

(2006) 01 CLB CK 0001
In the Company Law Board
Case No : C. P. 64 of 2005

Hillcrest Realty Sdn. Bhd

APPELLANT

Vs

Hotel Queen Road Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 31-01-2006

Acts Referred:

Constitution Of India 1950 — Article 4, 8, 11, 14
Securities Contracts (Regulation) Act, 1956 — Section 22A(3)(c)
Companies Act, 1956 — Section 3(iv)(c), 9, 81, 81(1), 81(1A), 82, 85, 87(2), 90(2),
111, 111A, 205, 283(1)(i), 286, 299, 300, 301, 307, 397, 398, 399

Citation : (2006) 71 SCL 41 CLB

Hon'ble Judges : S Balasubramanian, Chairman

Bench : Single Bench

Final Decision : Disposed Of

Judgement

S Balasubramanian, Chairman

1. As a part of disinvestment programme of the Government of India, M/S India Tourism Development Corporation (ITDC), a Government of India Undertaking owning various hotel properties, decided to divest its ownership of Indraprastha Hotel, popularly known as Yatri Nivas. For this purpose, a de-merger proposal was got approved by which the hotel property was transferred to a newly incorporated private limited company in the name of Hotel Queen Road Private Ltd (herin after referred to as Hotel) which was created as a special purpose vehicle to enable dis-investment At that time, the paid up capital of Hotel Queen was Rs 90 lakhs comprised in 9 lakh equity shares of Rs. 10/- each of which the Government of India (GOI) held 89.97% shares while Indian Hotels Ltd held about 10% shares and the balance shares were held by the employees of the company. GOI invited bids for sale of the shares of the company. By a Share Purchase Agreement dated 8.10.2002, the 6th respondent, a public company, being the successful bidder, acquired the shares held by GOI and Indian Hotels except those held by about 150 employee shareholders. In the 6th respondent, the 2nd respondent and his family members hold controlling interest. The 2nd

respondent is the elder brother of the 2nd petitioner. The total amount involved in the acquisition was Rs. 45.03 crores which was funded by the 6th respondent through loans of about Rs 33.25 crores from Banks, and the balance in cash which according to the 2nd petitioner was funded by Rs 5.50 crores from the 2nd petitioner and Rs 6.23 crores from the 2nd respondent

2. Since the 6th respondent had acquired about 99.99% equity shares in the Hotel, it became a subsidiary of the 6th respondent. The 2nd, 3rd respondents and the 2nd petitioner were appointed as additional directors on 8.10.2002 and later on were appointed as regular directors in the AGM held on 28. 12.2002. On 21.12.2002, the 6th respondent transferred 13 shares to 7 other persons of which 2 shares were transferred to the 2nd respondent, 3 shares to the 3rd respondent who is the wife of the 2nd respondent and one share to the 2nd petitioner. In the same AGM, the Memorandum of the company was altered to increase its authorized share capital to Rs. 33 crores consisting of 80 lakh equity shares of Rs. 10/- (Rs 8 crores) each and 25 lakh 8.5% redeemable preference shares of Rs. 100/- each (Rs 25 crores) without any voting rights. On 28.6.2003, once again the authorized capital was altered by increasing the preference shares to Rs 30 crores.

3. The 1st petitioner which is a company registered in Malaysia, applied for and was allotted, in two spells- on 5.5.2003 and on 19.7.2003- a total of 28,29,290 preference shares. (Rs 29.29 crores). To fund the renovation of the Hotel premises, a term loan of Rs 40 crores was raised from Indian Overseas Bank. This loan was secured with joint personal guarantees of the 2nd/3rd respondents and the 2nd petitioner, collateral security of the personal assets of the 2nd/3rd respondents and the corporate guarantee of the 6th respondent.

4. On 27.7.2004, 23,90,000 equity shares were allotted to the 6th respondent and again on 7.1.2005, 41,51,648 shares were allotted to the 6th respondent. In addition, on the same day, 1,10,000 shares were allotted to the 2nd respondent and 4,50,000 shares to the 3rd respondent. On 10.5.2005, further 10,00,000 shares were allotted to the 7th respondent. All these allotments were at par. On 10.5.2005, the company registered the transfer of 32,88,181 equity shares of the company held by the 6th respondent in favour of the 2nd respondent. In a Board Meeting held on 4.7.2005, 4th and 5th respondents were appointed as additional directors,

5. The 1st petitioner, claiming that due to non payment of dividend on the preference shares, it had acquired voting rights on the preference shares in terms of Section 87(2) of the Act, requisitioned an EOGM by a notice dated 1.6.05 for removing 2nd and 3rd respondents as directors and in their place to appoint two other directors. Since the company did not convene the EOGM, the 1st petitioner itself convened an EOGM on 4.8.2005 by a notice dated 8.7.05. The company filed a suit in Delhi High Court challenging the EOGM notices on the ground that the 1st petitioner was not entitled to any voting rights on the preference shares. The High Court declared that the 1st petitioner had no voting

rights on the preference shares therefore held that the resolutions passed in the said EOGM which had already been held as void. The 1st petitioner has filed an appeal before the Division Bench which is pending as of date.

6. On various grounds stated in the petition, the petitioners have challenged all the allotments of equity shares and also the transfer of equity shares from 6th respondent to the 2nd respondents and consequently they have sought for cancellation of all the allotments of equity shares as also the registration of transfer of shares from the 6th respondent to the 2nd respondent. They have also sought for a declaration that the appointment of the additional directors is illegal and invalid. Alleging that there is financial mismanagement in the company, they have also sought for an investigation into the affairs of the company.

7. Shri Choudhary appearing for the 1st petitioner submitted: The 2nd petitioner was instrumental in getting the investment made by the 1st petitioner. The 1st petitioner made investment in the preference shares only on the understanding that the respondents would use the funds for achieving objects of the Hotel and that the Hotel would pay dividend as per agreed terms and in the event of failure to pay the dividend, the 1st petitioner would be entitled to exercise its voting rights on the preference shares in accordance with law. It was also the understanding that the Hotel would continue to be a subsidiary of the 6th respondent. The 1st petitioner has the largest stake in the Hotel with an investment of about Rs. 29 crores. Before change in the capital structure on 27.7.2004, the 1st petitioner held more than 95% in the share capital of the Hotel. The investment in the preference shares was more than three times that of the investment in the equity shares. Even though, the Hotel was acquired with bank finance, it still needed funds for renovation and also for payment of dues to the employees under VRS Scheme. The amount invested by the 1st petitioner was not only used for the above purposes but also enabled the Hotel to raise further Rs. 40 crores from the banks. The Hotel did not pay dividend for two continuous years after the allotment of the preference shares to the 1st petitioner and as such voting rights had accrued on the preference shares held by the 1st petitioner in terms of Section 87(2) of the Act. Since the 2nd respondent was mismanaging the affairs of the Hotel and had also failed to make the hotel operational, the 1st petitioner, with the view to protect its interest and also the interest of the Hotel, decided to change the management of the Hotel. Accordingly, through its power of attorney holder, it sent a requisition to the Hotel on 1.6.2005 for convening an EOGM to remove the 2nd and 3rd respondents as directors and also to appoint two other persons in their place. On flimsy grounds^ by a letter dated 21.6.2005, the Hotel rejected the said notice as illegal. Since the Hotel had not taken any action on the requisition notice, the power of attorney holder of the 1st petitioner himself issued a notice on 8th July, 2005 convening the proposed EOGM on 4th August, 2005. For the first time on 23. 7.2005, the petitioners came to know that the Hotel had filed a civil suit before Delhi High Court seeking for a decree of declaration that notices issued for

convening the EOGM were illegal, null and void and also for a. declaration that the 1st petitioner was not entitled for any voting rights in respect of the preference shares held by it. Only during the proceedings in the High Court the petitioners came to know of the various allotments made to the 2nd, 3rd, 6th and the 7th respondents also the transfer of shares from 6th respondent to the 2nd respondent.

8. The learned Counsel further submitted: The sole and only purpose and motive of transfer of shares from the 6th to the 2nd respondent was to deny voting rights on the preference shares. In terms of Section 87(2) of the Act, voting rights would accrue on the preference shares if dividend is not paid for 2 consecutive years. However, in terms of Section 90(2) of the Act, Section 87(2) will apply in case of a private company only if it is a subsidiary of a public company. Admittedly, the 6th respondent is a public company and by virtue of its holding over 99.99% equity shares in the Hotel which is a private company, it was a subsidiary of the 6th respondent. By transfer of shares to the 2nd respondent, the holding of the 6th respondent in the Hotel has come down to 46.13% and thus the Hotel has ceased to be a subsidiary of the 6th respondent. By this method, the 2nd respondent has acted in a manner oppressive to the 1st petitioner as it has been deprived of its legitimate voting rights on the preference shares. The special rights to which the 1st petitioner was entitled to by law has been denied to it by the harsh and burdensome action of the 2nd respondent by de-linking the holding and subsidiary relationship between the Hotel and the 6th respondent. The timing of the transfer of shares would clearly indicate that the 2nd respondent was aware that the voting rights had accrued on the preference shares as the Hotel had failed to pay dividend accrued on the preference shares for two years. The contention of the respondents that in terms of Article 4 of AOA of the Hotel, the preference shares have no voting rights and the 1st petitioner, being aware of the same, invested in the preference shares and as such no voting rights could accrue on the same in terms of Section 87(2) of the Act has no legal basis. When the statute provides for voting rights, the same cannot be taken away by the provisions of the Articles as the same would be void in terms of Section 9 of the Act, according to which any provision in the Article, which is inconstant with the provisions of the Act, is void.

9. The learned Counsel further submitted. The approval of transfer of shares by the Board on 10.5.2005 also suffers from various legal infirmities. It was in violation of the provisions of the Article 8 and approved in a meeting without notice to the 2nd petitioner and without a valid quorum. Article 8 of the AOA of the company prescribes a procedure for transfer of shares according to which the transferor has to give a notice to the company regarding the proposed transfer and other shareholders are at liberty to purchase the shares at the same price or at a higher price. It is a settled law that any transfer in violation of the preemption provisions of the Articles is invalid. Further, the petitioner was not given any notice for this Board meeting. Not only Section 286 of the Act provides that notices for Board meetings should be given to every director in writing, Article 46

of AOA of the Hotel also stipulates so. It has been held that any resolution passed in a Board meeting without notice to a director is invalid -- Parmeshwari Prasad Gupta v. UOI : Col. Kuldeep Sing Dhillon v. Paragaon Utility Pvt. Ltd. 64 CC19 Punjab: Therefore, the approval of transfer in this Board meeting has to be declared as invalid. Transfer of shares is a contract with the company when the instruments of transfer are lodged for approval by the Board, it is also an arrangement as the company is a party to the registration of transfer. It has been held by this Board that to be a non interested director in terms of Section 300, the said director should not have any interest either as a transferor or a transferee or as a beneficial holder of shares -- Gordon Woodroffe Ltd. v. Trident Investment Ltd. 79 CC 764 CLB. Therefore, the provisions of Section 300 would also apply. Since the transfer was in favour of the 2nd respondent who was/is a director, he could not have participated in the business of approving the registration of transfer and without him, there would have been no quorum as only the 3rd respondent was the other director present in that meeting.

10. He further submitted: By acquiring these shares and with the allotments made to the 2nd respondent which have also been impugned in the petition, the 2nd respondent who held only 2 shares has now come to hold 37.76% in the Hotel. Further, the 2nd respondent did not pay any consideration to the 6th respondent for the shares and instead the consideration was adjusted against the loans given by him to the 6th respondent at the time of acquisition of the Hotel. In addition, while the 6th respondent made offers to other shareholders of the Hotel at the time of its acquisition, to purchase the shares at Rs. 183 per share, it has transferred the impugned shares for a much lower consideration. Out of the 32,88,181 shares transferred by the 6th respondent, 8,98,181 shares were those which were originally acquired from GOI at a price of Rs. 183.86/- per share but they were transferred to the 2nd respondent at Rs 20/- per share. The balance shares which were allotted at par on 27.7.2004, were transferred at Rs. 20/- per share. There is no explanation as to why such a differential pricing was adopted. This is nothing but a fraud played by the respondents to defeat the voting rights on the preference shares. Further, the 6th respondent has not adduced any justification for transferring the shares to the 2nd respondent other than stating that it owed money to the 2nd respondent ignoring the fact that the 2nd petitioner has also lent over Rs. 5 crores to the 6th respondent at the time of acquisition of the Hotel. If the Hotel had called for a general meeting before effecting the registration of transfer, the 1st petitioner would have voted against the said resolution as registration of transfer would affect the character of the Hotel being a subsidiary, affecting the voting rights accrued to the 1st petitioner. Only with a malafide intention to de-subsidiarize the Hotel, a specific number of shares were transferred. The 2nd and 3rd respondents being directors of both the Hotel and the 6th respondent, were in a fiduciary position in both the companies and by effecting the transfer, they have breached their fiduciary obligations.

11. The learned Counsel further submitted: In a Board Meeting held on

27.7.2004, the Board allotted 23,90,000 equity shares to the 6th respondent at par. No notice was given to the 2nd petitioner for this meeting and as such there was no occasion for him to seek leave of absence. However, it was recorded in the minutes that leave of absence was granted to him. The admitted fact is that the 2nd and 3rd respondents hold more than 2% shares in the 6th respondent and without disclosing their interest in terms of Section 299 of the Act, shares were allotted to the 6th respondent and as such they had automatically vacated the office of director in terms of Section 283(1)(i) of the Act. Again, in a Board Meeting held on 7.1.2005, shares were allotted to the 2nd, 3rd and 6th respondents without any notice to the 2nd petitioner. The allotment of shares to the 2nd and 3rd respondents is in violation of provisions of Section 300 according to which no interested director can participate or vote on transactions in which they are interested. In the present case, both the 2nd and 3rd respondents were interested directors and as such they could not have voted for the allotment of shares. Further, since both were interested directors, there was no valid quorum in any of these meetings and therefore no Valid business could have been transacted. Similar is the position with the allotment of shares to the 7th respondent as both 2nd and 3rd respondents were interested directors as they hold more than 2% shares in the 7th respondent. It has been held that Section 300 is based on public policy and violation of the same would result in the decision being void -- *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd.* 41 CC 377; *Madras Tube Co. v. Hari Kishon Somani* 1995 1 CLJ 195 Mad. Further, there is no justification to allot shares at par. Even though, the Hotel has not commenced its business, yet, the intrinsic value of the shares was very much higher. Therefore with the sole object to enrich his own group, the 2nd respondent has allotted the shares at par without any proper valuation.

12. He further submitted: The sole-object of allotment of shares impugned in the petition was with the view to perpetuate the control by the 2nd and 3rd respondents over the company. The legal position in regard to issue of further shares has been decided in many cases:

- a. Shares issued for their own benefits by directors or to maintain their own control over the company are liable to be set aside -- *Punt v. Symons and Co. Ltd.* 1903 2 CD 506 and *Piercy v. Mills and Co.* 1920 QCH 77.
- b. Malafide allotment for personal benefit is liable to be set aside -- *Dale and Carrington Pvt. Ltd. v. P.K. Prathapan.*
- c. Directors are in a fiduciary position and as such they should exercise their power for the benefit of the company and not to their own benefit -- *Needles Industries case : Hemant D. Vakil v. RDI Print and Publishing Co.* 84 CC838 CLB
- d. Increase in shares by majority is an oppression against minority-Akbar Ali A Kalbert v. Konkan Chemicals Pvt. Ltd. 88 CC 245 CLB

13. Summing up his arguments, Shri Choudhary submitted that the disputes between the 2nd petitioner and the 2nd respondent started sometimes in Dec.

2004 regarding their family affairs and division of businesses in the family. When attempts were made to resolve the disputes through the mediation of a renowned Solicitor in January, 2005, the 2nd respondent offered to go out of the Hotel and hand over its entire management to the 2nd petitioner, However, without doing so, the 2nd respondent manipulated the records of the company to show as if allotments were made on 7.1.2005 and 10.5.2005 (including transfer of shares). Since the 1st petitioner invested funds in the company on the advice of the 2nd petitioner and since the affairs of the company were being mismanaged by the 2nd respondent, it was decided to remove him and the 3rd respondent as directors with a view to protect the interest of the company. The 2nd respondent had kept the alleged allotments of shares and the transfer of shares as a secret till he disclosed the same in the civil suit. Having de-subsidiarised the Hotel, apprehending that he and the 3rd respondent would be removed from the Board, he also appointed two of his dummies as additional directors just to perpetuate his control over the Hotel. The 2nd petitioner demanded inspection of statutory records Of the company even before filing of this petition, but the same was denied. Even when this Board directed the Hotel to give inspection, the same was not given. Thus, the 2nd petitioner has been completely kept in dark about the affairs of the Hotel. Therefore all the allotments impugned in the petition should be set aside as also the transfer of shares from the 6th respondent to the 2nd respondent. In addition, there should be an order for investigation into the affairs of the company.

14. Shri Tikku, Senior Advocate appearing for the 2nd petitioner submitted: The respondents have falsely contended that the 2nd petitioner was appointed as a director only because he is the younger brother of the 2nd respondent. He was inducted into the Board due to his financial credential and the 2nd and 3rd respondents were aware that his association with the company would be of immense help to the company. Further, 2nd petitioner has also given personal guarantee to the extent of Rs 45 crores. In fact, both the brothers jointly acquired the Hotel as is evident from the admitted fact that the 2nd petitioner had given a loan of over Rs 5 crores to the 6th respondent at the time of acquisition of the Hotel. Even though the 2nd petitioner did not get any notice for any board meeting right from the beginning, he did not make it an issue as he had full faith and confidence in the 2nd respondent. However, when the disputes had started in December 2004, it was incumbent on the 2nd respondent to issue notices in writing to the petitioner for subsequent Board Meetings which he did not do and without notice to the 2nd petitioner, Board meetings were held and decisions to allot shares and register the transfer of shares were taken. For the first time, after the 2nd petitioner sought, in writing, for issue of notices for Board meetings, he received a notice for the Board meeting on 4.7.2005, that too, without any agenda. While the allotment of shares suffers from want of quorum, the transfer of shares was in violation of Article 8 of the AOA. The Board should have asked the 6th respondent to comply with the provisions of Article 8 but without doing so, it approved the transfer. There is not a single averment in

the reply that either the allotment of shares or the transfer of shares was for the benefit of or in the interest of the company or for bonafide purposes. All these acts have benefited only the 2nd respondent by which he has become the largest holder of equity shares and to the detriment to the interest of the petitioners.

15. Supplementing the above arguments, Shri Shanti Bushan, Senior Advocate for the 2nd petitioner submitted: In terms of Section 286, notices for Board meetings should be sent to all directors in writing. The respondents have not adduced any proof that notices were sent to the 2nd petitioner for the impugned meetings and therefore the presumption should be drawn that no notices were sent. The 2nd petitioner specifically asked for proof of notices by his letter dated 19.11.2005 but the company did not furnish the same. The contention of the respondents that oral notices over phone were given cannot be sustained as in terms of Section 286, notices must be in writing. It is a settled law that any business transacted without notices to all directors is invalid. Even for general meetings, the company is not issuing notices to all the shareholders as is evident from the affidavit filed by a shareholder (Vol III Page 393) that he had not received notices for any general meeting in the past. Therefore, all the allotments made in the impugned Board meetings as also the transfer of shares have to be cancelled as the meetings were not validly held on account of non issue of notices to the 2nd petitioner. Further the transfer of shares is a grave act of oppression, as, by this singular act, the 1st petitioner has been deprived of the voting rights statutorily accrued on the preference shares. Further, Articles of a company are binding whether it is private or public company. Therefore, Article 8 is binding and any transfer contrary to the provisions of Article 8 has to be declared as invalid.

16. Shri Sundaram, Sr. Advocate appearing for the 2nd respondent while questioning the maintainability of the petition on the ground that the pleadings in the petition and the appeal filed by the 1st petitioner in Delhi High Court were practically verbatim and as such the petitioners were guilty of forum shopping submitted: His client was the prime mover in acquisition of the Hotel, it is his company, i.e., the 6th respondent which bid for the Hotel and acquired the same after mobilizing necessary funds. If according to the 2nd petitioner that he was instrumental in getting the investment by the 1st petitioner on certain promises, the respondents are not concerned. As a matter of fact, the 1st petitioner must have been aware that the gestation period for the hotel project would be long and that is why it invested in the preference shares with a view to earn a fixed income of 8.5% instead of investing in the equity shares as there was no guarantee of any fixed income in equity investment. Therefore, its object should always be to get dividend and not to take over the control of the company. By this petition, the 1st petitioner is attempting at a back door entry which is not permissible in the scheme of the Act. The only commonality of interest between the 1st petitioner- a preferential shareholder and the 2nd petitioner - a holder of 1 equity share, is to oust out the 2nd and 3rd respondents and take over the control of the Hotel. It was the 2nd respondent who" appointed the 2nd

petitioner as a director and also gave him one share because both are brothers and the 2nd respondent had complete faith and trust in the 2nd petitioner. The very fact that the 2nd petitioner never attended any Board meeting would indicate that he never exhibited any interest in the affairs of the company. Suddenly, only in June, 2005 the 2nd petitioner demanded that notices for Board meetings should be sent by registered post and accordingly notices are being sent to him for the subsequent meetings. The claim of the 2nd petitioner that he has given personal guarantees for Rs 45 crores is utterly false. It is the 2nd and 3rd respondents who have given not only personal guarantees but also their properties as a collateral security for the loans and the 2nd petitioner is only a joint guarantor. In spite of the trust and faith that the 2nd respondent had in the 2nd petitioner, with the support of the 1st petitioner, the 2nd petitioner is trying to take control of the company. The main challenge in the petition is regarding transfer of shares by the 6th respondent to the 2nd respondent. It is an admitted fact that the 6th respondent is controlled by the 2nd respondent and the transfers being with the same group, the 2nd petitioner is not in any way affected. As far as the 1st petitioner is concerned, there is nothing on record to substantiate its claim that the company would always be a subsidiary of the 6th respondent to allege that by transfer of the shares, the company's status as a subsidiary has been disturbed only to deny voting rights accrued on the preference shares. It is to be noted that nowhere in the petition, there is any averment that the 6th respondent would always continue to be the holding company of the Hotel. Only as an after thought, such an averment is found in the rejoinder. Further, in Article 4 of the Articles of Association, it is specifically stipulated that the preference shares will have no voting rights. The claim of the 1st petitioner for voting rights is not with a view to protect its investment or to gain seats in the Board but to hand over the company to the 2nd petitioner who holds only one share. This fact is evident from the EOGM notice proposing the removal of the 2nd and 3rd respondents as directors and in their place to appoint the son and the brother-in-law of the 2nd petitioner as directors. The 1st petitioner, being a financier, instead of voicing its grievances that non payment of dividend is an act of oppression and seeking for a direction to pay the same, is trying to throw out the promoters of the company having a high stake in the Hotel. In equity, removal of the promoters by a financier should not be allowed. It is a settled law that preference shareholder cannot take over the control of a company and any step taken by the company to prevent such an attempt cannot be considered to be an act of oppression against the preference shareholders. The provisions of Sections 397/398 of the Act cannot be used for a collateral and collusive purpose. Even though, there are allegations of no notices for Board meetings, the 1st petitioner is not concerned with the same but the 2nd petitioner who had never complained of non receipt of notices for Board meetings for long, has raised the same in the petition only to facilitate the 1st petitioner to gain control of the company. As a matter of fact, even if the 2nd petitioner had attended the impugned meetings, the 2nd and 3rd respondents being in majority on the Board could have passed all the resolutions. As far as the allotment of

shares is concerned, the same was done as the company needed funds for renovating the hotel. On one hand the grievance of the petitioners is that the renovation had not been completed on time but at the same time, they are also questioning the raising of funds by allotment of shares. The 1st petitioner is not in any way concerned or connected with allotment of equity shares and the 2nd petitioner holding only one share is also not in any way affected by the allotment as the respondents' group always held more than 99% of equity shares. If at all, the 2nd petitioner could have any grievance, it could be that he had not been allotted proportionate shares which the company is willing to allot even now. Further, since the petitioners have impugned transfer of shares, they should have invoked the provisions of Section 111 for rectification of the register of members and cannot agitate the same in a petition under Sections 397/398 of the Act. In so far as the appointment of additional directors is concerned, it was done in a board meeting held on 4.7.2005 which was attended by the 2nd petitioner and the majority of the Board decided to appoint the additional directors even though the 2nd petitioner was opposed to the same. In the appointment of directors, the 1st petitioner is not in any way concerned with. The allegation of the petitioners that the hotel has not become operational due to mismanagement by the 2nd respondent is baseless. At the time when the Hotel was acquired, the hotel was in a bad shape requiring extensive repairs and renovation to make it a star hotel which also required time consuming obtaining of various approvals. Presently, most of the renovation of the hotel has been completed and it would become operational in the next few months. Since the petition has been filed for a collateral purpose, the same should be dismissed.

17. Shri Sarkar, Sr. Advocate appearing for the 1st respondent submitted: According to Para (b) at page 24 of the petition, the 1st petitioner invested in preference shares on the advice of its financial adviser viz. the 2nd petitioner. If it is so, the 2nd petitioner was fully aware that in terms of Article 4, the preference shares carried no voting rights. Even though, in the affidavit at pages 45 and 47 of the petition, it is stated that averments in the petition are based on records, no document has been produced relating to the alleged understanding that the 1st petitioner would be entitled for voting rights in the event of non payment of dividend. Even otherwise, in terms of Section 87(2) of the Act, voting rights would accrue on preference shares only when dividend is not paid for two years and in terms of Section 205 of the Act, the company cannot pay dividend without profits. Presently the company is not earning any profit and as such there is no question of default in payment of dividend. Even in terms of Section 87(2) of the Act, the voting rights accrued can be used only for protecting their dividend and investment and does not extend to seek for change in the management. It is an admitted fact that 6th respondent was a overwhelming majority shareholder right from the beginning. Till May, 2005, neither of the petitioners had complained about the affairs of the company. There is no averment in the petition that the 2nd petitioner has the right of management nor there is an averment that the company is in the nature of a partnership or a

family company wherein the right to management could be claimed. Even the complaint relating to non receipt of notices for Board meetings could be entertained only in a company in the nature of a quasi partnership or a family company. While the company was taken over in October, 2002, the 1st petitioner came as an investor only in May, 2003 and therefore it cannot claim the status of a promoter. In terms of Section 85 of the Act, preference shareholders will have voting rights only in matters which affects their rights as; preference shareholders and they cannot claim any right to management. Even though, Article 4 of the AOA clearly stipulates that preference shares do not carry voting rights, the said Article has not been challenged and as such this Article prevails. Rights of preference shareholders is always governed by Articles as held *Scottish Insurance Corporation Ltd v. Wilson and Clyde Coal Co.* 1949 1 All ER 1068 and *Re Isle Thanet Electric Supply Co. Ltd* 1949 2 All ER 1060. Therefore, Section 9 of the Act has no application, Similarly, a preference shareholder cannot complain of transfer of equity shares. The petitioners have also complained of under valuation of the shares transferred. This complaint can legitimately voiced only by the shareholders of the 6th respondent and not by the petitioners.

18. He further submitted: The petitioners have complained that in the matter of transfer of shares, the provisions of Article 8 have not been complied with. Article 8 would apply only if shares are transferred to an outsider and not to another member. Further, in law, as soon the transfer takes place by payment of consideration and execution of transfer instruments along with delivery of share certificates, the title to the shares passes on to the transferee. *LIC v. Escorts Ltd* ; *Vasudev Shelat v. Pranalal* . Therefore, as soon the 6th respondent had delivered the share certificates together with transfer instruments, the title to the shares became vested in the 2nd respondent and since transfer of shares from one member to another member is governed by Article 11 according to which no approval of the board is necessary in case of transfer of shares from one member to another member, the 2nd respondent automatically became a member in respect of the impugned shares. Even otherwise, since at the time of transfer of shares, the company was a subsidiary of the 6th respondent, in terms of Section 3(iv)(c), the company was a public company and therefore in terms of Section 111A, its shares were freely transferable. Shares of a public company are freely transferable has been judicially recognized in *Mafatlal Industries v. Gujarat Gas Co.* 97 CC 301: *Arjun S. Kalro v. Madhu Industrial Estate* 1997 1 CLJ 318: *Pushpa Katoch v. Manu Maharani Hotel* 2005 DLT 333.

19. Therefore, there was no legal infirmity in the transfer of shares. Further, the transfer of shares to the 2nd respondent and allotment of shares to the 7th respondent were approved in the Board meeting held on 10.4.2005. The minutes of this Board meeting were confirmed in the Board meeting held on 4.7.2005 and the 2nd petitioner who was present in that meeting never objected to the said confirmation. Even subsequently, when he inspected the minutes of this meeting, he recorded in the minutes his objection only relating to the appointment of additional directors and not the fact of confirmation of the earlier minutes of

10.5.2005 board meeting. Even in the High Court proceedings, he objected only to the appointment of the additional directors and not about the confirmation of the Minutes. Even assuming that they were legal infirmities as alleged by the petitioner in regard to the meeting on 10.5.2005, since the minutes have been subsequently confirmed by all the directors present, the same cannot be questioned subsequently as it has been held any irregularity in holding meeting could be subsequently cured by proper process. (1974 (2) All.ER 653-Bently Stevens}).

20. He further submitted: As far as allotment of equity shares is concerned, in terms of Section 81 of the Act, the preference shareholders have no right to seek proportionate shares. Not only in terms of Article 14, the directors have full powers to allot shares to any one of their choice, in the 1st AGM of the Hotel, the general body itself had approved that shares could be issued without right offer to the members. It is an admitted fact that there are only 3 directors in the company and in terms of Section 6 read with Schedule IA, the 2nd petitioner being the brother of the 2nd respondent, he is a "relative" within the meaning of Section 6 and therefore no decision involving anyone of the directors could be taken by the Board. The special fact that there were only 3 directors who were/are related to each other has to be taken into consideration while applying the provisions of Sections 297/299/300 of the Act failing which the Board will become non functional and even the transfer of one share to the petitioner would have to be declared as invalid. In *Sangram Singh P. Gaekwad v. Shanta Devi* the Supreme Court has held that when the petitioners have consented to and even benefited in the company being run in a way which would normally be regarded as unfairly prejudicial to their interest, they cannot complain later. In the present case, he got the benefit on one share by transfer approved in a meeting not attended by him and but attended only by other two interested directors. Further, these Sections would apply only in relation to any contract or arrangement with the company. The matters of allotment and transfers do not fall within "contract" or "arrangement" with the company as is evident from the fact that the provisions of Section 301 of the Act which stipulates maintenance of register of contracts does not stipulate that transfers and allotments should be incorporated in the said register. It has been held that Sections 299/300 are not applicable in cases of transfer of shares or allotment of shares - *T & K Govindraju v. Kadri Mills* CP No. 8 & 32 of 1995 CLB; *Mukkatukara Catholic Co. Ltd. v. H.B. Thomas* 96 CC 864.

21. Summing up his arguments, Shri Sarkar submitted that the petition is a collusive petition. The 1st petitioner never raised any objection on non payment of dividend in the past but has been induced by the 2nd petitioner to join this petition only because of other family disputes between the 2nd respondent and the 2nd petitioner. As a matter of fact, when the interests of a preference shareholder and an equity shareholder are entirely different, the question of their joining together and alleging oppression has no basis. The action under Section 397 is a class action and oppression alleged should be with reference to that

particular class. In the present petition, both have joined together with the sole object of taking over the control of the company which should not be permitted and the petition should be dismissed.

22. Shri Ganesh, Senior Advocate appearing for the 6th respondent submitted: The petitioners do not hold any share in the 6th respondent and therefore they have no locus standi to question the transfer effected by it to the 2nd respondent and seek any relief against the 6th respondent. Even their claim that the 6th respondent should continue to be the holding company of the Hotel is not supported by any document to which the 6th respondent is a party. Even in the agreement with GOI, there is no stipulation that the Hotel would continue to be a subsidiary of the 6th respondent. Neither the Clause 9. 4 or 13.5 of the said agreement, which were referred to by Shri Chaudhary would indicate that the 6th respondent would have to continue to be the holding company of the Hotel. As a matter of fact as soon the agreement was worked out, the terms of the agreement came to an end. At the time when the shares were transferred, the Hotel being a subsidiary of the 6th respondent, its shares were freely transferable in terms of Section 111A and therefore the 6th respondent was not obligated to follow the provisions of Article 8. In terms of Section 82, the shares are movable property and freely transferable and as such the 6th respondent has the statutory right to transfer the shares. In terms of Article 11 of the Articles of Association of the Hotel, no approval from the Board of the company is required when shares are transferred by a member to another member. A strict interpretation of Article 8 read with Article 11 would indicate that Article 8 providing for preemptive right would apply only in case of transfer of shares to a non member. Further the very basis of allegation that the shares were transferred only with the view to deny voting rights on the preference shares is incorrect as by May 2005, when the shares were transferred, voting rights had not accrued on the preference shares.

23. In the rejoinder, Shri Choudhary submitted: The contention of the respondents that the petitioners are prosecuting parallel proceedings is wrong. The civil suit in the High court was initiated by the Hotel and not by either of the petitioners. In the appeal, the only relief that the 1st petitioner has sought is for setting aside the order of the learned Single Judge that the 1st petitioner did not have any voting rights on the preference shares. No relief that has been sought in the present petition has been sought in the appeal. However, to avoid conflict of decision, this Board need not deal with the issue of voting rights in the present proceeding.

24. He further submitted: There is no question of the petitioners colluding with each other in filing the petition as contended by the respondents. Both are complaining of the fraudulent acts committed by the 2nd respondent as the same has affected the common interest of the petitioners and by this petition they seek to protect their legal rights. The funding pattern of acquisition of the Hotel would indicate that the 6th respondent has not invested any of its own money

and the entire funding was out of borrowed money. Since the 1st petitioner has the largest investment in the company, and the 2nd petitioner has given personal guarantee for Rs 45 crores, there is nothing wrong in their desire to take control of the company by removing the 2nd and 3rd respondents. As a matter of fact, the 1st petitioner could have invested in equity shares instead of in preference shares but due to some legal impediment, it could not do so. It invested in the preference shares with the understanding that it would have voting rights if dividend were not paid for two years. In so far as the applicability of Sections 297/300 is concerned, both transfer of shares and allotment fall within the purview of these Sections. If the buyer or seller is a director, the provisions of Section 300 will apply and when the Board approves the transfer, the company becomes a party and as such it becomes an arrangement within the meaning of Section 300 of the Act. The very fact that Section 307 of the Act requires maintenance of register for disclosing directors' shareholding, it is obvious that a company is actually involved in share transactions by a director and therefore he will be an interested director and as such should not participate while considering registration of transfer in his name. By 10.5.2005, the 2nd respondent held just 3% shares in the company and by transfer of the impugned shares in his name, his holding became 37%. While the company did not get any benefit by the transfer, the 2nd respondent got the benefit of his loan to 6th respondent repaid in the form of shares.

25. The learned Counsel further submitted: There is no need for a written understanding that the Hotel would continue to be a subsidiary of the 6th respondent. The 1st petitioner understood, from the various provisions of the agreement between GOI and the 6th respondent that it would continue to be the holding company of the Hotel. A reading of Clause 9.5 of the Agreement with GOI would indicate that the 6th respondent being the purchaser would continue to have the controlling interest in the Hotel and if so, the Hotel has to be a subsidiary of the 6th respondent. By the transfer, the 6th respondent ceased to be the owner of the Hotel. Likewise, in terms of Clause 13.4 of the same Agreement, no benefits or obligations under the Agreement shall be assignable without the approval of GOI. Therefore, from these clauses of the Agreement, the 1st petitioner understood that the Hotel would continue to be a subsidiary of the 6th respondent and invested its funds in the company. Further, at the time of communicating the allotment of preference shares to the 1st petitioner, the Hotel itself has sent a communication that the investment was subject to different laws and rules as prevailing in India and it is also applicable to the 1st petitioner as an investor. If so, the 1st petitioner was made to understand that in case dividend was not paid for two years, the company being a subsidiary of the 6th respondent, the preference shares would have voting rights in terms of Section 87(2) of the Act. In so far as applicability of Articles 8 and 11 is concerned, Article 11 only exempts obtaining of previous consent of the Board for transfer of shares from a member to another member and it does not exempt compliance with Article 8.

26. I have considered the pleadings and arguments of the counsel. At the outset, it is necessary to record that the respondents raised a preliminary objection that the 2nd petitioner, holding only one equity share could not maintain this petition. On my pointing out that in terms of Section 399, members holding 1/10th of issued capital are entitled to file a petition and issued capital includes not only equity shares but also preference shares, this objection was not pressed. Another issue, which I would like to record at the outset is that, during the hearing on 9.11.05, Shri Sundaram contended that the main issue relating to voting rights on the preference shares being before the High Court in appeal, the same should not be considered by this Board unless the appeal was withdrawn by the petitioners. On this, Shri Choudhary contended that the said issue was not before the High Court and as such there was no bar in my considering this issue in the present proceeding. On 14.11.2005, Shri Sundaram made an oral prayer that the said submission made by Shri Choudhary should be recorded and a copy of the same be given to the respondents which was objected to by Shri Choudhary and he submitted that if the respondents were to seek such an order, they should file a formal application. However, no such application was made by the respondents, However in the hearing held on 28.11.05, Shri Choudhary himself submitted that no finding needed to be given on the issue relating to voting rights on the preference shares as the same was before the High Court in appeal. In view of this, even though the counsel from the both the sides extensively argued on accrual of voting rights on the preference shares, and I have also elaborated their arguments on this issue in this order, I am not giving any finding on the same.

27. Before I deal with the merits of the case, it is necessary to point out that, even though there are allegations in the petition regarding financial mismanagement, mostly on the basis of the qualified report of the auditors in the annual report for the year 2003-2004, the same were not pressed during the hearing except by way of a passing reference. In the reply to the petition by the 2nd respondent, I find that he has given satisfactory explanation in respect of every allegation in detail and in the rejoinder, the petitioners have not challenged the explanation given in the reply. I also find that in the annual report for 2004-2005, the Auditor has not repeated most of the earlier qualified remarks, signifying the fact that the earlier lapses pointed out by the auditor have been rectified subsequently. In the written submission also, the petitioners have not referred to any instance of financial mismanagement. This is inspite of the fact that the claim of the 1st petitioner that it sought to remove the 2nd and 3rd respondents due to their mismanaging the affairs of the company. Thus, this petition appears to be essentially a petition under Section 397 relating to oppression.

28. This petition has been filed jointly by a shareholder holding redeemable preference shares and an equity shareholder under Sections 397 and 398 of the Act alleging oppression and mismanagement in the affairs of the company. Even though the 2nd petitioner contends that it was he who was instrumental in the

1st petitioner investing in the company as such he is interested in protection of the investment of the 1st petitioner, not even a single document was produced by him to substantiate this contention. In the earlier paragraph I have noted that in view of the mismanagement part of the allegations not having been pressed, this petition is essentially one on oppression. It has been judicially held in many cases that acts complained of as oppression should be with reference to the proprietary rights of a shareholder. Such rights of an equity shareholder are different from those of a preference shareholder. Yet, both have joined together in this petition with the 1st petitioner alleging oppression in the matter of transfer of shares from 6th to the 2nd respondent on the ground that it has resulted in depriving the voting rights accrued on the preference shares, the 2nd petitioner, has alleged oppression in the matter of allotment of shares and transfer of shares mostly on the ground that provisions of the statute and Articles have not been followed.

29. Regarding transfer of shares: Shri Sundaram contented that complaints relating to transfers have to be agitated in a petition under Section 111 and not in a petition under Section 397/398. His contention would be valid if only transfer of shares is alleged in isolation. In the present case, the petition not only contains the allegation relating to transfer but also of allotments, and the complaint of the petitioners is that these acts are oppressive to them. Further, they have alleged financial mismanagement. Therefore, it cannot be held that as a legal proposition, transfer of shares cannot be agitated in a petition under Section 397/398.

30. The foundation of the claim that the Hotel should continue to be a subsidiary of the 6th respondent is that there was such an understanding. When I asked Shri Chaudhary as to why the 1st petitioner chose to invest in equity shares instead of in preference shares if its object was to control the company, he submitted that there were some legal hurdles without elaborating as to whether the same were with reference to Indian Law or Malaysian Law. If there were legal hurdles to invest in equity shares at that time, whether the same legal hurdles would apply for taking control of the company has not been explained. It was also not explained, if the 1st petitioner had desired to invest in the equity share capital of the company, whether the respondents would have agreed as the control of the Hotel would have passed on to the 1st petitioner immediately thereafter. Even though, in the rejoinder to the reply filed by the respondents and during arguments by the counsel for the petitioners, it was urged that there was an understanding that the 6th respondent would continue to be the holding company of the company and that the 1st petitioner would be entitled to voting on the preference shares if dividend were not paid for two years, the petitioners could not furnish any proof of such an understanding. It was also not explained as to with whom the alleged understanding was arrived at - whether with the 2nd petitioner, 2nd respondent, the company or the 6th respondent. However, at paragraph 7 of page 25 of the rejoinder, is stated "In fact the Petitioner No2 is the only, witness for the understanding arrived by the Respondent No 1 and

Petitioner No 1 at the time of allotment of Cumulative Preference shares ". Who represented the Hotel during the understanding is not stated and it is also not stated as to how an understanding between the Hotel and the 1st petitioner would bind the 2nd or the 6th respondent who were obviously not parties to the understanding. By way of documents, only 3 letters have been disclosed in so far as allotment of preference shares to the 1st petitioner is concerned. By a letter dated

30. 4.2003 addressed to the 2nd respondent as Chairman of the Hotel, the 1st petitioner has written "With reference to your letter dated 19.2.2003 wherein you have invited applications for investment 8. 5% preference shares of hotel Queen Road Private Ltd., we are interested to acquire 8.5% redeemable preference shares face value of Rs. 100/- each for a total amount of INR 23.65 crores. For this purpose, we have already remitted 2.5 million US\$....". A similarly worded letter for additional preference shares together with consideration for the shares was sent by the 1st petitioner on 21st July, 2003. From these letters, not even a presumption could be drawn that the 1st petitioner invested in the Hotel on the understanding that it would continue to be a subsidiary of the 6th respondent.

31. In so far as the claim, of understanding that the company would continue to be a subsidiary of the 6th respondent I may beneficially refer to the celebrated case of Shanti Prasad Jain v. Kalinga Tubes Ltd 35 Comp. Cases 351-SC wherein oppression was alleged on the basis that there was a breach in complying with an agreement in relation to shareholdings in the company. The facts of the case, short of detail are: Kalinga Tube was a private Limited Company with two shareholders Patnaik and Loganathan having equal shares except a few shares held by outsiders. The company was in financial difficulties. The appellant-Jain- was approached for providing funds and also for arranging bank finance to which he agreed. On 27th July 1954, a written agreement was entered into between Jain, Loganathan and Patnaik. Company was not a party to the agreement. The agreement inter alia provided that Jain would be allotted shares in the company equal to those held by the other two by increasing the capital of the company. Accordingly the capital was increased and shares were allotted to Jain by which each of the three came to hold equal number of shares. Jain was appointed as the Chairman of the company. There was a further issue of shares which were also allotted proportionately. Later on, the company was converted into a public company with the view that being a public company it would be in a better position to mobilize more bank finances. Thereafter, some disputes arose between Jain and the other two. In December, 1957, the company obtained an approval from the Controller of Capital for further issue of equity shares to the tune of Rs 39 lakhs. Since the company had become a public company, the provisions of Section 81(1) of the Act became applicable by which shares had to be issued proportionately to the existing shareholders. Patnaik and Loganathan, did not have sufficient funds to subscribe to the shares if offered proportionately. Therefore, they apprehended that Jain would corner the shares not subscribed by them. Therefore, they convened a general meeting and with their majority equity

holding passed a resolution in terms of Section 81(1 A) to enable the company to issue the shares to outsiders without offering the same to the existing shareholders proportionately. Thereafter, Shares were issued to 7 outsiders. After some subsequent events which are not relevant to cite, Jain filed a petition under Sections 397/398 before Orissa High Court. . While the Learned Single Judge decided the matter in favour of Jain, on appeal the Division Bench decided the matter in favour of Patnaik and Loknathan. Shri Jain took up the matter to the Supreme Court. The Supreme Court after examining the entire provisions of Sections 397/398 in its detailed judgment, dismissed the appeal. In doing so, it noted that the agreement to which the company was not a party and the terms of which were not incorporated in the Articles, was not binding on the company. It also held that even the terms of the agreement did not provide that there would be equality in the shareholding for ever. The Supreme Court also, observed: "There is some force in the contention that Loganathan and Patnaik groups, when they were in need of the appellant, took his help, is also does appear that when the company had turned the corner and was jell that the appellants help was not absolutely necessary, these two groups thought it unnecessary to carry out the spirit of the agreement (though not the terms, for the terms had nothing to do with the future increase at capital tend its distribution). But can it be said that the conduct of the affairs of the company was carried on oppressively merely because these two groups which in March and July, 1958, were in majority did not carry out the spirit of the agreement? We have given anxious consideration to this aspect of the matter and we feel that, though the Patnaik and Loganathan groups did take advantage of the help given by the appellant when the company was in a difficult situation the fact that the fact that when new issue was made can be said to be oppressive of the then minority shareholders, namely the appellant when the company was in a difficult situation, the fact that when new issue was made on behalf of the public company, they decided to make it more broad based and issue the shares to others and not to the existing shareholders cannot be said to be oppressive of the then minority shareholders, namely, the appellant's group. We have already pointed out that it cannot be said to have been proved in this case that the appellant suffered in his proprietary rights as a shareholder and these circumstances it cannot be said that the action taken in March and July, 1958, were in majority did not carry out the spirit of the agreement? We have given anxious consideration to this aspect of the matter and we feel that, though the Patnaik and Loganathan groups did take advantage of the help given by the appellant when the company was in a difficult situation, the fact that when new issue was made can be said to be oppressive of the then minority shareholders, namely the appellant when the company was in a difficult situation, the fact that when new issue was made on behalf of the public company, they decided to make it more broad base and issue the shares to others and not to the existing shareholders cannot be said to be oppressive of the them minority shareholders cannot be said to be oppressive of the then minority shareholders, namely, the appellant's group. We have already pointed out that it cannot be said to have

been proved in this case that the appellant suffered in his proprietary rights as a shareholder and these circumstances it cannot be said that the action taken in March and July 1958 in the allotment of shares amounted to such oppression of the appellant as would justify an order under Section 397.

32. In the present case, the alleged understanding is not substantiated, leave alone the absence of any thing about the understanding in the Articles of the Hotel respondent. Secondly, the 1st petitioner, being a preference shareholder, does not have any proprietary rights in so far as equity shares are concerned, which an equity shareholder has the right to transfer in accordance with law and Articles. The 1st petitioner does not have any representation on the Board and even the 2nd petitioner has not claimed that he is representing the interest of the 1st petitioner on the (sic) Kalinga Tube case, Loganathan and Patnaik, with the sole objective of denying Jain his entitlement to right shares caused a resolution under Section 81(1A) passed by using their majority shareholding and allotted shares to outsiders. In the present case, the 1st petitioner's right to vote on the preference shares is a default right which is also under challenge and the shares have not been transferred to any outsider but only to another member within the same group. Therefore, if we apply the ratio of Kalinga Tube case in the present case, the 1st petitioner cannot claimant relief on the basis of the unsubstantiated understanding nor on the ground that it has been deprived of its proprietary rights. As far as the 2nd petitioner is concerned, if the Articles provide for preemptive rights, he can claim proprietary rights and allege that denial of the said right is oppressive to him. This aspect is being dealt with subsequently.

33. However, having based the entire petition on the alleged understanding with the respondents, in the rejoinder argument, Shri Choudhary contended that there was no need for any understanding and relied on the terms of the of the share purchase agreement with GOI to contend that from the terms of the agreement with the GOI, the 1st petitioner came to understand that the 6th respondent would continue to be the holding company of the Hotel. He referred to Clause 9.5 and Clause 13.4 of the said agreement. Clause 9.5 reads "The purchaser shall use the hotel properties for hotel and allied operations in accordance with the master plan of the application city/area". Clause 13.4; reads "Neither this agreement nor any benefits or obligations under: this agreement shall be assignable by any party without the prior written content of each of the other parties which consent shall not be unreasonably withheld. Subject to the foregoing, this agreement shall inure to the benefit of and be binding upon the parties and respective successors (including any successors by reason of amalgamation and merger of any party) and permitted assigns". In the agreement certain clauses have been inserted under the heading of "Post closing date obligations of the purchaser". There is no specific clause under this heading stipulating that the purchaser would continue to be the holding company. Under that heading Clause 9.5 finds a place and the wording of this clause only indicates that even after the closing date, the hotel properties cannot be used for

any other purpose other than the hotel. No one can, by any stretch of imagination, come to understand that this clause conveys the meaning that the 6 respondent would continue as the holding company. Since Clause 13.4 does not appear under the above heading and appears under the heading "Miscellaneous", it is quite clear that the prohibition of assignment would continue only up to the date of Working out the agreement. Therefore, from this clause also the 1st petitioner could not have understood that the 6th respondent would continue to be the holding company. In the agreement, the 6th respondent has been referred to as the "Purchaser" (which expression shall include its successors and permitted assigns). It is an admitted fact that the 2nd and 3rd respondents control the 6th respondent and therefore the transfer; being; within the same group as contended by the learned Counsel for the respondents, cannot be considered to be in breach of the assignment clause even if applies subsequent to the working out the agreement. If according to the petitioners, the transfer of shares by the 6th respondent violates the assignment clause in the agreement, if the 1st petitioner by virtue of its alleged voting rights on the preference shares takes over the control of the company, it would also be in breach of the same assignment clause. It is on record that the 2nd and 3rd respondents, in addition to giving personal guarantees have also given as collateral security, a number of . their personal properties for the loans sanctioned by the bank and the 6th respondent has given its corporate guarantee. The petitioners vehemently argued that the 1st petitioner's contribution to the share capital before the allotment of the impugned shares accounted for more than 3 times of the equity share capital held by the 6* respondent. It is to be noted that the petitioners have taken the face value of the equity shares for comparison purposes. In reality, the 6th respondent not only purchased the shares at more than Rs. 180/- per share but also cleared the liabilities of the Hotel at the time of acquiring the company. The petitioners themselves have admitted that the acquisition cost of the hotel was Rs. 45 crores, which included the consideration for the shares and also the amount needed to clear the liabilities of the Hotel. If the contention of the petitioners that it is the one who has the largest financial stake in the company should control the management of the company, then, in the present case, obviously, it is the banks which have funded more than 70 crores for both acquisition and renovation of the Hotel, In corporate law, it is always the equity shareholders who have the statutory rights deciding the composition of the Board.

34. When a member alleges oppression, he has to specifically plead on five facts- what is the alleged act of oppression, how it is oppressive, who committed the act of oppression, whether it is in the affairs of the company, and whether the company is a party to the commission of the act of oppression, In the present case, the act of oppression alleged by the 1st petitioner relates to transfer shares by the 6th respondent to the 2nd respondent: the act is oppressive as by this transfer, the 1st petitioner has been deprived of its voting rights on the preference shares. As regards the other three aspects, the stand of the petitioners is not clear. There is no specific averment as to who committed the

act of oppression and how the company is a party to the oppression. If it is the 6th respondent which has committed the act of oppression, the petitioners have no locus standi as this petition is essentially in the affairs of the company. If: their allegation is that since the 2nd respondent controls both the companies and therefore he has acted in an oppressive manner then the petitioners cannot complain, as the transfer is within the same group. Further, a transaction of transfer of shares by a member can never be considered to be in the affairs of a company. In deciding a matter under Section 397, the conduct of the parties is relevant. As per the petition, the 1st petitioner was dis-satisfied with the performance of the company and as such it desired to have the management changed. Not even a single document has been produced to show that at any time, the 1st petitioner enquired about the affairs of the company. As a matter of fact, the alleged acts of mismanagement were not even pressed during the hearing. Secondly, there is nothing on record to show that at any time either after the expiry of the first year or the second year, the 1st petitioner sought for payment of dividend. All of a sudden, on 1.6.2005, it issued a requisition notice seeking for removal of the 2nd and 3rd respondents. Further, both before the High Court and before this Bench, when the Hotel offered to pay the dividend due for the two years, the 1st petitioner declined to accept the same. Thus, it is very clear that the sole object of the 1st petitioner was to gain control of the company by removing the 2nd and 3rd respondents who have not only given their personal guarantees but also given their personal assets as collateral securities and who have, by themselves carried on the affairs of the Hotel right from the time of acquisition. Therefore, I am of the view that no lawful action taken by the promoters having overwhelming majority of equity shares and who have nurtured the company, to prevent an outsider from taking control of the company, could be considered to be an act of oppression. In this connection, I may beneficially refer to the observation of the Division Bench of Delhi High Court regarding the principle of equity in *Shrimati Abnash Kaur v. Land Krishna Sugar Mills Ltd* 44 CC 390: Holding that while exercising equity jurisdiction, which clothes the court with discretionary powers, the Court observed "The discretion cannot be exercised arbitrarily or according to one's own will or whim. It has to be regulated by law, allay its rigour, advance the remedy and to relieve against abuse. The court, therefore, exercising equity jurisdiction, cannot ignore the well known maxims of equity. Two such maxims are that he who seeks equity must do equity and he who comes into equity must come with clean hands. Another equally well known maxim is that where both parties to the litigation are at fault, the defendant's position is stronger (see Pomeroy 's Equity Jurisdiction, Vol 2, page 90) " . In the present case, it is the 2nd petitioner holding only one equity share, is aiming to take control of the Hotel with the support of the 1st petitioner as is evident from the fact that his son and brother in law were proposed to be appointed as directors on removal of the 2nd and 3rd respondents as directors. Thus, it appears that the 2nd petitioner, being a minority shareholder, is trying to oppress the majority. Therefore, any action taken legally to prevent such an occurrence by the majority cannot be considered

to be oppressive.

35. Since the petitioners have alleged that the transfer was not in accordance with the provisions of the Act and the Articles, I have to only examine whether the transfer suffers from any legal infirmity. The petitioners have challenged the transfer on three legal grounds: that the transfer is in violation of Article 8, registered in a board meeting held without notice to the 2nd petitioner (Section 286), approved by interested directors (Sections 299/300) and without a valid quorum (Section 287). In *Needles Industries* case, the Supreme Court has held that an isolated illegal act need not lead to the conclusion that it was committed with the view to oppress, but a series of illegal acts could lead to that presumption. Therefore, whether the alleged illegal acts could lead to the presumption has to be examined.

36. As far as violation of the provisions of Article 8 is concerned, the contention of Shri Sarkar was that since at the time of transfer, the company was a subsidiary of the 6th respondent, in terms of Section 3(iv)(c) of the Act, the company was a public company and therefore its shares were freely transferable in terms of Section 111A of the Act. Alternatively, he also submitted that under Article 11, transfer from a member to another member is permissible and there is no need to comply with Article 8. I have to necessarily reject the first contention. The basic characteristics of a private company in terms of Section 3(iii) of the Act do not get altered just because it is a subsidiary of a public company in view of the fiction in terms of Section 3(3)(iv)(c) of the Act that it is a public company. May be it is a public company in relation to other provisions of the Act but not with reference to its basic characteristics. In terms of that Section, a company is a private company when its Articles restrict the right of transfer of shares, restrict its membership to 50 (other than employee shareholders) and prohibits invitation to public to subscribe to its shares. Therefore, all the provisions in the Articles to maintain the basic characteristics of a private company in terms of Section 3(1)(iii) will continue to govern the affairs of the company even though it is a subsidiary of a public company. One of the basic characteristics of a private company in terms of that Section is restriction on the right to transfer and the same will apply even if a private company is a subsidiary of a public company. Therefore, none of the cases cited by Shri Sarkar regarding the free transferability of shares of the public company, is relevant in this case. Since transfer of shares of a private company has to be strictly in accordance with Articles, the company should always follow the terms of the applicable Articles in respect of any transfer. In the present case, the controversy is as to which of the two Articles 8 or 11, is applicable in the matter of transfer of shares from one member to another member. If Article 8 applies, the transfer of the impugned transfer is invalid and not if Article 11 is applicable.

37. Article 8 reads "Any member desiring to sell any of its shares shall send notice in writing to the board setting out details of the proposed transaction such as the number of shares, the fair value and the name of the proposed transferee.

The board shall, within 7 days from the date of such notice, notify the non transferring shareholders about the proposed transaction. In case, any of the non transferring shareholders are willing to purchase the shares at the same price or at a higher price, that shareholder shall notify the board of his willingness within 21 days from the date of the notice. Upon receipt of such notice, the transferring shareholder shall transfer the shares to that non transferee shareholders. In case no such notification is received by the board from a non transferring shareholder, within 30 days from the notice by the transferring shareholder, the transferring shareholding shall be at liberty to sell and transfer the shares to any person at the same or at a higher price". Article 11 reads " Subject to Section 3 of the Act, no transfer of shares shall be made or registered without the previous sanction of the board except when the transfer is made by any member of the company to another member or to members (spouse, child or children or heirs) or the board may decline to give such sanction without assigning any reasons.

38. If one were to read Article 8 without reference to Article 11, it would appear that all transfers of shares, irrespective of whether the transfer is from one member to another member or to an outsider, would be governed by this Article. Likewise from an independent reading of Article 11, it would appear that transfer from a member to another member is permissible even without the approval of the Board. Obviously, both cannot be applied together. Article 11 not only covers a transfer to another member but also to the spouse, child or heirs. If Article 11 were to subject to Article 8, it is likely to lead to unintended or absurd result. For instance, if a member, out of love and affection, desires to transfer his shares by way of a gift to his spouse, if he were to follow the provisions of Article 8, some other member could take the shares either at free of cost or at a nominal value defeating the very desire of the transfer by gift. I actually put a similar question to Shri Chaudhary during the hearing and his answer was that if a member wished to bypass Article 8, he could only bequeath his shares by way of a will. This would mean that no member can transfer any of his share during his life time even by way of gift. Such a situation is completely contrary to Section 82 of Act, according to which a share being a movable property, is freely transferable in accordance with Articles. The main idea of providing for restrictions in the Articles of a private company is that, the company being a small one with a few members, the shares should be kept with the same group and therefore restrictions are put to screen the entry of outsiders. While reasonable restrictions are permissible, absolute restriction is not permissible. If Shri Chaudhary's contention is accepted, it would mean absolute restriction. When there is conflict between two Articles, the same has to be resolved by adopting or choosing the one which advance the cause of justice. In the present case by way of a harmonious construction, it has to be held that Article would apply only to a transfer to an outsider and not in the case of a transfer from a member to another member. Such construction would also advance the cause of justice if one keep in mind the object of providing pre-emptive rights. Since in the present case, the transfer is not invalid. In this connection, I am once again constrained

to observe that at the time when the 6th respondent transferred on share to the 2nd petitioner, no records reveal that Article 8 was compiled with even though there were about 150 employee shareholders at that time. The learned Counsel for the respondents urged that in terms of Article 11, even the approval of the Board is not necessary and the title of shares passes on the transferee as soon the share certificates are delivered (sic) with transfer instruments. A scrutiny of Article 11 would show (sic) only exempts "prior approval" of the Board and not approval for registration of transfers, which, by law has to be approved by the Board.

39. According to the allegation that the meeting on 10.5.2005 in which the registration of transfer was approved was held without notice to the 2nd petitioner, the company has not adduced any proof that written notices were ever sent to the petitioner for any Board meeting and as such I (sic) to draw an adverse inference that no notice was sent for this (sic) also. The counsel for the petitioners rightly cited a number of decisions to the effect that any board meeting held without notice to all directors is invalid. Whether these decisions can be applied in the present case is a debatable point. According to the 2nd petitioner himself, (sic) never received a notice for any board meeting and therefore if one were to apply the above decision, all the board meetings held by the company right from the time the 2nd petitioner became a director, have to be declared as invalid. The 2nd petitioner became a shareholder by registration of one share in his favour in a Board meeting held on 21.12.2002 and likewise the 1st petitioner was allotted preference shares in two board meetings held 5.5.2003 and on 19.7.2003. The admitted position is that the petitioner did not attend any of these meetings for want of notice. The Company Law Board is a court of equity and in applying the provisions of law, it has to apply the same uniformly. It would be highly unjust to apply these decisions only to board meetings impugned in the petition in which decisions allegedly, adverse to the interest of the petitioners had been taken leaving out those, not impugned in the petition, in which decisions in favour of the petitioners had been taken. If the principle that meetings without notice to a director are invalid is to be applied uniformly to all board meetings, then, neither of the petitioners could claim to be a shareholder of the company as they became shareholders by transfer/allotment of shares approved in Board meetings without notice to the 2nd petitioner. In other words, they would cease to be members of the company disentitling them even from prosecuting the present petition itself. This, I am sure was not the intention of the petitioners while the counsel for the petitioners cited decisions on this point. Therefore, I do not propose to apply this principle to any of the impugned board meetings to declare that the allotment of shares and registration of transfer of shares as invalid on account of non issue of notices to the 2nd petitioner for these Board meetings.

40. The other legal issue raised by the petitioners in relation to the transfer of the impugned shares is that in the matter of registration of transfer of shares, the company being a party, it is an arrangement within the scope of Section 300

and as such the 2nd and 3rd respondents "being interested directors could not have participated in approving registration of shares in favour of the 2nd respondent. On this Shri Chaudhary relied on the decision of this Board in Gordon Woodroffe case (supra). In that case, the interpretation of "interested directors" arose with reference to Section 22A(3)(c) of SCRA and this Board observed As long as the Board of directors who participate in a voting not have any pecuniary interest either as a transferor or transferee or as a beneficial holder, as in the present case, the decision cannot fall within the ambit of either "contract" or "arrangement" as contemplated under Section 299/300 of the Act". If as contended by Shri Chaudhary that Section 300 is applicable in the matter of transfer, as rightly pointed out by Shri Sarkar, registration of transfer in favour of a brother of a director would also come within the purview of this Section as a brother of a director is a relative in terms of Section 6 of the Act. Since transfer of one share in favour of the 2nd petitioner was approved in the Board Meeting held on 21.12.2002 by the 2nd and 3rd respondents, this transfer has also to be declared as invalid. Shri Chaudhary tried to differentiate between a transfer to a director and to a relative and contended that Section 300 would apply only in case of transfer to and from a director. I am unable to accept this contention. Section 300 reads: 'No director of a company shall, as a director, take any part in the discussion of or vote on any contract or arrangement entered into or to be entered into by or on behalf of the company, if he is in any way whether directly or indirectly concerned or interested in the contract or arrangement nor his presence count for the purpose of forming a quorum at the time of any such discussion or vote and if does vote, his vote shall be void. " A director, definitely has an indirect interest in or concern with his own brother. Therefore, if the registration of transfer in favour of the 2nd respondent has to be declared as invalid, in terms of Section 300, then the same will have to be done in respect of transfer in favour of the 2nd petitioner also. The judgment of the Apex Court in Gaekwad case as referred to by Shri Sarkar is relevant. Any way, this discussion is only academic as in Kerala Kaumudi case (supra), the Supreme Court has held that in case of transfer of shares, the transaction is a private arrangement and the company comes into picture only for the purpose of recognition of the transferee as the new shareholder. Therefore, the contention of Shri Chaudhary that in the matter of transfer of shares, the company is a party and therefore it is an arrangement with in the purview of Section 300 has to fail.

41. In relation to the transfer of shares, there are other allegations that the 6th respondent transferred the shares at a lower price and that without receiving any consideration, adjusted the same against the loans given by the 2nd respondent in exclusion of the 2nd petitioner who had also given loans to the 6th respondent etc. This petition has been filed in the matter of Hotel Queen and not in the matter of the 6th respondent and as such these complaints cannot be examined in this petition. Further, this issue would also become irrelevant in view of the final direction that I propose to give. Thus, in so far as the registration of transfer is concerned, I do not find that the same is oppressive to the 1st petitioner nor is

against the provisions of Articles or the Act. Therefore, impugned transfer does not require to be declared as invalid.

42. Allotment of Shares: The next allegation is regarding allotment of equity shares. The petitioners have challenged all the allotments on various grounds: that the allotments were made to benefit the directors and their group companies in breach of directors' fiduciary obligations only with the view to defeat the voting rights on the preference shares and to increase the holdings of the respondents; that the shares were allotted at par without proper valuation; that provisions of Section 300 would apply and that no notice was issued to the 2nd petitioners for any of the Board meetings in which shares were allotted.

43. It is a settled law, as decided in the cases cited by the learned Counsel for the petitioners and also decided in many other cases, that directors cannot use their power to issue/allot shares with the sole object of enhancing their own holdings or with the view to convert a majority into a minority. In this case, the respondents group, even at the time of acquiring the Hotel, held more than 99% shares in the equity capital of the company and even after the impugned allotments, the same group holds practically the same percentage of the shares. Therefore, the cases cited by the petitioners have no application in the present case, in so far as the illegality in the issue/allotment of shares, it is a settled law as propounded by the Supreme Court in *Needle Industries* case that if the issue of further shares is in the interest of the company and in the process if directors are also benefited, it cannot be considered to be an act of oppression. In the present case, one noteworthy aspect in so far the allegation relating to allotment of shares is concerned is that, the petitioners have not challenged the same on the ground that the company was not in need of funds and as such there was no need to issue further shares. Their realization that the company was in need of funds is evident from the fact that in the reliefs sought in the petition, while seeking for cancellation of the issue/allotment of shares, they have not sought for refund of the amount invested in the impugned shares to those to whom the shares were allotted, but have sought for treating the amount as unsecured loans from these persons. The respondents have given copies of the Bank statements of the company to the petitioners to evidence the receipt of money from the respondents as consideration for the shares allotted to them. However, in the written submission, the petitioners have alleged that the 2nd respondent did not bring in cash for the allotment made to him but the same was adjusted against his loan account to the company. Since this allegation is only in the written submission to which the respondents did not have any opportunity of rebuttal, I am unable to give any finding. Whether, by these allotments, the respondents have got undue benefits at the cost of the petitioners is an issue for consideration. As rightly pointed out by the learned Counsel for the respondents, the 1st petitioner, being only a preference shareholder, cannot allege oppression in the matter of allotment of equity shares. As far as the 2nd petitioner is concerned, he could complain of oppression only on the ground that he was not allotted proportionate shares.

44. I have already given my finding on the impact of meetings held without notice to the 2nd petitioner and a such I am not repeating the same. In so far applicability of Section 300 is concerned, the learned Counsel for the petitioners contended that in allotment of shares, the company being a party, it is an arrangement and also a contract with the company. Shri Choudhary relied on the decision of Supreme Court in Kerala Kauladi Ltd. case wherein the Supreme Court has held that it is imperative that the company should be a party to any agreement relating to allotment of shares. I find that this case has been quoted out of context as in that case, the provisions of Section 300 were not examined. The issue examined was whether an agreement relating to allotment of shares without the company being a party to the agreement could be enforced against the company and the Court held that to enforce the agreement against a company, the company should be a party to it.

45. The applicability of Section 300 in allotment of shares to directors has been examined by this Board in Kadri Mills case. This Board has observed "In regard to legal infirmities, his submission has been that before a quorum of non interested directors, the board decided to issue convertible warrants and also issued shares against the warrant. As far as the presence of dis-interested directors is concerned, we are in full agreement with the submissions made by the counsel of the respondents. As rightly pointed out by him, as long as the board takes the decision which is subject to general body approval, the question of approval of directors being interested in a particular subject may not be of much relevance. What is required is that the general body should be advised about the interest of the directors when the subject is placed before the general body for their consideration. Even otherwise, issue of shares/warrants cannot be considered to be an arrangement or contract within the provisions of Section 299 or 300. If it is so, then, no issue of right shares/warrant could be made in case all the directors are shareholders of a company. Regarding the allegation that when the warrants were converted in that meeting, quorum was absent. One has to keep in mind that the general body has already approved conversion of warrants and what the board did was only with the authority of the general body which was aware of the interest of the directors. Therefore, we do not find any infirmity in the interested directors participating in allotting the shares".

46. From the above case it is evident that while holding that in the matter of allotment of shares to directors, Section 300 is not applicable, this Board had also held that if there is a general body approval for issue of shares to directors, then even interested directors could allot shares to themselves. Shri Sarkar referred to the resolution passed by the general body in the first AGM of the Hotel in terms of Section 81(1A). I find from the notice for the first annual general meeting of the company convened on 28.12.2002, that the following resolution was proposed as a special resolution: "Resolved that pursuant to Section 81 (1A) and other applicable provisions of the Companies Act, 1956 as amended and subject to the following terms and conditions, the Board of Directors of the company be and is hereby authorized to offer issue and allot 71

lakhs equity shares of Rs. 100/- and 25 lakhs redeemable preference shares of Rs. 100/- each without the need to offer the same proportionately to the existing shareholders". In the Explanatory Statement attached to the Notice to this resolution, it was stated "As you are aware the company is in need of funds for the purpose of renovation and upgradation of Hotel - Indraprastha. The company has received offers from persons outside India and/or entities outside India to buy 25 lakhs redeemable preference shares at Rs. 100/- each at par which would result in inflow of Rs. 25 crores. Similarly, holding company and present directors and their relatives have interest to buy equity shares now proposed to be offered by the company. As Section 81A stipulates approval of existing shareholders before allotting shares to persons other than existing members, the above resolution is thus recommended for your kind approval". (emphasis supplied). On the basis of this explanatory statement disclosing the directors' interest to acquire shares, the general body authorized the Board to issue/allot preference shares to the 1st petitioner and equity shares to the directors and their relatives as also to the 6th respondent, even without proportionate shares to the existing shareholders. Thus when the shares had been allotted to the directors with the approval of the general body, as decided in Kadri Mills case, the same cannot be impugned to be in violation of Section 300. The 2nd petitioner could have justifiably alleged oppression that when the general body had approved issue/allotment of shares to the directors, he also should have been allotted shares, but he only seeks to cancel the allotments. Admittedly, the respondents have not justified exclusion of the 2nd petitioner, who was/is a director, from allotment of shares. However, during the hearing the respondents have agreed to allot proportionate shares to the 2nd petitioner also.

47. The petitioners have also alleged that the 2nd respondent has played a fraud in the matter of transfer and allotments of shares. Their allegation of fraud is based on their contention that the transfer and allotments were illegal, unlawful and malafide, done with the view to deprive the 1st petitioner of its voting rights on the preference shares. Shri Chaudhary relied on *State of UP v. T. Suryachandra Rao* to substantiate his contention that the respondent had played a fraud. In that case, the Supreme Court held that any thing done in suppression of material fact or misrepresentation is a fraud. In the present case, no such suppression of material facts or misrepresentation in the allotments/transfer of shares has been alleged. Further, in regard to the transfer of shares, I have already given my findings. As far as the allotment of shares is concerned, the first allotment to the 6th respondent was made on 27.7.2004, when there was admittedly no dispute among the parties and even otherwise, the allotment was made to the largest shareholder. Likewise, in the second allotment on 7.1.2005 also largest number of shares were allotted to the 6th respondent. Even though it is contended by the 2nd petitioner that disputes had started in December . 2004, yet, the allotments made on this date had not affected the status of the 6th respondent being the largest shareholder- the holding company. Thus the question of alleging that these allotments to the 6th are fraudulent acts done

with an ulterior motive does not arise. In so far as allotment to the 2nd and 3rd respondents is concerned, the 2nd petitioner can only have the grievance that he was not allotted proportionate shares. In regard to the allotment and transfer of shares approved in the Board meeting on 10.5.2005, there is nothing on record to show or established by the petitioners, that the minutes and connected records were fabricated after the EQGM notice was issued on 1.6.2005 by the 1st petitioner. In that were the case, the petitioners could definitely allege fraud. Further, the learned Counsel for the respondents brought to my notice that in the Board meeting held on 4.7.2005, the 2nd petitioner was a party to the confirmation of the Minutes of the Board Meeting on 10.5.2005. This stand of the respondents has not been rebutted by the 2nd petitioner. If he was a party to the confirmation of the minutes, he cannot now complain. Even if there was no confirmation contrary to the claim by the respondents, in the earlier paragraphs, I have already held that the allotments and the transfer were done lawfully and with the view to protect the interests of the promoters of the company. Therefore, I do not find that the respondents are guilty of any fraud. The counsel for the petitioners also contended that by the allotments and transfer of shares, only the 2nd respondent was benefited and not the company. As far as the allotments are concerned, it is an admitted fact that the company needed funds and to that extent the company was benefited by induction of funds. In so far as transfer of shares is concerned, in no case any company could be expected to benefit as it is a transaction between a buyer and a seller.

48. The petitioners have also challenged the appointment of additional directors appointed in the Board meeting held on 4.7.2005. The challenge is mainly on the ground that it was done with a view to perpetuate the control of the company by the 2nd and 3rd respondents in case they were removed in the proposed EOGM. If it is the objection of the petitioners on the appointment of the additional directors, then, I do not find any justification,. It is on record that there are only three directors on the Board with the 2nd petitioner also being a director. If the 2nd and 3rd respondents had been removed in the EOGM, wherein two more directors of the petitioners' choice were proposed to be appointed, then the petitioner would have majority on the Board. Thus, I find that in the appointment of additional directors, neither the petitioners have shown how it is prejudicial to their interests or the company or how it is oppressive to them.

49. On an over all analysis of this case, I find that contention of the respondents that this petition has been filed for the sole purpose of taking over the company and not for redressing the grievances of oppression is justified. It is on record that till it issued the notice for EOGM, the 1st petitioner was practically dormant as far as the affairs of the company were concerned. So was the 2nd petitioner, who, being a director did not seem to have evinced any interest in the affairs of the company. While seeking for declaring the transfer of shares as invalid on the ground that the same was in violation of the preemptive rights in terms of Article 8, the 2nd petitioner has not sought for granting him that pre-emptive rights to enable him to acquire the shares. Instead he has only sought for cancellation of

the transfer so that the 6th respondent would be restored to the position of the holding company. Similarly, in so far as the allotments of equity shares impugned in the petition is concerned, he has again sought for cancellation and not for proportionate shares to him also. Like wise, the 1st petitioner, when was offered dividends due on the preference shares during the hearing, refused to accept the offer as if it accepted the offer, its claim for voting rights would vanish and it cannot take control of the company. It is a well settled proposition that the provisions of Section 397 are to be invoked to get the grievances of oppression redressed and not for the purpose of achieving an oblique or ulterior object. In this connection I may refer to the case of Mathur v. Har Swamp Mathur 40 Comp Cas 282 (AH), where in Allahabad High Court has observed "the court has to be careful and astute enough to prevent a misuse of the provisions of sections 397/398 by a party, lest a remedy proposed and granted to overcome an alleged mischief becomes a source of greater oppression than the one sought to be removed or prevented". This observation squarely applies in this case.

50. In view of the foregoing findings that the petitioners have not been able to establish any act of oppression or mismanagement in the affairs of the company and that this petition has been filed with the oblique object of taking control of the company, the petition deserves to be dismissed. However, as far as the 2nd petitioner is concerned, I find some distinguishing features which prompt me to grant some appropriate reliefs taking into consideration the observation of the Supreme Court in Needles Industries case (para 172) and reiterated in Gaekwad's case (para 207) that even when oppression has not been established, the court may grant such relief so as to do substantial justice between the parties. Even though the respondents repeatedly contended that the 2nd petitioner holds only one share, it is to be noted that even the 2nd respondent held only two shares and the 3rd respondent only 3 shares before allotment and transfer of shares impugned in the petition. In the rejoinder the petitioners have indicated that at the time of acquisition of the Hotel, the 2nd petitioner had given a loan of Rs 5.5. crores. It was repeatedly mentioned during the hearing and stated in the written submissions also. Even though in the sub-rejoinder, the 2nd respondent had indicated that the cash portion of the cost of acquisition was contributed by him and his sister concerns, the stand of the petitioners that the 2nd petitioner had given a loan of Rs 5.5. crores was not specifically denied nor any documents produced to rebut the same. In the balance sheet of the 6th respondent for the years 2003 and 2004, I find that there is a credit balance of Rs 4.91 crores in the name of the 2nd petitioner under "unsecured loans". The 2nd petitioner has also given a joint guarantee for the loans of Rs 45 crores. Both are still continuing. No one would give a substantial loan and a joint personal guarantee unless he has some beneficial interest in the project. Nor he would have been appointed as a director. I am unable to believe that the 2nd petitioner was appointed as a director only because of the relationship. I am therefore of the view that, it would be just and equitable which would also ensure substantial justice between the parties, that

the 2nd petitioner also gets the benefit in terms of the allotment as also of transfer of shares. As far as allotment of shares is concerned, the respondents themselves undertook before me that they would allot proportionate shares to the 2nd petitioner if he so desired, however without indicating the basis on which the proportion would be arrived at. I have already held that allotment of shares to the 6th respondent cannot be questioned as it was/is the largest shareholder in the Hotel. However, the 2nd respondent holding 2 shares and the 3rd respondent holding 3 shares and a non shareholder-the 7th respondent which is under the control of the 2nd respondent- were allotted shares in exclusion of the 2nd petitioner. Therefore, I am of the view that the shares allotted to these respondents should be subject to proportional allotment to the 2nd petitioner. Since the 2nd and 3rd respondents held 5 shares collectively before the allotment of shares to the 2nd, 3rd and the 7th respondents, the 2nd petitioner should be offered 1/6th of the total shares of 15,60,000 shares allotted to these respondents- that is 2,60,000 shares should be offered to the 2nd petitioner at par. In case he accepts the same along with consideration, each of these respondents should transfer 1/6th of the shares allotted to each of them. Since it is the stand of the 2nd petitioner that at the time of acquiring the Hotel, he had given a loan of Rs 5.5 crores to the 6th respondent, which stand has not been rebutted, I am of the view that he should get benefit for the same. Therefore, when the 2nd respondent acquired shares from the 6th respondent against the loan given by him of Rs 6.23 crores, it is just and proper that the 2nd petitioner should also get shares against his loan. Of the total loan of Rs 11.73 crores given by both, the loan of Rs 5.5 crores given by the 2nd petitioner constitutes 46.9%. Therefore, I am of the view that the 2nd respondent should transfer 46.9% of 32,88,181 shares transferred to him by the 6th respondent. Accordingly, I direct so. The number of shares required to be so transferred works out to 15,42,156 shares. The consideration for the transfers will be Rs 20 per share at which the 6th respondent transferred shares to the 2nd respondent. Since the consideration for the transfer of the shares from the 6th respondent was adjusted against the loan account of the 2nd respondent in the 6th respondent, similarly, consideration for 15,42,156 shares now directed to be transferred by the 2nd respondent to the 2nd petitioner be adjusted in the personal accounts of the 6th respondent by debiting the account of the 2nd petitioner and crediting the personal account of the 2nd respondent. This is however, subject to the 2nd petitioner making a request in writing to the 2nd respondent referring to this direction and subject to availability of credit in the account of the 2nd petitioner in the 6th respondent. Within 15 days of his making a request in writing, the transfers should be registered in the register of Members of the Hotel without any further act by any one. Since the 2nd petitioner would also get the shares at the same price at which these shares were transferred/allotted, even the allegation of the 2nd petitioner that the shares were under-valued no longer survives. I have consciously not taken into consideration the allotments made to the 6th respondent as the object of my direction is to maintain the ratio of shareholding between the 2nd petitioner and the 2nd/3rd respondents as it is the

6th respondent which acquired the Hotel. In future also there should always be a proportional offer of shares to all the shareholders whenever further allotments are made. Similarly, since the respondents themselves have offered to pay the dividend due on the preference shares, they shall be bound to do so if the 1st petitioner makes a request in writing. I also direct, that for all future Board meetings, the 2nd petitioner should be given 7 day notices by registered post with acknowledgement due along with agenda. He shall also be given inspection of all statutory records and other documents which he is entitled to inspect in his capacity as a director and a shareholder.

51. Before parting with this order, I consider it necessary to record that at the invitation of the counsel from both the sides, on conclusion of the hearing , I visited the Hotel premises. Both the 2nd petitioner and the 2nd respondent were present. I found that most of the renovation work had been completed and work was going on in the ground floor of the premises. The second respondent informed me that once the ground floor work was completed in the next few months, he was planning to have a soft opening of the hotel. After the visit to the hotel premises, in view of the close relationship between the 2nd petitioner and the 2nd respondent, I invited them for a discussion with a view to explore the possibility of an amicable settlement of the disputes but without any fruitful result. My further two interactions with the parties along with their advocates to settle the disputes amicably also failed. Since the discussions with me were without prejudice, I am not recording the details of the discussions.

52. The petition is disposed of in the above terms with no order as to cost.