

(2011) 08 MAD CK 0264

In the Madras High Court

Case No : O.S.A. No's. 2 to 5 and 258 of 2009 and Company Appeal No's. 21, 25 to 27 and 29 of 2009

C.G. Holdings Private Limited and Others

APPELLANT

Vs

Ramasamy Athappan and Nandakumar Athappan and Others
etc. etc.

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Arbitration Act, 1940 — Section 9
Arbitration and Conciliation Act, 1996 — Section 45
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Companies Act, 1956 — Section 402
Specific Relief Act, 1963 — Section 16

Citation : (2011) 08 MAD CK 0264

Hon'ble Judges : V. Periya Karuppiyah, J;R. Banumathi, J

Bench : Division Bench

Advocate : Karthik Seshadri, in O.S.A. Nos. 2 to 5 of 2009 and Comp. Appeal No. 27/09, J. Sivanandaraj, in Comp. Appeal Nos. 25 and 26 of 2009, AR. L. Sundaresan, for Aditya Bhat, in O.S.A. No. 258 of 2009 and Comp. Appeal Nos. 21 and 29/2009, Appellant No. 1 in O.S.A. No. 258 of 2009, for the Appellant; Karthik Seshadri in RR1 and 2 in O.S.A. No. 258/09, RR.1 and 2 in Comp. Appeal Nos. 26 and 29/2009, RR2 and 3 in Company Appeal Nos. 21 and 25/2009, J. Sivanandaraj in RR1 and 2 in O.S.A. Nos. 2 to 5, RR6 and 7 in Comp. Appeal No. 21 of 2009, RR4 and 6 in Comp. Appeal No. 29/09 and for RR5 and 6 in Comp. Appeal No. 27 of 2009, AR. L. Sundaresan, for Aditya Bhat in R1 in Comp. Appeal Nos. 25 and 27 of 2009 and for R4 in O.S.A. Nos. 2 to 4 of 2009, R5 in O.S.A. Nos. 2 to 4 of 2009, R6 in O.S.A. Nos. 2 to 4 of 2009 and Comp. Appeal No. 26 of 2009 and R.7 in Comp. Appeal No. 29 of 2009, R7 in OSA Nos. 2 to 4 of 2009, R4 in Comp. Appeal No. 26 of 2009, R5 in Comp. Appeal No. 26/2009, V. Lakshminarayananm, for R8 in O.S.A. Nos. 2 to 4 of 2009, R. 4 in Comp. Appeal No. 27 of 2009 and R.5 in Comp. Appeal No. 21 of 2009, R9 in O.S.A. Nos. 2 to 4 of 2009, R4 in Comp. Appeal No. 21 of 2009 and R3 in Comp. Appeal No. 27 of 2009, C.S.K. Sathish in R.10 in O.S.A. Nos. 2 to 4 of 2009, R1 in Comp. Appeal No. 21 of 2009, R3 in Comp. Appeal No. 26 of 2009 and 29 of 2009 and R2 in Comp. Appeal No. 27 of 2009, K.S. Sunder in R8 in Comp. Appeal No. 21 of 2009, R9 in Comp. Appeal No. 21 of 2009, R4 in Comp. Appeal No. 25 of 2009 and R8 in Comp. Appeal No. 27 of 2009, T. Suresh and O.S. Karthikeyan, R10 in Comp. Appeal No. 21/09 and R9 in Comp. Appeal No. 27/09, for the Respondent

Judgement

R. Banumathi, J.—Whether the single Judge was right in finding that the arbitration agreement has become inoperative and whether the single Judge was right in allowing the application -A. No. 1236 of 2008 granting stay of arbitration proceedings are the points falling for consideration in O.S.A. Nos. 2 to 5 of 2009, which arise out of the order dated 29.10.2008 made in O.A. No. 277 of 2008 and Application Nos. 1236, 2670 and 2671 of 2008 respectively in C.S. No. 257 of 2008 on the file of this Court. The Order of the Company Law Board dated 3.8.2009 modifying its earlier order dated 13.8.2008 in C.P. Nos. 65 and 76 of 2005 and issuing various directions in modification of its earlier order is under challenge in Company Appeal Nos. 21, 25 to 27 and 29 of 2009.

2. The issues involved in these Original Side appeals and Company Appeals relate to the dispute pertaining to the Joint Venture Agreement dated 30.1.2004 in relation to the affairs of M/S. Cheran Enterprises Private Limited. Since common issues are involved in the Original Side Appeals and Company Appeals, all the appeals were heard together and shall stand disposed by this common judgment.

3. For convenience, the parties are referred by their names and also in short form and wherever necessary they shall be referred as per their array in C.S. No. 257 of 2008.

4. Factual background of the matter:

The 10th Defendant - K.C. Palanisamy (in short, "KCP"), an Industrialist from Coimbatore along with his family members had acquired controlling interest in M/S. Vasantha Mills Limited (in short, "VML") and promoted a Company in the name and style of Cherran Properties Limited (in short, "CPL"). VML and CPL owned extensive immovable properties, which are capable of being developed into valuable commercial and residential properties. The 1st Plaintiff - Ramasamy Athappan is known to KCP even prior to incorporation of Cheran Enterprises Private Limited (in short, "CEPL"), being the Principal Officer of 1st Capital Insurance Company, which is a group company of Odyssey America Re-Insurance Corporation (OARC), a large multinational Company, forming part of "Fairfax Group" of Companies, having its registered office in Stamford, Connecticut at U.S.A. In 2003, R.Athappan conveyed to KCP to arrange for funding through ORE Holdings incorporated in Mauritius under Mauritius Laws promoted by OARC as its wholly owned subsidiary under the Mauritius Laws for the purpose of developing the lands belonging to VML and CPL. For a consideration of Rs. 4 Crores, KCP allotted/transferred 20 percent of equity shares in CPL and 15.6% of equity shares in VML to Nanda kumar Athappan as per the understanding between KCP and Ramasamy Athappan. Cheran Enterprises Private Limited came to be incorporated in November 2003 by KCP and his wife Soundari Palaniswamy

with an authorised capital of Rs. 10,00,000/-consisting of 10,000 equity shares of Rs. 100/-each. Subsequently, in 2004, the authorised capital of the Company was increased to Rs. 18,00,00,000/-. By virtue of a share purchase agreement dated 13.1.2004 entered into between C.G. Holdings and CEPL, C.G. Holdings sold 1,00,00,000 equity shares of Rs. 10/-each in CPL representing 80% equity shares in CPL and 12,41,969 equity shares of Rs. 10/-each in VML to CEPL. In consideration of which, C.G. Holdings was allotted 45% of the issued, subscribed and paid up capital of CEPL. Similarly, Athappan has sold his share holding in CPL and VML to CEPL and in exchange of which he was allotted 10% of the issued, subscribed and paid up capital of CEPL.

5. A Joint Venture Agreement (JVA) was executed on 30.1.2004 between (i) C.G. Holdings Private Limited; (ii) ORE Holdings Limited; (iii) Nantha kumar Athappan; (iv) Ramaswamy Athappan, (v) K.C.Palanisamy, (vi) Vasantha Mills Limited (VML), (vii) Cherraan Properties Limited (CPL) and (viii) Cheran Enterprises Private Limited (CEPL). By Joint Venture Agreement:

?K.C.Palanisamy brought in investment by way of contribution of properties of VML and CPL worth Rs. 130 Crores to get 45% shares in CEPL.

?ORE to hold 45% against investment of cash of Rs. 75 Crores and

?Nandakumar Athappan to hold 10 percent against investment of Rs. 4 Crores.

6. As per "Business Purpose and Scope of J.V.A. (Clause 4.1), the Company has been incorporated to

(i) purchase, construct and develop a hotel property, a shopping complex and an information technology park,

(ii) renovate and develop properties owned by CPL and VML, and

(iii) sell the aforementioned properties.

KCP, C.G. Holdings, VML and CPL are one group, ORE is another group and Plaintiffs - Ramasamy Athappan and Nandakumar Athappan are one group. Under JVA, ORE nominated one Chandran Ratnaswami, who lives in Canada, to act as a Director in the Joint Venture Company - CEPL. C.G. Holdings nominated K.C.Palanisamy as a Director in CEPL. 2nd Plaintiff - Nandakumar Athappan nominated his father - Ramaswamy Athappan, who lives in Singapore as a Director in CEPL. Hence, K.C.Palanisamy alone is the Indian Director and was appointed as the Managing Director of CEPL. K.C.Palanisamy, who is a former member of Legislative Assembly and also a Member of Parliament, after receiving Rs. 75 Crores to the credit of CEPL is acting in violation of the terms of JVA and alleged to have misappropriated Rs. 75 Crores. Contrary to the terms of JVA, K.C.Palanisamy is alleged to have subsequently encumbered the properties of CEPL by entering into collusive agreements with sister concerns. K.C.Palanisamy alleges that ORE committed breach in failing to provide guarantee to enable CEPL to obtain Syndicated credit facility of Rs. 300 Crores, which is in clear violation of

Article 9 of JVA.

7. Ramasamy Athappan and ORE Holdings held Board meeting of CEPL on 21.9.2005 and 22.9.2005 and rescinded the collusive agreements that were entered into by KCP with Cheran Constructions Limited (CCL). KCP was also questioned and instructed to return moneys that were misappropriated and various resolutions were passed including removal of KCP as a Managing Director and as the sole signatory of Bank account.

8. C.P. No. 65 of 2005: In November 2005, C.G. Holdings and KCP filed C.P. No. 65 of 2005 under Sections 397 and 398 of The Companies Act before the Company Law Board, Southern Region Bench, Chennai to:

(i) declare that the alleged Board meetings of CEPL held on 21/22.9.2005 and the resolutions passed thereon are null and void and not binding on the C.G. Holdings, KCP and CEPL;

(ii) amend the Articles of Association of CEPL to include Articles to the effect that so long as C.G. Holdings holds shares in CEPL, No. policy decision to increase the authorised capital, sale, disposal or encumbrances of the investments in shares in subsidiaries such as CPL, VML, be taken up by the Company in General Meeting without the affirmative vote of C.G. Holdings;

(iii) amend the Articles of Association of CEPL to include an Article that so long as C.G. Holdings and its nominees on the Board as a Director, No. quorum for any meeting of the Board of Directors would be possible without the presence of such a nominee;

(iv) permanent injunction restraining Chandran Ratnasamy and Ramasamy Athappan or the nominees of ORE Holdings and Nandakumar Athappan from proceeding with the holding of the meeting of Board of Directors of CEPL on 12.11.2005 and other reliefs.

9. C.P. No. 76 of 2005: ORE Holdings Limited filed this Petition before the Company Law Board under Sections 397 and 398 of the Companies Act for various reliefs alleging acts of mismanagement and suppression by KCP in his capacity as a Managing Director and C.E.O. of CEPL. In the said Petition, ORE Holdings Limited prayed for:

(i) removal of KCP as a Director, C.E.O., and the Managing Director of the Company;

(ii) restraining C.G. Holdings and KCP or their nominees from in any manner acting on behalf of CEPL

(iii) constituting a Board of Management for the Company consisting of independent Directors and nominees of ORE Holdings;

(iv) direct CEPL and other Respondents to give effect to the resolutions passed by the Board in its meeting dated 12.11.2005; and (v) set aside all contracts

entered by or on behalf of subsidiaries in violation of the provisions of JV Agreement and other reliefs.

10. The Company Law Board heard C.P. Nos. 65 and 76 of 2005 together and with a view to bring an end to the grievance of C.G. Holdings, KCP, ORE and Athappan on 13.8.2008 in exercise of the powers under Sections 397 and 398, passed the following order:

CEPL shall return a sum of Rs. 75 crores and Rs. 4 crores invested by ORE and Athappan respectively, together with simple interest at the rate of 8% per annum from the date of investment till the date of repayment within a period of 12 months in one or more instalments, commencing from 01.11.2008. While making the payment CEPL, CG Holdings and KCP shall ensure that at least 25% of the amount due is paid in every quarter. CEPL, CG Holdings and KCP are at liberty to make use of the fixed deposit held by CEPL with SBI Erode Main Branch, free of any liens or encumbrances towards refund of the investments of ORE and Athappan. VML shall not alienate or sell any of its immovable properties till full payment is made to ORE, in terms of this order. In the event of any failure to make the repayment within the specified time, CEPL, CG Holdings, KCP and VML will duly convey the immovable properties of VML, namely, 17.15 acres of land in favour of ORE and 7.80 acres of land in favour of Athappan by executing and registering necessary deeds of conveyance in strict compliance with all applicable laws, as consideration for reduction of capital and surrender of the shares of ORE and Athappan, upon which ORE as well as Athappan will deliver the share certificates and blank transfer forms in respect of their holdings in CEPL and the subsidiaries, if any, in favour of CG Holdings and KCP. CEPL is consequently authorized to reduce its share capital and in the meantime, operation of the impugned agreements is suspended to expedite and ensure due completion of the modalities of exit by ORE and Athappan, thereby, bringing to an end the acts complained of in the present proceedings. CEPL shall ensure necessary statutory compliances till the whole process, in accordance with the aforesaid directions, is properly completed. The parties are at liberty to apply in the event of any difficulty in implementation of the smooth exit of ORE and Athappan from CEPL.

11. Even when the matters were being pursued before the Company Law Board, VML, CPL, C.G. Holdings and KCP have initiated various civil and criminal proceedings. VML, CPL and KCP filed Civil Suit - O.S. No. 90 of 2007 on the file of District Munsif's Court, Kangeyam seeking for declaration that allotment of shares in favour of Nandakumar Athappan in CEPL, VML and CPL is tainted by fraud and misrepresentation and also null and void and consequently to restrain Nandakumar Athappan by way of permanent injunction not to alienate or sell or pledge the shares allotted to him and not to exercise his voting rights in CEPL and VML and Ramasamy Athappan not to function as a Director of CEPL.

12. C.G. Holdings, KCP and his father Chenniappan have filed six criminal complaints against the Plaintiffs - Ramasamy Athappan and Nandakumar Athappan. Conversely, Plaintiffs and other parties to the JVA have also filed three

criminal complaints against C.G. Holdings and KCP for misappropriation of funds, forgery of minutes/resolutions and fabrication of accounts. KCP was arrested and remained in custody for 87 days. Even when the parties were seriously pursuing the Petitions before the Company Law Board and other proceedings, in 2007, C.G. Holdings and KCP wrote to the Secretary of the Court of International Chamber of Commerce (ICC) making a "Request for Arbitration" seeking for declaration that the JVA dated 30.1.2004 is vitiated by misrepresentation and to direct CEPL to forthwith transfer the title to the claimant. Objections were filed by the Plaintiffs for invoking ICC Rules inter alia stating that arbitration proceedings are barred by principles of res judicata and that complicated issues of facts are involved and hence the dispute is not arbitrable. ICC sent a communication (1.2.2008) stating that the objections of Plaintiffs have been considered by ICC Court and that the arbitration would proceed in accordance with Article 6(2) of ICC Rules of Arbitration.

13. At this stage, Plaintiffs have filed C.S. No. 257 of 2008 inter alia seeking for the reliefs:

(i) declaration that the Arbitration Agreement contained in Article 22 of JVA dated 30.1.2004 is null and void, inoperative and incapable of performance and

(ii) permanent injunction restraining C.G. Holdings and KCP from proceeding with the arbitration proceedings under Reference No. 15174/JEM pending before the International Chamber of Commerce (ICC). Along with the suit, the Plaintiffs have also filed two applications - O.A. No. 277 of 2008 and A. No. 1236 of 2008 for interim injunction restraining C.G. Holdings and K.C.P. from proceeding with the arbitration proceedings under Reference No. 15174/JEM and to stay the arbitration clause in Clause 22 of the JVA dated 30.1.2004 pending disposal of the suit.

14. C.G. Holdings and KCP filed Petition - C.A. No. 154 of 2008 before Company Law Board to modify the Order of Company Law Board dated 13.8.2008, inter alia praying to injunct Plaintiffs -ORE Holdings, Ramasamy Athappan, Chandran Ratnaswami, Nandakumar Athappan and OARC from interfering with the day to day management of CEPL and to permit C.G. Holdings and KCP to deal with the fixed deposit - T.D.R. No. 759413 dated 14.10.2005 lying in the State Bank of India, Erode Main Branch and to permit C.G. Holdings and KCP to induct two additional Directors on the Board of CEPL. ORE Holdings and Plaintiffs have also filed applications in C.A. No. 155 of 2008 and C.A. No. 10 of 2009 to modify the earlier order and to release the amount lying in the fixed deposits with State Bank of India, Erode Main Branch and other reliefs. In modification of its earlier order dated 13.8.2008, by the common order dated 3.8.2009, the Company Law Board directed S.B.I., to release 50% of maturity proceeds in fixed deposit No. 759413 in favour of ORE and Nandakumar Athappan in the ratio of 75:4 and the remaining 50% of the maturity proceeds in favour of C.G. Holdings and KCP enabling them to deal with the same viz., 50 percent of the matured proceeds without any interference. The Company Law Board also permitted C.G. Holdings

and KCP to induct two additional directors on the Board of CEPL and shall carry on the affairs of CEPL in accordance with the provisions of the Act without intervention of ORE and N. Athappan. Company Law Board further directed the properties of VML, namely, 17.15 acres of land would be conveyed in favour of ORE or its nominee in the event of any remote need, which may arise in future, on account of non-compliance of the Order dated 13.8.2008 by CEPL, C.G. Holdings and KCP. The Company Law Board further directed ORE and Nandakumar Athappan to deposit their share certificates in respect of their holdings in CEPL with the Bench Officer within 30 days. Being aggrieved by the said common order dated 3.8.2009 modifying the earlier order, the parties have preferred the Company Appeals.

15. In the impugned Common Order dated 29.10.2008 made in O.A. No. 277 of 2008, A. Nos. 1236, 2670 and 2671 of 2008 in C.S. No. 257 of 2008, the learned single Judge did not accept the contention of Plaintiffs that the arbitration agreement is null and void and that it has become incapable of being performed. Pointing out the various civil and criminal proceedings initiated by C.G. Holdings and KCP, the learned single Judge held that both parties plunged into series of litigations and took the view that C.G. Holdings and KCP have made the arbitration agreement inoperative by resorting to a series of litigations before various Fora. Referring to the Order passed by the Company Law Board dated 13.8.2008 and the findings of Company Law Board, the learned single Judge observed that the Company Law Board clearly held that "the whole controversies have spurred out of JVA dated 30.1.2004". The learned single Judge observed that having filed Company Petitions, Civil Suits and Police complaints and when the parties were engaged in a pitched battle, asking them to go to arbitration before ICC would not serve the purpose. Pointing out that all the points raised before the International Court of Chambers were effectively determined by the Company Law Board and Company Law Board has passed the most equitable remedy parting of the ways among ORE Holdings, Plaintiffs and KCP, the learned single Judge held that by the conduct of the parties, there is abandonment of the arbitration agreement and that the arbitration has become inoperative and allowed the applications granting injunction. The application - A. No. 2670 of 2008 filed by C.G. Holdings and KCP u/s 45 of Arbitration Act was dismissed. Being aggrieved by the order of the learned single Judge, C.G. Holdings and KCP have preferred appeals - O.S.A. Nos. 2 to 5 of 2009.

16. Assailing the findings of the learned single Judge, Mr. Karthik Seshadri, learned Counsel for the Appellants/Plaintiffs inter alia made the following submissions:

?The provisions of Sections 397 and 398 of Companies Act is a statutory remedy provided to shareholders, who are "oppressed" and complain of "misrepresentation";

?Filing Petition under Sections 397 and 398 of the Companies Act does not prohibit invocation of the arbitration clause in the JVA. By filing Company Petition

in C.P. No. 65 of 2005, C.G. Holdings and KCP were espousing a cause as an aggrieved shareholder. Similarly, C.P. No. 76 of 2005 filed by ORE Holdings was a Petition filed by a shareholder against other shareholders;

?O.S. No. 90 of 2007 pertains to a cause of action, which happened even prior to the JVA (dated 30.1.2004), which contains the arbitration clause and main applicant to the arbitration viz., C.G. Holdings is not a party to the suit - O.S. No. 90 of 2007;

?By their conduct, C.G. Holdings and KCP have unequivocally communicated their intentions to proceed with the arbitration before ICC;

?Looking at the issues raised, there is No. waiver or estoppel as contended. The Plaintiffs have participated in the constitution of ICC Arbitral Tribunal and each and every allegation contained in the plaint was raised before the ICC and ICC considered the request of the Plaintiffs to invoke Article 6 and rejected the same and proceeded to constitute the Arbitration Tribunal in accordance with ICC Rules.

17. VML and CPL are represented by the counsel Mr. V. Lakshminarayanan. Before the learned single Judge, VML and CPL have neither filed any counter in the applications nor advanced any arguments, before the learned single Judge, VML and CPL, who are subsidiary Companies, have not even preferred any appeal. Mr. V. Lakshminarayanan, the learned Counsel for VML and CPL submitted that in Application No. 1236 of 2008, by saying that the arbitration Clause 22 of JVA dated 30.1.2011 has become inoperative, the learned single Judge foreclosed the right of VML and CPL in approaching the Arbitral Tribunal and therefore VML and CPL are to be heard in these appeals. Even though VML and CPL have not preferred any appeal, we have permitted Mr. V. Lakshminarayanan to canvass the arguments on behalf of VML and CPL and we have heard the arguments of Mr. V. Lakshminarayanan at length.

18. Mr. V. Lakshminarayanan has submitted that money deposited to the credit of CEPL was diverted only with the knowledge of other shareholders and Plaintiffs and ORE Holdings cannot complain of breach of terms of JVA. The learned Counsel would further contend that the single Judge erred in saying that the issue raised for arbitration before ICC has already been raised in Company Applications and in O.S. No. 90 of 2007 on the file of District Munsif's Court, Kangayam. The learned Counsel would further submit that in O.S. No. 90 of 2007 the issue involved is allotment of shares to Nandakumar Athappan for consideration of Rs. 4 Crores and the said allotment of shares in VML and CPL which was much earlier to the incorporation of CEPL and the suit - O.S. No. 90 of 2007 has nothing to do with the issues to be resolved by the Arbitral Tribunal.

19. Mr. Sivam Sivanandaraj, the learned Counsel for Plaintiffs/Respondents 1 and 2 would contend that in its order dated 13.8.2008 the Company Law Board decided almost all the issues arising between the parties and while so, referring the matter to Arbitration would amount to re-agitating the entire issues. The learned Counsel would further contend that Company Law Board has passed its

order in the very same dispute and the Appellants having initiated various civil proceedings and also filed six criminal complaints against the Plaintiffs, conversely, Respondents 1 and 2 and other parties to the JVA have filed three complaints on the allegations of misappropriation of funds, forgery of minutes/ Resolutions have been seized by the Investigating Agency and pointing out the various proceedings, the learned single Judge rightly held that the arbitration agreement has become inoperative by abandonment and waiver by the conduct of parties. Taking us through the materials on record, in particular, the Bank statement, the learned Counsel would contend that based on the materials, the Company Law Board has given clear findings to the effect that KCP has committed breach of JVA and if ICC proceedings is allowed to be initiated, it will result in multiplicity of proceedings.

20. On behalf of ORE Holdings, learned Senior counsel Mr. AR.L. Sundaresan appearing along with Mr. Aditya Bhat has submitted that ORE Holdings brought investment of Rs. 75 Crores towards its share capital and without any corporate approval, KCP, who was in the helm of affairs of CEPL mismanaged the funds. Learned Senior counsel would further contend that the Company Law Board rightly held that the conduct of KCP was harsh, burdensome, oppressive and failed in his statutory obligations. Learned Senior counsel would further contend that the Company Law Board rightly held that the entire investment made by ORE must be restored back to ORE. Placing reliance upon a decision of the Supreme Court in the case of Atul Singh and Others Vs. Sunil Kumar Singh and Others, , the learned Senior Counsel contended that if the arbitration agreement is claimed as illegal, void and inoperative, reference to arbitration is not possible and in such a case only the Civil Court can decide the validity of arbitration agreement in question.

21. Joint Venture Agreement, dated 30.1.2004: The whole controversy emanates from JVA dated 30.1.2004. The main grievance of C.G. Holdings and KCP is that as per JVA, only Rs. 75 Crores came in and the Syndicated credit facility to the tune of Rs. 300 Crores was not provided by OARC and hence there is breach of Clause 9.1 of the JVA. The further grievance of KCP is that R.Athappan should have been an independent person, but he was actually part of Fairfax Group of Companies. On the other hand, the grievance of Plaintiffs and ORE Holdings pertains to the conduct of KCP in the day to day administration of CEPL and its subsidiaries. In the Board Meeting held on 21.9.2005 and 22.9.2005, the irregularities in the affairs of CEPL and misappropriation of funds and properties of CEPL by KCP was discussed and on 21.9.2005, it was resolved that in supersession of the previous resolutions that the operation, instruction, remission, withdrawal and other acts in respect of the funds, bank accounts, deposits and securities of CEPL would be carried out only by two of the three Directors of the Company acting jointly.

22. Since the whole controversy has spurred out of the JVA, it is necessary to briefly refer to the salient features of JVA dated 30.1.2004.

?to appoint C.G. Holdings nominee (K.C.Palanisamy), Athappan nominee (Ramaswamy Athappan) and Chandran, Representative of ORE as Directors of CEPL (Clause 2.3(ii));

?not to sell, transfer, pledge or otherwise encumber the shares held by Athappan, C.G. Holdings, CPL in VML without the prior written consent of ORE (Clause 2A.4);

?to exercise the voting rights by C.G. Holdings, CPL, R.Athappan and Athappan in respect of their shares in VML, CPL, Unaitted Builders & Consultants (UBC) and Unaitted Plantations Limited (UPL) in a manner directed by ORE (clause 2A.6);

?to amend the articles of association of CPL and VML as specified in Clause 2A.7;

?ORE to bring in investment of Rs. 75 Crores (Clause 3 of JVA);

?to seek and obtain a syndicated credit facility of Rs. 300 crores, to be secured by a corporate guarantee to be issued by OARC (clause 9.1);

?to pledge the shares of (i) C.G. Holdings and Athappan in VML; (ii) KCP and his affiliates in UBC and UPL and (iii) Athappan in UPL and UBC in favour of OARC, as security for the grant of a corporate guarantee by OARC (clause 9.1);

?C.G. Holdings Nominee (KCP) appointed by the Board as the CEO and Managing Director of CEPL.

?Clause 12.3 of JVA as to the functioning of CEPL is very relevant. Any decision on the matters stated in Clause 12.3 shall require an affirmative vote from ORE and No. resolution in relation to the same shall be carried through unless approval of ORE is obtained on the same.

?For any investment or other payment made by CEPL or its Subsidiaries in excess of USD 1,00,000, approval of ORE has to be obtained. (Clause 12.3(vi))

?Approval of ORE is to be obtained for any sale, transfer or any other form of disposal of substantial assets of the Company or its Subsidiaries other than the assets whose sale has been approved under the Annual Business Plan. (Clause 12.2(ix))

23. Clause 14 of JVA sets out "Events of Default". Clause 14.1(x) stipulates the default clause in case Company is not able to meet its financial or Business targets stipulated in the Business Plan. For the avoidance of doubt, Clause 14.1.2 clarifies that the matters stated in Article 14.1(x), (xi) and (xii) shall be capable of being declared as Events of Default only by ORE.

24. JVA envisages that the parties shall go by the terms of the JVA and the articles. In the event of any conflict between the JVA and the Articles, the former shall prevail in terms of Clause 4.2 of the JVA. The main purpose of the incorporation of CEPL itself is to renovate and develop the properties of CPL and VML. By virtue of its investment, ORE exercises control over CEPL and its subsidiary Companies - VML and CPL. In terms of Joint Venture Agreement,

CEPL, VML and CPL would function as one unified group. The affairs of CPL and VML and how ORE would exercise official control over subsidiaries viz., CPL and VML has been succinctly observed by the Company Law Board in its common order dated 13.8.2008, which reads as under:

...The letter and spirit of the JVA would unequivocally show that the affairs and functions of CEPL and its subsidiaries are inseparable and further that these entities are intended to be treated as a single economic unit towards achieving the main objects of CEPL. ORE by virtue of its investment in CEPL would exercise sufficient control and influence over the affairs of CPL and VML. In the light of these facts of the present case, the affairs of the holding company, namely, CEPL would necessarily include the affairs of the subsidiary companies, namely CPL and VML, under Sections 397 and 398 of the Act. The JVA would establish that CPL and VML are treated as branches of CEPL, in which case the CLB is empowered to exercise its power u/s 402 of the Act with reference to the subsidiaries, in a proceeding initiated against the holding company, as held in *Shankar Sundaram v. Amalgamations Ltd. and Ors.* (2002) III C.C. 252). When the business of the holding company is intertwined with that of CPL and VML, ORE, a shareholder of the holding company, is entitled to agitate the grievances on account of the subsidiary companies. In view of this, the grievances of ORE, holding 45% of equity shares of CEPL that the subsidiary companies, namely, CPL and VML entered into contracts with CCL in respect of their properties, contrary to the JVA and without any approval of the Board of directors of CEPL can be raised in the present proceedings

On the above observations, the Company Law Board went into the entire gamut of all transactions of CEPL.

25. The request of C.G. Holdings for arbitration before International Chamber of Commerce (ICC) is for the reliefs to declare that the JVA is vitiated by misrepresentation on the part of ORE Holdings, Plaintiffs, Odyssey Re Holdings, OARC and Fairfax and to direct them to pay damages for all the losses suffered by C.G. Holdings.

26. Before we touch upon the matter as to the issues raised before ICC we may analyse the materials to have an understanding as to how the same issues were already agitated before the Company Law Board in C.P. Nos. 65 and 76 of 2005, it is necessary to delve into the acts of mismanagement alleged by the Plaintiffs and ORE Holdings, which was elaborately dealt with by Company Law Board.

27. Financial Mismanagement and siphoning of money: As pointed out earlier, ORE brought in investment of Rs. 75 Crores, which was duly credited in the account of CEPL in ABN Amro Bank on 29.1.2004. Since the time of investment, constantly, money has been moved. The Bank Statement of account shows trail of money. As per Clause 12.3(vi) of JVA/Article 45(vi), any investment or other payment made by CEPL or its Subsidiaries in excess of USD 1,00,000 has to be approved by ORE. The movement of money is not supported by the approvals

from the Board and affirmative vote from ORE.

28. In C.P. Nos. 65 and 76 of 2005, Company Law Board elaborately dealt with the movement of money as well as the attachment of the fixed deposits of CEPL, an account of securing long term and short term capital gain tax. Transfer of shares of the subsidiaries viz., CPL and VML in favour of CEPL is governed by the share purchase agreement dated 13.1.2004 entered into between C.G. Holdings and CEPL. The income tax Authorities arrived at the capital gains of Rs. 70.94 Crores. In its communication dated 8.6.2005, the income tax Authorities pointed out that

M/S.C.G. Holdings P. Ltd., and Shri Athappan were holding the controlling shares of the Company almost 100% (including those shares presently held by the public agreed to be purchased by Shri K.C.Palanisamy). This right in the Company was diluted to the extent of 45% with the entry of ORE Holdings Ltd. through M/S. Cheran Enterprises P. Ltd. That means there is a relinquishment of right over the ownership to the extent of 45% against which M/s ORE Holdings Ltd. brought in Rs. 75 crores. This attracted short term capital gains tax of Rs. 32.40 crores.

29. As held by the Company Law Board, C.G. Holdings as well as KCP are accountable for the income tax liability and the consequent appropriation of 25.57 Crores from the fixed deposit held by CEPL with State Bank of India, Kilpauk, Chennai on 24.9.2005 towards income tax liability of C.G. Holdings. State Bank of India, Erode Branch by its communication dated 16.11.2005 reported that a sum of Rs. 6.86 Crores has been remitted on 23.09.2005 from out of the fixed deposit amount kept by CEPL to the income tax Department towards tax liability of C.G. Holdings. Pointing out that the appropriation of amount of Rs. 25.57 Crores and Rs. 6.86 Crores was without any approval of Board of Directors of CEPL, the Company Law Board held as under:

These amounts, namely, Rs. 25.57 crores and Rs. 6.86 crores having been appropriated towards the income tax liabilities of C.G. Holdings, without any approval of the Board of directors of CEPL and not for the purpose of CEPL, must be restored back to the account of CEPL by KCP, on the principles enunciated in (a) Selangor United Rubber Estates Limited v. Cradock and Ors. (1968) 1 W.L.R. 1555; (b) K. Narain Das v. Bristol Grill Private Limited and Ors. (1997) 90 CC 79; (c) Life Insurance Corporation of India v. Haridas Mundhra and Ors. (1966) 36 CC 371). The conduct of KCP in having regarded CEPL's funds, as though his own funds is burdensome harsh and wrongful, as held in In re H.R. Harmer Ltd. (1959) 1 W.L.R. 62).

30. The Company Law Board appointed auditors M/S. Deloitte Haskins & Sells. In its order, the Company Law Board referred to the interim report of M/S. Deloitte Haskins & Sells, which has traced the movement of funds in CEPL Books for the year ended 31.03.2005, according to which, a major portion of Rs. 16.13 Crores was moved to Group Companies/related parties. The movement of funds is not

supported by any approvals from the Board of CEPL or the affirmative vote of ORE and is in clear violation of Clause 12.3 (vi) of JVA/Article 45(vi). The Circular resolution relied upon by KCP was rejected by the Company Law Board.

31. We have also perused the Accounts of CEPL in ABN Amro Bank, Coimbatore Branch. The learned Counsel for the Plaintiffs Mr. Sivam Sivanandaraj and learned Counsel for ORE Holdings -Mr. AR.L. Sundaresan, Senior Counsel along with Mr. Aditya Bhatt, have drawn our attention to the movement of money from out of the Rs. 75 Crores deposit lying in the credit of CEPL. As per the terms of JVA, Clause 12.3(vi)/Article 45, any investment or other payment made by CEPL or its Subsidiaries in excess of USD 1,00,000 requires an affirmative vote from ORE and No. resolution shall be carried through unless it is approved by the Board with an affirmative vote from ORE.

32. Drawing our attention to the observations of Company Law Board pertaining to investment in Data Access India Limited (DAIL), Mr. Lakshminarayanan, learned Counsel for VML has contended that even the Company Law Board has recorded a finding that the decision to invest moneys in DAIL was as a result of the collective wisdom exercised by among others - KCP, R.Athappan, Chandran, Paul Rivett and Prem Watsa, after an in depth study of the financial and technical viability, business prospects of telecom business, modalities and advantages of funding of DAIL. The investment in DAIL is from out of USD 17 Million lent by OARC. The above said findings of the Company Law Board as to investment in DAIL is only a passing observation on the issue, which we would elaborate a little later, while dealing with the orders of the single Judge of the Delhi High Court in C.P. No. 292 of 2004 and related applications. At this stage, suffice to note that even the Company Law Board has pointed out the transfer of a sum of Rs. 35.30 Crores from CEPL to Cheran Holdings Private Limited (CHPL), who, in turn, invested in DAIL. Subsequently, the said money of Rs. 35.30 Crores has been re-transferred to CEPL. In this regard, the findings of the Company Law Board reads as under:

KCP had admittedly transferred the loaned amount of USD 17 million, (equivalent to Rs. 78.45 crores) extended by OARC to the account of CHPL from DAIL. CHPL in turn transferred a sum of Rs. 35.30 crores to CEPL, thereby returning the said sum to CEPL due to which the shares of DAIL were acquired from Siddharth Ray and associates. It is for the aforesaid reasons R.Athappan, Chandran, ORE and OARC cannot excuse themselves from the unauthorised investment by KCP in DAIL despite the fact that CEPL did not suffer any loss on this account, excepting that funds were not available to CEPL for a significant period.

By a reading of the above, it is clear that the investment made in DAIL is from the loaned amount of USD 17 million extended by OARC to CHPL. Investment in DAIL is an independent transaction, which has been referred by Company Law Board only to say that funds were not available to CEPL for a significant period.

33. Contracts entered with Cheran Construction Limited (CCL) and KCP's act of

diverting immovable property assets of CEPL: Yet another major conduct of KCP is diverting all immovable properties of VML and CPL brought into CEPL by C.G. Holdings to its other subsidiary companies. As pointed out earlier, C.G. Holdings hold 45 percent of CEPL against contribution of properties of VML and CPL. As per Clause 12.3 (ix), any sale, transfer or any other form of disposal of substantial assets of the Company (CEPL) or its Subsidiaries, has to be approved by the Board with an affirmative vote from ORE. Without any such Board resolution with affirmative vote from ORE, five contracts were entered into between CPL, VML and CCL and the five agreements are:

- (a) agreement for sale-cum-developing dated 28.08.2004 between VML and CCL for sale of the landed property measuring 7.80 acres situated at Coimbatore for a consideration of Rs. 6 crores;
- (b) agreement of sale-cum-developing dated 28.08.2004 between VML and CCL for sale of landed property measuring 17.15 acres situated at Coimbatore for a consideration of Rs. 60 crores;
- (c) agreement of sale-cum-developing dated 28.08.2004 between CPL and VML to construct 1,00,000 sq.ft. for apartments in Cherran Towers for a consideration of Rs. 5 crores;
- (d) agreement of contracting dated 14.01.2005 between CPL and CCL for construction of a three star hotel in Cherran Towers for a consideration of Rs. 35 crores; and
- (e) agreement of contracting dated 14.01.2005 between CPL and CCL for upgrading the existing shopping complex at Cherran Towers for a consideration of Rs. 15 crores.

34. Even though the agreements with CCL are for several crores, CPL and VML got only a paltry sum of Rs. 10,000/-. Cheran Constructions Limited (CCL) has been promoted as a private Company in 1988 by KCP, his wife and one R. Manian, who are the subscribers to the Memorandum of Association. After referring to these agreements, the Company Law Board clearly held "...that CCL is nothing but an extended arm of KCP and cannot plead ignorance of the JVA,...containing inter alia restrictive covenants and matters relating to CPL and VML and brush aside the stipulations on the ground that CCL is not a party to JVA." In C.P. No. 76 of 2005, ORE Holdings has alleged that the above agreements are oppressive of other shareholders of CEPL. The Company Law Board has extensively gone into this aspect and we may usefully refer to the relevant findings of the Company Law Board, which reads as under:

...CCL has not produced any material to show that any development or construction work has been carried out pursuant to the controversial contracts, thereby incurring any expenditure in this behalf...

VML parted with possession of 24.95 acres of prime lands on receipt of a paltry amount of Rs. 20,000/-, which is the only benefit derived by VML. CCL has been

given powers to mortgage the properties for the purpose of raising loans to complete the construction as per the agreements, while VML will have No. right to deal with the property without the written consent of CCL.

...CCL's capacity and capability, demonstrated with reference to the documentary evidence on record in No. way would justify the contracts with CPL and VML and overcome the consequent prejudices being suffered by CEPL. KCP undoubtedly had taken enormous steps in safeguarding and enhancing the value of CPL properties as well as bringing VML out of sickness, thereby saving its vast extent of properties and settling dues of all workmen, as elaborated by Dr. Ravi chandran and undenied by ORE, which however do not empower KCP to act contrary to the JVA/articles of CEPL, while dealing with properties of CPL and VML.

35. On the above findings, the Company Law Board has held that by virtue of Clause 12(3)(vi)/Article 45 (vi), any investment or other payment made by CEPL or its Subsidiaries in excess of USD 1,00,000 requires an affirmative vote from ORE. The investments made by CPL in each of the contracts entered with CCL exceeds the monetary limit of USD 1,00,000 fixed under Clause 12.3(vi)/Article 45(vi). The Company Law Board further held that:

Clauses 11.3.4(vii)/Article 88(a)(vii) further stipulates that entering into Joint Venture Agreement; or other business arrangement by CEPL or its subsidiaries require an affirmative vote from ORE director and No. resolution in relation to this matter can be carried through without approval of ORE director. CPL or VML has not ensured compliance with these requirements before entering into contracts with CCL and all the contracts are hit by the provisions of Clause 11.3.4(xvii)/article 88(xvii) and Clause 12.3(vi)/article 45(vi).

36. KCP's lack of diligence in discharging statutory duties:

In its order, the Company Law Board observed that KCP is accountable for not having diligently discharged its statutory duties cast on him. The Company Law Board further observed that the acts of KCP would frustrate the Business Plan of CEPL and that his acts are oppressive of ORE and R.Athappan apart from his acts being contrary to the terms of JVA.

37. As pointed out earlier, the Company Law Board appointed Deloitte Haskins & Sells, Chartered Accountants to carry on independent audit of transactions of CEPL for the year ended 31.3.2005. In its order, the Company Law Board observed that the Auditor's Report is inconclusive due to lack of requisite information which ought to have been furnished by KCP and hence the Chartered Accountants were constrained to rely upon the unsigned financial statements of accounts of which they could not confirm accuracy of the figures as stated in the report.

38. From the Order of Company Law Board, it is seen that none of the statutory records, Bank statements, Confirmation of Current Account Balances held with

Banks and for the sums advanced to other Companies/related parties have been made available to the Chartered Accountants for carrying out the audit of transactions of CEPL.

39. After detailed analysis of allegations and counter allegations, Company Law Board held that the business of CEPL can never be carried on in association of KCP and that there is complete mistrust and lack of mutual confidence between KCP on one hand and ORE, R.Athappan and OARC on the other hand. In exercise of powers under Sections 397 and 398 read with Section 402 of the Companies Act and with a view to bring an end to the grievances of the parties concerned, Company Law Board inter alia directed CEPL to return a sum of Rs. 75 Crores and Rs. 4 crores invested by ORE and Athappan respectively together with simple interest at the rate of 8% p.a. from the date of investment till the date of repayment within a period of twelve months. (vide Para No. 9) Company Law Board had given liberty to CEPL to make use of the fixed deposit held by CEPL with S.B.I, Erode Main Branch to make payment to ORE and Athappan. The said order was subsequently modified by Company Law Board on 3.8.2009, which we would refer a little later while dealing with Company Appeals.

40. Strained relationships between the parties aggravated the situation resulting in both parties filing civil suits as well as number of criminal complaints/cases. Instead of instituting arbitration proceedings at the early point of time, C.G. Holdings, CPL, VML and KCP repeatedly filed suits and number of criminal complaints. The details of the criminal complaints filed by KCP against ORE and Athappan are as under:

Crime No. /Offences alleged

Date of filing/Police Station/Court

Name of Complainant

Name of Accused

Status

157 of 2006 Section 138 Negotiable Instruments Act, 1881

December 2005 J.M. / Perundurai

Cherran Constructions Limited

(1) CEPL; (2)R. Athappan (3) G. Athappan (4) Chandran Ratnaswami (6) ORE

Quashed by an order dated 30.09.2010 in CrI.O.P. No. 31601 and 31602 of 2010

Sections 409, 405, 471, 389 r/w 120B Indian Penal Code, 1860

27.02.2006 Economic Offences Wing, Egmore

K.C.Palanisamy

(1) ORE

(2) Fairfax (3)PremWatsa (4) R.Athappan (5) Chandran Ratnaswami (6)Paul Rivett (7) OARC (8)N. Athappan

Economic Offences Wing failed to lodge an FIR. KCP files CrI.O.P. No. 9791/2006 before the High Court for a direction. The High Court does not pass any orders and the Petition was subsequently dismissed as withdrawn.

Cr. No. 7 of 2007 Sections420, 109, 408, 409 r/w 120 Indian Penal Code, 1860

19.04.2007 Kangayem Police, Crime Branch

K.C.Palanisamy

(1) R.Athappan (2) G.Athappan (3) N.Athappan (4) Prem Watsa (5) Benn Watsa (6) Chandran Ratnaswami (7) Fairfax Financial Holdings (8)Hamblin Watsa Investment Council (9)OARC (10) ORE

Complaint was quashed by High Court. SLP No. 21069 & 21070/2010 filed by KCP against this order was dismissed on 22.11.2010

CrI.M.P. No. 6096 of 2007 Sections406, 420, 467 r/w. 120B Indian Penal Code, 1860

04.12.2007 Perundurai

K.C.Palanisamy

(1) Prem Watsa (2) Chandran Ratnaswami (3)R.Athappan (4) Fairfax (5)OARC (6)HamlinWatsa (7) Benn Watsa

Dismissed on 13.03.2007 after examining KCP, two witnesses and his documents

Cr. No. 238 of 2007 Sections406, 409, 420 r/w 120B Indian Penal Code, 1860

01.06.2007 Perundurai Police

Chennaiappan Gounder F/o.K.C.Palanisamy

(1) ORE (2)Hamblin Watsa Investment Council (3) ORE (4)Elevate Properties (P) Ltd., (5)R.Athappan (6) Chandran Ratnaswami (7)NandakumarAthappan (8)PremWatsa

Stayed by the High Court in CrI.O.P.19448 & 19449/2007 on 04.07.2007. The petitions are pending

Cr. No. 466 of 2007 Sections406, 409, 420, 471 Indian Penal Code, 1860

08.06.2007 Kangayem Police

Chennaiappan Gounder F/o.K.C.Palanisamy

(1) R.Athappan (2) Chandran Ratnaswami (3)OARC (4)PremWatsa (5) N.Athappan (6) Benn Watsa

Stayed by the High Court in Crl.O.P. No. 20886-20887/2007 on 12.07.2007. The petitions are pending.

(7) G.Athappan (8) Samblin Watsa Investment Council (9) ORE (10) Paul Rivett

Cr. No. 468 of 2007 Sections 406, 409, 420, 467, 468, 471, 472, 477 Indian Penal Code, 1860

09.06.2007 Kangayem Police

Chennaiappan Gounder F/o.K.C.Palanisamy

(1) R.Athappan (2) Chandran Ratnaswami (3) OARC (4) Prem Watsa (5) N.Athappan (6) Paul Rivett (7) G.Athappan (8) Hamblin Watsa Investment Council (9) ORE

Stayed by the High Court in Crl.O.P. No. 20888-20889 of 2007 on 12.07.2007. The petitions are pending.

41. It is in this factual background and proliferation of civil and criminal proceedings initiated by KCP, the learned single Judge held that Clause 22 of JVA containing arbitration clause has become inoperative. Learned single Judge took the view that

... parties are already engaged in Gorilla warfare of litigations at several locations and C.G. Holdings and KCP have made the arbitration agreement inoperative by resorting to a series of litigations before various Fora. Pointing out that the concept of holding the parties to their bargain and driving them to arbitration is based on the principle of "one-stop adjudication....

The learned Judge held that the arbitration is devised as an alternative dispute resolution mechanism and not as an additional dispute resolution mechanism. Thus, on the facts and materials and on the conduct of the parties, the learned single Judge held that by estoppel, abandonment and waiver, C.G. Holdings and KCP have rendered the arbitration clause inoperative.

42. Assailing the said findings, Mr. Karthik Seshadri, learned Counsel appearing for the Appellants has contended that Sections 397 and 398 of the Companies Act does not prohibit the invocation of the arbitration clause and it is a statutory remedy open to C.G. Holdings and KCP. The learned Counsel further contended that a statutory remedy is provided under the provisions of Sections 397 and 398 to shareholders, who are "oppressed" or complain of "mismanagement". Drawing our attention to C.P. No. 65 of 2005, the learned Counsel submitted that the actions complained of are the oppressive conduct of two joint venture partners viz., ORE and their nominee Chandran Ratnaswami and Athappan as well as the Board of the Company. The learned Counsel would further contend that none of the allegations in C.P. No. 65 of 2005 pertain to the claims of C.G. Holdings arising out of the contractual claims under the joint venture agreement and breach of Clause 9.1 of JVA. The learned Counsel further urged that the Petition filed by ORE Holdings in C.P. No. 76 of 2005 was similarly a Petition filed by the

shareholder against the other shareholders under Sections 397 and 398 of the Companies Act and merely because the Appellants participated in those proceedings, it would not take away the rights to invoke arbitration.

43. Mr. Karthik Seshadri, the learned Counsel for Appellants placed reliance upon the decision of Supreme Court in Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, to contend that the violations of contractual rights may be agitated by way of a civil suit and only in extra ordinary circumstances, would such matters be looked into by the Company Law Board u/s 397 of the Companies Act. The learned Counsel for the Appellants also placed reliance up on Sumitomo Corporation Vs. CDC Financial Services (Mauritius) Ltd. and Others, , wherein the Supreme Court approved the views taken by Company Law Board that the proceedings under Sections 397 and 398 of the Companies Act always relate to the affairs of the Company. Observing that the provisions of Sections 397/ 398 of the Companies Act can be invoked only if the disputes even among the shareholders or allegations against each other relate to the affairs of the Company, Supreme Court held as under:

21. As rightly observed by Company Law Board, the proceeding under Sections 397/398 of the Companies Act always relates to the affairs of the company. Insofar as the arbitration clause in JVA is concerned, to bind the Company it has to be a party to the arbitration agreement. It was pointed out that even though the Company is a party to JVA, No. arbitration has been provided for disputes between the shareholders and the Company or in relation to allegations in the affairs of the company.

44. In Sumitomo Corporation Vs. CDC Financial Services (Mauritius) Ltd. and Others, , at Paragraphs 18-23, the Hon"ble Supreme Court considered the disputes vis-a-vis the arbitration clause. The Hon"ble Supreme Court concluded that as parties to the dispute were not parties to the arbitration clause and hence the matter need not be referred. The Apex Court considered the dispute vis-a-vis the arbitration clause and refused to refer the parties to the arbitration on the ground that the Company therein was not a party to the arbitration agreement and hence the matter was not sent to arbitration. In the said judgment, in paragraph No. 23, the Supreme Court held as under:

23. CLB, on analysing those relevant aspects, concluded that the grievances of the Petitioners therein (the contesting Respondents) fall squarely in the affairs of the Company and since No. arbitration has been provided in regard to the disputes between PTL and the Company, there is No. arbitration agreement at all between the Company and PTL in JVA to refer the parties to arbitration. CLB has also concluded that Petitioners 2-5 therein are not parties to either of the two agreements. Based on the above factual aspects, CLB has concluded that there is No. commonalities of parties and considering all the relevant aspects arrived at a conclusion that the application deserves to be dismissed on the main ground that the Company in the affairs of which application has been filed, is not a party to the arbitration agreement in JVA and Petitioners 2 to 5 therein were not parties

to JVA or SPA could also independently prosecute the said petition as they satisfy the requirements of Section 399 and finally, the arbitral forum is not specific.

The learned Counsel for Appellants Mr. Karthik Seshadri contended that the conclusions of the Supreme Court do not indicate that the relief u/s 397/398 of the Companies Act is a statutory right incapable of being referred to arbitration. On the contrary, the Hon'ble Supreme Court only looked into the dispute, parties to the dispute and the arbitration clause and concluded that the parties to the dispute were parties to the arbitration clause and therefore the matter need not be referred to arbitration.

45. The learned Counsel for the Appellant also placed reliance upon a decision of Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., contending that the statutory rights conferred under the Companies Act cannot be referred to arbitration. The said case pertains to winding up of the Company, which involves a special procedure to be followed by the Official Liquidator appointed by the Court and does not involve the adjudication of disputes between the parties. As discussed infra, the basis on which the arbitration was sought for has been the subject matter of dispute both before the Company Law Board and in various other litigations. Hence, the above judgment has No. application to the facts of this case.

46. The learned Counsel for Appellants contended that the Company Law Board dealt with only the issues pertaining to the oppression and mismanagement of CEPL and the larger issues are to be determined. Holding that bifurcation of cause of action i.e., subject matter of cause of suit or in some cases, bifurcation of suit between the parties, who are parties to arbitration agreement, is not permissible, in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , the Supreme Court held as under:

16. The next question which requires consideration is - even if there is No. provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and Ors. is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is No. such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on

occasions there is possibility of conflicting judgments and orders by two different forums.

47. Clause 9.1 of JVA deals with Financing of the Company and Profit Distribution. As per Clause 9.1, OARC has to secure syndicated credit facility by a corporate guarantee and as security for the grant of corporate guarantee by OARC: (i) each of C.G. Holdings and Athappan shall pledge all right, title and interest in their Shares of VML in favour of OARC; (ii) Palanisamy and his Affiliates shall pledge all of their right, title and interest in equity shares of Unaitted Plantations in favour of OARC and (iii) Athappan shall pledge all the shares and other interests subscribed to, or/held by him in Unaitted Plantations and Unaitted Builders & Consultants Limited. The grievance of the Appellants is that there was breach of Clause 9.1 of JVA as OARC failed to bring in the syndicated credit facility to the tune of Rs. 300 Crores and OARC and Fairfax Group had committed breach of Clause 9.1. Further grievance of the Appellants is that Ramasamy Athappan should have been an independent person, but he was actually part of Fairfax Group and therefore the Plaintiffs also have committed breach of Clause 9.1 and also Clause 24.3 of JVA. The learned Counsel for Appellants contended that in C.P. No. 65 of 2005, the Company Law Board has only dealt with the matters pertaining to oppression and mismanagement alleged by the shareholders and none of the allegations in C.P. No. 65 of 2005 pertain to the claims of C.G. Holdings and KCP arisen out of the contractual claims of JVA and the breach of terms of JVA.

48. The Company Law Board observed that "nevertheless the grievances on account of non-issue of corporate guarantee by OARC are not remedial u/s 397/398 for the reasons already recorded." Laying emphasis upon the said findings of Company Law Board, Mr. Karthik Seshadri, the learned Counsel for Appellants contended that the said view of Company Law Board clearly shows that Company Law Board has not dealt with all the issues arising out of the contractual breaches and Company Law Board has imposed a restriction on itself based on the decisions of the Supreme Court that it will not decide the issues arising out of contractual breaches and has directed the parties to work out their rights in accordance with Article 22 of JVA viz., arbitration clause. It was therefore contended that when the Company Law Board itself was of the view that the issues could be raised only before arbitration, learned judge was not right in saying that Company Law Board has finally resolved the dispute between the parties.

49. Onbehalf of the Appellants, reliance was placed upon the observations of the Company Law Board that the issues are to be agitated only before the Arbitral Tribunal as per Clause 22 of JVA. The learned Counsel for the Respondents contends that the Appellants cannot take advantage of the said observation of the Company Law Board in its order dated 13.8.2008. Onbehalf of the Respondents, it was contended that as per the procedure, a party seeking leave of the Court to arbitrate on the same cause of action ought to file an application

under Order 2 Rule 2 CPC In that application, the contesting parties ought to be given an opportunity to agitate as to why they should not be vexed again on the same cause of action. The Appellants have not filed any such application under Order 2 Rule 2 Code of CPC before the Company Law board and CLB also has not granted such specific relief to pursue the matter before the arbitration. The effect of the final order passed by Company Law Board is to "end" the grievances of C.G. Holdings and KCP and ORE and Athappan. When all the grievances were considered and final orders were passed by the Company Law Board, the Appellants cannot seek to re-agitate the issue and some other issues allegedly raised by them.

50. As held by the Supreme Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , by bifurcation of suit into two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court (Company Law Board), it would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such litigation. The Company Law Board having passed an order for smooth exit of ORE and N.K. Athappan by directing CEPL to return the money along with interest, the observation of Company Law Board is contrary to the principles laid down by the Honourable Supreme Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, .

51. The learned Counsel for the Appellants mainly placed reliance upon the observation of the Company Law Board that none of the complaints made as regards violation of contractual rights derived from JVA can be agitated in a proceeding u/s 397 of the Act, but only in a Civil Court. Much reliance was also placed upon the observations of Company Law Board that the grievance of KCP or ORE on account of the purported breach of the terms of JVA are not amenable to the jurisdiction of the Company Law Board and that Clause 22 of JVA provides for dispute resolution mechanism in settling any differences arising between the parties in respect of implementation of the JVA. The learned Counsel for Appellants further contended that when Company Law Board itself has left open the issues as regards violation of contractual rights to be determined by arbitration in terms of Clause 22 of the JVA, the learned single Judge erred in holding that the arbitration clause has become inoperative.

52. Breach of Clause 9.1 of JVA is alleged mainly on the ground of non-issuance of a corporate guarantee by OARC to secure syndicated credit facility in terms of the JVA. It is pertinent to note that the controversies raised in relation to non-issuance of a corporate guarantee by OARC in securing a syndicated credit facility in terms of JVA has been dealt with by the Company Law Board, wherein the Company Law Board held that the said issue has been set at rest in view of the explicit acknowledgment reflected in the annual report of Odyssey Re Holding Corporation for the years 2005 and 2006. We may usefully refer to the said annual report of Odyssey Re Holding Corporation for the years 2005-2006, which has been extracted in the order of the Company Law Board, which reads as

under:

The Company organised O.R.E. Holdings Limited ("ORE"), a corporation domiciled in Mauritius, on December 30, 2003 to act as holding company for various investments in India. On January, 29, 2004, ORE was capitalized by the Company in the amount of \$ 16.7 million. ORE is consolidated in the Company's consolidated financial statements. During 2004, ORE entered into a joint venture agreement relating to the purchase by ORE of 45 of Cheran Enterprises Private Limited ("CEPL"). CEPL is a corporation domiciled in India, engaged in the purchase, development and sale of commercial real estate properties. The joint venture agreement governing CEPL contains a provision whereby Odyssey America could be called upon to provide a guarantee of a credit facility, if such facility were established by CEPL in an amount up to \$ 65.0 million for the funding of proposed developments. The credit facility has not been established as of December 31, 2005. {"The credit agreement was never established," (as found in the annual report for the year ending 2006)} and the requisite conditions for any future provision for the guarantee No. longer exist. ORE's Indian joint venture partner is claiming that the guarantee should be available and is pursuing legal actions against the Company. The Company finds this claim without merit and is vigorously defending the legal actions.

53. As pointed out by the Company Law Board, it is on record that G.E.Commercial Finance, Gurgaon had sanctioned in terms of its communication dated 13.9.2004 in favour of CEPL a term loan of USD 66 million for the purpose of working capital finance, capital expenses and investment in subsidiaries on the terms and conditions specified therein. The Company Law Board upon analysis of the entire matter framed various points for consideration. In so far as the grant of corporate guarantee by OARC, Company Law Board framed the following point for consideration:

CG Holdings and Athappan should pledge heir shares and shares in VML in favour of OARC; KCP and his affiliates should pledge their right in their partnership interest in UBC and pledge their equity shares of UPL; and Athappan should pledge his interest in UPL and UBC, as security for the grant of Corporate Guarantee by OARC for the syndicated credit facility which may be obtained by CEPL (clause 9.1)

The contention raised on the grant of corporate guarantee by OARC has been elaborately considered by the Company Law Board.

54. On analysis of various aspects, Company Law Board concluded that it was No. longer possible for the parties to carry out joint venture business of CEPL as per the terms of JVA. Only to have smooth exit of ORE and Athappan, the Company Law Board passed the order directing CEPL to repay Rs. 75 Crores and Rs. 4 Crores invested by ORE Holdings and Athappan respectively. By perusal of the order of Company Law Board, in our considered view, Company Law Board has elaborately gone into the issues arisen between the parties even though

those objections were filed under Sections 397 and 398 of the Companies Act. As demonstrated *infra*, there are commonality of issues raised in both the Company Petitions, O.S. No. 90 of 2007 and the Petition filed before I.C.C. seeking for arbitration.

55. Criminal Cases: The learned Counsel for Appellants Mr. Karthik Seshadri contended that the purport of the criminal proceedings are different and initiating of criminal complaints does not amount to waiver of arbitration. of course, a party does not waive his right to invoke arbitration by filing criminal complaints. But what is relevant is the allegations in the plethora of criminal complaints filed at the instance of the Appellants/father of KCP/ Respondents. Both parties have made serious allegations of cheating, forgery, falsification of records, etc., against one another. Even before the arbitral Tribunal, the same allegations are made. The Honourable Supreme Court and the Madras High Court have held that the arbitration is not the appropriate forum if allegations of fraud, misappropriation and complicated facts are involved.

56. The learned Counsel appearing for the Appellants contended that Courts readily held that in cases, where substantial questions of law arise for consideration or issues which require serious consideration of evidence relating to fraud and misrepresentation are involved, such cases are best left to the Civil Court. In support of his contention, the learned Counsel also placed reliance upon a decision of the Supreme Court in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, wherein the Supreme Court had enlisted the following five grounds for revoking the contract of arbitration in a matter arising under the Arbitration Act, 1940:

- (i) Excess or refusal of jurisdiction by arbitrator,
- (ii) Misconduct of arbitrator,
- (iii) Disqualification of arbitrator,
- (iv) Charges of fraud,
- (v) Exceptional cases.

The Supreme Court thus clearly held that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference.

57. Holding that where there are serious allegations of fraud and serious malpractices on the part of the parties, such a situation can only be settled in Court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator, the Supreme Court in *N. Radhakrishnan Vs. Maestro Engineers and Others*, the Supreme Court held as under:

23.... In this connection, reliance was placed on a decision of this Court in Abdul Kadir Shamsuddin Bubre Vs. Madhav Prabhakar Oak, in which this Court under para 17 held as under:

17. There is No. doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference.

In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the abovementioned case, the facts of the present case do not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.

24. This view has been further enunciated and affirmed by this Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , wherein this Court under para 4 observed:

4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

25. ...

The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

...Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations, etc., and therefore application for reference to arbitrator is liable to be rejected.

The ratio of the above decision squarely applies to the case on hand. In the present case, the Respondents have made serious allegations of diverting of money, misappropriation and criminal breach of trust, which, in our opinion, cannot be properly dealt with by the arbitrator.

58. O.S. No. 90 of 2007 was instituted by VML, CPL and KCP against Nandakumar Athappan, Athappan Ramaswami, CEPL, Unaitted Plantations, Unaitted Builders & Consultants Limited. The prayer in O.S. No. 90 of 2007 is to declare the allotment of shares in favour of Nandakumar Athappan at the instance of Ramaswami Athappan in VML, CPL, CEPL, Unaitted Plantations, Unaitted Builders & Consultants Limited is null and void and tainted by fraud and

misrepresentation. Mr. Karthik Seshadri, learned Counsel for Appellants contended that cause of action for O.S. No. 90 of 2007 arose out of allotment of shares made in the said Companies even prior to JVA dated 30.1.2004 and the said suit does not emanate from JVA dated 30.1.2004 in which there are several other parties and in which the arbitration clause is incorporated. It was further submitted that by the letter dated 17.8.2006 itself, the Appellants had invoked the arbitration in Article 22.3 of JVA and written to Plaintiffs concerning the appointment of arbitrator and therefore learned single Judge erred in arriving at the conclusion that O.S. No. 90 of 2007 would be a bar for proceeding with arbitration before I.C.C.

59. Reiterating the above submissions, Mr. V. Lakshminarayanan, the learned Counsel for VML would also contend that O.S. No. 90 of 2007 pertains to the allotment of shares to Nandakumar Athappan in VML, CPL, Unaitted Plantations and Unaitted Builders & Consultants Limited, which is much prior to JVA dated 30.1.2004 and while so the learned single Judge erred in saying that the issues involved in O.S. No. 90 of 2007 are the same as that of the issues sought to be raised in the arbitration before the ICC.

60. The above contention does not merit acceptance. In O.S. No. 90 of 2007, the prayer is to declare the allotment of shares to Nandakumar Athappan at the instance of Ramaswamy Athappan in CEPL, VML and CPL is tainted with fraud and misrepresentation and also null and void. Even though the allotment of shares challenged in O.S. No. 90 of 2007 is stated to be prior to JVA, by a careful reading of O.S. No. 90 of 2007, it is seen that almost the entire plaint averments revolve around JVA dated 30.1.2004, the alleged breach in failure to bringing in the syndicated credit facility to the tune of Rs. 300 Crores and breach of Clause 9.1 of JVA. By a careful comparative reading of the averments in O.S. No. 90 of 2007 and C.P. No. 65 of 2005, we find that the averments in O.S. No. 90 of 2007 are verbatim same as that of other averments in C.P. No. 65 of 2005. Likewise, the averments in the Reference before ICC also revolves around JVA viz., the alleged non-providing of syndicated credit facility and the alleged breach of Clause 9.1 of JVA.

61. Taking us through the averments in C.P. No. 65 of 2005 and O.S. No. 90 of 2007 and also the Petition filed before ICC requesting for reference to arbitration, the learned Counsel for Respondents 1 and 2/ Plaintiffs Mr. Sivam Sivanandaraj submitted that the entire dispute that is now sought to be referred to arbitration has already been placed for adjudication in C.P. No. 65 of 2005 and before District Munsif's Court, Kangeyam in O.S. No. 90 of 2007. It was further contended that the facts, issues and the entire dispute alleged before the Arbitral forum are the same as alleged in the Civil Suit filed before the District Munsif's Court, Kangeyam (O.S. No. 90 of 2007) and the Company Petition - C.P. No. 65 of 2005 filed before the Company Law Board.

62. Per contra, refuting the above contentions, Mr. Karthik Seshadri, learned Counsel for the Appellants contended that there was No. commonality of issues

and commonality of parties and both the Company Law board as well as the District Munsif's Court, Kangeyam have No. competence of jurisdiction to determine the multifarious issues raised by the parties. The learned Counsel would further contend that in any event, C.G. Holdings was not a party in O.S. No. 90 of 2007 and therefore the learned single Judge was not right in saying that O.S. No. 90 of 2007 would be a bar to the Appellant/C.G. Holdings to proceed with the arbitration.

63. Mr. V.Lakshminaranayanan, learned Counsel would also contend that the larger issues cannot be resolved before the District Munsif's Court, Kangeyam. It was further submitted that by holding that Article 22.3 of JVA viz., Arbitration clause has become inoperative, the learned single judge shut the opportunity to VML as well as CPL to agitate the larger issues before the appropriate forum.

64. There is No. merit in the contention that C.G. Holdings, being not a party in O.S. No. 90 of 2007, could not effectively adjudicate upon the issues in O.S. No. 90 of 2007. A Company is a legal personality entirely distinct from its members. In certain exceptional case, Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the corporate entity. For instance, Court has power to lift the corporate veil if it is used for tax evasion or to circumvent tax obligation. The principle of lifting or piercing a veil is also applicable to cases of holding company - subsidiary relations, where insptie of there being separate legal personalities, the facts and circumstances show that they are in reality parts of one concern owned by a parent company or a group as a holder. Applying the ratio of the decision of Jai Narain Parasrampuriah (Dead) and Others Vs. Pushpa Devi Saraf and Others, , the Company Law Board held that CCL is nothing but an extended arm of KCP.

65. If we lift the corporate veil, we find that the Companies - VML, CPL, C.G. Holdings, CCL and number of other Companies were promoted only by KCP. At this juncture, it is pertinent to note that in the JVA dated 30.1.2004, KCP only has signed as a Director of C.G. Holdings as well as VML and CPL and CEPL. Lifting the corporate veil and applying the ratio of the decision of Jai Narain Parasrampuriah (Dead) and Others Vs. Pushpa Devi Saraf and Others, , we find that VML, CPL and C.G. Holdings are one group of Companies promoted by KCP.

66. In the joint venture Company - CEPL, KCP is a nominee of C.G. Holdings in his individual capacity and he is the third Plaintiff in O.S. No. 90 of 2007. When VML, CPL and KCP are pursuing the suit - O.S. No. 90 of 2007, C.G. Holdings cannot contend that they do not have the opportunity of adjudicating the various issues raised by it.

67. By a careful comparative reading of C.P. No. 65 of 2005, O.S. No. 90 of 2007 and the "Request for Arbitration", we find that the facts and issues are identical. Though the prayer sought for in the "Request for Arbitration" is worded differently, the averments are almost the same as that of the averments in C.P. No. 65 of 2005 and O.S. No. 90 of 2007 and the "Request for Arbitration" contain

the acts: (i) business proposal; (ii) Toronto meeting; (iii) Incorporation of CEPL; (iv) discussion of terms; (v) joint venture agreement; (vi) alleged non-providing of syndicated credit facility by OARC; ((vii) DAIL investment and (viii) 21/22.9.2005 Board meeting. Likewise, in C.P. No. 65 of 2005 and O.S. No. 90 of 2007, the issues raised are: (i) Athappan promised to always support KCP, but in reality, Athappan was an employee of ORE and hence the entire JVA is fraudulent; (ii) Athappans promised to bring in syndicated credit facility of USD 65 Million equivalent to Rs. 300 Crores but failed to do so; and (iii) intention of ORE and Athappans was to grab the immovable properties.

68. The averments in the "Request for Arbitration" revolved around the same issues and prayer sought for is also almost identical. The prayer sought for in the "Request for Arbitration" is (i) declaration that the JVA is vitiated by misrepresentation on the part of the Respondents; (ii) award directing the 4th Respondent - CEPL to forthwith transfer the title to the real Estate of C.G. Holdings or its order; (iii) award directing the Respondents to pay damages for all losses suffered by C.G. Holdings by reason of Respondents' breach of JVA and/or misrepresentations.

69. As discussed earlier, various acts referred to, issues and prayers made before the arbitral forum are the same and are also raised before the various Fora viz., O.S. No. 90 of 2007 on the file of District Munsif's Court, Kangeyam, C.P. No. 65 of 2005 before the Company Law Board, Southern Region Bench, Chennai and the counter statement filed in C.P. No. 76 of 2005. Considering entire matter, Company Law Board has decided most of the issues and passed the Order directing return of moneys invested by Athappans and ORE to enable smooth exit of Athappan and ORE. It is in this factual scenario the learned single Judge held that the Appellants by their conduct engaged in pitched battle of litigation with the Respondents and hence Article 22.3 of JVA - arbitration clause has become inoperative.

70. Request for Arbitration: After raising the dispute in C.P. No. 65 of 2005 and also contesting C.P. No. 76 of 2005, proposing to initiate arbitration before ICC, on 14.8.2006, C.G. Holdings issued letter to Nandakumar Athappan stating that as per Clause 22 of JVA, C.G. Holdings and Athappan are to jointly appoint an arbitrator. In the said letter, C.G. Holdings proposed the names of Lord Steyn or Sir Anthony Evans as arbitrators and called upon N.Athappan to select any one of them as arbitrator. On 21.8.2006, N.Athappan through his counsel issued a preliminary response stating that as per the Arbitration Clause 22.3 in the JVA he has 45 days time to respond to such a request and also stated that he has No. knowledge of both the persons proposed. On 25.8.2006, KCP issued a further letter annexing copy of the Biodata particulars of Lord Steyn or Sir Anthony Evans and stating that if N.Athappan does not revert back within 7 days, he would proceed with initiation of arbitration proceedings. On 2.9.2006, N.Athappan issued a letter stating that in view of the fact that instead of arbitrating, KCP had also initiated C.P. No. 65 of 2005 and also defending C.P.

No. 76 of 2005 on merits and therefore KCP has waived his right to arbitrate and N.Athappan refused for appointing the above stated arbitrators. To the said letter, there was No. response from KCP or C.G. Holdings.

71. After receiving the said letter from N.Athappan refusing to submit to arbitration, KCP filed number of criminal complaints as stated in paragraph No. 40 between December 2005 to June 2009. CPL, VML and KCP have also filed O.S. No. 90 of 2007 before the District Munsif's Court, Kangeyam on the same facts as C.P. No. 65 of 2005. After one year, KCP's father - Chenniappan also filed criminal complaints against R.Athappan, Chandran Ratnaswami, OARC and others. One year after Athappans letter stating that KCP and C.G. Holdings had waived their right to arbitrate and while C.P. Nos. 65 and 76 of 2005 before the Company Law Board and O.S. No. 90 of 2007 on the file of District Munsif, Kangeyam are pending, on 12.9.2007, C.G. Holdings and KCP filed a "Request for Arbitration" before ICC praying for (i) declaration that the JVA is vitiated by misrepresentation on the part of the Respondents; (ii) transfer of immovable properties to C.G. Holdings and KCP and (iii) damages against ORE, OARC and Athappans for breach of JVA and/or misrepresentation. On 24.10.2007 the Athappans wrote to ICC requesting time to respond to the "Request for Arbitration". In paragraph 4.1 of their response, Athappans stated that request for extension of time to send the response should not be regarded as submission to the arbitration and saying so, Athappans reserved their rights. On 26.11.2007, Athappans sent a detailed reply to ICC refusing to submit to arbitration and they have also raised preliminary grounds of objection and called upon ICC Court to reject the "Request for arbitration" under Article 6(2) of ICC Rules. By their letter dated 28.11.2007, ORE also responded to the "Request for Arbitration". In Paragraph 1.4 and 1.5 of their response, ORE clearly stated that arbitration has been waived by the conduct of parties and hence Arbitral Tribunal (ICC) does not have jurisdiction to entertain the dispute. ICC proceeded to constitute the Tribunal. In response to the constitution of Arbitral Tribunal, on 27.12.2007, Athappans sent a further reply to ICC citing various judgments in support of their contentions and stating that the parties have waived their right to arbitration. In Paragraph 2 of the response, Athappans raised objection to the very initiation of arbitration. However, in Paragraph 4, it was stated that if the Court/ICC is inclined to order that the arbitration has to be proceeded, then to grant Athappans an opportunity to make oral submissions before final decision is arrived at. On 1.2.2008, ICC sent a letter to Athappans stating that it had decided to proceed with the arbitration proceedings and called upon the parties to comment upon the same. By their letter dated 19.2.2008, Athappans clearly stated that they do not submit to the jurisdiction of any Arbitral Tribunal that is appointed by ICC and requested two weeks further time to appropriately respond to the proposed action by ICC. By the letter dated 26.2.2008, ICC granted two weeks time to respond to the decision to proceed with the arbitration. It was thereafter Suit -C.S. No. 257 of 2008 came to be filed on 7.3.2008 and interim injunction was obtained restraining C.G.Holdings and KCP from proceeding with

arbitration.

72. Re-contention on Request for Arbitration: Contention of Appellants is that at No. point of time, C.G. Holdings and KCP have waived their right to invoke arbitration clause and that they have filed O.P. No. 279 of 2005 before Coimbatore District Court u/s 9 of the Arbitration and Conciliation Act for interim reliefs and the same was contested by Athappans and ORE on the ground of territorial jurisdiction.. The learned Counsel for Appellants contended that the Appellants issued notice to the Plaintiffs as early as 14.8.2006 to join them in the appointment of arbitrators and the sequence of correspondence thereafter exchanged between 6th and 10th Defendants on the one hand and the Plaintiffs on the other hand would clearly demonstrate vacillating stand being adopted by the Plaintiffs. Taking us through the above said correspondence, the learned Counsel for Appellants contended that the sequence of the events will clearly show that at all material points of time, right from the commencement of the disputes, C.G. Holdings and KCP, by their actions and conduct have unequivocally communicated their intentions to proceed with the arbitration before the ICC. It was further submitted that only the Plaintiffs are attempting to frustrate the entire process of arbitration first by refusing to join in the appointment, second by filing objections before ICC and finally by filing the present suit - C.S. No. 257 of 2008.

73. There is No. force in the contention that Plaintiffs were attempting to frustrate the arbitration. In their letter dated 2.9.2006, Athappans clearly stated that in view of filing of C.P. Nos. 65 and 76 of 2005, KCP has waived the right to arbitrate and hence Athappans were refusing to appoint arbitrators. As rightly contended by learned Counsel for Plaintiffs, there was No. response from C.G. Holdings or KCP to the said letter dated 2.9.2006. Even while KCP was hotly pursuing the Petitions before the Company Law Board and lodging various criminal complaints for nearly about one year, seldom there was any action to take further steps to initiate arbitration. Interestingly, KCP along with CPL and VML filed suit - O.S. No. 90 of 2007 on 23.1.2007.

74. As per Article 4, the date on which the Request concerned is received by the Secretary shall be the date of commencement of the arbitral proceedings. Article 4(1) and 4(2) of Rules of Arbitration of ICC reads as under:

Article 4

Request for Arbitration

1. A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the "Request") to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt.

2. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral

proceedings.

75. As pointed out earlier, in the present case, "Request for Arbitration" is dated 12.9.2007 and as per Article 4, the said date shall be deemed to be the date of commencement of arbitral proceedings. In September 2007, C.P. Nos. 65 of 2005 and 76 of 2005 were also being hotly contested by all parties to the JVA and the suit - O.S. No. 90 of 2007 also came to be filed even before the "Request for Arbitration". Upon analysis of the materials, the learned single Judge rightly held that all parties have unequivocally demonstrated that they have waived the arbitration clause.

76. The learned Counsel for Appellants Mr. Karthik Seshadri contended that to invoke waiver, it would be necessary for the Plaintiffs to show that C.G. Holdings and KCP have acted in such a manner that the Plaintiffs were entitled to assume that the Defendants have in fact waived and given up their right to arbitrate and such an assumption cannot easily be inferred. The learned Counsel would further contend that to constitute a waiver, there must be an intentional relinquishment of known right or voluntary relinquishment or abandonment of a known existing legal right or conduct such as warrants inference of relinquishment of known right or privilege. In support of his contention, the learned Counsel placed reliance upon the decision of Supreme Court in A.P. SRTC v. S. JAYARAM (2004) 13 SCC 792). In the said decision, referring to Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, , the Supreme Court has held that to constitute waiver, there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right or conduct such as warrants an inference of the relinquishment of a known right or privilege.

77. Reliance was also placed up on ALLIED MARINE TRANSPORT LTD. v. VALE DO RIO DOCE NA VEGACAO, S.A. (1985 1 WLR 925), wherein after considering the question of appointment of arbitrators followed by prolonged inactivity of parties, the Court of Appeal held as under:

That silence and inactivity were of their very nature equivocal and could not therefore of themselves constitute an unequivocal representation for the purposes of invoking the principle of equitable estoppel; that moreover, there was No. evidence that in failing to take steps to prepare their case, the owners had acted in reliance on any representation made by the characters; and that, accordingly the characters were not estopped from pursuing their claim and the associated reference to arbitration (post, pp.937-DE, 941A-D).

Reliance was also placed by the learned Counsel on the decisions of Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd., , Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd., and WORLD PRIDE SHIPPING LTD. v. DAIICHI CHUO KISEN KAISHA (1984 2 LLOYDS REPORT 489).

78. The learned Counsel for Appellants Mr. Karthik Seshadri has further contended that in this case such an assumption cannot be inferred since KCP and

C.G. Holdings filed application u/s 9 (O.P. No. 279 of 2005) before District Court, Coimbatore. It was further urged that after filing C.P. No. 65 of 2005 before the Company Law Board followed the request to appoint arbitrator on 14.8.2006 and even thereafter, C.G. Holdings and KCP were pursuing the matter to initiate arbitration proceedings. The learned Counsel would further contend that filing of criminal complaints and any investigation thereafter is a matter of public policy and initiating criminal complaints therefore can never give rise to the conclusion that it constituted waiver or abandonment or estoppel. Placing reliance upon the decisions of *TRISUNS CHEMICAL INDUSTRY v. RAJESH AGARWAL and Ors.* (1999) 8 SCC 636) and *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, , it was contended that the learned Judge erred in finding that the filing of criminal complaints would constitute waiver or abandonment.

79. Assailing the findings of learned single Judge as to estoppel, on behalf of Appellants, it was contended that estoppel requires an unequivocal communication/representation by one party to another and acted upon by the other that the arbitration agreement is put to an end and that representation must be unequivocal. The learned Counsel urged that there was No. communication or act of C.G. Holdings and KCP right through which can estop them from invoking arbitration clause. Laying emphasis upon filing of application u/s 9 of the Arbitration and Conciliation Act in O.P. No. 279 of 2005 and notice dated 14.8.2006, the learned Counsel contended that right from the beginning, C.G. Holdings and KCP have communicated their unequivocal intention to go for arbitration and while so the learned single Judge erred in saying that by their acts or conduct, C.G. Holdings has waived/abandoned its right to arbitrate.

80. Per contra, the learned Counsel for Plaintiffs Mr. Sivam Sivanandaraj contended that all the issues raised before the Arbitrator are the predominant issues in O.S. No. 90 of 2007 and also considered in Company Petitions. It was further submitted that the filing C.P. No. 65 of 2005 and hotly contesting C.P. Nos. 76 of 2005 and defending C.P. No. 76 of 2005 and filing number of criminal complaints would amount to waiver of right to arbitrate and the learned single Judge rightly held that the conduct of parties warrants inference of relinquishment of a known right. In support of his contention, the learned Counsel placed reliance up on *VO TRACTOR EXPORT v. TARAPORE and COMPANY and Anr.*, wherein the Honourable Supreme Court held that arbitration proceedings and civil suits cannot be agitated side by side. It was therefore contended that when O.S. No. 90 of 2007 and C.S. No. 257 of 2007 are pending, ICC Arbitration cannot be permitted to proceed simultaneously.

81. For waiver, there must be intentional or voluntary abandonment of a known right. It may be either express or implied from the conduct, but its basic requirement is that it must be an intentional act being fully informed as to his rights and with full knowledge of such right. *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, . Reliance was also placed upon a decision of a single Judge of the Karnataka High Court in *RAMAKRISHNA*

THEATRE LTD. v. GENERAL INVESTMENTS and COMMERCIAL CORPORATION LTD, (AIR 2003 KAR 502). Waiver of the right to arbitration however cannot be easily assumed. It requires an unequivocal demonstration of intent to waive. After extracting passage from O.P.Malhotra's Law and Practice of Arbitration and Conciliation, the learned Judge has well considered the aspect of waiver.

82. Having seen the letter dated 14.8.2006 from C.G. Holdings stating that as per Clause 22 of JVA, Athappans are to jointly appoint arbitrator and after Athappans sent response (2.9.2006) stating that KCP has waived his right to arbitrate, KCP thereafter did not further pursue the matter to initiate arbitration proceedings till 12.9.2007. The flow of events and conduct of KCP and circumstances would clearly show that by filing O.S. No. 90 of 2007 and by hotly contesting the Company Petitions and filing number of criminal complaints, C.G. Holdings and KCP have waived their right to arbitrate. A right once waived by a party in respect of the course to be adopted for settlement of a dispute between himself and the other side is lost for ever and cannot be reclaimed or re-agitated later on, on being visited by the consequences that followed such waiver of the right to a specific course to which he was entitled to as a matter of right. The Party, who had waived his right to settle the dispute in an arbitration proceedings, cannot be permitted to turn around and contend that he is entitled to the remedy of arbitration.

83. Re-Contention: Various issues need to be arbitrated upon: Mr. Karthik Seshadri the learned Counsel for Appellants contended that there are several issues that have arisen out of JVA viz., breach of Clause 9.2 of JVA (Syndicated credit facility by OARC); effect of the investments in DAIL through the Joint Venture Company; effect of the business plan in Clause 11 that was presented to the Board of Joint Venture Company, consequences of various decisions to invest in Sporting Pastime India Limited to acquire large extent of properties and the breach by Joint Venture partners in providing requisite support thereof. It was contended that those issues are larger issues that require a lot of oral and documentary evidence to be placed; examination of witnesses, cross examination, discovery process for getting documents and none of the aforesaid has been done in any proceedings so far and only the arbitrators will be in a position to evaluate the entire facts, documents, evidence presented and give a just and proper decision. It was also urged that in the light of allegations that KCP had misappropriated funds belonging to the Joint Venture Company and are stoutly denied by KCP and these issues are to be arbitrated upon.

84. By a careful reading of the order of Company Law Board in C.P. Nos. 65 and 76 of 2005, it is clear that the alleged breach of Clause 9.2 has been elaborately dealt with. Company Law Board dealt with not only the issues pertaining to the oppression and mismanagement of CEPL and also the larger issues arising between the parties. Only to ensure smooth exit of ORE and Athappan, the order dated 13.8.2008 came to be passed by the Company Law Board. It is pertinent to note that KCP had not challenged the said order of Company Law Board.

85. Per contra, KCP had sent a letter dated 20.8.2008 to the counsel on record for the Plaintiffs stating that in compliance with the Order passed by Company Law Board offering to pay the amount to N.Athappan to the tune of Rs. 4 Crores with interest at the rate of 8 percent per annum calculated at Rs. 545.52 lakhs as the sum refundable. Later KCP chosen to file C.A. No. 154 of 2008 seeking certain modification in respect of Rs. 20 Crores in fixed deposit T.D.R. No. 759413 dated 14.10.2005 lying with the State Bank of India, Erode Branch. This again indicates that KCP had chosen to comply with the order of the CLB and see that Athappans and ORE make smooth exit.

86. Since most of the issues sought to be raised in the arbitration were already raised and resolved by the company Law Board and when the Company Law Board has passed the order to ensure smooth exit of Athappan and ORE, the Appellants now cannot contend that larger issues need to be raised before the arbitration.

87. In so far as the contention of the Appellants regarding the investment in Sporting Pastime India Limited, it pertains to the loan advanced by OARC, which is not a party to the JVA. The investment in Sporting Pastime India Limited itself is the subject matter of several rounds of litigations with Kasthuri and Sons with whom KCP had entered into agreement. That apart, it is also the subject matter of litigation in the Delhi High Court in C.P. No. 292 of 2004.

88. Re-Contention: Only Arbitral Tribunal has the power under ICC to decide its own jurisdiction - Civil Suit is not maintainable:

Plaintiffs filed suit - C.S. No. 257 of 2008 seeking for declaration that the arbitration agreement contained in Article 22 of the JVA dated 30.1.2004 is null and void, inoperative and incapable of performance and also for permanent injunction restraining the Appellants from proceeding with the arbitration proceedings under Reference No. 15174/JEM.

89. The learned Counsel for Appellants Mr. Karthik Seshadri has contended that such a suit seeking declaration that Article 22 - Arbitration Clause in JVA is null and void and is not maintainable in view of Article 6(2) of ICC Rules. As pointed out earlier, on 12.9.2007, Appellants made "Request for Arbitration". By the letter dated 24.10.2007, the Plaintiffs sought extension of time to file answer to the Request for Arbitration. On 26.11.2007, the Plaintiffs sent their response impugning the validity of proposed arbitration proceedings on the grounds:

- (i) arbitration proceedings are barred by the principle of Res sub judice;
- (ii) Extinguishment of arbitration agreement by waiver, estoppel, abandonment and frustration;
- (iii) Claimant/C.G. Holdings are barred by Section 16 of the Specific Relief Act from enforcing the arbitration agreement against the Respondents.
- (iv) Claim of any "Request for Arbitration" on the ground that JVA dated

30.1.2004 is null and void, disentitles the claimant/C.G. Holdings from seeking arbitration. Complicated issues of facts are involved and hence the dispute is not arbitrable.

90. Article 6 of ICC Rules deals with "Effect of the Arbitration Agreement. Article 6(1) reads as under:

Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

Articles 6(2) and 6(3) deal with instances where the Respondent failed to file an Answer to refuse to take part in the arbitration proceedings. Article 6(4) stipulates that the arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent. Articles 6(2) to 6(4) reads as under:

(2) If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed in such a case, any party returns the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

3. If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

4. Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

91. The Plaintiffs sent a detailed response to the Request for Arbitration and requested ICC to exercise powers under Article 6(2) of the ICC Rules of Arbitration and refuse to permit the arbitration to proceed. Upon consideration of the Request for Arbitration and the response sent by the Plaintiffs, the ICC proceeded to appoint Prof. James Crawford as co-arbitrator on behalf of C.G. Holdings -Claimant 1 and N. Athappan -Respondent 2 and Lord Hume Griffiths as co-arbitrator and took the necessary steps to appoint the Chairman of the Arbitral Tribunal. In conformity with Article 30(3), ICC called upon the claimants and Respondents and in conformity with Article 30(3), the parties have to pay

the advance on cost as under:

Claimants: US\$ 37500

(US\$ 67500 less US\$ 30000 already paid)

Respondents: US\$ 67500

92. Laying emphasis upon Article 6 of ICC Rules, the learned Counsel for Appellants contended that Arbitral Tribunal appointed by ICC has power to decide its own jurisdiction and it shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent. It was further contended that the Plaintiffs having invoked Article 6(2) of ICC Rules and consciously proceeded to invite the decision from the ICC and suffered a decision from ICC under Article 6(2), it is not open to the Plaintiffs to file the suit impugning the arbitration clause in the JVA and challenging the initiation of arbitration proceedings on identical grounds.

93. No. doubt, in response to the "Request for Arbitration", Athappans and ORE sent a detailed reply reiterating their stand that C.G. Holdings and KCP having initiated multiple litigations in various civil Courts and having lodged criminal proceedings for the very same cause of action cannot seek reference to arbitration. In the said response, it was also brought to the notice of ICC that C.P. Nos. 65 and 76 of 2005 are in the final stages of adjudication and the "Request for Arbitration" appears to have been made to frustrate the Company Petition and other proceedings. Even though the Plaintiffs and ORE requested ICC to exercise its powers under Article 6(2) of the ICC Rules of Arbitration and merely because ICC proceeded to appoint arbitrators, it cannot be contended that the Plaintiffs suffered a decision from ICC and were precluded from filing the suit. It is pertinent to note that ICC did not make any judicial or quasi-judicial order in respect of Respondent's assertion on the invalidity of JVA, but merely communicated its intention in appointing the arbitrators and calling upon them to pay the costs and to hear the parties in detail. Hence, there was No. prima facie decision on the merits of the matter and the objection raised as to the maintainability of the suit cannot be countenanced.

94. If we accept the submission of Mr. Karthik Seshadri, it would defeat the whole purpose and legislative intent of Section 45 of Arbitration and Conciliation Act, 1996. Section 45 has been enacted to empower the Courts in India to test whether the agreements falling in Part II of Arbitration and Conciliation Act is void, inoperative or incapable of being performed. This is to ensure that the parties do not waste time and money on an arbitration that may be thrown out on technicalities.

95. Learned Counsel for the Plaintiffs would contend that in any event, ICC Rules cannot override a statute i.e., Section 45 of Arbitration and Conciliation Act, 1996 applicable in India. Moreover, Clause 22.1 of JVA specifically states that the law applicable to the parties and the law that the ICC shall follow in determining the

dispute is the Indian Law. As per Section 45, the Courts in India are the appropriate forum to determine a question of whether arbitration agreement is void, inoperative or incapable of performance.

96. Placing reliance on the decision of V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, and Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, , the learned Counsel for Respondents Mr. Sivanandaraj contended that even where parties have agreed to refer a dispute for foreign arbitral tribunal it is always subject to a rider that the agreement is subject to the law of the land viz., that it does not prevent the parties from coming to the Court but only gives the Court the power to refuse its assistance in appropriate cases and where enforcing the agreement would work hardship or injustice, the Court would take into consideration before holding the parties to their bargain

97. The basic objective in referring the matter to arbitration is to provide speedy remedy to the parties. When parties have been fighting out various litigations, it cannot be contended that the same issues are to be again re-agitated before the ICC. When the Company Law Board has elaborately dealt with the matter and when O.S. No. 90 of 2007 on the file of District Munsif's Court, Kangeyam is also pending, the same issues cannot be sought to be agitated before ICC and thus making the whole process expensive.

98. Re-contention on dismissal of application u/s 45 of Arbitration and Conciliation Act:

The existence, validity and scope of arbitration agreement can be determined by Court:

(i) before the commencement of arbitration

proceedings (Section 45)

or

(ii) at the stage of enforcement of the award.

(Section 48)

98. Section 45 reads as under:

45. Power of judicial authority to refer parties to arbitration.-Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

99. The ingredients of Section 45 are: a Judicial authority should be seized of an action in the matter of which the parties have made an agreement for arbitration. In the absence of a valid arbitration agreement, judicial authority will

not be seized of its authority and a stay will not be granted. Thus, Section 45 requires that in order to specifically perform the agreement, the Court has to satisfy that the agreement is valid, operative and capable of being performed.

100. Section 8, which deals with the arbitrations in India, is akin to Section 45, which deals with the International Arbitrations. By a comparative reading of Section 45 and Section 8, it is clear that Section 45 gives a much wider discretion to the Court on the question of referring the parties to arbitration than Section 8. Section 8 leaves No. discretion that the Court in the matter of referring parties to arbitration; whereas Section 45 grants the Court the power to refuse a reference to arbitration if it finds that the arbitration agreement is "null and void", "inoperative" or "incapable of being performed". Section 8 leaves the matter relating to the existence and validity of the arbitration agreement to be decided by the arbitral Tribunal itself. On the other hand, Section 45 specifically provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority may refer the parties to arbitration unless it finds that the agreement is "null and void", "inoperative" or "incapable of being performed". The conditions involved in Section 45 have not been adverted to in Section 8. As rightly contended by the learned Counsel for Plaintiffs Mr. Sivam Sivanandaraj, foreign arbitrations involve heavy expenses. Hence, the questions of existence and validity of the arbitration agreement, its operativeness and capability of being performed have been entrusted to the Court instead of arbitral Tribunal. u/s 45, the Court is therefore duty bound to decide whether the arbitration agreement is "null and void", "inoperative" or "incapable of being performed".

101. In the case of *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, , the Supreme Court held as under:

28. The words "shall" and "unless" appearing in Section 45 mandate that before referring the parties to arbitration, the judicial authority should be satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed....

37. Clearly Section 45 casts an obligation upon the judicial authority when seized of the matter to record a finding as to the validity of the arbitration agreement as stipulated in the section and there is nothing to suggest either from the language of the section or otherwise that the finding to be recorded is to be only *ex facie* or *prima facie*.

38. It is true that Section 5 limits judicial intervention in the manner provided therein. It accelerates the arbitral process by curtailing chances of delay that may be caused in court proceedings. But, at the same time, it is also clear that though Sections 8 and 45 both deal with the power of judicial authority to refer parties to arbitration, in the former which deals with domestic arbitration, No. provision has been made for examining at that stage the validity of the arbitration agreement whereas u/s 45 which deals with arbitrations to which the

New York Convention applies, a specific provision has been made to examine the validity of the arbitration agreement in the manner provided in Section 45. Both provisions are differently structured albeit the purpose of both is to refer parties to arbitration but in one case domestic arbitration and in the other case international arbitration. Unlike Section 8 which provides that the application shall be moved not later than when submitting the first statement of the substance of the dispute, u/s 45 there is no such limitation. The apparent reason is that insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to the Arbitral Tribunal and left most of the matters to be raised before the arbitrators or post-award. In case of foreign arbitration, however, in its wisdom the legislature left the question relating to the validity of the arbitration agreement being examined by the court. One of the main reasons for the departure being the heavy expense involved in such arbitrations which may be unnecessary if the arbitration agreement is to be invalidated in the manner prescribed in Section 45.

39. ...

40. The traditional approach has been to allow a court, where a dispute has been brought despite an arbitration agreement, to fully rule on the existence and validity of the arbitration agreement. This approach would ensure that the parties are not proceeding on an invalid agreement as this would be a fruitless exercise involving much time and expenditure. In some countries, however, the traditional approach has changed. The liberal approach which seems to be gaining increasing popularity in many legal systems both statutorily as well as through judicial interpretation is to restrict the review of validity of the arbitration agreement at a prima facie level. For final review the parties may raise issue before the arbitral forum or post-award.

102. In paragraph No. 40 of the above judgment, the Supreme Court has made it clear that this approach of deciding the validity of the agreement by the judicial authority before the parties are sent for arbitration would ensure that the parties are not proceeding on an invalid agreement as this would be a fruitless exercise involving much time and expenditure.

103. In *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, the Supreme Court held that the review by the Court to determine the validity of the arbitral agreement was to be on a prima facie basis. The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on prima facie view. In the said judgment, the Supreme Court summed up the law as follows:

111. ... if on a prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties

and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in a regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available u/s 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court u/s 50(1)(a) of the Act and further appeal to this Court under Sub-section (2) of the said section.

(underlining added)

104. The learned Counsel for the Appellants contended that by virtue of Section 45 of the Act, it is mandatory that the Court will have to refer the parties to arbitration once it is seized of an action in respect of which the parties have made agreement for arbitration to which they conventionally agreed for arbitration/foreign arbitration. The learned Counsel would further contend that even if some of the issues were considered by Company Law Board, so long as the arbitration agreement is valid, it is mandatory that the Court will have to refer the parties to arbitration. Taking us through the impugned order of learned single Judge, the learned Counsel for Appellants Mr. Karthik Seshadri would further contend that when there is a valid arbitration agreement, referral to arbitration is mandatory and while so the learned single Judge fell in error in saying that the arbitration clause -clause 22 of JVA has become inoperative. The learned Counsel for the Appellants would also contend that following the ratio of *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, , the scope of enquiry u/s 5 of the Act would be restricted only to prima facie analysis and the learned single Judge erred in saying that the arbitration clause has become inoperative. It was further submitted that without any full-fledged trial and without giving opportunities to the parties to adduce oral and documentary evidence, the learned single Judge erred in holding that the arbitration clause has become "inoperative". It was further urged that the finding of the learned single Judge holding that the arbitration clause has become inoperative, virtually amounts to decreeing of the suit and such a final finding of fact arrived is in contravention of the principles laid down by the Honourable Supreme Court in *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, .

105. In *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, , the Honourable Supreme Court laid down that while considering the application u/s

45, the Court is required to make a prima facie determination whether the arbitration agreement is null and void", inoperative", or "incapable of performance". If on a prima facie determination, the Court finds that the arbitration agreement is not null and void, inoperative or incapable of performance, the parties would be referred to arbitration. After affording sufficient opportunity to the parties, where the Court arrives on a prima facie finding that the arbitration agreement is null and void, inoperative or incapable of performance, the Court shall refuse to refer the parties to arbitration. In *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, , the Supreme Court also held that when the Court refuses to refer the parties to arbitration, the Court must give a reasoned order as to why the Court is not referring the parties to arbitration.

106. Before the single Judge, even though the parties have not adduced oral evidence, by perusal of the materials on record, it is seen that the learned Judge afforded full opportunity to the parties and heard the matter at length. In Paragraph No. 50, the learned single Judge held that there is No. scope nor any need for such elaborate enquiry since the Court is rejecting the application on the basis of the admitted facts and evidence that the arbitration agreement has become inoperative by virtue of the conduct of the Defendants 6 and 10 (C.G. Holdings and KCP). The learned Judge dismissed the application in A. No. 2670 of 2008 filed by the Appellants u/s 45 of the Arbitration and Conciliation Act, 1996 on the only ground that the arbitration agreement has become "inoperative". The learned single Judge further proceeded to observe as under:

32. ...An agreement may be rendered inoperative even by acts of omission or commission, on the part of the parties. Waiver, abandonment, renunciation, election, acquiescence, etc., are some of the acts of commission or omission, by which an agreement may be made inoperative by a party....

107. Before the learned single Judge, sufficient opportunity was afforded to the parties and the order of the learned single Judge is well reasoned. We do not find any error in the procedure nor contravention of the principles laid down by the Supreme Court in *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, .

108. Re. Contention: "...Null and Void", "...inoperative" or "...incapable of being performed.... ": The learned single Judge discussed in extenso the term "null and void". After dealing with the various instances, which would result in an agreement being rendered void, with reference to various provisions, the learned single Judge rejected the arguments of Plaintiffs holding that proving existence of any of the situations listed thereon and based solely on the allegation that the JVA had contained arbitration clause. In so far as "incapable of being performed", considering the said term "incapable of being performed", the learned single Judge held that the arbitration by itself is not incapable of being performed and on those findings did not accept the contention of Plaintiffs that the arbitration agreement is "incapable of being performed".

109. The learned single Judge allowed the application - A. No. 277 of 2008 filed by the Plaintiffs and granted stay of arbitration proceedings. The learned single Judge dismissed Section 45 application (A. No. 2670 of 2008) on the only ground that the conduct of Appellants rendered the arbitration clause "inoperative". Upon consideration of totality of circumstances the learned Judge held that conduct of Appellants is inconsistent with the right to arbitrate.

110. In determining whether a party has waived its right to arbitration, the Court examines the following factors:

?(i) Whether the party's actions are inconsistent with the right to arbitrate;

?(ii) Whether the litigation machinery has been substantially invoked;

?(iii) Whether dispute arising out of the contract was adjudicated and whether in judicial process important events had taken place;

?(iv) Whether delay affected or prejudiced the opposing party.

111. The learned Counsel for the Appellants contended that the arbitration clause does not prohibit the filing of Company Petition, which mainly pertains to the management of the Company and thus filing of Company Petition is subject to the right of the party in requesting to refer the dispute to arbitration. It was further contended that a party cannot be said to have waived his right merely because the criminal cases were registered.

112. As pointed out earlier, several criminal cases have been filed and number of quash petitions also came to be filed. of course a party does not waive his right to invoke the arbitration of the dispute by filing of criminal complaints. when a party deliberately choses not to adopt a particular course of action, the arbitration agreement becomes inoperative and as the parties have waived or abandoned the arbitration clause, by invoking the jurisdiction of Civil Court, the doctrine of waiver applies. The Appellants had the option to go before ICC even in 2005, but the Appellants chose to file C.P. No. 65 of 2005 and also stoutly defended C.P. No. 76 of 2005 filed by ORE Holdings. Even in C.P. No. 76 of 2005, the Appellants have not sought for reference to arbitration. By agitating the matter before the Company Law Board for nearly two years, and filing the Civil Suit in O.S. No. 90 of 2007 before District Munsif's Court, Kangeyam, by their conduct, the Appellants must be deemed to have given a go bye to the arbitration clause.

113. The parties have been engaged in pitched battle before the Company Law Board and orders were passed by the Company Law Board on 13.8.2008. When the matter was pending before the Company Law Board, the Company Law Board has passed interim orders at various stages. The learned Counsel for Plaintiffs would submit that even settlements/proposals have been made disclosing parties intentions and discovery process has been utilised. We find much force in the contention of the Respondents that Athappans and ORE have spent considerable time and money before the Company Law Board. In so far as

O.S. No. 90 of 2007 pending before District Musnif's Court, Kangeyam, the suit is ready ripe for trial and the Respondents are diligently defending the same. Having initiated proceedings before various forums, cannot now seek to invoke arbitration as an additional remedy.

114. Thus, the Appellants initiated/participated substantially in various litigation proceedings. As pointed out earlier, after the Company Law Board passed the order (13.8.2008) directing CEPL to return the investment made by ORE and Athappans, by letter dated 20.8.2008, in compliance of the order of Company Law Board, Appellants offered to pay the amount of Rs. 545.52 lakhs as the sum refundable to N.Athappan in full settlement. The waiver is clearly implicit from the acts of the Appellants, which indicates their intention not to proceed with the arbitration. On the facts and circumstances of the case and in view of the pitched battle of litigations between the parties, the learned single Judge rightly held that there is a waiver by estoppel and that the arbitration clause in JVA has become "inoperative". The said conclusion is based on materials on record warranting No. interference. We do not find any ground for interference with the order of the learned single Judge allowing injunction application -A. No. 277 of 2008 restraining C.G. Holdings and K.C.Palanisamy from proceeding with the arbitration and dismissing A. No. 1270 of 2008 filed by the Appellants u/s 45 of Arbitration and Conciliation Act.

115. O.S.A. No. 258 of 2009: This Appeal arises from the order of single Judge dated 4.2.2008 made in Application No. 5848 of 2007 in C.S. No. 709 of 2007.

116. As pointed out earlier, OARC loaned amount of 17 million USD to Data Access America Inc. (DAA) for being invested in DAIL. Pacific Convergence Corporation Limited, a creditor of DAIL filed Company Petition in C.P. No. 292 of 2004 seeking winding up of DAIL for the inability to pay its debts. By the judgment dated 18.11.2005 Delhi High Court allowed the Petition for winding up of DAIL and directed the Official Liquidator to take possession of all assets and records of DAIL. Alleging that criminal complaints are filed against OARC and ORC, OARC and ORC filed suit - C.S. No. 709 of 2007 seeking permanent injunction restraining KCP, Cheran Holdings Private Limited, C.G. Holdings, CCL, Chenniappan Gounder and B.Gunasekaran from instituting any proceedings, civil or criminal arising out or connected with the JVA dated 30.1.2004 including the investment of ORE Holdings in CEPL and the loan granted by OARC to DAIL and also seeking for permanent injunction restraining them from in any manner publishing/advertising any material defaming OARC and ORE Holdings. In the said suit, KCP filed Application - A. No. 5848 of 2007 requesting the Court to refer the matter to arbitration to ICC in terms of Article 22 of JVA dated 30.1.2004. KCP had also filed A. No. 5849 of 2004 to strike off the names of Cheran Holdings Private Limited (CHPL), Cheran Constructions Limited (CCL), Chinniappan Gounder - father of KCP, B.Gunasekaran. In Application A. No. 5848 of 2007, KCP sought for referring the matter to arbitration to ICC on the ground that Article 22.2 of JVA contains the arbitration clause. Both the applications

were resisted by OARC and ORE Holdings. Pointing out that an order of permanent injunction has been sought for not only from instituting any civil or criminal proceedings but also any proceedings arising out of JVA dated 30.1.2004 and that it contains arbitration clause, the learned single Judge ordered striking off the words "joint venture agreement dated 30.1.2004) occurring in prayer "A" in the plaint. The order of the learned single Judge reads as under:

12. At this juncture, when this Court suggested the learned Senior counsel Mr. AR.L.Sundaresan, appearing for the Respondents to amend prayer "A" to the plaint suitably as to the removal of the reference in respect of Joint Venture Agreement dated 30.1.2004 including the investment of the second Plaintiff in Cheran Enterprises Private Limited, the learned senior counsel fairly would admit that if the Court comes to such a conclusion then, this Court can exercise its power under Order 6 Rule 16 of CPC to strike out the prayer which it consider unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the suit of which is otherwise an abuse of the process of the Court. Under such circumstances, I am of the view that under Order 6 Rule 16 of Code of Civil Procedure, the following in the relief "A" to the plaint, or connected with the Joint Venture Agreement dated 30.01.2004, including the investment of the second Plaintiff in Cheran Enterprises Private Limited" alone is ordered to be struck off. For filing amended plaint by one week. A. No. 5848 of 2007 is disposed of.

A. No. 5848 of 2007 was disposed off on the above lines. The application -A. No. 5849 of 2007 seeking striking off the names of Defendants 2 and 4 to 6 viz., Cheran Holdings Private Limited (CHPL), Cheran Constructions Limited (CCL), Chinniappan Gounder - father of KCP, B.Gunasekaran and the same came to be dismissed.

117. Being aggrieved by the order in A. No. 5848 of 2007, OARC and ORE have preferred appeal - O.S.A. No. 258 of 2009. On behalf of OARC and ORE, the learned Senior Counsel Mr. AR.L.Sundaresan contended that the learned judge ought to have simply dismissed the applications filed by KCP and C.G. Holdings and striking off the reference to JVA was not warranted by the materials on record before the Court. It was further submitted that while purporting to exercise the suo motu powers of Order 6 Rule 16 Code of Civil Procedure, the learned judge failed to see that none of the conditions required for the exercise of such powers have been met and the above impugned order is non-speaking and perverse.

118. Pleading can be ordered to be struck off under Order 6 Rule 16 only if they are shown to be unnecessary, scandalous, frivolous or vexatious. Allegations in the plaint, which are unnecessary and also tend to prejudice and embarrass Defendants in the fair trial of the suit are liable to be struck out. It is pertinent to note that in the light of spate of criminal complaints and other litigations initiated by KCP and his father -Chenniappa Gounder, the suit - C.S. No. 709 of 2007 came to be filed for permanent injunction restraining the above said Defendants

from instituting any proceedings civil or criminal arising out of or connected with joint venture agreement dated 30.1.2004. The entire plaint averments revolve around the amount of 17 million USD loaned by OARC and JVA dated 30.1.2004. While so, it cannot be said that the averments pertaining to JVA dated 30.1.2004 and the consequent relief sought for is unnecessary or tend to prejudice KCP and his group of companies.

119. A. No. 5848 of 2007 was filed seeking for reference to the arbitration and A. No. 5849 of 2007 was filed seeking striking of the names of the Defendants 2 and 4 to 6 therein. The learned single Judge ought to have considered the applications on their own merits. By reading of the above order, it is seen that the submission of the Senior Counsel is to the effect that the Court can exercise its power under Order 6 Rule 16 CPC to strike out the prayer which it consider unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the suit of which is otherwise an abuse of the process of the Court. In our considered view, the prayer sought for in the suit i.e., relief of permanent injunction not to initiate any vexatious proceedings in respect of JVA dated 30.1.2004 cannot be said to be scandalous, frivolous or vexatious. On the mere fact that OARC and ORE have included several causes of action, the prayer in respect of JVA does not make it scandalous or frivolous. Nothing can be scandalous which is relevant for the determination of the suit. In our considered view, the learned single Judge was not right in striking off the words "joint venture agreement dated 30.01.2004" including the investment of the 2nd Plaintiff in Cheran Enterprises Private Limited in the relief "A" to the plaint. In the light of our findings in O.S.A. Nos. 2 to 5 of 2009, the order of the learned single Judge in Application No. 5848 of 2007 in C.S. No. 709 of 2007 is liable to be set aside and O.S.A. No. 258 of 2009 is allowed.

120. Company Appeal Nos. 21, 25 to 27 and 29 of 2009: The gist of order in C.P. Nos. 65 and 76 of 2005 dated 13.8.2008 is that:

?CEPL, KCP and C.G.Holdings were to return Rs. 75 Crores to ORE and Rs. 4 Crores to Athappan. The money was to be paid within a period of one year starting 1.11.2008 with 25 percent of the same, being paid every year.

?CEPL, KCP and C.G. Holdings were to utilise Rs. 20 Crores maintained in the fixed deposit at State Bank of India, Erode to pay ORE and Athappan. In the event of failure to pay the money, the property of VMC situated in Coimbatore is to be transferred to ORE and Athappan in the proportion of 17.15 acres and 7.80 acres respectively. Until then VML was refrained from dealing with the property.

?On receipt of money, ORE and Athappan were to surrender their shares in CEPL and CEPL shall accordingly be permitted to reduce its share capital.

?The parties were given liberty to approach Company Law Board for limited purpose of overcoming difficulties in implementation of the said order.

121. Pursuant to the said order, KCP issued a letter dated 18.8.2008 to State

Bank of India, Erode directing them to transfer the moneys contained in State Bank of India, Erode to ORE and Athappan. Simultaneously, on 20.8.2008, KCP wrote to Athappan calling upon him to surrender his entire share holding of 10 percent in CEPL in return for the sum of Rs. 5.45 Crores. Meanwhile, on 11.9.2008, ORE and Athappan called for a Board of CEPL to discuss various issues in order to take appropriate steps for proper compliance of the order dated 13.8.2008 and for ensuring other statutory compliance. At that juncture, on 19.11.2008, KCP filed C.A. No. 154 of 2008 before Company Law Board praying for permission to deal with the money lying with the State Bank of India, Erode and for direction to restrain ORE and Athappan nominees and the Board from functioning as Direct Ors.

122. The amount of Rs. 20 Crores lying in State Bank of India, Erode had already been attached by the police in the course of investigation into the complaints filed by ORE and Athappan. Athappan filed Criminal O.P. No. 1137 of 2009 in which the Madras High Court by order dated 21.1.2009 raised the attachment and interpreting the order of Company Law Board directed release of moneys to Athappan and ORE in accordance with the Order of Company Law Board dated 13.8.2008 in C.P. Nos. 65 and 76 of 2005. The said order was also communicated to State Bank of India, Erode. On learning the same, KCP by his letter dated 4.2.2009 revoked his earlier letter dated 18.8.2008 and refused to send for release of the money to Athappan or ORE. Consequently, the Bank asked N.Athappan to get specific directions to the Bank for release of funds. Hence, N.Athappan and R.Athappan filed C.A. No. 10 of 2009 before Company Law Board for a direction to release the funds in State Bank of India, Erode in furtherance of Order dated 13.8.2008. ORE also filed C.A. No. 155 of 2008 for direction to the State Bank of India, Erode funds to release the amount and also praying that in the event VML's land is to be transferred to it then the same may be permitted to be transferred to a nominee of ORE.

123. In all the three applications, by a common order dated 3.8.2009 Company Law Board interalia directed State Bank of India, Erode to release 50 percent of the CEPL's money to ORE and N.Athappan in the ratio of 75:4 and the remaining 50% of the proceeds to C.G. Holdings and KCP and passed the following order:

(i) SBI is authorised to release 50% of maturity proceeds of the fixed deposit No. 759413 held in the name of CEPL, in favour of ORE and N.Athappan in the ratio of 75:4 and the remaining 50% of the proceeds in favour of C.G. Holdings and KCP enabling them to deal with the same, namely, 50% of maturity proceeds, without any interference from the Respondents 2 to 6 in C.A. No. 154 of 2008, provided that C.G. Holdings and KCP shall by way of an affidavit to be filed with the Bench Officer within 30 days, undertake

(a) to tender all necessary co-operation and execute and /or procure the executions of documents required to facilitate remittance of the investment of ORE in accordance with the CLB Order:

(b) to take appropriate action for raising the order of attachment made by EPFO over VML properties within a period of 90days; and

(c) deposit with the Bench Officer within 30 days, the share certificates together with signed share transfer forms in respect of their holdings in CEPL.

(ii) None of the nominees of ORE as well as N.Athappan will exercise their rights as director of CEPL until further orders.

(iii) C.G. Holdings and KCP will induct two additional directors on the board of CEPL and shall carry on the affairs of CEPL in accordance with the provisions of the Act, without the intervention of ORE and N.Athappan or their nominees;

(iv) The properties of VML, namely, 17.15 acres of land will be conveyed in favour of ORE or its nominee, in the event of any remote need, which may arise in future on account of non-compliance with the order dated 13.08.2008 by CEPL, C.G. Holdings and KCP;

(v) ORE and N.Athappan will deposit the share certificates together with signed transfer forms in respect of their holdings in CEPL, with the Bench Officer within 30 days;

(vi) CG Holdings and KCP, in case of failure to file an affidavit as stipulated in the proviso to para 9(i) here above, SBI will release the entire maturity proceeds of the fixed deposit Nos. 759413 held in the name of CEPL in favour of ORE and N.Athappan in the ratio of 75:4 without reference to any of the parties to the present proceedings; and

(vii) All other terms and conditions of the common order dated 13.08.2008 shall remain unchanged.

124. Challenging the said order, O.R.E filed Company Appeal Nos. 21 and 29 of 2009 and N.Athappan and R.Athappan filed Company Appeal Nos. 25 and 26 of 2011 and C.G. Holdings and KCP filed Company Appeal No. 27 of 2011.

125. Company Appeal Nos. 25 and 26 of 2009 preferred by R.Athappan and N.Athappan were admitted on the following questions of law:

...2. Whether the Hon''ble Company Law Board rendered functus officio in respect of the prayers sought in CA 154 of 2008?

3. Whether by passing order dated 03.08.2009 the Hon''ble Company Law Board has reviewed/reversed its order and therefore whether the Hon''ble Company Law Board has the power of review?

4. Whether grant of 50% of the money of CEPL to the money of CEPL to the Second and Third Respondents was in the paramount interests of CEPL?

5. ...

6. Whether the Hon''ble Board was justified in not granting the power sought in

CA 10 of 2009?....

126. Mr. Sivam Sivanandaraj, learned Counsel for N.Athappan contended that KCP and C.G. Holdings failed to comply with previous order of Company Law Board dated 13.8.2008 by not paying a single instalment and while so, the Company Law Board ought to have reprimanded C.G. Holdings and KCP and Company Law Board overlooked the fact that by 3.8.2009 atleast three installments were already due. It was further submitted that Company Law Board has not given any reasoning, what so ever, in its order dated 3.8.2009 for arriving at any of its conclusions contained therein and the direction of Company Law Board granting right to KCP to deal with the funds of CEPL on the ground that the same was in the "paramount interest" of CEPL is mostly erroneous and an error apparent on the face of the record.

127. The main contention of learned Counsel for N.Athappan is that when serious charges of criminal breach of trust and misappropriation of moneys of CEPL have been laid against KCP, whose bail was also cancelled by the High Court, the direction of Company Law Board giving KCP 50 percent of the money of CEPL is completely contrary to the paramount interest of the Company and the orders issued by the High Court.

128. Reiterating the contentions, Mr. AR.L.Sundaresan, learned Counsel for ORE would contend that Company Law Board failed to see that KCP has been judicially recognised as an untrustworthy person and having proclivity to breach obligations and in the light of categorical findings, Company Law Board ought not to have permitted KCP to have access to the funds of CEPL lying in State Bank of India, Erode and also the assets of CEPL. It was further urged that by reviewing its earlier order dated 13.8.2008 Company Law Board has in fact rewarded a wrong doer, which the law cannot condone.

129. Grievance of KCP is that ORE and N.Athappan continuously colluded with each other and acting detrimental to the interest of CEPL and while so there was No. basis, what so ever, for the Company Law Board to direct release of 50 percent of the funds in the account of CEPL to N.Athappan and ORE.

130. Power of Company Law Board to review: Onbehalf of ORE and Athappan, it was mainly contended that Company Law Board has No. power to review its own order, especially, in the guise of a clarification. The learned Counsel Mr. Sivam Sivanandaraj submitted that by its order dated 13.8.2008 Company Law Board retained power only to pass orders in the event of any difficulty in implementation of the smooth exit of ORE and Athappan from CEPL; but however, the order dated 3.8.2009 reverses the crux of the order dated 13.8.2008 and hence without jurisdiction. It was further submitted that after passing the order dated 13.8.2008, Company Law Board has No. further power to review its order.

131. Refuting the above contention, Mr. Karthik Seshadri, learned Counsel for KCP submitted that u/s 398 read with Section 402 of the Companies Act, power

has been conferred upon the Board "to make such orders as it thinks fit and in the interest of the Company (CEPL), Company Law Board has rightly modified its earlier order.

132. In 1997(90) Company Cases 1, Division Bench of this Court had an occasion to consider the scheme of the Act pertaining to corporate management of the Companies. Observing that under Sections 398 read with 402 of the Companies Act, power has been conferred upon the Court (Company Law Board) to make such order as it thinks fit, it was held as under:

Under Section 397 read with Section 402 power has been conferred on the court "to make such orders as it thinks fit if it comes to the conclusion that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up "with a view to bringing to an end the matters complained of". Similarly, u/s 398 read with Section 402 power has been conferred upon the court "to make such orders as it thinks fit", if it comes to the conclusion that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company by reason of which it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company "with a view to bringing to an end or preventing the matters complained of or apprehended" (emphasis supplied). Both the wide nature of the power conferred on the court and the object or objects sought to be achieved by the exercise of such power are clearly indicated in Sections 397 and 398....

While exercising the powers under Sections 397 and 402 of the Companies Act, the court is considering not only the relief that is sought for, but also considers as to what is the nature of the complaint and how the same has to be rectified. It is the interest of the company that is being considered and not the individual dispute between the Petitioner and the Respondent. If that be so, the interest of the company requires that the majority shareholders must have their say in the management....

The same principle was reiterated in *ALDGATE INTERNATIONAL SA v. AL CHAMPDANY INDUSTRIES LIMITED and Ors.* (2011 (164) Comp. Cas 123).

133. It is fairly well settled that Company Law Board does not have the power of review. (*Gopal Krishna Sengupta v. Hindustan Construction Company Limited* (2002) 112 Com Cases 166 (CLB). It is however open to the Company Law Board to exercise its inherent powers and to make such orders as may seem necessary to meet the ends of justice. The Company Law Board has power to review and recall its orders which have been wangled through fraud or misrepresentation.

134. It is pertinent to note that on a question of law right of Appeal is provided u/s 10F of the Act. Challenging the order dated 13.8.2008, KCP and C.G. Holdings have not chosen to prefer appeal. After correspondence with the Bank, KCP has filed C.A. No. 154 of 2008 praying for permission to deal with the money lying with State Bank of India, Erode. As elaborated earlier, in its earlier order dated 13.8.2008, the Company Law Board has recorded categorical findings: (i) conduct of KCP having regarded CEPL's funds as though his own funds is burdensome, harsh and wrongful; (ii) movement of funds from CEPL as traced by the auditors M/S. Deloitte Haskins & Sells is not supported by any approvals from the Board of CEPL. (iii) KCP had taken enormous steps in safeguarding and enhancing the value of CPL properties as well as bringing VML out of sickness thereby saving its vast extent of properties and settling all dues of workmen which is in contravention to JVA/Articles of CEPL. (iv) KCP is accountable for not having diligently discharged its statutory duties cast on him. On those factual findings, in its Order dated 13.08.2008, Company Law Board observed that the very purpose of CEPL could not have been achieved in terms of JVA and in the light of those factual findings directed CEPL to return a sum of Rs. 75 Crores and Rs. 4 Crores invested by ORE and Athappan respectively along with interest at 8 percent. In the said Order, Company Law Board also permitted KCP to utilise the money to return the said amount to ORE and Athappan and in the meanwhile directing that VML shall not alienate or sell any of its immovable properties till payment is made to ORE. Company Law Board also made provision that in the event of failure to make the repayment within the specified time, CEPL, C.G. Holdings, KCP and VML were to duly convey the immovable properties of VML i.e., 17.15 acres of land in favour of ORE and 7.80 acres of land in favour of Athappan. When Company Law Board has recorded categorical findings that CEPL neither carried out nor could accomplish its Business Plan in accordance with terms of JVA and Company Law Board directed return of sum of Rs. 75 Crores and Rs. 4 Crores, Company Law Board was not justified in modifying its earlier order permitting KCP to deal with 50 percent of the money lying with State Bank of India, Erode. The observation of Company Law Board that "KCP and C.G. Holdings should be in a position to generate funds by operating exclusively so as to meet the claim of ORE and N.Athappan and permitting C.G. Holdings as well as KCP to withdraw 50 percent of the amount from State Bank of India, Erode is not a justifiable one. The observation of Company Law Board that KCP will get reasonable amount of fixed deposit to run the affairs of CEPL and thereby augment funds to discharge the obligation imposed in the Order is nothing but encouraging the proved mismanagement of KCP.

135. Given the sequence of events if KCP is placed in position to manage CEPL, KCP would again try to divert the amount to innumerable subsidiary companies floated by him. In the light of factual situation emerging, the learned Company Law Board was not justified in directing ORE and N.Athappan to deposit the share certificates with the Bench Officer. Having found that KCP had not discharged his statutory duties and that he was not prudent in managing CEPL,

Company Law Board was not justified in directing payment of 50 percent of the deposit lying with the State Bank of India, Erode.

136. The direction of the Company Law Board (in its order dated 3.8.2009) directing that ORE and Athappan nominees shall not intervene in the business of CEPL contradicts in its own order dated 13.8.2008, wherein CLB clearly stated that ORE and Athappan would exit after receiving return of their investments or transfer of VMC property. In its previous order, Company Law Board has maintained status quo regarding contract of CEPL until ORE and Athappan are repaid their investments. The subsequent order dated 3.8.2009 is to give control of CEPL to KCP. If the control of CEPL is given back to KCP, certainly KCP would divert the money as well as the properties and ORE and Athappan would never be paid their investments. The second order of Company Law Board dated 3.8.2009 to the extent permitting KCP to withdraw 50% of the money completely reverses the position and therefore it cannot be said to be "removal of any difficulty in the implementation of smooth exit of ORE and Athappan from CEPL". On the contrary, the subsequent order dated 3.8.2009 considerably alters the manner of exit of ORE and Athappan. While passing the Order dated 3.8.2009, the Company Law Board failed to note that KCP had not paid any instalment from 1.11.2008. Without paying the money, KCP only wants to have control of CEPL. To have control over CEPL, KCP should have taken efforts to comply with the earlier order dated 13.8.2008. The Company Law Board has not kept in view the failure on the part of KCP to comply with the earlier Order dated 13.8.2008. The subsequent Order of the Company Law Board dated 3.8.2009 gives a go bye to its earlier order dated 13.8.2008.

137. Jurisdiction of the High Court in an Appeal u/s 10-F of the Act is expressly confined to the determination of any question of law. Finding of a question of fact may also result in a question of law if the Tribunal's finding is without evidence or based on irrelevant material. In our considered view, the order of Company Law Board dated 3.8.2009 modifying its earlier order is so perverse or unreasonable that No. person acting judicially could have arrived at such a conclusion and therefore we are constrained to interfere with the impugned order of Company Law Board dated 3.8.2009. We are of the view, in the order dated 3.8.2009, findings of the Company Law Board are not only perverse, but passed in an arbitrary manner. The direction permitting KCP and C.G. Holdings to withdraw 50 percent of the amount and direction to ORE and Athappan to deposit their share certificates is not supported by any reasons, evidence or materials. The order dated 3.8.2009 virtually nullifies the earlier order. The Company Law Board did not keep in view the conduct of KCP and other proved mismanagement. Without first complying with the order of returning the money of Rs. 75 Crores and Rs. 4 Crores with interest at 8 percent, the Company Law Board was not justified in directing ORE and N.Athappan to deposit the share certificates in the Bench. Order of Company Law Board dated 3.8.2009 ignores the conduct of KCP in mismanaging CEPL and siphoning of money and properties either to KCP or to subsidiary companies. Therefore, Company Appeal Nos. 21

and 29 preferred by ORE and Company Appeal Nos. 25 and 26 preferred by N.Athappan and R.Athappan are to be allowed and the impugned order dated 3.8.2009 in so far as permitting KCP to deal with 50% of the amount lying in SBI, Erode Branch is liable to be set aside.

138. Order of Delhi High Court in C.P. No. 292 of 2004 and Company Application Nos. 1429 of 2006, 221 of 2007, 688 of 2010, 1061 of 2010 and 989 of 2007 in C.P. No. 292 of 2007 and CCP(CO) Nos. 31 of 2005 and 16 of 2007 dated 21.1.2011: Anticipating approval of the Board of CEPL, KCP transferred Rs. 33 Crores to CHPL to be paid to DAIL. Subsequently, CEPL Board disapproved the said transfer of funds to CHPL for investing in DAIL. OARC had given a loan of USD 17 Million to Data Access America Inc. (DAA), which is a wholly owned indirect subsidiary of DAIL. DAA executed a promissory note dated 13.8.2004 in favour of OARC. Subsequently, the loan proceeds were inappropriately remitted by DAA to DAIL as payment of receivables for services rendered by DAIL. Faced with inappropriate remittance and subsequent diversion of the loan proceeds and the failure of DAA to make payment on the loan, DARC instituted a suit for recovery of USD 17 Million in the Supreme Court of State of New York, U.S.A. in which the judgment and decree was passed for the said amount together with interest.

139. C.P. No. 292 of 2004 was filed for winding up DAIL. In the said Company Petition, Canara Bank filed C.A. No. 221 of 2007 seeking for the relief to release a sum of Rs. 17.56 Crores lying in the State Bank of India, Erode as fixed deposit of CEPL and for other reliefs. Referring to C.P. Nos. 65 and 76 of 2005 on the file of Company Law Board and the Orders dated 13.8.2007 passed therein, the single Judge of Delhi High Court passed orders on 21.1.2011 attaching all bank accounts and deposits of CEPL, CHPL, SPIL and KCPAHPL and restraining them from making payments except with the permission of the Court. In the said order, single Judge of Delhi High Court observed that the Order dated 21.1.2011 be brought to the notice of Madras High Court and also be filed with Company Law Board. On behalf of the Appellants, it was contended that in view of the order passed by the single Judge of Delhi High Court in C.P. No. 292 of 2004 and other applications, dated 21.1.2011 the amount now lying in SBI, Erode Branch cannot be released or paid to N.Athappan or to ORE. We do not propose to express any opinion on the merits of the Order passed by the single Judge of Delhi High Court for the simple reason that the matter is under challenge before the Delhi High Court. It is pertinent to note that the said Company Petition pertains to DAIL and the loan amount advanced by OARC. The said transaction has nothing to do with the loan amount advanced by ORE to CEPL. In our considered view, the order passed by the learned single Judge in C.P. No. 292 of 2004 dated 21.1.2011 would not affect the order passed by the Company Law Board way back on 13.8.2008.

140. Order passed against VML and contentions of VML: As discussed earlier, by Order dated 13.8.2008, Company Law Board directed CEPL to return the amount

invested by ORE and Athappan and in the event of any failure to make the repayment within the specified time, CEPL, C.G. Holdings, KCP and VML have to duly convey the immovable properties of VML viz., 17.15 acres of land in favour of ORE and 17.80 Acres of land in favour of Athappan as consideration for revocation of capital and surrender of shares of ORE and Athappan, upon which "ORE" as well as Athappan will deliver the share certificates in respect of their holdings in CEPL in favour of CG Holdings and KCP.

141. Alleging that ORE, being non-resident Company, is not permitted to hold immovable property in India and that in the event of failure to return the investment amount, ORE filed Petition in C.A. No. 155 of 2008 to direct the property of VML to be conveyed to nominee of ORE. Upon consideration of the rival contentions, Company Law Board held that ORE, being an entity of foreign origin (Mauritius), cannot hold any immovable property and that holding of immovable property would amount to violation of FEMA, modified its earlier order to the effect that in the event of any remote need the properties of VML 17.15 acres of land will be conveyed in favour of ORE or its nominee.

142. Being aggrieved by the order passed in C.A. No. 155 of 2008, C.G. Holdings and KCP have preferred appeal - C.A. No. 27 of 2009. It is pertinent to note that VML has not preferred any appeal but only C.G.Holdings and KCP have preferred appeal.

143. Learned Counsel Mr. Lakshminarayanan submitted that behind the back of VML such an order came to be passed and advanced arguments. As observed in paragraph No. (17), with a view to afford an opportunity to VML, we have heard the submissions of Mr. V. Lakshminarayanan. Learned Counsel for VML contended that the property of VML was to act as a security till the share capital was returned in accordance with applicable laws in India and while so by the impugned order dated 3.8.2009 the Company Law Board has overstepped its jurisdiction and given a go bye to the provisions of Foreign Exchange Management Act even though earlier order dated 13.8.2008 contained a condition that parties are required to abide strictly by all the applicable laws of India. It was further contended that the Order of the Company Law Board introducing a new condition to execute the sale deed in favour of ORE nominee, considerably alters the previous order, which is beyond the jurisdiction of Company Law Board. It was also submitted that over the years the value of the properties of VML has gone up and therefore if the properties of VML are to be conveyed, as an entity, VML would be subjected to great loss.

144. ORE, being a non-resident Company, is not permitted to hold immovable property in India. In the first limb, the properties of VML are kept as security and only in the event of remote need, the properties of VML i.e., 17.15 acres are to be conveyed to ORE and 7.80 acres to Athappan. ORE, being a non-resident Company, is not permitted to hold immovable properties in India, however, subject to approval/permission to be obtained by ORE from the competent authority.

145. As per Order of Company Law Board, amount invested by ORE has to be refunded, which of course, must be in accordance with applicable laws: be it compliance with FEMA or other Regulations. ORE, being a foreign investor-an entity of foreign origin, as per FEMA, cannot own immovable property in India. Compliance of FEMA or other applicable Regulations cannot be bypassed. By the order dated 3.8.2009, Company Law Board modified its earlier order directing VML to execute the sale deed, conveying immovable properties of 17.15 acres to the nominee of ORE and thereby modified its earlier order.

The Order of the Company Law Board modifying its earlier order directing VML to convey the properties to "nominee of ORE" is to be modified to the effect that any such conveyance should be subject to applicable laws and Regulations and with required approval/permission to be obtained by ORE from the competent authorities. The Order of the Company Law Board in C.A. No. 155 of 2008 is to be modified to that extent.

146. In the result, O.S.A. Nos. 2 to 5 of 2009 are dismissed. O.S.A. No. 258 of 2009 is allowed and Order dated 4.2.2008 made in Application No. 5848 of 2007 in C.S. No. 709 of 2007 is set aside.

Company Appeal Nos. 21 and 29 of 2009 preferred by ORE and Company Appeals Nos. 25 and 26 of 2009 preferred by N.Athappan and R.Athappan are allowed. Company Appeal No. 27 of 2009 is disposed of modifying the Order of Company Law Board dated 3.8.2009 in C.A. No. 155 of 2008 to the effect that the conveyance of immovable properties to nominee of ORE is subject to all applicable laws and Regulations and if need be, with necessary approval/permission to be obtained by ORE from the competent authorities.

However, there is No. order as to costs. Consequently all the connected miscellaneous petitions are closed.