON seeking for the shares. He answered in the negative. DESCON urged

that since on an earlier occasion all the shareholders collectively decided not to divest their shares, when AYCL decided to divest, it should have taken DESCON into confidence. I would have accepted this contention, if the action of AYCL was behind the back of DESCON. Radhakrishanan was advised of the proposal to sell as early as on November 19, 2007 and therefore he was in the know of the proposed action by AYCL but DESCON of which Shri Radhakrishnan was/is the managing director, did not protest. Therefore, even assuming that DESCON had the legitimate expectation, it had abandoned the same.

39. DESCON has voiced its grievance that financial institutions have joined with AYCL for disinvesting their shares for self interest. It is to be noted that these institutions invest in shares only for the purpose of investment and their interest would always be to get maximum price for the shares. If any of these-AYCL, LIC or United Insurance had independently proposed to sell their shares, they would not get the same consideration as they could by joining together to sell their collective holding of the majority shares in the company. It is a common sense that majority shares in a company would always attract better buyer and better price. Possibly there may not be any takers for acquiring small percentages of shares. Therefore, there can be no complaint that all these shareholders have come together to collectively sell their shares for self interest. Shri Mookherjee also pointed out that even before the sanction of scheme by the BIFR, AYCL had proposed to sell its shares. I do not find any reason as to why a shareholder cannot sell his shares and therefore this ground cannot vest with DESCON any right to seek for the shares.

40. DESCON has sought two alternative reliefs. One is that fair value should be determined and the shares should be offered to it or in the alternative it should be allowed to match the highest offer so that it could acquire the shares at that price. In so far as direction for sale of shares on the basis of fair value is concerned, the same has to be rejected on various grounds. Legitimately, a shareholder can seek for shares on fair valuation, if he had been a promoter of the company along with the one whose shares he seeks. It is an admitted position that the company was incorporated in 1919 while DESCON became a shareholder only in 1995. Shri Mookherjee relied on Bhau Ram v. Baij Nath Singh case AIR 1962 SC 1476,

wherein the Supreme Court has held that pre-emption in favour of a co-sharer has been recognised by the High Courts and since the company is a quasi partnership, the same principle should be applied to direct AYCL to divest its shares in favour of DESCON. It is to be noted that the concept of co-sharer would arise only in case where the property is enjoyed by more than one person jointly and that is what exactly happened in that case. Therefore, this principle cannot be applied even in case of a quasi partnership company as there is no co-sharing. He relied on Howard , Smith Ltd. v. Ampol Petroleum Ltd. [1974] 1 All. ER 1126 (PC). In that case, the appellant therein was the majority shareholder. The board of the company allotted majority shares to an outsider and that is why it was held that allotment of majority shares to an outsider with a view to reduce the majority of an existing shareholder is in breach of the fiduciary duties of the directors. In this case, there is no allotment by the board of directors. It is the majority shareholders who have proposed to sell their shares by a process of bidding. There is no creation of a new majority in place of an existing majority. Only the ownership of majority shares is proposed to be changed. Therefore, the question of the directors breaching their fiduciary duties does not arise even though the nominees of these shareholders are majority directors on the board of the company. In other words, there is no action by the company to apply the principles of fiduciary obligations. He also relied on Kamal Kumar Datta v. Ruby General Hospital [2006] 134 Comp. Cas. 678; [2006] 7 SCC 613, for the proposition that when a material change is brought about in the management, the same is covered under section 398(1)(b) of the Act. Again it is to be noted that the material change was brought about by allotment of shares and not by transfer of shares by majority shareholders. Therefore, no ground has been adduced for directing AYCL to divest the shares in favour of DESCON on the basis of fair valuation. Further, it is to be noted that AYCL and other financial institutions are public sector undertakings and as has been held by Supreme Court in Chint Ram Ram Chand v. State of Punjab [1996] 9 SCC 338, the fairest means of any public undertaking disposing of its assets is by way of open auction. Normally, the fair price is never the best price. The best price can be found out only by means of either bids or by way of auction and since the selling shareholders are public institutions, it is in the public interest that they get the best price. Shri Mookherjee argued that since

AYCL had offered its shares to the LIC, in all fairness it should have offered the shares to DESCON also when it decided to disinvest. I could have found some substance in this contention if DESCON had immediately, after it came to know from Shri Radhakrishnan that AYCL was proposing to disinvest, DESCON had made an offer to AYCL to purchase the shares. DESCON did not do so. Further, it is not only AYCL but other financial institutions have also joined in the process of disinvestment and it is not a case that either the LIC or United Insurance had offered to sell their shares to AYCL. In other words, just because AYCL had offered its shares to the LIC, DESCON cannot now demand that even the LIC and other shareholders should offer their shares to DESCON. Therefore, the question of directing AYCL and financial institutions to sell their shares to DESCON on a fair value does not arise.

41. Now, the admitted position is that the bidding process has started and even the Supreme Court has allowed the bidding process to go on. The alternate prayer made by DESCON is that it should be allowed to match the highest offer. Even though it is submitted that in addition to 19 parties who have submitted their bids, DESCON also has submitted its bid. In view of the Supreme Court direction that before the commencement of the bidding process, the advertisement should be modified by incorporating therein a clause giving particulars of the proceeding pending before the Company Law Board, it is not known whether final financial bids have been submitted by the parties. Any direction that DESCON should be given the right to match the highest offer would only make the bidding process more of a price finding exercise than a real competitive bid. Therefore, I do not propose to grant this prayer.

42. However, there are certain factors in favour of DESCON, which necessitate application of equitable principles in granting suitable reliefs, Shri Mookerjee relevantly referred to the judgments in Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad [2005] 123 Comp. Cas. 566; [2005] 11 SCC 314, that in the facts of a case, to do substantial justice between the parties, reliefs can be granted. The admitted fact is that the company itself promoted/incorporated DESCON as a measure of diversification-that is there is a close association between the two and that DESCON is the single largest shareholder of the company with 32 per cent.

shares and that most of the employees of DESCON are ex-employees of AYCL and that the company has performed well under the management of Shri Radhakrishnan who is also the managing director of DESCON, in the sense that its turnover has gone up from Rs. 216 crores in 2001-02 to Rs. 379 crores and that a loss making company has become a profitable one. Therefore, purely on these equitable grounds, I am of the view that DESCON cannot be just equated with third party bidders and it should have a better chance to acquire the shares than the third parties, however, at a competitive price. Accordingly, I direct that if the difference between the highest bid and that of DESCON is less than 10 per cent. then, there shall be a further open bid between the highest bidder and DESCON. By this, even AYCL and the financial institutions would get a better/competitive price for their shares. This process was actually adopted in Satyam Computer's case which had been widely publicised except that in that case since the difference between the highest and the second bid was more than 10 per cent., the highest bidder succeeded. Since in terms of the Supreme Court directions, the bidders had been advised of the proceeding before the Company Law Board, AYCL will now advise the bidders about this direction that there shall be a further open bid between DESCON and the highest bidder, if the difference between the bid of the highest bidder and that of DESCON is less than 10 per cent. In view of this direction, AYCL is at liberty, if it decides to do so, to invite fresh bids.

43. As I had directed in my order dated December 3, 2008 (DESCON Ltd. v. DPSC Ltd. [2009] 149 Comp. Cas. 281 (CLB)), Shri Radhakrishnan shall continue as the managing director of the company as long as DESCON remains the single largest shareholder in the company. Earlier, the main reason for seeking his removal was that there was likely to be a conflict of interest. Now that the bidders have already completed due diligence, the question of conflict, if any, does not arise.

44. The petition is disposed of in the above terms with no order as to costs.