
(2015) 08 BOM CK 0117

In the Bombay High Court

Case No : Company Appeal No. 42 of 2013 in Company Petition No. 83 of 2011 and Company Appeal No. 43 of 2013 in CLB/Company Petition No. 82 of 2011

Enercon GmbH

APPELLANT

Vs

Wind World (India) Limited and Others

RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:

Citation : (2015) 08 BOM CK 0117

Hon'ble Judges : N.M. Jamdar, J

Bench : Single Bench

Advocate : S.U. Kamdar, Senior Advocate, Zubin Behramkamdin, Jehangir Jejeebhoy, Vivek Vashi, Kanika Sharma, Hrushi Narvekar, Krishnendu Sayta, Shaheda Madraswala i/b Bharucha and Partners, for the Appellant

Judgement

N.M. Jamdar, J.

INTRODUCTION

1. These two Company appeals arise from the common order passed by the Company Law Board, Mumbai bench, Mumbai dated 14 December 2012. The parties and the issues raised in these two appeals are interlinked. The appeals were argued and heard together and are being disposed of by this common judgment.

2. Both the Company Appeals are filed by Enercon GmbH. In Company Appeal No. 42 of 2013 - Enercon GmbH has challenged the order passed by the Company Law Board in Company Petition No. 83 of 2011 (originally numbered as Company Petition No. 74 of 2008) filed by Mr. Yogesh Mehra and others. In Company Appeal No. 43 of 2013 - Enercon GmbH has challenged the order passed by the Company Law Board in Company Petition No. 82 of 2011 (originally numbered as Company Petition No. 121 of 2007) filed by Enercon GmbH.

3. The Company in respect of which the proceedings have arisen is M/s. Enercon (India) Limited, now named Wind World (India) Ltd. Enercon GmbH holds 56% equity shares in Enercon India Ltd. and 44% shareholding is by the Mehra family. Yogesh Mehra is the Managing director of Enercon India Limited. His brother Ajay Mehra is a whole time director. The other directors on the board of Enercon India are Dr. Aloys Wobben who is also the chairman, and Mr. Hans-Dieter Kettwig. Dr. Aloys Wobben is 100% share-holder of Enercon GmbH, the 56 percent shareholder in Enercon (India) Ltd.

4. The Company Petition No. 82 of 2011 was filed by Enercon GmbH (referred to as EG) against Enercon (India) Ltd. (referred to as EIL) and the Mehra family (the Mehras) and certain other subsidiaries on 11 August 2007. The Company petition No. 83 of 2011 was filed by the Mehras against EG, Dr. Aloys Wobben and Mr. Hans-Dieter Kettwig on 3 November 2008. By the impugned order dated 14 December 2012, the Company Law Board - (the Board) has dismissed the Company petition No. 82 of 2011 filed by EG and has allowed the Company Petition No. 83 of 2011 filed by the Mehras. The Board has directed EG to sell its share holding to Mehras, laying down certain modalities as regarding appointment of facilitator and for valuation. The Board has held that a case of oppression made out by the Mehras against EG is proved and as per provisions of Section 397, 402 and 403 of the Companies Act, 1956 (the Act), buyout by Mehras of the shareholding of EG is necessary.

FACTS

5. EG and Mehras incorporated the Company in question i.e. Enercon India Ltd. (EIL) for manufacturing and marketing wind turbine generators and energy converters in India. EG is a Company registered under the laws of Germany. EG is one of the pioneers in the field of wind energy. Dr. Aloys Wobben holds many patents in the field of wind turbine generators. He is the 100% shareholder of EG. Yogesh, Ajay, Sudarshan, Minakshi, Radhika, Sitakshi, Siddharth Mehra are members of the Mehra family. EG holds 56% shares of EIL and Mehras hold 44%.

6. The Mehras and EG entered into a Shareholders Agreement in respect of EIL on 12 January 1994. A Technical Know-How Agreement was also entered into between the parties. The Shareholders Agreement executed on 12 January 1994 was between Enercon Gesellschaft für Energieanlagen mbH & Co. i.e. EG and Mr. Yogesh Mehra, acting for himself and his family members. The Agreement stated that the Mehras have incorporated a Company, "Enercon India Limited", having its registered office at Mumbai, Maharashtra and the Mehras have requested EG and the EG has agreed to supply technical know-how and assistance for manufacturing, marketing of Wind Turbine Generators and components excluding Wind Turbine Controllers and parts. The authorised share capital of the EIL was to be 22,500,000 Rupees (twenty two million five hundred thousand Rupees), divided into 2,250,000 Equity shares of 10 Rupees (ten Rupees) each. It was provided that the EG will take over 1,020,000 equity shares in EIL being 51% paid up capital at par and the Mehras would take 980,000 Equity Shares being

49% of the paid-up capital EIL. The management of the EIL was agreed to vest in four Directors. So long as EG owned not less than 51% of the share capital, EG was to have a right to appoint two directors, one of them would be a non-retiring director. So long as Mehras owned not less than 49% of the equity shares, the Mehras would also have right to appoint two directors, one of them a non-retiring director. Chairman of the board was to be appointed by EG. Managing director was to be appointed by the Mehras. It was agreed that in case of deadlock the Chairman would have a casting vote. It was agreed that 30 days written notice of meeting of directors would be given to every director in India or outside for meetings of the board. In case of directors residing outside, notice of meeting was to be sent by cable, telex or fax. The board of directors were given certain powers to take decisions. As regards transfer or sale of shares it was agreed that if any party desired to dispose of its shares, it would give written notice to the other party. Agreement contemplated execution of an agreement on the Transfer of Technical Know-How with the EIL and there were certain other usual clauses.

7. A Technical Know-How Agreement was executed on 12 January 1994 between EG and EIL. EG was styled as "the Know-How Supplier" (KHS) and EIL was styled as "the Know-How Receiver" (KHR). It was stated in the agreement that EG has the expertise and know-how in mechanical engineering and related technologies in respect of wind turbine generators and EIL intends to manufacture, trade and market the same in India. It was stated that at the request of the EIL, EG has agreed to provide the right and the license to use the technical know-how to the EIL for manufacture of E-26 Wind Turbine Generators and if market conditions are conducive then additionally to produce the E-40 Wind Turbine Generators. The "Products" were defined as E-26 Wind Turbine Generators and atleast two other ranges/models. The EG was to supply technical know-how in respect of manufacturing of the products for the Indian markets only. It was agreed that EIL would receive exclusive right to market the products in India. For consideration of supply and technical know-how, EG was to receive 5% royalty fee on the sales of wind turbine generators-WTGs and the components. EG was to make an attempt to assist EIL in achieving indigenisation. EIL was under obligation to keep all the information secret and use the same only for the purpose of the agreement. Period of Technical Know-How agreement was for 10 years from the effective date or from 7 years from the commencement of production. In the contingency of EG withdrawing its shareholding, EIL was to retain right to manufacture the products in India and the technical know-how already transferred.

8. The Reserve Bank of India gave its In-principle approval. The permission for conversion of loan into equity was received from Government of India, Ministry of Finance and from Government of India, Ministry of Industry. A Supplementary Shareholders Agreement was executed on 19 June 1998. The share capital of EIL was increased in the year 2000. The general permission from Reserve Bank of India was received. The EG subscribed additional 1.26 million Equity shares and

the Mehras subscribed to additional 0.99 million Equity shares. A further Supplementary share-holding agreement was executed on 19 May 2000.

9. One more Agreement was entered into that is Intellectual Property License Agreement (IPLA) dated 29 September 2006. It was stated in the recital that the technical know-how agreement of 1994 has since expired this agreement was being entered into. IPLA agreement is now subject matter of an arbitration proceedings. The implications of IPLA in respect of consideration of the subject matter of the present proceedings will be dealt with at a later stage.

10. This was broadly the arrangement between the parties. The day to day management of EIL was with the Mehras. Sometime around the year 2006 negotiations took place between Yogesh Mehra and Dr. Wobben for sale of 6% shares of Mehras to EG. Certain price was offered by Dr. Aloys Wobben as a chairman of EG. However, the transaction could not go through as the parties differed on price. Thereafter there were disputes between EG and EIL in respect of supply of parts. The Mehras negotiated with one IL & FS to sell its shares of 6% for Rs. 220 crores and informed EG by letter dated 10 August 2007. In view of the intention of the Mehras to sell its shareholding to an outsider the EG filed a Company petition No. 82 of 2011.

Company Petition No. 82 of 2011 by EG

11. The case of EG in the Company petition No. 82 of 2011 was as follows :

"(i) EG is the fourth largest wind turbine manufacturer in the world. It is a pioneer in the invention of gearless wind turbines. As of April 2007, EG had installed 11006 wind turbines. It has production facilities in Germany, Sweden, Brazil, India and Turkey. Dr. Aloys Wobben founded EG in the year 1984. He holds around 40% of all registered patents in the field of wind energy technology worldwide. He pioneered the gearless technology in wind turbines in the year 1993. He is recipient of the Federal Cross of Merit the only general State decoration of Federal Republic of Germany. He is a longstanding advisor to the Government of Federal Republic of Germany with respect to the energy sector. Yogesh Mehra does not have any wind energy experience or credentials as the family business of Mehras was textiles.

(ii) Around the year 2006 basic differences in approach arose between EG and EIL. EG was interested in cautious project research and development of wind turbines, while Mehras were interested in setting up independent power producing wind farms. Mehras planned to sell their investment to EG in August 2006 with a view to encash the investments rather than bringing in more funds. When a valuation of rupees 1.5 billion Euros (8000 crores) was put forth by Mehras, the EG questioned the same. It was explained by Mehras that it was based on their forecast. It is on this valuation that Mehras tried to sell its shares of 6%. At that time EG realised that the Mehras were trying to deceive them by inflating the price of shares of EIL. Mehras concealed vital information regarding EIL from EG. Management related information was not given. In spite of technical

know-how agreements, the finances of EIL were hidden by the Mehras. The EIL is a joint venture between EG and Mehras and the foundation of the EIL was the innovation and inventions of Dr. Aloys Wobben, the chairman of EG. The relations between Dr. Wobben and Mr. Yogesh Mehra were excellent and thus Dr. Wobben put his full trust in him. By the year 2005, it became apparent that EIL was in need of funds and EG was ready to infuse funds. Mehras however avoided to infuse funds in EIL. Mehras stated that they would make it a zero debt Company. Though in the month of May 2006, Mehras assured that 55 crores of equity would be put in, Mehras took no steps to increase it.

(iii) The debt burden of EIL increased to about 560 crores. To obtain loans Mehras falsely projected the balance-sheet of EIL. EIL was being run by manipulation of accounts so as to project it as having a lucrative investment and to raise finances from the open market and borrowings. Instead of concentrating on manufacturing on wind turbines generators and its research, Mehras were more interested in indiscriminately acquiring land and needlessly created various subsidiary Companies. The Mehras were responsible for EIL committing Sales tax and VAT violations and funds of the Company were also being siphoned off in the construction of towers etc. Yogesh Mehra was misusing his position as Managing director and was not supplying correct information to EG.

(iv) The matters came to head when Mehras denied Intellectual Property Licence Agreement. The Mehras, inspite of having received benefit under the IPLA, were avoiding to make self assessment of accounts. On 16 February 2007, EG demanded information which was kept back from EG relating to reporting system, financial results, balance and profit loss, planning, EIPP policy, production installations, board resolutions etc. Around 20 February 2007, it was decided that the partnership be terminated. Supplies were stopped. With mutual consent in February 2007, supplies were resumed. Stoppage of supply had no effect on production as 120 finished uninstalled machines were being held by EIL. EG came to know from customers of EIL that false invoices were issued and the funds of EIL were siphoned out. Large amount of finances were diverted to construction work. The Mehras being managing directors and in control of day-to-day affairs were mismanaging EIL and were acting oppressively. The Mehras were sabotaging the efforts of EG. Huge stock of fully finished products were lying in the EIL. Under the management of Mehras, EIL has committed Sales tax and VAT violations.

(v) The Mehras brazenly questioned the IPLA and refused to do a self-assessment. They were focusing on acquiring lands and vesting them in separate companies. It is therefore necessary to alter the Article 171 which conferred day to day management in the hands of Mehras group. The affairs of the EIL conducted by Mehras group was oppressive to EG, and also against the public interest. The Mehras already voiced their intention to cash out their investment. A case under Section 397 and 398 of Companies Act, 1956 was made out. Accordingly EG is entitled for a direction to remove Mehras from the position of

Managing directors and board of directors. Article 171 and 128(A) need to be amended and right of appointment of directors given to Mehras be deleted. The Mehras should be directed to transfer their share-holding of 44% upon independent fair valuation."

12. EG in Company Petition No. 82 of 2011 made the following prayers -

"(a) Pass appropriate orders and directions removing the Respondent Nos. 2 and 3 from the positions of Managing Director and Whole Time Director respectively of Enercon (India) Limited.

(b) Pass appropriate orders and directions removing the Respondent Nos. 2 and 3 from the positions of Managing Director and/or Whole Time Director and respectively of the said subsidiary and associate companies of Enercon (India) Limited.

(c) Direct that the Articles of Association of Enercon India shall stand amended, in particular Article 171, to the effect that rights of appointment of directors and participating in management given to the Mehra Group (Respondent Nos. 2 to 8) shall stand deleted.

(d) Direct that the Articles of Association of Respondents Nos. 9 to 35 being the subsidiary and associate companies of Enercon India shall stand amended to the effect that rights of appointment of directors and participating in management given to the Mehra Group (Respondent Nos. 2 to 8) shall stand deleted.

(e) Direct Respondent Nos. 2 to 8 to transfer their entire shareholding (44%) in Enercon (India) Limited to the Petitioner at a fair value to be independently arrived at on the basis of the balance sheet of the Company giving the true view of the Company.

(f) Direct Respondent Nos. 2 to 8 to transfer their entire shareholding in the subsidiary and associate companies of Enercon (India) Limited including but not limited to Respondent Nos. 9 to 35 herein to the Petitioner at a fair value to be independently arrived on the basis of the balance sheet of each of the said companies giving the true view of each company.

(g) Direct an investigation to ascertain the conduct of the Respondent Nos. 2 to 8 in dealing with assets, properties, monies and management of the Respondent No. 1 Company.

(h) Direct Respondent No. 1 to take all necessary and consequential action to the report of the investigation, including but not limited to tracing out the monies, property and assets of the Company in the hands of the Respondent Nos. 2 to 8 or any of them and direct restoration of such monies, properties and assets to Respondent No. 1.

(i) Pass such other and further order(s) or direction(s) as this Hon''ble Board deems fit and proper in the facts and circumstances of the present case."

13. This was in short the case made out by EG in their Company petition No. 82 of 2011. An application was taken out by EG for interim relief. The Board by its order dated 24 September 2007 came to the conclusion that the position of the EIL is critical and supplies need to be resumed by EG immediately. EG was authorised to appoint one of its nominees as a joint managing director, subject to EG resuming the supply. Joint managing director was to work together with managing director. Status-quo was directed to be maintained, with regard to all the issues pending then and no action in relation to the dispute was to be taken. The Board also gave its suggestions for amicable resolution of the dispute. It suggested that the Mehras may consider selling their entire share-holding of 44% to EG and an auditor be appointed for that purpose. It was noted in the order dated 13 November 2007 that Mr. Arvind Karnik was appointed as a joint managing director. The matter was thereafter adjourned from time to time on the ground that settlement talks were in progress. On 15 May 2008, the Board noted that the compromise efforts had failed and matter needed to be heard on merits. By order dated 19 May 2008, the Board directed that no board meeting to be convened without the leave of the Board.

Reply by Mehras to the Company Petition No. 82 of 2011

14. On 4 July 2008, a reply came to be filed by the Mehras opposing the Company Petition No. 82 of 2011. The case of Mehras in their reply, briefly was as follows :

"(i) Since the inception, the work of Mehras has been very good and EIL has been successfully managed. The turnover of EIL as on 31 March 2007 is Rs. 2200 crores. Profit after tax was estimated upto Rs. 82 crores. It was only since May 2006 that grievances were started being raised by EG. In fact EG on various occasions had praised the Mehras for conducting EIL smoothly.

(ii) In the petition EG has suppressed various material facts and only with a view to force exit of the Mehras from EIL. As many as around 35 to 40 important documents have been suppressed. EG had obtained an ex-parte temporary injunction against EIL in the Regional Court at Hamburg, Germany. This fact was suppressed. The Hamburg District Court on 9 April 2008 had vacated the ex-parte ad-interim order. Even in the proceedings before the High Court the order passed by the Hamburg Court was suppressed. Various attempts have been made by EG to bring the functioning of EIL at a stand-still so that it can acquire the shareholding of Mehras at lowest price.

(iii) The supplies of necessary parts was stopped without reason. Therefore, EIL had to cancel various orders. Non-availability of components seriously affected the functioning of EIL and so also the various agreements EIL had entered into between the other parties.

(iv) The EG arbitrarily rejected the proposal of Mehras to access the capital market which would have enormous benefits to EIL and ensured long term continuity. The Mehras had not agreed that 44% of 10 million Euros would be put

in by the Mehras. The EG had offered a sum of rupees 40 million Euros for 6% stock of Mehras from which position the EG unjustifiably resiled.

(v) There was no question of inflating the valuation nor any evidence is produced in that regard. The allegation that Mehras concealed state of affairs from the EG is baseless. Finances of EIL were never hidden nor withheld nor there was any window dressing of the accounts. The accounts were maintained by one of the most reputed audit firms. On the other hand, EIL was awarded Best Service Provider award due to the management of Mehras. The EG always had access to the information of EIL on the SAP server located in Germany. Mehras gave full cooperation with due diligence team of the EG. The extensive review was carried out by EG and all the details were provided. Personal guarantees of substantial amounts have been given by Mehras while EG gave only a corporate guarantee of rupees 34 crores in ABN Amro Bank, which was withdrawn without notice to Mehras.

(vi) The wind conditions in India differ from region to region. Due to the transportation problem and lack of quality infrastructure and other facilities, there has been an inventory built-up but that has nothing to do with the management of the Company. It is only with a purpose of taking the control of EIL by reducing the value that EG did not introduce higher capacity machines in India. The EG was interacting on regular basis with representative of the Petitioners and there was a Balanced Score Card system developed. In affidavit filed on 30 August 2007, the position as regards sub-contractor was clarified. There was no question of deleting the Article 171 as there was no case of mismanagement made out. IPLA was a draft document and was not a concluded contract. As recent as 2 October 2006, letters of oppression were given to Mehras by EG. There being no mismanagement or oppression, petition was liable to be rejected."

Company Petition No. 83 of 2011 of Mehras

15. Thereafter the Mehras filed a Company Petition No. 83 of 2011 (re-numbered from Company Petition No. 74 of 2008). The case of Mehras, after narrating basic facts, in this petition was in short as under -

"(i) The EG in its capacity as a majority shareholder committed various acts of oppression. The EIL was being managed by Mehras competently and there was no complaint by EG in respect of the management by the Mehras. The EG with an intention to force exit on Mehras made an attempt when deciding to purchase 6% share-holding of Mehras at 40 million Euros unilaterally changed over to purchase 12% of the share-holding at the same amount. When the Mehras rejected this revised offer, EG took various steps vindictively to ensure ouster of Mehras from EIL.

(ii) EG unilaterally and fraudulently stopped supplies of parts and components and inspite of the interim orders passed by the Board in EG's petition EG continued to indulge in these acts of oppression. After agreeing that EG would

infuse capital in a meeting with bankers EG backed out from the same. EG recalled the facility of rupees 34 crores sanctioned to EIL by ABN Amro Bank. In view of this withdrawal EIL was placed in serious financial trouble.

(iii) The EG unjustifiably relied upon a draft IPLA, which was not a concluded, contract to stop the supplies which was crucial for existence of EIL. EG instituted frivolous and vexatious proceedings in the Court at Hamburg, withholding information important to EIL in respect of its transfer pricing. EG also stopped the access of EIL through the SAP system, which was necessary for its day to day functioning.

(iv) EG addressed malicious correspondence to third parties including customers and financial institutions to affect the business of EIL. In view of stoppage of supplies, the benefit granted under Export Promotion Capital Goods Scheme to EIL was affected and exposed directors to threat of criminal prosecution under relevant acts. The representatives of EIL did not act in the interest of EIL but in the interest of EG. Even after supply was directed to be resumed, EG deliberately supplied the machinery in mismatched manner.

(v) EG unjustifiably used the fact of termination of the draft IPLA to address correspondence to various parties to prejudice the interest of EIL inspite of the position that draft IPLA was not a concluded contract. EG arbitrarily directed EIL not to proceed in respect of the export project in Ethiopia resulting in substantial financial loss and threat to levy being imposed by the government.

(vi) In spite of such malicious actions on part of EG, the efforts of Mehras and morale of the employees remained unaffected. It was only due to the reputation of Mehras that the bankers did not recall the loan facilities. The work of EIL was appreciated and various awards were conferred.

(vii) In view of such oppressive acts of EG relief needs to be granted in favour of Mehras. EG should comply with agreed principles, EG should refrain from representing to the third parties on the basis that draft IPLA is terminated, EG should infuse funds. The Article 171 should be amended to remove the right of appointment of directors in EG and the power to casting vote under Article 157, and EG should transfer their entire shareholding to Mehras at a fair value."

16. Accordingly the Mehras in the Company petition made the following prayers--

"a) Direct that Respondent No. 1 be obliged to comply with the Agreed Principles executed on September 29, 2006 between Petitioner No. 1 on behalf of Respondent No. 2 and Respondent No. 3 on behalf of Respondent No. 1 in particular continuous supply of parts, components, raw materials and special components as per the pricing parameters as had been agreed on;

b) Pass appropriate orders and directions removing Respondent Nos. 3 and 4 from the board of Respondent No. 2 owing to their acts of breach of fiduciary duties to Respondent No. 2 as pointed out in the body of this petition;

- c) Direct that Respondent Nos. 1, 3 and 4 be enjoined and restrained from representing to any third party, banks, financial institutions and any other lending agency that the draft IPLA is terminated and not enforce any rights that it may allegedly accrue from its termination;
- d) Direct that Respondent No. 1 act upon its commitment, as made before the banks on December 20, 2007 to infuse further capital of Rs. 112 crores into Respondent No. 2;
- e) Direct that the accounts of Respondent No. 2 for the financial years 2006-2007 and 2007-2008 be audited as per past practice and standards and that Respondent No. 1 extend all co-operation to this end;
- f) Direct that the Articles of Association of Respondent No. 2 shall stand amended, in particular Article 171, to the effect that rights of appointment of directors and participating management given to Respondent Nos. 3 and 4 shall stand deleted;
- g) Direct that the Articles of Association of Respondent No. 2 shall stand amended, in particular Article 157 in as much as the power of the casting vote shall not be exercised by any director so appointed by Respondent No. 1;
- h) Direct that Respondent No. 1 transfer their entire shareholding 56% in Respondent No. 2 to the Petitioners at a fair value to be independently arrived at on the basis of the valuation carried out by any person as appointed by this Board;"

Reply of EG to the Company Petition No. 83 of 2011 of Mehras

17. The EG filed their reply to the Company Petition No. 83 of 2011. In the reply EG took various contentions. Most of the averments in the reply were repetitions of the stand taken by EG in their petition and for sake of brevity the contentions of reply have been only briefly adverted to as under-

"(i) The petition by Mehras is nothing but a counterblast and abuse of process. The petition does not disclose any cause of action. It is the Mehras who are the oppressors and mismanaged EIL.

(ii) Issues raised by Mehras in the petition are raised in the Suit No. 2667 of 2007 filed in the Bombay High Court. The petition challenges IPLA, which contains arbitration clause and further the matters under IPLA are not within the jurisdiction of the Board.

(iii) By order dated 29 January 2009, the Board had directed valuation, which order has become final.

(iv) The issues raised by Mehras are purely contractual in nature. The Mehras repudiated the IPLA and sought to infringe the intellectual property rights of EG. The Mehras systematically attempted to revoke the patents held by Dr. Wobben. The Mehras attempted abuse of SAP system by prying into areas they were not

entitled to and therefore preventive action had to be taken. The allegations regarding transfer pricing are totally baseless.

(v) After petition was filed by EG, in review of affairs of EIL, it transpired that Mehras held more than 15 illegal meetings between April 2007 to October 2007 without notice to EG. Through these illegal meeting Yogesh and Ajay Mehra assumed wide powers. The Mehras concealed that certain subsidiaries were created.

(vi) The Mehras adopted dilatory tactics in respect of the audit. The auditors did not comply with the orders of the Board. The conduct of the statutory auditor to EG was not fair and was only to support the Mehras. The Mehras manipulated accounts to falsify credit ratings, high inventory of almost 120 fully finished products was maintained to causing EIL to commit violations of taxing statutes. The Mehras, by keeping EG in dark, created huge debts and committed misappropriation of assets of EIL. The profits of EIL were artificially increased."

18. The averments made in the petition by the Mehras were dealt with by EG parawise, and in consonance with their stand enumerated earlier, denied the contentions. The EG accordingly sought dismissal of the Company petition filed by Mehras.

Proceeding before the Company Law Board

19. On 27 January 2009, the Company Petition along with Company Application No. 329 of 2008, No. 372 of 2008 and No. 429 of 2008 were taken up for consideration. The Board noted the position of the shareholding. It noted that there has been a complete loss of trust and confidence between two sets of shareholders which is evident from the fact that each of them have filed the petitions. There was a complete deadlock due to which board meetings were not being held, and parting of ways was in interest of the EIL. The Board suggested that parties to consider parting of ways. Since the parties agreed for appointment of M/s. Sharp & Tannan both the parties were given liberty to make submissions before the valuer. On 29 January 2009, matters were taken up and an order was passed superseding the earlier orders. Certain modalities were laid down for the purpose of valuation for determination of value of shares. Independent valuation of each of the Respondent No. 9 to 35 was to be carried out. The issue whether Respondent Nos. 33, 34 and 35 were part of the enterprise was to be considered by the Board. The Mehras and EIL were directed to maintain status-quo as regards its fixed assets.

20. On 21 April 2009, the earlier order was modified and M/s. Suresh Surana & Associates were appointed as valuers. On 23 July 2009, it was agreed by consent that M/s. Ernst & Young, India would be the valuer. On 19 October 2009, Company Application Nos. 423, 424, 425, 426 of 2009 were taken up by the Board. Company Application No. 423 of 2009 was filed by EG seeking certain directions to the Mehras. The Board directed the auditors of EIL to furnish all the information furnished by EIL to the auditors for the purpose of audit. As regards

the allegations of EG that inspite of status-quo order EIL created charge on the assets by depositing of title deed and has incorporated subsidiaries, the Board directed that the subsidiaries i.e. Vaayu companies be made as Respondents. The Board observed that for the time being it did not propose to pass any order on the application. On 27 November 2009, the application filed regarding direction to EIL to submit information was disposed of and it was directed that an undertaking be furnished by EG that it will not use the information for any purpose other than valuation and not use it in the correspondence with third parties. Company Application No. 67 of 2010 was filed by EG in respect of due diligence of EIL, came up for consideration before the Board on 23 March 2011. The Board noted the order passed by this Court in Company Appeal No. 91 of 2009. It noted that undertaking as contemplated by the order passed by this Court was not filed in Company petition. The submission of EG that undertaking was not required was rejected in view of the order passed by this Court. By order dated 23 November 2011, the Board directed EG to furnish undertaking in view of the order. The appeal filed by EG challenging the order dated 23 March 2011 was dismissed. Thereafter EG filed a special leave petition in the Apex Court, which was also dismissed. The EG furnished an undertaking, which according to it, was in substantial compliance of the direction of this Court.

21. Before the Board the petitions were extensively heard. The EG contended that the Mehras in conducting the affairs of the EIL had committed acts of oppression and mismanagement and the Mehras alleged that the EG has acted oppressively against the interest of EIL. Both the parties thus alleged oppression/mismanagement on the part of other side and defended their own action.

22. It was argued by EG that Mehras held 15 board meetings and an extra ordinary general meeting without any notice to EG. Various companies were incorporated to frustrate the valuation proceedings and profit at the expense of EG and EIL. It was submitted that Mehras were attempting to render EIL defunct by siphoning its funds. It was argued that Yogesh Mehra was interested in setting up independent power wind farms. It was further contended that Mehras resiled from their duties to infuse funds. Despite the order of status-quo the Mehras continued dealing with short term and long term finances keeping EG in dark. It was contended by EG that its technology was usurped and its intellectual property rights were infringed. It was submitted that the proceedings had been brought by EIL against Dr. Aloys Wobben for revocation of 19 of the patents. Mehras attempted to cause EIL to wrongfully obtain parts ignoring the patents of EG. It was contended that EIL abused the SAP server by importing EGs data and peep into it's global operations. It was contended that the Mehras filed criminal proceedings and when the representative of EG visited India, they were questioned by the Police officers at the Taj Mahal hotel, Mumbai, where they were staying. It was argued that, by an unauthorised resolution without notice to EG, Yogesh Mehra conferred himself untrammelled powers to take decisions without approval of Board. It was further contended that in the order dated 29 January 2009 there is a clear finding that there is a loss of trust and deadlock in

the Board meetings and the question cannot be re-opened. It was contended that the EG being majority share-holder be permitted to hold a general meeting and change the composition by removing the Mehras and for modification of the Articles of Association. As regards the contractual obligation between EG and EIL, it was contended that those issues need not be gone into as there are proceedings pending in Civil Courts and courts of competent jurisdiction.

23. It was further contended by EG that the Company petition No. 83 of 2011 filed by Mehras is liable to be dismissed in limine because as no cause of action was made out and it was merely a counter-blast to EG's petition. It was contended that Mehras have already raised a dispute regarding alleged obligation of EG to supply components, in Suit No. 2667 of 2007 filed in this Court and in any case these matters were commercial disputes not within the jurisdiction of the Board. It was also contended that Mehras petition is not maintainable as no case is made out of oppression by share-holders via the business and management of EIL and the complaint made must relate to the affairs of the Company. It was urged that the acts of oppression complained against EG were not in the capacity of shareholders and independent acts of EG as technical know-how provider could not come under the concept of oppression. As regards the allegation made by Mehras, the EG contended that the issues regarding transfer pricing and other contractual disputes are subject matters of dispute before other forums. It was contended that no share-holder can be forced to infuse funds. It was further submitted that in view of conduct of Mehras of downloading of data from SAP server that EG had to take protective action. The Mehras had also withdrawn their personal guarantees from various banks when EG withdrew its guarantees, there is no question of any oppression. It was submitted that the EG's technology is patented and EG has always retained its exclusive rights and only part of the technology was licensed to EIL for a limited period which was wrongfully sought to be taken away by EIL. Various decisions were cited as regards the rule that the Board should ordinarily direct buy out in favour of majority. On these and various other grounds EG presented its case.

24. Mehras contended that none of the prayers in Company Petition No. 82 of 2011 filed by EG, could be granted as the conduct of EG was unfair and prejudicial. It was contended that the EG had indulged in acts of oppression of sudden stoppage of supplies, mismatch of supplies, withdrawal of guarantees, denying access to SAP server, refusal to infuse capital and refusal to give information on transfer pricing. It was also contended that inspite of the direction of this the Board to EG to file an undertaking that the data sought for will not be misused, EG did not furnish such undertaking. The charge of EG regarding Vaayu Companies was denied contending that none of the orders passed prevented the incorporation of such subsidiaries and no competing business was done. The Mehras contended that even otherwise they were not averse to including these Vaayu Companies in valuation exercise. It was contended that the role of EG as a technological know-how provider and the shareholder could not be separated. It was contended that it could not be that the actions of EG as a know-how

provider, since though being prejudicial to the interest of the EIL, could be ignored, since they were majority share-holders. It was contended that the refusal of EG to infuse capital in the EIL when Company was in need of additional funds, was oppressive as a majority share-holder. The Mehras contended that the EG withdrew guarantees pushing EIL towards financial brink as a majority shareholder. The Mehras placed on record details of various litigations instituted by EG and contended that the EIL was involved in spate of litigations by the EG and this conduct as a majority share-holders could not be ignored. The Mehras contended that EG consistently was thwarting attempts to get the valuation done as they were never interested in the same. Mehras contended that EG never made any complaint regarding the management of Mehras and only started making complaints as part of their plan to depress the value of shares to force Mehras to exit. Mehras contended that the resolutions were passed as the practice followed by EIL. It was further contended that even if EG exits from EIL, EIL will not suffer as the technology which is available can be marketed and the EIL will not be financially affected and the Mehras are best suitable to carry on with the EIL. These were broadly the submissions made by the Mehras before the Company Law Board (the Board) with dismissal of EG's petition and for grant of relief in their petition.

Impugned order of the Company Law Board

25. By the impugned order dated 14 December 2012, the Board dismissed the Company petition No. 82 of 2011 filed by EG stating it as not maintainable. The Company Petition No. 83 of 2011 filed by the Mehras, was allowed with various directions. The Board found that the Mehras had made out a case of oppression by the EG and that parting of ways could not be avoided. The Board came to the conclusion that it would be in the interest of EIL and the shareholders that EG should go out of EIL. It held that even though Mehras were in the minority, giving EIL to EG will be rewarding the wrongdoer. The Board further noted that for parting of ways valuation was necessary for which EG had refused to give an undertaking. The Board accordingly directed that one Mr. Hari Sankar Acharya, Ex-Chief Commissioner of Income Tax be appointed as Facilitator-cum-observer. He was directed to sort out the issue of giving requisite information to the valuers. He was given complete immunity from any civil or criminal proceedings and all the parties were directed to cooperate with him. The Board appointed M/s. Grant Thornton India Pvt. Ltd. at Mumbai as Valuers to value EIL and the subsidiaries as on 31 March 2006. The valuation was to be furnished to EIL with a copy to the Board. Even if EG failed to give requisite undertaking the valuation was to continue. On receipt of valuation report, the Mehras were to make remittances of the dues to EG within three months. The observer Mr. Acharya was directed to ensure smooth proceedings before the Valuers of EIL till the valuation was completed and EG's dues were cleared. Mr. Acharya was given liberty to mention the matter to apprise the Board and seek further directions if necessary. The Company petition No. 82 of 2011 filed by EG was accordingly dismissed as not maintainable. The Company petition No. 83 of 2011 filed by the

Mehras was allowed. The C.A. No. 232 of 2012 was disposed of in terms indicated above. All Company applications stood disposed of except C.A. No. 240 of 2012 which was not pressed.

The Present Appeals

26. The EG thereafter filed the present Company appeals i.e. Company Appeal No. 42 of 2013 challenging the order passed in Company Petition No. 83 of 2011 and Company Appeal No. 43/2013 challenging the order passed in Company Petition No. 82 of 2011. By order dated 18 January 2013, the Appeals were admitted. The order passed by Board dated 14 December 2012 was stayed. The interim orders dated 29 October 2007, 7 January 2008 and 19 May 2008 were continued. In matters arising out of the IPLA, proceedings initiated by EG reached the Apex Court and the Apex Court in SLP No. 33252/33263 of 2013 on 31 October 2013 expedited the hearing of the present Company appeals. Accordingly, the Appeals were taken on priority and heard over various dates. The counsel also submitted their written submissions.

27. Mr. Sudipto Sarkar along with Mr. Navroz Seervai, and Mr. S.U. Kamdar, learned Senior advocates made submissions for the Appellants-EG and Mr. Fredun DeVitre, learned Senior advocate appeared for the Respondents-Mehras in both the Appeals.

SUBMISSIONS

28. The primary argument of Mr. Sarkar is that the order of the Board suffers from complete non-application of mind and the proceedings need therefore remanded back. Mr. Kamdar, without prejudice to the submissions of Mr. Sarkar, advanced submissions on merits in case the prayer of remand was not accepted. According to him the Mehras petition was liable to be dismissed and EG's petition needed to be allowed. Mr. DeVitre supported the impugned decision of the Board to contend that there is no non-application of Board and there is no need for remand and the order of the Board was fully justified.

Submissions on behalf of EG.

29. Mr. Sarkar learned Senior Advocate in brief submitted as under-

"(i) The impugned order was passed by the learned member of the Board in haste. The order suffers from non-application of mind and having not addressed itself to the merits of the contentions. The order is perverse and contains errors on the face of it. The arguments were closed before the Board on 27 November 2012. The Written submissions were filed on 11 December 2012 and the impugned order was passed on 14 December 2012 running into 171 pages without dealing with various contentions. The learned member has merely reproduced the various contentions of the parties. The case laws cited by the Appellants have not been considered at all.

(ii) The Board has dismissed the petition of the EG as not maintainable even

though all the ingredients of Section 399 of the Act were satisfied. In spite of the relevant ingredients missing from the Mehras petition, the same was allowed. The conclusion that the petition of EG was not maintainable was contrary to the observations made by the Board itself in the impugned order. Furthermore, by order dated 29 January 2009, the Board had observed that there is complete deadlock in the board and complete parting of the ways was the only solution and that Mehras should sell their shareholding.

(iii) The Board could not have dismissed the petition as not maintainable. In the operative portion of the impugned order the Board has recorded that the petition of the Board requires to be thrown out at the threshold, despite of observing that the Board had no option but to dispose of both the petitions on merits in view of the order of this Court.

(iv) In spite of demonstrating that the actions of the Mehras, the minority shareholders, were oppressive and prejudicial to the interest of majority, the Board not only gave clean chit to the Mehras but awarded them the entire EIL. The Board has not considered the unauthorised alteration of the Articles of Association by Mehras, criminal complaints filed by the Mehras incorporation of various Vaayu Companies, passing of an illegal board Resolution on 26 April 2007 empowering themselves with sweeping powers and the wrongful conduct of the statutory of the auditors of the Company. These factors clearly indicated the wrongful and oppressive conduct of the Mehras and most of the submissions raised by EG raised on these wrongful acts have not been considered at all.

(v) There is no finding as regards the illegal modification of Articles of Association; incorporation of Vaayu companies; CARE ratings; Lack of Provisioning as per Standard Accounting Practices; Tax Evasion; Non-compliance with GAAP; meeting and interconnection with Consortium of Bankers; needless financial assistance from various Banks; refusal by Mehras to infuse capital; artificial inflation of profits, distortion of financial gains; diversion of EIL's Resources; vexatious proceedings; setting up parallel SAP Server; re-engineering EG's technology; auditors refusal to give information; Mis-appropriation of assets; inducing EG to purchase Mehra's shares at inflated prices. Thus having observed that the petition has to be heard on merits, non-consideration of all the above grounds would make the order perverse and liable to be set aside on the ground of non-application of mind.

(vi) The Company Petition filed by Mehras under Section 398 of the Act was not maintainable against EG, the share-holders, who were not in active management of the Company. The requirement of Section 398 of the Act is that the act of mismanagement must be attributable to the share-holders who are in management of the Company and against only such share-holders that the petition making grievance of mismanagement can be filed.

(vii) Not only factually EG was never in management and the Mehras were in management, this position is also made clear in the Articles of Association of EIL.

Inspite of raising this point which goes to the root of the claim made by Mehras the Board did not deal with the issue. The Mehras also did not establish that any of the acts of EG were oppressive and no case for oppression has been made out in the Mehra's petition.

(viii) The Board completely lost sight of the settled legal position that in order to succeed in the charge of mismanagement, the Petitioner has to prove that it is the affairs of the Company which is conducted by the shareholders in a manner oppressive to some part of the members. The conduct must be burdensome and operate harsh and the position must continue till the date of the petition. To constitute an act of oppression there must be actions on one group of shareholder in respect of the affairs of the Company. Therefore Mehras had to demonstrate that the action complained by EG were in their capacity as a shareholder and those actions in the capacity of share-holder were oppressive to Mehras.

(ix) The Board confused between the actions of EG in its capacity as a shareholder with the actions of EG as a technology provider. If at all any act of oppression is to be alleged, it will have to be established that the actions of EG as a share-holder were oppressive. No complaint can be made that the actions of EG as a technology provider is oppressive as it would be in the realm of contractual and intellectual property matters.

(x) The Board, having held that the EG was right in its contention that the proceedings initiated by EG in respect of contractual and commercial disputes and that EG had correctly decided not to argue on issues which are purely in the nature of commercial and contractual, proceeded to make observations on merits regarding the very same dispute which were to be decided by the competent Courts. The Board made observations on merits on the validity of IPLA, the purported transaction of technology, stoppage of supplies, all three pending in the concerned courts.

(xi) The grievance and reliefs claimed by Mehras were in relation to contractual agreements between the parties and therefore, their petition was not maintainable. The Board failed to give effect to legal position that the contractual disputes are beyond the scope of Section 397 and 398 of the Act. Failure to act in terms of the contract would be its breach and cannot be considered as oppression and/or mismanagement.

(xii) It is also settled legal position that before case of Section 397 and 398 can be entertained, it will have to be established that the case for winding up of the Company on just and equitable grounds is made out. The Mehras did not seek winding up of EIL on just and equitable grounds as they are the ones who are in management of EIL. The Board did not address itself to this basic issue, the impugned order therefore, suffers from non-application of mind.

(xiii) While listing out the proceedings initiated by Mehras and EG, the learned member of the Board did not mention the suit for stoppage of supplies, being

Suit No. 2667 of 2007, filed by Respondent No. 2 and 3 for very same relief in this Court and various proceedings instituted by Mehras were clubbed under one head. The Board passed orders in the petition filed by Mehras, which are beyond the scope of Section 402 and 403 of the Act. While granting relief under Section 402, the Board recorded findings on validity of the IPLA, transfer of technology, stoppage of supplies. Once the Board itself had agreed that these disputes will not form part of the proceedings before the Board, the Board could not have given findings on merits of the same.

(xiv) The Board could not have directed transfer of technology to Mehras merely because they were permitted to buy out the shareholding of EG. The Board had no jurisdiction at all to arrive at such finding. Further more the issue regarding transfer of technology is being agitated in various courts and is sub judice.

(xv) The direction to issue transfer of technology is not only not within the powers of the Board, the direction is issued without considering that the EG is a world leader in production and manufacture of wind turbines and Mehras were only involved in textile business earlier.

(xvi) The Board could not, in absence of exceptional circumstances, direct the Mehras, the minority, to buy out EG, the majority. The normal rule is that the majority should buy out the minority. No exceptional circumstances are shown to order the buy out by minority of the shares of the majority. The Board failed to give effect to settled position of law and introduced a concept of de jure and de facto control, concepts which are unknown to law in respect of buy outs.

(xvii) The Board proceeded on completely erroneously basis to order the valuation. Principles of natural justice were violated by the order of the Board by denying the copy of valuation report to EG and directing payment of consideration as per valuation without giving an opportunity to EG. The Board also gave no justification for choosing the period and date for valuation, that too without including the Vaayu Companies atleast on six occasions. In spite of Mehras stating that the Vaayu companies can be included in the valuation exercised, the Board left the Vaayu companies out of the valuation process.

(xviii) The Board was not justified in appointing Mr. Acharya- a observer - cum facilitator under Section 402 of the Act and giving him unfettered powers making him exempt from all civil and criminal liabilities.

(xix) The manner in which Mr. Acharya is appointed is highly questionable. This particular member of the Board has appointed Hari Sankar Acharya in various companies, each time fixing exorbitant fees in his favour. Mr. Acharya has been appointed by this particular member of the Board fixing fees from Rs. 73,000/- to Rs. 3,00,000/- p.m. The Companies on which he is appointed are located at Bangalore, Mumbai, Hyderabad, Delhi and Ahmedabad and it is not possible to believe that when he would be simultaneously working in all these places.

(xx) The order of the Board is opposed to principles of natural justice and

fairness. It suffers from non-application of mind and lack of adequate reasons and non-consideration of various issues raised by EG. The Board has also dismissed EG's petition is not maintainable at the threshold. Considering these facts this is a fit case where the order of the Board be quashed and the matter be remanded back for fresh consideration."

30. Mr. Kamdar, learned Senior Advocate on behalf of EG contended in brief as under -

"(i) Firstly, that the impugned orders ought to be quashed and set aside and the petition filed by the EG needs to be restored to the file to be heard by the Board afresh on merits. If this prayer is not acceded to, relief be granted in favour of EG as prayed for in their Company petition as the various acts of the Mehras constituted oppression and mismanagement on their part, and Mehras petition be dismissed.

(ii) The Mehras unauthorisedly altered the Articles of Association to enable them to run the EIL in a manner they wanted. The amendments were carried out unauthorisedly, disregarding the special rights of EG. The Article 170A of the Articles of Association was amended without notice to EG and this clearly constituted an act of oppression against the EG. The amendment deprived EG of their affirmative vote on various issues and removed various restrictions on the powers of Mehras. The amendment unilaterally increased the limit for short term loan. This is a clear act of oppression by Mehras against EG.

(iii) Between April 2007 to October 2007, fifteen illegal board meetings of EIL were held by Mehras, without giving notice to EG, which EG came to know first time in January 2008. The Board resolutions dated 26 April 2007 passed without notice to EG, gave sweeping powers to Yogesh Mehra. The powers were given to buy-back and enter into other arrangement with customers who were close to Mehras. Powers were conferred to defend or institute legal proceedings on behalf of EIL and authorising themselves to take decision without approval of board. It has to be held that the illegal resolutions constituted oppression and mismanagement.

(iv) These purported Resolutions were passed empowering Yogesh Mehra and Ajay Mehra to take various major policy decisions without the approval of the Board, terming them as day to day activities. None of the powers conferred by the said resolution could be termed as day to day activities. These resolutions purported to be passed were backdated to circumvent the order of status-quo passed by the Board on various dates, more particularly the order dated 29 October 2007.

(v) The Mehras filed a derivative suit in 2007, which action was in complete contradiction with the purported powers assumed by them under the alleged resolution. If the Mehras had allocated themselves these powers under the resolution then there was no need for them to file a derivative suit, and this clearly indicates that the so-called resolution is a back-dated and fabricated

document.

(vi) The proceedings filed by Mehras on the strength of the illegal resolutions were not in the interest of EIL. All these proceedings were vexatious without any substance and constituted an act of gross oppression against the EG. The litigations instituted by Mehras was an act of oppression by the Mehras.

(vii) On 29 October 2007, the Board had directed that the status-quo in regard to all issues pending in the proceeding should be maintained and no action should be taken further. By order dated 19 May 2008, the Board had directed that without leave of the Board no meeting shall be convened and no circular resolution would be passed. However, in and around 2010, the EG came across material on the internet indicating that the Mehras incorporated various companies, the "Vaayu" companies at various places. Mehras incorporated Vaayu Companies with similar structure of EIL, with a clear view to defeat the rights of EG.

(viii) The Mehras fraudulently funded these Vaayu Companies with a shareholding pattern as out of which 11 Vaayu Companies had shares belonging to Mehra group and not of EG. The Mehras transferred the benefits to the 11 Vaayu companies in which they and their family members were the sole shareholders. The Vaayu companies were established with a view to siphon out the funds of EIL and to misuse the technology and disintegrate and destroy the EIL. These Vaayu companies were incorporate to pervert the process of valuation and to transfer the technology without any authority. The act of incorporating these Vaayu Companies was gross act of oppression of Mehras.

(ix) When the EG's representation had come to India and were staying at Taj Mahal hotel, on 1 September 2008, officers of the Economic Offence Wings, in connection with a complaint filed by Mehras, interrogated them for six hours. EG's representative filed Criminal Revision Application in this Court and the stay was granted to further proceedings. However, the Mehras continued to press the criminal matter. All this was done by Mehras to pressurise EG by exposing its representative to the threat of arrest. This was also a serious act of oppression by Mehras.

(x) The auditors, Deloitte Haskins and Sells, acted in connivance to defy the order dated 29 October 2009 of the Board the Board refused to provide EG, the majority share-holder, the requisite information as required by the EG despite of the order of the Board.

(xi) The Mehras created various charges on the property of EIL on the strength of illegal meetings and resolutions and misappropriated the assets of EIL. Inspite of orders of The Board dated 29 October 2007 and 19 May 2008 granting interim orders, the Mehras procured various loans from bank and encumbered assets of EIL in contravention of the orders of the Board. Equitable mortgages on all immovable property for amount of Rs. 63 crores, hypothecation of entire assets of the companies for Rs. 25 crores, hypothecation of certain assets for 20 crores

and modification of an earlier charge for Rs. 200 crores. These charges were created without any board meetings and the purported meetings were all without notice to EG. All these acts would show that the Mehras committed acts of gross oppression on the EG, the majority share-holder and the petition filed by EG needs to be allowed.

(xii) The petition of Mehras was not maintainable. Section 398 of the Act formulates that the shareholder/s against whom a relief is being sought has to be management of the Company. Since EG was not in the day-to-day management of the Company there is no question of entertaining the petition filed by Mehras against the EG. To maintain a petition for oppression there must be two or more groups of share-holders and the acts complained must be by a group acting against the interest of another group. The acts complained must be in the capacity of share-holder and the contractual disputes between the share-holders out of purview of the Board. The EG was acting in its contractual capacity as a technology provider and the acts complained of are the acts of EG not as a shareholder but as a technology provider. This settled position of law has been reiterated time and again by the Apex Court.

(xiii) The actions of EG in it's capacity as a technology provider for enforcement of it's contractual and intellectual property rights does not amount to oppression under Section 397. The Board, after holding that such contractual disputes are outside the purview of petition under Section 397 and 398, went on to adjudicate them. The relief sought for by Mehras in their petition are clearly contractual and on this reason alone the petition filed by Mehras was not maintainable and should have been dismissed. Even assuming that the petition was maintainable, none of the allegations made by Mehras had any substance and none of them constituted acts of oppression on the part of EG.

(xiv) The allegation that EG initiated spate of litigations against the Mehras to throttle the Company are baseless. Mehras misused and infringed the patents and technology license by EG and committed breach of the Technical Know-How Agreement and in the circumstances to protect it's contractual and intellectual property rights EG had to institute various litigations. EG had, in fact, invoked arbitration clause, however instead of cooperating with the same Mehras filed Civil Suit and obtained certain interim orders. They also filed criminal proceedings only to harass EG. It was Mehras therefore, who instituted numerous frivolous and vexatious proceedings against EG.

(xv) There is no substance in the allegations of Mehras that the EG initiated malicious correspondence to third parties so as to affect the business of EIL. These letters were written by EG only to protect it's intellectual property rights and contractual rights which were being misused by the EIL at the behest of Mehras and therefore the EG was justified in addressing such correspondence. The actions of EG were not as a share-holder and therefore, could not constitute an oppression. The Board did not consider this position of law and straightaway concluded that EG kept it's own interest above the interest of EIL.

(xvi) The allegation of Mehras that there was stoppage and mismatch of supplies is also baseless. The Mehras filed a derivative suit for resumption of supplies wherein Mehras clearly alleged that these acts of EG were in violation of their contractual obligation. Even though the EG was under no obligation to supply after the expiry of the agreement, the EG continued to make supplies under impression that the parties were negotiating a comprehensive agreement. In spite of this position, Mehras continued to commit defaults in payment and therefore, protective action had to be taken by EG. The question of allegation of mismatch of supply is sub judice in this Court in a Civil suit. The issue of mismatch of supply is a complex issue.

(xvii) The Mehras refused to provide EG with correct financial position and manipulated the accounts. EG suspected that the Mehras were manipulating the actions, and were justified in withdrawing corporate guarantee to safeguard its own financial interest. The Mehras misused their access to SAP system and downloaded confidential and proprietary information of EG. The Mehras filed an Application No. 123 of 2008 for SAP access. A detailed reply was filed by EG setting out various facts to which there was no response by Mehras. Not giving access to SAP did not amount to any oppression.

(xviii) There is no question of jeopardising the fulfillment of EIL for a project in Ethiopia. License granted to EIL was restricted to India and EIL was not entitled to manufacture the turbines outside India. Even assuming it was permissible under the Export Promotion Capital Goods Scheme, it could not have been done without the permission of EG. EG was prepared to infuse funds in the Company however, Yogesh Mehra avoided to put funds in the Company when it was needed. The Mehras mismanaged the Company and presented wrong picture to induce EG to purchase portion of Mehras share-holding at an inflated value. The allegation of Mehras regarding transfer pricing was based on speculation and there was no real impact due to increase in prices. EG had increased the prices of only one item out of many that were being supplied that too on account of a global price rise. The Mehras created various charges without leave of the Board in spite of the order passed by the Board. The Mehra's petition requires to be dismissed and EG's petition be allowed."

Submissions on behalf of Mehras

31. A summary of arguments of Mr. Fredun DeVitre, on behalf of the Mehras as under -

"(i) The EG has levied unfair allegations against the learned member of the Board that she misconduct herself. The Board has reproduced the written submissions and there is nothing wrong in the same as it is a matter of convenience. Adequate reasons have been given and the basic position that there is lack of trust between two groups is established and only question was which group should be directed to buy out the other. The Board with a well-reasoned decision after giving detailed reasons has directed the Mehras to buy out the share of EG.

The petitions were heard at length and the matter has been dealt with in detail and therefore, there is no reason to remand the matter which will put the parties to inconvenience. The EG is only interested in delaying the matters. The learned member had taken extensive notes of the arguments. Parties filed their written submissions and thereafter decision was given. The submission that the decision was taken in undue haste is without any basis.

(ii) Though the Board stated that the petition by EG is not maintainable and deserves to be rejected at threshold, the Board decided the matter on merits and the discussion by the Board would demonstrate this fact.

(iii) The Mehras have at the outset taken a stand that appointment of Mr. Acharya can be set aside and be substituted by any fit and qualified person by this court and no capital can be made out of this appointment by EG. The Board has provided for fair process of valuation. Any other fair and reasonable process of valuation can also be suggested to by this Court which the Mehras are agreeable. It is settled law that date of valuation is generally taken as date closest to the date of filing the petition. If the argument of EG is that the Mehras have refused the valuation of the contemplated shares then there is no difficulty for EG to accept valuation on earlier date. Even otherwise, Mehras are agreeable if any other appropriate date for determining value of shares can be determined. Mehras have no objection to include Vaayu Companies in the valuation.

(iv) The Board, on 29 January 2009, passed an order regarding a finding that parting of ways between two groups of share-holders was inevitable however, the same was an interim order. It was open to the Board, at the time of final hearing to come to a conclusion after hearing of the matter and the main question before the Board at the time of hearing was, which group can buy out the other and the reasons for the same.

(v) The EG holds 56% of equity share capital in EIL, 44% is held by independent minority i.e. the Mehras. EG is solely under and controlled by Dr. Aloys Wobben who owns 100% share capital. The parties entered into various agreements such as Share-holders Agreement, Technical Know-How Agreement. The parties agreed that the Board of Directors would consist of four directors, two directors from each share-holder group and in case of deadlock, chairman was to have casting votes. The EG did not at any time prior to filing of the petition choose to exercise its rights to appoint any alternate director and a Joint Managing Director as it was entitled to under the Articles.

(vi) The day-to-day management was carried on by the Mehras with the consent and knowledge of EG. The EG invested amount of Rs. 3.78 crores for its 56% equity shareholding. The Mehras invested Rs. 2.97 crores. There were four relevant time periods. Firstly, from 1994 to January 2004 i.e. till the technology transfer agreement expired by efflux of time. Secondly, February 2004 to January 2007. Thirdly, from February 2007 to August 2007 when EG filed it's agreement and fourthly, after August 2007 when Mehras filed the petition. After

1994 when the joint venture was set up there was no grievance or objection raised by EG in respect of functioning of EIL. Various subsidiary companies were set up as the main business of EIL was of manufacturing and marketing of wind turbines by undertaking turn-key projects. Accounts of these companies was included in the accounts of EIL. A SAP system was set up and EG had all time access to the transaction in India. Thus EG was in full knowledge of the functioning of EIL.

(vii) No objection or any protest was made by EIL regarding any matter concerning the EIL. The EG was kept full informed of all the transaction in India in respect of management of EIL. It was for the first time in February 2007 that EG, only to create some dispute, demanded provision for 7.5% of total sales invoice with full knowledge that all the profits of EIL would be wiped out.

(viii) There was no structured format for exchanging information and this would be done by representatives of EG and some time by visiting India for exchange of information. Mr. Yogesh Mehra would also visit Germany atleast twice a year. Statutory auditors would scrutinise the accounts. Minutes of the meetings were also sent. This functioning was recorded in the letter dated 23 February 2007 which was never denied by EG.

(ix) The EG from time to time by addressing letters acknowledged and appreciated the work done by Mehras in regard to EIL. Letters were issued on 1 December 2005, 2 October 2006, 6 October 2006 for the year 2006, thereafter 2007 to 2010. EIL won Best Service Provider among manufacturers award. Certificates were also issued appreciating the work.

(x) After the Technology Know-How Agreement expired in January 2004, the supplies were continued pursuant to various meetings. The parties entered into a document called the "Agreed Principles" dated 29 September 2006. The document contemplated the possible situation in future that if EG divests its shareholding in EIL. It was contemplated even though EG would continue to supply technology in special components. Royalty payable was also fixed. The meetings were held by the parties in their capacity as a share-holder. In the various correspondence that ensued EG described itself as acting in capacity as a majority share-holder.

(xi) Around 2006, Dr. Wobben, in view of attempt to find an amicable solution, expressed that he was willing to consider selling his share-holding to concentrate more on research. Dr. Wobben had also appreciated the work of Mehras. The Dr. Wobben offered a sum of Euros 40 million for the 6% equity shares of Mehras. The Mehras took the offer forward and took steps. Dr. Wobben changed his stand and sought 12% shares at the same price. The Mehras refused to sell at such a low price.

(xii) As a consequence thereafter EG took various steps to suppress the value of shares. The EG thereafter as a majority share-holder stopped the supplies to EIL. There was no prior intimation of stoppage of supplies. The stoppage of supplies

was ordered by Dr. Wobben as a main share-holder of EIL which is clear from the correspondence. The Board therefore, correctly held that stoppage of supplies by EG was in its capacity as a shareholder. The Mehras then sent such information which was sought for by EG. Supplies were resumed in March 2007 since information sought for was furnished. Again correspondence received in reference to the discussions that took place on 24 February, 2007 were as parties had agreed for termination of partnership in EIL. Due diligence was carried out and all the information was supplied. On 5 May, 2007, the Mehras wrote a detailed letter setting out the ill-effects regarding introduction of the E-40 model and according to the Mehras it was not in the best interest was the Company. In July 2007 again supplies were stopped without any reason. These acts affected EIL and they were done by EG in its capacity as a share-holder.

(xiii) EG thereafter withdrew corporate guarantees given on behalf of EIL to ABN Amro Bank. This was without notice to EIL and Mehras. When EG filed it's petition there was no mention of withdrawal of guarantees by EG. Mehras had pointed out that withdrawal of corporate guarantee without prior notice did serious damage to the EIL. The Mehras on the other hand, had given personal guarantees to the tune of approximately Rs. 540 crores. After filing the petition EG withdrew the SAP access/connectivity of EIL falsely claiming authorization for the access. This caused tremendous problems in the functioning of EIL. The access to SAP was essential for business operations of EIL. The action of EG was equivalent to a majority share-holder taking the books of accounts. The Board has therefore, correctly held that this action of EG amounted to oppression.

(xiv) EG filed vexatious proceedings in Hamburg Court and obtained ex-parte injunction in respect of the alleged trademark infringement. The conduct of EG and its directors was in contravention of their fiduciary duty as share-holders of EIL. EG refused to provide transfer pricing information after 2005-2006. EIL being Indian subsidiary of foreign principal was required to produce material before tax authorities which was unjustifiably withheld despite repeated reminders causing problems for EIL and oppression to minority share-holders. The EG also refused to infuse capital in EIL. The director appointed by EG agreed in the meeting dated 20 December 2007 that they would increase the capital, but EG did not honour the commitment made by it's own director. Though EG filed an application seeking permission to infuse capital and they did so only for the purpose of creating a record, on the other hand disowning the commitment made by it's own director. EG went to the extent of denying even the knowledge of commitment. EG attempted to depress price of shares to affect the interest of Mehras.

(xv) EG deliberately delayed the valuation exercise and saw to it that each valuer would recuse itself. In spite of the orders passed by the Courts directing EG to file an undertaking that they will not use the information received from Mehras except for certain contingencies specified therein, EG refused to give such undertaking. When the Board refused to pass any order regarding appointment

of a fresh valuer since EG refused to give an undertaking, EG filed an appeal in this Court which was rejected, Special Leave Petition filed by EG was also dismissed by the Apex Court. After the completion of hearing EG made an application calling upon the Board to accept modified form of undertaking which was rightly objected to by the Mehras. The entire conduct of EG was not bonafide and in breach of the orders passed by the Board and this Court. EG therefore, is not entitled to any equitable relief.

(xvi) EG misused the information supplied by the Mehras and entered into correspondence with the suppliers, vendors, even competitors to discredit EIL and to create a blockade so as to ensure maximum harm is caused to EIL to bring the business of EIL to close and in order to depress the value of the shares.

(xvii) There is no substance at all in EG's allegations of oppression and mismanagement by Mehras. There was no unauthorised alteration of Articles of Association as alleged. Amendment to Article 170(a) was carried out in the year 2003 when there was no dispute between the parties. EG was kept fully informed of all the meetings. Amended Articles were forwarded to EG. They were also annexed by EG to its petition stating that there are amended articles. There is no grievance regarding the amendment to Article 170(a) in the petition filed by EG inspite of being aware of the amendment. Correspondence entered into between the parties would clearly show that EG was aware of the amendment to the Articles throughout. Even in the suit filed by Mehras in this Court the amended Articles of Association were annexed. Objection that no notice was given cannot be raised after such a long passage of time. In any case, the amendment cannot be termed as oppressive as powers exercised by Mehras pursuant to these amendments was for the benefit of EIL and could not be termed as oppressive. Similarly, there is no basis for the allegations that the Board resolutions dated 26 April 2007 were illegal and amounted to oppression. EG raised a grievance regarding board meeting of 26 April 2007 for the first time in Company application which was filed on 27 February 2008.

(xviii) The issue regarding the Board resolutions was concluded by order of the Board dated 19 October 2009. Furthermore, the argument of EG of want of notice is without any basis as for past 13 years particular practice was followed which was followed for the meeting in question. There is no pleading that the resolution was fabricated. The argument based on filing of derivative suit also is without any substance. Derivative suit had to be filed in view of the actions of the nominee directors of EG, in the interest of EIL.

(xix) The prayer of EG to restrain formation of new subsidiaries was rejected by the Board. The Vaayu companies were set up as part of the business of EIL and the Mehras had offered to include Vaayu companies in the valuation exercise. No evidence has been placed on record to show that Vaayu companies were conducting business in competition with EIL.

(xx) The EG has made needless allegations against statutory auditors which were

working for 14 years since inception, without any objection from EG. No allegations could have been made without making the statutory auditors a party.

(xxi) There is no breach of any order of the Board in respect of holding of board meetings. All the charges that were alleged to be created are prior to 19 May 2008 i.e. the interim order of the Board. The order on 29 October 2007 did not restrain holding of board meetings as it did not provide for closure of activities of the Company. There is absolutely no substance in the allegation that Mehras instituted vexatious criminal proceedings. Mehras bonafide pursued remedies available to them in law.

(xxii) The contention of EG that allegations against EG were not maintainable as they were not in day to day management is incorrect. Section 397 does not have a concept of minority or majority shareholders. Being in fact in control and in law being in control, are settled legal propositions. The directors can act oppressively by doing nothing to defend the interest of the Company when certain action is warranted. Section 397 also contemplates a situation where a shareholder who may not be in active management of the Company can be guilty of oppressive conduct against other shareholders. The stand of the EG that its actions were not in the capacity of majority shareholder is incorrect. The stoppage of supplies were in the capacity as majority shareholder, withdrawal of corporate guarantee and addressing correspondence to customers, bankers, suppliers were all in capacity of majority shareholders. Letters sent to competitors were also in capacity of majority shareholders. The nominee directors of EG on the board of EIL chose not to further the interest of EIL. All the actions of Mehras were in the interest of EIL.

(xxiii) The Mehras have been in day to-day management of the Company for 20 years. There have been no objections or protests regarding management of the Company. Mehras have adopted manufacturing of turbines to suit Indian conditions. EG has distanced itself from the Company and did not take part by appointing nominee directors. EG sought deletion of the word "Enercon" and the name of "EIL" had to be changed.

(xxiv) It is not a settled proposition that the majority must buy out the minority even though majority is the oppressor. Various decisions interpreting Section 402 of the Act relied upon by EG are all distinguishable on facts. The Board has correctly appreciated the factual background and has directed that Mehras should buy out the stock of EG and this finding substantially subsists, should not be interfered. The allegations of EG regarding the valuation process is baseless. The Board has directed that the valuation should be done by independent auditor.

(xxv) Even assuming no case of oppression has been made out there is a severe deadlock and since the impugned judgment of Board puts an end to the dispute in an equitable manner it is not necessary to interfere with the same. Both the appeals therefore, are without any merit and deserve to be dismissed."

DISCUSSION

32. Firstly, the submission of EG that the proceedings need to be remanded to the Company Law Board will have to be taken up for consideration. The arguments on behalf of EG on merits have been advanced, as alternative arguments in case the conclusion is reached that remand is not necessary. Remand is sought by EG on the ground that the petition filed by them has been dismissed as not maintainable at the threshold and various facets urged by them have not been considered at all. The manner in which the decision is rendered is opaque and it is given in an extremely hurried manner. Thus, the decision of the Board is assailed on the ground of suffering from serious lacunas, and that there is lack of fairness in decision making process. In the preceding paragraphs the pleadings of the parties and the submissions made both before the Board and in this Court have been enumerated which will show that various complex issues arose for consideration. The grievances made by EG are serious and cannot be brushed away simpliciter. Such grievances ultimately have a bearing on the faith of the litigants in the decision making of the Board. It is therefore necessary to consider the various statutory provisions regarding the role and functioning of the Board and the grant of relief under Section 397, 398 and 402 of the Act to appreciate the decision making process of the Board.

33. The Company Law Board is established under the Companies Act 1956. It was found desirable to set up a Board for convenient administration of Companies Act. Until 1 February 1975, the Board functioned as a delegate of the Central government. By the Companies Amendment Act of 1974, the Board was empowered with certain functions, which were earlier with the Courts. Later on it was found necessary to increase the strength of the Board so that the Board could decide all the matters which were transferred from the Court, by forming benches. To enable it to discharge the quasi-judicial functions more effectively, it was found necessary to empower the Board with powers akin to Civil Court to summon witnesses, production of documents, etc. It was also felt necessary to ensure that the members of the Board have adequate qualifications in law and exposure to discharge their quasi-judicial function more effectively.

34. The Board was initially under the control of the Central Government and this control was infringing upon its independence as a quasi-judicial body. Various changes were brought about by the Companies Amendment Act, 1988 as regards the powers and functions of the Board. This amendment was preceded by setting up of a committee who submitted its report. The committee noted that there was need for a quasi-judicial Tribunal, independent of the executive authority of Central government, not only to ensure that the affected party is heard but also the decisions are seen to be taken judiciously and without interference. The committee recommended that the Board should be an independent quasi-judicial body similar to Income-Tax Appellate Tribunal, with its benches at different places. The Act was amended in 1988 to establish a Company Law Board with independence to exercise judicial and quasi-judicial functions. This was the background in which the Board came into existence

35. The Company Law Board constituted under Section 10E of the Act is empowered to exercise and discharge such powers as may be conferred upon it under the Act. The Board has powers which are vested in the courts under the Code of Civil Procedure 1908 while trying a suit, in respect of disclosure and inspection of documents, enforcing attendance of witnesses, compelling production of documents, examining witnesses, granting adjournments and reception of evidence on affidavit. Every bench of the Board is deemed to be a Civil Court under Section 195 and the proceedings before it are deemed to be judicial proceedings. The Board in exercise of its powers and discharge of functions is guided by principles of natural justice. The Board has power to regulate its own proceeding. Any person aggrieved by the decision or order of the Board is entitled to file an appeal to the High Court against it as provided under Section 10F of the Act. Thus, the proceedings before the Board partake colour of judicial proceedings and the basic characteristics of a judicial proceedings apply to proceedings before the Board.

36. Board exercises substantial powers in respect of oppression and mismanagement within a company. Under Section 397 and 398 of the Act, any member of a company can apply to the Board in case of oppression and mismanagement in respect of the affairs of the Company by the other member or members. Under Section 397 any member can approach the Board complaining that the affairs of the Company are conducted prejudicial to public interest or causing oppression to any member or members. The Board can remedy the situation by putting an end to the oppression if it is of the opinion that the Company's affairs are being conducted opposed to public interest and oppressive to other member of members, and though case for winding up of the Company is made out, it will be unjust to such member or members who is complaining of oppression to wind up the company. Under Section 398 any member can bring to the notice of the Board that the affairs of the Company are being conducted prejudicial to public interest and to the interest of the Company and that there has been a material change in the management and control of the Company which is likely to affect the affairs of the Company prejudicially. The Board, if it is of the opinion that the affairs of the Company are being conducted in a manner prejudicial to the interest of the Company and public interest or any change has been brought about resulting in prejudice, the Board can pass such orders as it deems fit. Substantial body of law is developed in England and in this country regarding the concepts of Oppression and Mismanagement in a Company. There are various decisions both in English and of Indian Courts laying down parameters as to what would constitute oppression and mismanagement and under what circumstances a relief can be sought.

37. Section 402 lays down the powers of the Board for dealing with the situations under Section 397 and 398. On an application under Section 397 or 398, without prejudice to generality of powers, the Board can pass orders regulating the conduct of the affairs of the Company in future. It can direct purchase of share or interest of member by other members. The Board can, in case of purchase of

shares consequent reduction in share capital, terminate, set aside and modify any agreement between the company and its managing director, director, managing agents, secretary, treasurer or the manager on equitable terms, after giving notice to the concerned parties. The Board can set aside any transfer, delivery of goods, payment, other acts relating to property by and against the company. The Board has also been given powers to pass appropriate orders on any other matter, which according to the Board are just and equitable.

38. Section 402 of the Act read with Rule 9 of Companies (Court) Rules 1959, confers substantial powers on the Board to give such directions as may be necessary for achieving the ends of justice. The Board is empowered to grant appropriate relief in the larger interest of the Company, even if there is no prayer to that effect in the petition. The Board has power to alter and over-write the articles of association. The Board can appoint an officer of the Court to look after the affairs of the Company. The appeal to the High Court under section 10F from the order of the Board is only on questions of law.

39. Bare perusal of these provisions would show that the powers conferred on the Board are very wide. Board can change the control of the Company by directing buy out of the interest of the members of the Company. The Act confers substantial powers on the Board to end disputes and to arrive at amicable settlements. Extremely wide powers have been conferred on the Board in the matters relating to a company. Considering such wide powers, it is axiomatic that they must be exercising in fair, transparent and judicious manner. Directing a buy-out of a group of shareholders and ordering their exit from the Companies is serious for such members. For them it is end of their association with the company.

40. It is obvious, considering the nature of proceedings and the implications of the outcome, that the litigants expect that they will be dealt with fairly by the Board. The orders of the Board have far-reaching effect on the affected parties. The Board which was once an authority to oversee the provisions of the Act working under the supervision of the Central government, is now, by various amendments, a body with the attributes of a judicial body. The strict parameters of conduct as applicable to a judicial body are desirable to be followed by the Board.

41. One of the fundamental attributes of the judicial functioning is the procedural justice. It requires that view points presented by either parties are addressed, cogent reasons are given as to which argument and why it is accepted or rejected. Care needs to be taken that no litigant goes with a feeling that the procedural justice was not followed. Keeping in mind this statutory framework, the role, powers and responsibility of the Board and the expectations of the litigant from it, the grievances made by the EG need to be considered.

42. The first grievance made by the EG is that the Company petition No. 82 of 2011 filed by EG was dismissed as not maintainable in spite of observing that in

view of the directions of this Court there was no option but to dispose of the petition on merits. It is the contention of the Mehras that though the Board did state that the petition is dismissed as not maintainable, but in fact, the Board has dealt with the petition of EG on merits.

43. There is no doubt that if the petition filed by EG is found to be dismissed as not maintainable and it is shown that the petition was indeed maintainable and deserved greater scrutiny, then it will have serious effect on the outcome of the litigation. There is no debate that the Board in the impugned order has stated that the petition filed by EG "deserves to be thrown out at the threshold" and is "not maintainable". Three issues therefore arise. First, the petition was not maintainable in view of any statutory embargo and deserved to be thrown at threshold and there was no question of looking at the case on merits. Second, it was dismissed holding that no pleadings are made in the petition to found a charge of oppression and mis-management and therefore the petition is not maintainable as being bereft of any particulars. Thirdly, though it is mentioned that the petition is not maintainable, it is decided on merits.

44. There is a specific meaning to the phrase "not maintainable" and the learned member is presumed to know the connotation of the phrase "not maintainable" as contra distinguished from "not proved" or "not sustainable" or "without merit". "Not maintainable" refers to a position where a petition as presented, does not even require scrutiny on merits. As if it was not clear enough to state that the petition was not maintainable, the learned member further clarified it stating that the petition of EG "deserved to be thrown out at the threshold". The Board's conclusion on EG's petition therefore reads that it was "not maintainable" and "deserved to be thrown out at the threshold". It is not expected of the Board to use such important phrases casually. It is not expected of the appeal Court to look for meanings and hear debates on what the learned member actually meant. Even though the above three positions cannot co-exist, I will now consider whether the learned member was right in any of these respect.

45. First aspect is as to whether the Board was right in holding that the petition of EG was "not maintainable" and "deserved to be thrown out at the threshold," taking the phrases as they are used. Chapter VI of the Act deals with prevention of oppression and mismanagement. This Chapter contains Section 397 and 398, which have been referred to earlier, deal with petitions of the members making a grievance regarding oppression and mismanagement. The right to approach the Board under Section 397 and 398 is conferred subject to conditions laid down in Section 399 of the Act. In the case of company having share capital, the right to apply under Section 397, 398 is on not less than 100 members and not less than 1/10th of total number of members whichever is less, or members holding not less than 1/10th of issued share capital. In case of company not having share capital right is conferred on not less than 1/5th of total number of members. The Central Government is also empowered to authorise any member of a company

to apply to the Tribunal under Section 397, 398 of the Act, even if requirements of requisite member are not fulfilled, subject of course to certain conditions. No other requirement regarding maintainability of a petition is shown except the one laid down in Section 399. The EIL is company having share capital. The EG's share is 56% and therefore, EG clearly fulfilled the requirement under Section 399. If the requirement under Section 399 was not fulfilled the EG's petition could have been dismissed at the threshold, as stated by the Board. The petition therefore was maintainable and the finding of the Board taken in the first sense is therefore, completely perverse.

46. Now to the second aspect, that is to examine whether the petition was not maintainable as no cause of action was pleaded by EG to invoke section 397, 398 of the Act. It may be possible to not entertain the petition which is bereft of any particulars whatsoever and does not even spell out any allegations regarding oppression and mismanagement. In the petition filed by EG, the EG has made EIL, Mehras and various companies which were formed subsequently (Vaayu companies) as party Respondents. Therefore, the necessary parties were joined to the petition. The petition contains particulars about the EIL and its main objects. It gives details about share-holders agreement, supplementary shareholders agreements and various permissions sought from the Government. The petition gives particulars of the Petitioners, it gives the qualifications of the Petitioners to file the petition. It gives the particulars of Respondents, number of equity shares held by them and percentage of shareholding. Thereafter the petition narrates detailed factual background, which led to the dispute between the parties. It then proceeds to list genesis of cause of action and allegations of oppression and mismanagement by Mehras are made in detail. It is pleaded that in and about the year 2005, EG became concerned about the financial reserves of the company and EG decided to take a closer look in the functioning of the company which was so far left in good faith in the management of Mehras. It is pleaded that as EG started making more inquiries various tactics came to light. It is pleaded that Mehras tried to justify the poor performance while giving assurance, however none of the assurances were followed up. It is stated that various issues arose regarding the financial practices and as a part of ongoing legal discussions. Mehras offered to sell their share-holding and thereafter went back on their commitment. It is urged that the valuation produced by Mehras was highly inflated. The EG further alleged malafide conduct on the part of Mehras to conceal state of affairs from it. It is alleged that high inventories and stock in transit were maintained. Thereafter it is alleged that the Mehras recklessly proceeded to deny the IPL and take various steps in contravention of the agreement thereunder. The EG summarised the acts and oppression and mismanagement. From paragraph 61 to 81 the EG enumerated the grounds on which according to Mehras committed acts of oppression and mismanagement. It is with these pleadings that the Mehras filed a petition for oppression and mismanagement and consequential reliefs in their favour. It is pertinent to note that the EG's petition was first in time.

47. If the petition presented by EG is to be considered, no reasonable person would ever come to a conclusion that it had no particulars whatsoever and therefore it was not maintainable and required to be rejected at threshold without scrutiny on merits. All the adequate particulars which would constitute a cause of action for invoking these sections and the legal requirement of the Petitioners holding the requisite number were satisfied. The petition therefore, could not, in any circumstances be described as not maintainable for lack of particulars. What is further startling is that the Board also mentioned in the impugned decision that in view of the direction of this Court both, the Petitions will have to be decided on merits. Yet the learned member proceeded to state that the petition of EG was not maintainable and required to be dismissed at threshold. This is a completely perverse approach.

48. Now to the third scenario. This is the position urged by Mr. DeVitre, that mentioning that the petition is not maintainable is a mere error and in fact the Board has dismissed the petition of EG on merits. If the petition is dismissed on merits after having considered all the aspects, then the use of the phrases "not maintainable" and "deserved to be thrown out at the threshold", is utter casualness. These phrases have a specific meaning in law and the learned member is expected to know them. Use of these phrases has brought about vagueness in the impugned decision. If Mr. DeVitre's submission is to be accepted then the decision of the Board needs to be scrutinised to ascertain whether the Board did apply it's mind to all the facets urged by EG and whether the petition by EG was comprehensively dealt with and dismissed.

49. Since it is urged by Mr. DeVitre that the learned member has in fact considered the matter on merits and the EG's petition was rightly dismissed and Mehras petition was rightly allowed, I will now proceed to consider whether the learned member did decide the matter on merits, by analysing the reasoning of the learned member on the grounds of challenge.

50. It has been highlighted by EG in their submissions that following grounds were urged by them in support of their case, and most of them were not adverted to by the Board.

- "a. Board resolutions passed by Mehras.
- b. Modification of Articles of Association.
- c. Incorporation of four group companies.
- d. Incorporation of Vaayu companies.
- e. CARE rating.
- f. Standard accounting practices.
- g. High inventories.
- h. Non-compliance with GAAP.

- i. Meeting with bankers.
- j. Financial assistance from various bankers.
- k. Refusal to infuse capital.
- l. Inflation of profits
- m. Distorted financial picture.
- n. Diversion of resources.
- o. Breach of security on SAP server.
- p. Technology infringement.
- q. Attempts to revoke patents.
- r. Mis-appropriation and inducing EG to purchase shares at inflated prices."

EG's case was based on these grounds. If the learned member has dismissed the case of EG on merits as urged, then the learned member is expected to have dealt with these issues.

51. One of the central contention that was raised by EG was that a petition for mismanagement cannot be filed against the members who are not in management. It was their contention that the petition filed by Mehras was under Section 397 and 398 of the Act. According to them EG was never supposed to be in management of EIL and also factually EG was not in the management and Mehras since inception have been managing the Company. Reliance was placed on the decisions in the cases of Chatterjee Petrochem (I) Pvt. Ltd. Vs. Haldia Petrochemicals Ltd. and Others, (2011) 105 CLA 27 : (2011) 167 CompCas 373 : (2011) 11 SCALE 325 ; Incable Net (Andhra) Limited and Others Vs. AP Aksh Broadband Ltd. and Others, (2010) 3 ComplJ 1 : (2010) 5 JT 628 : (2010) 5 SCALE 427 : (2010) 6 SCC 719 : (2010) 100 SCL 402 : (2010) 5 UJ 2664 ; M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, AIR 2008 SC 1738 : (2008) 3 CLT 596 : (2008) 143 CompCas 97 : (2008) 2 ComplJ 496 : (2008) 3 SCALE 650 : (2008) 6 SCC 750 : (2008) 83 SCL 451 : (2008) 1 UJ 583 : (2008) AIRSCW 2402 : (2008) 2 Supreme 502 ; Kamal Kumar Dutta and Another Vs. Ruby General Hospital Ltd. and Others, (2006) 134 CompCas 678 : (2006) 5 ComplJ 511 : (2006) 7 JT 333 : (2006) 7 SCALE 668 : (2006) 7 SCC 613 : (2006) 70 SCL 222 : (2006) 4 SCR 462 Supp and Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, AIR 2001 SC 1416 : (2001) 105 CompCas 493 : (2001) 2 ComplJ 392 : (2001) 4 JT 424 : (2001) 3 SCALE 86 : (2001) 4 SCC 420 : (2001) 2 SCR 811 : (2001) 2 UJ 1134 : (2001) AIRSCW 1359 : (2001) 3 Supreme 80 . This ground was taken by the EG in their reply to the petition filed by EIL as well as in their submissions before the Board. This was an important point. Surprisingly there is no consideration of this major argument advanced by EG.

52. EG had urged that Mehras had unauthorisedly altered Articles of Association

and it was one of their main ground to allege oppression. It was urged by them that alterations were made by Mehras in the Articles of Association with a sole purpose of acquiring more power and reducing the role of EG in EIL. It was EG's case that they came to know of such unauthorised alteration only after filing the company petition. EG raised this ground in their reply to the petition filed by Mehras. Both the parties urged their rival contentions on this issue and filed rejoinder and written submissions. According to EG Article 170(a) was amended without intimation to EG and without their knowledge. It was urged by them that by the amendment made various conferred substantial powers on Mehras. This action of Mehras was put forth by EG as ground of oppression. Serious grievance was made that the amendment was carried out without notice to EG when Section 31(1) of the Act, mandates that it should be done by special resolution so also section 189(2) was relied upon. It was urged on behalf of EG that not only the amendment unilaterally conferred substantial powers on Mehras but the same was done without giving notice to EG and following procedural requirements. Reliance was placed on the decision of the Apex court in the case of M.S. Madhusoodhanan and Another Vs. Kerala Kaumudi Pvt. Ltd. and Others, (2003) 117 CompCas 19 : (2003) 4 CompLJ 185 : (2003) 6 SCALE 191 : (2004) 9 SCC 204 : (2003) 46 SCL 695 : (2003) 2 SCR 107 Supp , Smt. Claude-Lila Parulekar Vs. Sakal Papers Pvt. Ltd. and Others, AIR 2005 SC 4074 : (2005) 2 BC 542 : (2005) 124 CompCas 685 : (2005) 4 CompLJ 193 : (2006) 1 CTLJ 465 : (2005) 3 JT 523 : (2005) 11 SCC 73 : (2005) 59 SCL 414 : (2005) 2 SCR 1063 : (2005) 2 UJ 1103 : (2005) AIRSCW 1892 : (2005) 3 Supreme 46 , and on the decision in the case of Ebrahimi v. Westbourne Galleries Ltd. & Ors., [1972] 2 WLR 1289.

53. On the other hand, on behalf of Mehras it was contended that the amendment was carried out in the year 2003 when there was no dispute between the parties and it was a practice followed in EIL that EG would be made aware of all meetings and minutes from time to time and EG was forwarded all the information and therefore, the grievance made regarding no notice, was without any substance. The EG had challenged the stand taken by Mehras as factually incorrect and not contained in the petition. Therefore, the question that needed to be considered by the Board was whether the action of Mehras in carrying out the amendment amounted to oppression as it was without notice and without following the due mandatory procedure or factually any special procedure was not necessary in view of the practice and understanding between the parties. The Board, though referred to this aspect of the matter, has not dealt with it as required by a original fact finding body. EG has argued this point on merits in this Court without prejudice to its" contentions that it is the Board who at the first instance must decide this controversy. Mr. DeVitre has also made submission on merits. However the charge of non-application of mind cannot be brushed aside. The Board has not addressed itself at all to this head of oppression which is pressed into service by EG with seriousness.

54. Similarly, another ground of oppression urged by EG has not met the scrutiny

it deserves at the hands of the learned member. That ground was the assertion of illegality of both resolutions dated 26 April 2007. According to EG this board resolution passed without notice to EG gave wide and substantial powers to Yogesh Mehra. The powers were conferred to defend and institute legal proceedings and decide various matters, without approval of board of directors. Company application No. 629 of 2010 was filed by EG seeking a stay on the resolution. Both the parties submitted their pleadings and also written submissions on this issue. It was urged by EG that the board resolutions were illegal as they did not conform to the statutory requirements and judicial decisions. Serious allegation was made by EG that the fact that board resolution was not disclosed made it a suspicious document and the said purported resolution was backdated to circumvent the interim order passed by the Board on 29 October 2007.

55. It was urged by EG that if the board resolution gave powers to Mehras to institute litigation on behalf of EIL then there was no need for Yogesh Mehra and Ajay Mehra to file Suit No. 2667 of 2007 in a derivative capacity. Mehras countered this allegation by submitting that notice need not have been given to EG because it was not a practice followed in the company for various years. Mehras also sought to explain the reason why suit in derivative capacity had to be filed. On the other hand it was further contended by EG that such a resolution which empowered Mehras with such huge sweeping powers could not have been passed without notice to EG and there was no question of any past practice. Again the issue needed deeper scrutiny. Learned member dealt with this contentious issue by simply stating that since EG did not bother about the management of EIL, it cannot now complain about the illegality of the resolution. The learned member also observed that there is no pleading in respect of the board resolution in the company petition, even though Company Application No. 629 of 2010 was pending before it to be decided. The serious charge levied by EG regarding fabrication of resolution was rejected in one line that there is no evidence to that effect. Again the learned member has failed to address herself to a major issue.

56. One more ground that was raised by EG to levy charge of oppression was incorporation of Vaayu companies. It was a case of EG that EG came across that the Mehras incorporated various companies referred to as Vaayu companies some time in the year 2010. According to them, the incorporation of some of these companies were in contravention of the interim order of the Board dated 29 October 2007 and 19 September 2008. EG placed on record the details of the said Vaayu companies such as the date of incorporation and shareholding. EG urged that Mehras created these companies to siphon off the funds and defeat the rights of EG. According to them this was to misuse the technology which was previously licensed and sub-licensed the proprietary technology. It was urged on behalf of Mehras that the prayer made by EG in Company application No. 426 of 2009 not to form any new subsidiaries without the leave of the Court was rejected. It was their contention that nothing is shown by EG as to how these

companies are carrying on competing business and Mehras offered that the Vaayu companies can be included in the valuation exercises. Thus a serious issue arose as to what was the impact of incorporation of Vaayu companies as regards charge of oppression. That they would be included in valuation exercise was a matter for the purpose of valuation and that by itself could not provide an answer to the charge of oppression. The controversy as to whether the Vaayu companies were incorporated to defeat the rights of EG, what were their shareholding composition, whether they were formed to further sub-contract proprietary technology, were some of the issues which arose for consideration. The learned member found it not necessary to delve deeper in this controversy as according to her once Mehras offered that the Vaayu companies be included in valuation exercise, the issue lost its seriousness. However, the learned member completely lost sight of the fact that this was a ground on which oppression was alleged by EG and therefore, it was incumbent on her to decide this issue considering in that context.

57. EG had also made a grievance that auditors had refused to provide requisite information and they had committed contempt of the Board's order. Company Application No. 67 of 2010 and No. 68 of 2010 were filed by EG making an allegation that company's auditors were in collusion with the Mehras to prohibit EG from obtaining necessary information. The Company applications were dismissed by the learned member without having dealt with them on merits. Whether since the auditors not being party to the proceedings, no allegations could have been made, as contended by Mehras, was also one of the points for consideration, if detailed inquiry was held by the learned member. The learned member came to the conclusion that EG refused to give undertaking inspite of the directions of this Court dated 27 November 2009 and therefore it was disentitled from any equitable relief under the Act. Again this issue is simplistic as that. What was the nature of undertaking, whether the undertaking was for benefit of EG or it was for benefit of EIL; what were the consequences of not furnishing an undertaking; whether not furnishing undertaking would amount to an oppressive conduct; and whether EG was trying to seek certain unfair advantage, were some of the points that arose for consideration. The learned member however straightaway concluded that because EG did not give an undertaking as directed they are precluded from claiming any equitable relief. Both the parties had levied charges against each other as to who was to blame for delay in valuation exercise, which aspect was not adverted. Drawing conclusions in favour of one party without discussion is not decision making.

58. Another grievance made by EG was that Mehras instituted malicious criminal proceedings against EG's representatives, employees and independent professionals. EG made a grievance that these persons were subjected to harassment with a view to ensure that they did not come to India, this conduct was oppressive. What was the real impact of the incident of representative of EG being questioned by the investigating authorities, was a question which arose for consideration, as it was one of the grounds of oppression. The learned member

again simplistically concluded the issue by stating that several proceedings were taken to take EIL's interest. The application of mind and reasoning of the learned member is extremely sketchy on this ground as well.

59. The heads of oppression listed in paragraph 50 were some of the major heads of oppression alleged by EG, which are unfortunately dealt with by the learned member in most perfunctory manner. The grounds raised by EG cannot be stated as frivolous to deserve the summary treatment meted out by the learned member. Each of the heads of oppression as alleged, constitute a serious charge and required a detailed discussion. What one finds is that the learned member has simply upheld the explanations of Mehras and has drawn direct conclusion and has dismissed the petition of EG as "not maintainable". EG in its oral argument in this Court as well as in written submissions has advanced submissions on merits without prejudice to their contentions that the matter needs to be remanded to the Board. When both the parties have filed their petitions attributing oppression and mis-management against each other and the petitions were heard together, then non-consideration of grievance of one party will vitiate the proceedings, and the relief granted in favour of other party, which is an outcome of such decision also therefore, will not be sustainable in law. I therefore find merit in the claim of EG that its petition was not decided on merits at all.

60. Now turning to grant of relief in the petition filed by Mehras. Serious grievance was made by Mr. Sarkar and Mr. Kamdar that not only the petition filed by EG has been rejected without any reasoning and without addressing to the vital points, but even while allowing the petition of Mehras, the learned member has not considered the defence of EG and has straightaway granted relief to Mehras.

61. It was urged that the main defence of EG to the petition filed by Mehras that it was not maintainable has not been dealt with by the learned member. It was urged by EG that, for a petition to be maintainable under Section 397 of the Act, it must make out a case of oppression by members in the affairs of the Company. It was urged by EG that none of their acts which were alleged as oppressive by Mehras were not in the capacity as a share-holder but were in the capacity as a technology provider. It was Mehras contention that EG stopped supplies, withdrew corporate guarantees and addressed correspondence to third parties prejudicial to EIL's interest and these acts according to Mehras were in the EGs capacity as shareholder and were some of the main grounds of oppression.

62. I have considered the submission. As regards the stoppage of supplies was concerned, it was a matter of contractual dispute for which civil proceedings are pending in the form of civil suit in this Court. A contempt petition was also filed in this Court on the issue of supply. Learned member had reminded herself the position of law that the contractual disputes between members is not within the jurisdiction of the Board to decide. In spite of this position, the learned member

went on to address contractual disputes on merits and held that the allegation of stoppage of supplies by EG was true and it was without justification and that EG was obliged to supply to EIL. The learned member also came to the conclusion that EG deliberately supplied material which was not required, causing mismatch which caused substantial loss to EIL. These were clear findings on the merits of the contractual dispute, which the learned member had reminded herself not to enter into. This is a clear error on the part of the learned Member.

63. Main question that arose was whether these acts were in the capacity as a share-holder or as a technology provider. Learned member chose to address herself on the merits of the dispute to hold against EG. Such observations therefore, on merits of contractual dispute fell outside the jurisdiction of the Board.

64. Withdrawal of bank guarantees by EG was put forth as a ground of oppression by Mehras. The learned member again reached direct conclusion that EG, by entering into correspondence with the bankers attempted to destroy EIL. Various contentious issues raised by the parties have not been addressed to. It was EG's contention that EG was not obliged to provide financial support and the obligation was cast on Mehras and inspite of repeated requests critical financial information sought for was not supplied by Mehras to EG. It was their case that financial status was not candidly shared with EG. EG believed that the accounts of the Company were tinkered with to defraud the bankers and Mehras themselves withdrew their personal guarantee. Thus, a substantial area opened up for scrutiny as to what was the role of EG in respect of finances and securing bank guarantees and whether the parties fulfilled their respective obligations. Instead of undertaking this scrutiny, learned member summarily concluded that the act of withdrawal of bank guarantees was for destroying EIL.

65. Same treatment was given to the issue of access to SAP server. It was the allegation of Mehras that they were blocked from accessing SAP which severely impaired the ability of EIL to function. On the other hand, it was EG's contention that they had to take this preventive measure as Mehras were trying to unauthorisedly access restricted data. On this issue also there were various facets, as to whether the data uploaded had a back-up; whether in fact attempts were made by Mehras to access unauthorised data; whether EG acted in self defence; and what was the exact manner in which the information was uploaded and shared. Instead of undertaking this exercise, learned member concluded that by not giving access to SAP server EG damaged EIL in a designed manner. As regards issue of EG writing letters to third party, it was EG's contention that they were doing so in the capacity of technology provider. This was another contentious issue as to whether EG could have written these letters as shareholders or they could have only written these letters in the capacity of technology provider. Again this scrutiny was not undertaken and a conclusion was reached that the EG has acted oppressively by addressing correspondence against EIL.

66. The issues which were not dealt with as outlined above were not minor. Thus, not only the learned member dismissed the petition of EG in the manner detailed above, but even while upholding the charge of Mehras of oppression by EG, she did not take into consideration various grounds raised by EG and proceeded to draw conclusion without any discussion. This is apart from the fact that if EG's petition is held to be rejected without application of mind then even relief in favour of Mehras cannot be sustained.

67. Further grievance was made by EG that even while granting relief the learned member has proceeded in completely arbitrary manner. It was contended that no reason is given why a particular method of valuation was chosen. Even copy of valuation report is not given to EG and no opportunity is given to EG to challenge valuation. Learned member decided the date of valuation as 31 March 2006 and 31 March 2007, as the dates have been nearest to filing of petition. Reliance was placed on the decision of Profinance Trust SA v. Gladstone [2001 EWCA CIV 1031] and Re London School of Electronics [1986] Ch. 211. Perusal of these cases indicate that it is in the discretion of the court, in the interest of justice, which date of valuation figures which is fair to both the parties is to be arrived at. Therefore there had to be discussion on the date of valuation. No such exercise is carried out by the learned member. The grievance was also made that Respondent No. 33 and 35 have been removed from valuation exercise without any reason.

68. A grievance was also made by EG that the various company applications, which were pending, were simply disposed of along with main petition. One finds no specific reasoning as regards each of the applications, discussion on the reliefs prayed therein and what would be the resultant consequences of these applications. Though Mr. DeVitre sought to urge that the impugned decision has broadly touched all the reliefs claimed in these Company applications, it is expected of the learned member to deal with each of the applications which were framed for specific reliefs. In absence of dealing with the applications individually their disposal in such a summary manner cannot be accepted and cannot be considered as a disposal on merits. This is also one of the grounds on which EG has sought that the matter be reconsidered by the Board.

69. Now to the serious grievance made by EG. That is regarding the manner in which the litigation was conducted by the learned member of the Board. The counsel have taken me through almost every line of the impugned decision. Various parts were read and re-read. The entire judgment proceeds in a casual manner and has no structure. At many places one finds direct conclusions akin to one line slogans. There is no manner of reasoning how the learned member reached these slogan cum conclusions. Based on these conclusions further conclusions are drawn and thereafter operative order follows. Large body of material was before the Board, some issues were outside its jurisdiction to consider, how the learned member reached these conclusions is not stated.

70. It is clear from what is enumerated earlier that the nature of dispute is

serious. It is not only a dispute between two private entities but also has larger ramifications. There are issues of cross border commerce, investor confidence and trust in the business environment in India. EIL is in the field of generation of wind energy. In India, production of wind energy, as alternate source of energy, is an issue of larger public importance. EIL employs a large work force. It has a huge turnover. The EG is a world leader in production of wind turbine energy and is the fourth largest wind turbine manufacturer in the world. Dr. Aloys Wobben, person behind EG holds more than 40% of all registered patents in the field of wind energy. The Mehras are also leading businessmen. The dispute between them over the control of EIL will have bearing on the production of wind energy in India. This is only to emphasise that the dispute to be dealt with by the learned member was not minor but had wider implications. Both the sides had raised various grounds and submitted voluminous pleadings and written submissions, with record in running into not less than forty volumes. Voluminous written submissions were presented by both the sides. Arguments were advanced on almost every aspect of the dispute. Considering at what was at stake at both the sides i.e. the control of an important segment of the industry and considering the complexity of the matter one would have expected a thorough application of mind and a decision rendered with some seriousness. Unfortunately, the learned member has completely abdicated her duty to decide judicially and has rendered a decision which is not befitting a quasi-judicial body.

71. Before the learned member detailed oral arguments were advanced by the parties. The parties presented their written submissions. Submitting the detailed written submissions has now become a common practice in the matters involving voluminous record. Generally the hearing, even in this Court, takes place on adjourned dates, as sometimes it is not possible to give day to day hearing. Many times at the request of the counsel or for some other reason, day to day hearing cannot be held. In such a situation the counsel generally piece together all their oral arguments advanced in a truncated manner in the form of written submissions. The presiding officers also find such written submissions useful when the hearing takes place over various dates. Generally therefore, when the written submissions are submitted and the arguments are closed, it is but natural that the member would take some time to go through the written submissions and then arrive at the verdict. This process takes some time if one has to assimilate what is narrated in the written submissions.

72. In the present case the learned member closed the arguments on 27 November 2012. Detailed written submissions were filed on 11 December 2012 at 1.00 p.m. The learned member passed the impugned order of 130 pages, within 72 hours of filing written submission, on 14 December 2012 at 10.30 a.m. Having gone now through the record and considered the various issues raised by the learned counsel, to my mind it does not seem to be probable that the impugned decision of 130 pages could be rendered after reading volumes of written submissions within a span of less than three days. This is not to say that such efforts are impossible, but considering the daily pressures of work and the

time that is taken to go through the written submissions, the exercise borders on being incredulous.

73. Mr. Sarkar submitted that one of the reason that the learned member has delivered the decision within 72 hours is that the learned member has simply cut and pasted the submissions of the parties in the decision. It was contended by Mr. DeVitre that such is a usual time saving methodology adopted by the Courts and there is nothing improper about the same. I have perused the impugned decision along side the comparison table placed on record by Mr. Sarkar. Perusal of this clearly shows that many places findings given by the learned member are the same as the written submissions of Mehras. They indeed seem to be copied and pasted. The Court may, as a time saving device, while narrating the arguments of the parties copy from the written arguments, but it is not expected that the reasoning part of the judgment is nothing but a copy of the written submissions of the winning party. This not only shows complete non-application of mind but also creates extreme dissatisfaction in the mind of a losing party about the fairness of decision making.

74. Therefore that the Judgment was pronounced within three days of filing written submissions is not a ground of challenge in itself but it is coupled with the submission that this extremely short time span has resulted in a complete non-application of mind and has left many of the issues unaddressed. The discussion in the earlier paragraphs will show that the charge of non-application of mind is well-founded. The decision does seem to have been rendered in a hurried manner and liable to be set aside.

75. The structure of the impugned decision is also confusing. The learned member from paragraph 1 to 11 narrates the facts in brief in respect of both the petitions and some of the orders passed by the Board. Paragraph 12 to paragraph 20, the learned member reproduces the pleadings of EG. From paragraph 21 to 38, the learned member refers the arguments made on behalf of EG. Paragraph 39 refers and reproduces passages from the decisions cited by EG. Again from paragraph 40 to 53 the arguments made by EG are referred. Paragraph 54 to 84 reference is made to the arguments made on behalf of EIL and Mehras, the decisions cited by them and several facts and figures. Sometimes conclusions are drawn and operative order follows. It is difficult to ascertain where the arguments end and where the reasoning starts.

76. Both the parties had relied upon number of judicial pronouncements interpreting the various positions of law. The topic of oppression and mismanagement is of cardinal importance in the field of corporate management and has been subject to detailed scrutiny by various high courts, the Apex Court and the English courts. There is a vast body of judge made law which has laid down intricate nuances of these concepts. The ratio of the superior courts are binding on the authorities below it and the observations also provide a guidance to decide the case in hand. It is for this purpose that the parties cite and rely upon case laws. The parties advance submissions relying on these decisions to

show that in a particular fact situation a particular decision was arrived at. They do so by analysing the factual position of the decision so cited and how to apply the law therein to their case. It is true that on many occasions the advocates cite more decisions than necessary, but the judgments of the superior courts, which have relevance, have to be taken into account while deciding the case. The learned member has brushed aside the decisions cited in one line in paragraph 85. The learned member observes-

"I have considered the rival submissions and the case laws cited. There is no dispute with the case law cited, but each case turns on its own facts."

Some of the conclusions reached by the learned member are contrary to the binding case law relied upon therefore, it was incumbent upon the learned member to deal with the decision cited. The learned member simply swept away the decisions in one single sentence. This is most perfunctory. No tribunal can simply disregard the decisions of the superior courts having direct bearing on the case without even attempting to distinguish or to comment upon the same. If a shareholder is directed to exit from a company, which is a serious consequence, this is not the way that the board should treat him. Naturally the counsel for EG have made a serious grievance and they cannot be faulted for the same.

77. The learned member thereafter tabulated the litigation launched by Mehras and EG against each other. This tabulation was for the purpose of ascertaining the impact of litigation and whether the litigations would such result in acts of oppression. The learned member listed sixteen proceedings filed by EG against EIL and Mehras. Then the proceedings initiated by Mehras against EG are tabulated and six proceedings have been mentioned. Mr. Sarkar made a grievance that forty seven Revocation petitions filed by Mehras have been put under one head i.e. "Revocation petition" at Serial No. 5 in the chart. According to Mr. Sarkar, the learned member by this methodology showed a skewed picture of the rival litigations. On the other hand, Mr. DeVitre submitted that the learned member has only reproduced the chart given by the EG. Had this been a stand alone ground nothing much would turn on this, as there can be no fault with the presiding officer reproducing the table which is already placed on record. But as one goes along analysing the impugned decision and finds various such seemingly innocuous lapses falling in a pattern substantiating the charge of non-application of mind and lack of fairness in decision making, then this point cannot be ignored. The purpose of this chart was to highlight the litigation instituted by the rival parties. Allegation of oppression was on the ground of needless litigations. Thus it was necessary to have a balanced picture of the rival litigations. At a casual glance the reader gets an impression that EG instituted sixteen proceedings in different courts while Mehras instituted only six. The proceedings instituted by EG for patent infringement in different courts have been specifically listed. However when it came to Mehras chart, 47 Revocation petitions have been clubbed under one serial number as Revocation petition. It is not the question of what would be the impact of instituting such litigations on the

charge of oppression, but the point here to note is that the way the chart has been reproduced by the learned member gives a completely distorted picture of the cases filed. If filing of cases against each other was a head of oppression, then the learned member ought to have emphasised that not one Revocation petition but forty seven Revocation petitions were filed by Mehras. It cannot be an excuse to state that this is how chart was given by EG. The decision making was by the learned member and omission to specify the number of Revocation petitions reflects on the application of mind by the learned member. It is also not that the learned member, though in the chart mentioned only one petition, but has explained in the Judgment that there were in fact forty seven petitions.

78. The learned member then proceeded to reiterate that EG was right in not arguing issues which are not commercial and contractual disputes are pending. The member records that the petitions have been heard in pursuance and compliance with higher courts order and EG has presented arguments on merits and rightly except issues which are admittedly commercial and contractual disputes and which are pending in different forms. Then the member states that she cannot ignore the acts of sudden stoppage of supplies, mismatch of supplies, refusal to infuse capital, withdrawal of bank guarantee, malicious letters. Thereby holding that these grounds were proved against EG. The learned member has proceeded as if she had already reached a conclusion that these charges were established against EG. In the preceding paragraphs before reaching these conclusions, what is reproduced by the learned member, are submissions of the rival parties. Though Mr. DeVitre, in a valiant effort to give a shape and substance to the reasoning of the learned member, submitted that learned member has not reproduced the submissions but that is how she has dealt with the matter. It is not possible to accept this explanation. Each paragraph opens with referring to a submission of the counsel. These submissions is simplicitor reproduced from written submissions. As stated earlier, "stoppage of supplies", "mismatch of supplies", "refusal to infuse capital", "withdrawal of bank guarantees" are slogans. The learned member thereafter repeatedly refers to these heads to castigate EG and to arrive at a conclusion that EG committed acts of oppression. For each of these heads EG had various points to contend, as demonstrated by Mr. Sarkar and Mr. Kamdar in great detail.

79. After proceeding to hold that EG committed acts of oppression, the learned member concluded that Mehras succeeded in making out a case that EG's hands are unclean and EG's petition deserves to be thrown out at the threshold. The learned member rejected the contention of EG based on order dated 29 January 2009 holding that this order was merely interlocutory. The learned member also held that the Mehras specific allegations remained uncontroverted and thereafter proceeded to decide who would buy out the shareholding of the other group and appoint a valuer and a observer.

80. The appointment and choice of the observer made by the learned member is rather disturbing. The learned member has appointed one Mr. Hari Shankar

Acharya, Ex- Chief Commissioner of Income-Tax, with unfettered powers, immunity from all civil and criminal liabilities. Mr. DeVitre thought it fit to disassociate himself from the appointment of Shri Acharya stating that at the outset itself that Mehra's are not insisting on Mr. Acharya and any other suitable observer can be appointed by this Court. This will not be of much relevance as in any case ultimately the choice has to be left to the Court and a party cannot insist on one particular individual. What is relevant is the suo motu choice of the observer made by the learned member in the context of the unsatisfactory decision making. It is based on this choice that the grievance of being unfairly dealt with is made by EG. Therefore, this deliberate choice of a particular observer cannot be taken so lightly, as sought to be done by the Mehra's. The learned member, suo motu appointed Mr. Acharya to assist the functioning of EIL. The learned member granted immunity to Mr. Acharya from any kind of civil or criminal proceeding to be launched or already launched against the Company and for all acts done prior and subsequent with an additional personal immunity. It directed that no government agency would initiate any civil or criminal or coercive action against Mr. Acharya for the acts. EIL was directed to provide remuneration to Mr. Acharya as per his stature to be fixed by EIL. EG has produced details, which are not controverted, that this particular member has appointed Mr. Acharya as an observer on a Company at Bangalore with remuneration of Rs. 70,000/-, for a company at Mumbai at Rs. 1 lakh, for a Company at Hyderabad with Rs. 3 lakhs, another Company at Hyderabad for Rs. 2 lakhs and Company at Ahmedabad for Rs. 3 lakhs. The grievance has been rightly made that Mr. Acharya is appointed as facilitator of Companies situated at Bangalore, Mumbai, Hyderabad, Ahmedabad on per month basis and it is not possible for him to simultaneously look at different companies in different situations. All the facts regarding Mr. Acharya have gone uncontroverted except to state that Mehra's do not insist on Mr. Acharya. Such kind of repeated suo motu appointment by the learned member needs lot to be desired.

81. Mr. Sarkar submitted that this is not the first time that the decisions of this particular learned member have been reversed by the higher courts on the ground of non-application of mind and unsatisfactory decision making. He relied upon the observations of this Court in *Shah Pulp & Paper Mills Ltd. v. Pravinchandra Hirji Shah* (Company Appeal No. 1 to 2011 in CLB Company Petition No. 60 of 2006 dated 17 May 2013) and the decision of the Calcutta High Court in *Dharam Godha Vs. Universal Paper Mills Ltd.*, (2012) 2 CALLT 589 : (2012) 110 CLA 32 : (2012) 113 SCL 491 , and the decision of Gujarat High Court in the case of *Vraj Integrated Textile Park Ltd. & ors. v Yogesh Chandrakant Bhavsar*, [Company Appeal No. 4 of 2013 in Company Petition No. 65 of 2012 dated April 9, 2013.]

82. Therefore, if one takes overall view of the decision, it clearly appears that the manner in which the learned member has proceeded to record conclusion and pass the operative order does not indicate that there was an application of mind and there is substance in the charge of extreme hurriedness and lack of fairness

in decision making.

83. In light of the above it is contended by Mr. Sarkar that the matter needs to be considered *de novo* by the board. It was contended by Mr. DeVitre that though the learned CLB though has stated that petition of EG is dismissed as not maintainable has in fact dismissed it on merits after considering all aspects. He submitted that even the petition of Mehras has been considered in all aspects and an equitable order has been passed. He submitted that in any case there will have to be parting of ways and therefore, the only question that would remain is who should buy out whom and that question can be decided by this Court. He submitted that it is not necessary to remand the proceedings back to the Board, since all the record is before the Court and remand will only further an additional avoidable expenditure. However a resolute stand has been taken on behalf of EG that the decision making process has not been fair and their petition has been dismissed in a summary manner and matter must be remanded back for reconsideration, to the fact finding authority. EG has made it clear that all the submissions on merits were without prejudice to their request for remand. It is not EG's primary contention that irrespective of the manner the CLB has disposed of their proceedings, this Court should consider the entire matter on merits. Remand is the main prayer of EG. Therefore, I will have to consider the request for remand made by EG and it cannot be brushed aside merely because the entire record is now available in this Court.

84. The findings of fact will have to be arrived at by the Board. It is the Board which is the original authority. Section 10F of the Act provides an appeal to this Court only on the question of law. The scope of Section 10F is limited. If there are no findings of fact rendered on crucial aspects by the Board, such original and fact finding exercise cannot be done under 10F merely because the party who has succeeded insist on it being done. The way the learned member has merely copied the submissions, drawn direct conclusions, written a 130 pages judgment in three days with total non-application of mind to vital issues, cannot be simply be ignored and the appeal be considered on merits even though there are no factual finding. Tolerance of such decision making will send a wrong signal.

85. Furthermore it is not only the question of inter se rights of the parties but there is a wider angle. That is the perception of a litigant about the administration of justice. The concern that justice should be administered in a fair and transparent manner and after following principles of law, goes beyond an individual dispute. The manner in which the learned member has proceeded, raises various questions regarding the confidence of a litigant in the dispensation of justice by the Board. Company Law Board is established to exercise functions earlier exercised by the Courts and the Board is under obligation to follow the principles of natural justice. Fairness is an integral part of the principles of natural justice. A litigant coming before the Board has to be dealt with fairly. This would imply that adequate reasons are given why an order is passed in favour or against a party. No impression be given that the issue was pre-determined and

something was amiss in the decision making. Though extent to which principles of natural justice will apply will vary from Tribunal to Tribunal, there can be no compromise on the adherence to concepts of procedural justice. One of the cardinal requirement is that the decision rendered must be a reasoned decision. An unreasoned decision may ultimately be correct but it is not so to the party which has lost. Giving adequate reasons in support of the decision removes unfairness from the decision making process. The adherence to these principles retains the faith of litigating public in judicial and quasi-judicial proceedings and in no terms they can be compromised. There is no reason why the Board is not required to scrupulously adhere to principles of fairness especially considering the wide powers it enjoys.

CONCLUSION

86. If all the points taken cumulatively and the entire effect of the impugned decision and the manner it is rendered is considered, makes out a case for remand of the proceedings to the Board. In my opinion, therefore, the impugned order needs to be set aside and the petitions needs to be reconsidered afresh by Board. It is however clarified that the above discussion is regarding the need to remand the proceedings highlighting the issues not considered and not on the merits of the rival contentions, which will be decided by the Board independently. Considering the reason for remand, the Board will give priority to the disposal of the proceedings and since entire material is already available, the Board will make an endeavor to dispose the proceeding at the earliest.

ORDER

87. Accordingly, Company Appeal No. 42 of 2013 and Company Appeal No. 43 of 2013 are disposed off as under:

- "i. The impugned order dated 14 December 2012 passed by the Company Law Board is quashed and set aside;
- ii. The Company Petition No. 82 of 2011 and Company Petition No. 83 of 2011 stand restored to the file of the Company Law Board to be disposed of on merits. The Company Applications which are disposed by the impugned order dated 14 December 2012 also stand restored to file of the Company Law Board to be disposed of on merits.
- iii. The Company Law Board will dispose of the proceeding within a period of 8 months from the date the parties shall first appear before it.
- iv. The parties are directed to remain present before the Company Law Board on 21 September 2015, where upon the Board will give further directions.
- v. Interim order passed in the present appeals on 18 January 2013 shall be continued till the disposal of the company petitions by the Company Law board.
- vi. No order as to costs."