
(2007) 04 AHC CK 0132
In the Allahabad High Court

Starlinger and Co. Ges.m.b.H.	Vs	APPELLANT
Lohia Starlinger Limited and Others		RESPONDENT

Date of Decision : 20-04-2007

Acts Referred:

COMPANIES ACT, 1956 — Section 17, 313, 397, 398, 402
Income Tax Act, 1961 — Section 10F, 66

Citation : (2007) 5 ADJ 744 : (2008) 1444 CompCas 642

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Shri P.V. Kapoor, Sr. Advocate assisted by Shri Dhruv Wahi, Shri Saral Srivastava and Ms. Namrata Kapoor for STARLINGER & Co. Ges.m.b.H, Sonnenuhrgasse 4, A-1060 Vienna, Austria, the appellant and Shri Ravi Kant, Sr. Advocate assisted by Ms. Bindu Saxena, Shri Yatindra Shukla and Shri Saurabh Srivastava for M/s Lohia Starlinger Limited, D-3/A, Panki Industrial Estate, Kanpur and other respondents.

2. This appeal u/s 10F of the Companies Act, 1956 arises out of an order dated 12.12.2006 passed by the Company Law Board (CLB), Principal Bench, New Delhi in the Company Petition No. 62 of 2005, on a Company Application Nos. 365 & 324 of 2006 by which the CLB held that the issues raised by the application filed by the appellant are the matters to be decided on conclusion of main proceedings and permitted the respondent company to implement the decision taken in AGM dated 30.9.2006 relating to amendment of the objects clause of the Memorandum of Association with the stipulation that till the disposal of the petition it shall not commence any business other than automotive parts and electrical accessories as indicated in para 5 of its application CA 365 of 2006.

3. The facts giving rise to the appeal are as follows:

That the appellant is a company organized and existing under the laws of Austria

having its registered office at Sonnenuhrgasse 4, A-1060, Vienna, Austria. It is engaged in the manufacture of "Circular Weaving Machines" and machinery for plastic processing, packaging and textile industries for last 167 years. M/s Lohia Engineering Works, a firm incorporated having its registered office at 73-A, Fazal Ganj, Kanpur, India entered into a contract dated December 14 th, 1980 with Maschinenfabrik Starlinger & Co., the company incorporated under the laws of Austria (now the appellant) to form a new company by the name of Lohia Starlinger Ltd., the respondent or any other company mutually agreed upon for undertaking the manufacture of the machinery for production of PP/ HDPE Woven fabrics, described in the agreement as follows:

I. CIRCULAR WEAVING MACHINE, TYPE HD4 with necessary accessories like Creel, winding units etc.

II. Additional equipments (a) Take-up units model FIL 23 to prepare bobbins From the tapes; and

III. Other auxiliary machines like fabric cutting machine, stitching machine, sack printing machine, baling machine etc.

4. The parties to the contract agreed that Starlinger will hold 40% of the equity shares in the new company and the balance 60% will be held by Lohia, their friends and Indian public. The clauses 4,7, 11, 16, 19, 21, 25, 27, 28 and 31 of the agreement relevant for this appeal are quoted as below:

4. STARLINGER grants to the NEW COMPANY exclusive right to manufacture the said MACHINERY in India and market the same. On the other hand Lohia shall not manufacture and market similar equipment of other companies without the agreement of STARLINGER.

7. STARLINGER will also provide comprehensive technical data regarding metal analysis, heat treatment properties, requirements of castings, forgings and other special purpose components, roller, hearings, gears and electrical equipments.

11. STARLINGER shall to be best of their ability and knowledge give the new company all the information and data which are required for the manufacture and marketing of the said Machinery. In case the New Company requires further information or clarification regarding such information and data, then STARLINGER shall use its best efforts to furnish the same to the New Company as early as possible.

16. That New Company shall be free to sub-licence to other Indian companies; the know-how and technology, if necessary. However, such sub-licensing will be subject to the Approval of all the parties concerned including STARLINGER and Lohia and subject to the approval of the Government of India.

19. In consideration of the services to be rendered by STARLINGER the New Company shall pay to STARLINGER a royalty of 5% (five percent) subject to Indian taxes for a period of five (5) years from the date of commencement of

commercial production of the said machinery by the New Company.

21. The royalty shall be calculated on the basis of the net ex-factory sale price of the products exclusive of excise duties, minus the landed cost of the imported components irrespective of the source of procurement, including ocean freight, insurance, customs duty etc.

25. The New Company is bound to keep correct and accurate records of the Machinery manufactured and delivered and shall render to STARLINGER an account of the machines sold and delivered or exported by them every six (6) months. STARLINGER shall have the right to examine and verify such records by an authorised representative of STARLINGER or any independent chartered accountant.

27. That New Company can market their products as Licensee of STARLINGER.

28. The New Company shall be free to export their products to all countries except Brazil and Austria where STARLINGER have already got necessary arrangements. However, in order not to have a clash of interest, it is agreed that the New Company will route all their exports through the worldwide sales organization of STARLINGER.

31. All disputes, differences and disagreements arising in connection with this Agreement shall be settled mutually as far as possible, failing which the same will be rendered to the International Chamber of Commerce, Zurich and finally settled under the Rules of the said Arbitration court of the Chamber shall be final and binding on the parties thereto.

5. A supplementary agreement dated 13.4.1982 was entered into between the parties by which it was agreed that payment of royalty/ lumpsum payment made by Lohia Starlinger to Starlinger during the period of agreement shall constitute full compensation for use of any patent rights till the expiry of life of the patent and Lohia Starlinger shall be free to manufacture the items even after the expiry of the collaboration agreement without making any additional payments. A shareholders' agreement dated 10.11.1992 provided for explicit terms including valuation of shares, right of first refusal, in case any one of the parties wanted to leave the company. The shareholders' agreement was made part of Articles of Association of the company.

6. The shareholders' agreement dated 10.11.1992 between Maschinenfabrik Starlinger & Co. (STACO) represented by Mr. F.X. Huemer on one part and Mr. Raj Kumar Lohia, his family members and associate companies (the Lohia family) on the other part started with opening statement about the agreement dated 25 th June 1992 between the parties and the promotion of "Lohia Starlinger Ltd. (LSL) and a technical collaboration cum equity capital participation agreement dated 8 th October, 1981 as modified by supplementary agreement dated 17 th September, 1985 for manufacture of certain PP/HDPE/ Woven Sacks machineries and manufacturing facilities at various places including Kanpur, and the desire of

LSL to re-structure its capital base with a view to reduce its dependence on funds borrowed from the banks/ financial institutions at comparatively higher interest rate. The agreement provided that the equity share capital of LSL will remain at its present ratio 60:40 between Lohia family and STACO and in the event STACO and/or Lohia family intends to advise his shareholder LSL the agreement provides that if STACO wants to leave, the Lohia family shall have the option to purchase STACO's share either by itself or through its nominees at a price to be worked out in accordance with the agreement in which consideration is to be arrived at by a firm of independent Chartered Accountant in India. In the event Lohia declines to purchase the shares within 16 weeks of the offer, STACO will be free to dispose of its shareholding in the manner and offer will be made to existing members of LSL in proportion to their respective shareholding on an appointed date with a right of renunciation failing which STACO may sell the shares to any other parties. On the other hand if the Lohia family is desirous to disinvest its shares, STACO will have the right of first refusal but this right will not be applicable to transfer between members of the Lohia family themselves. The payment of price was to be worked out in the same manner in which the shares of STACO were to be valued in case of offer of sale to LSL. Cost of shares were to be worked out by adding simple interest at the rate of 10% from the date of payment by STACO to LSL deducting sum total of outstanding paid of LSL in Austrian Shilling. The agreement further provided voting rights held by STACO to be exercised by Mr. F.X. Huemer or his immediate family members and in the event they ceased to be in the management, the LSL shares held by STACO shall be deemed to have been offered for sale to Lohia family in accordance with the agreement. The agreement was subject to arbitration in English language with applicable Indian laws in accordance with the rules of arbitration of International Chambers of Commerce, Paris.

7. A separate contract dated 30.6.1992 was executed for manufacture of "Circular Weaving Machine", which were described in the agreement as under:

I. Circular Weaving Machine, type HD4 with necessary accessories like Creel, Winding Units etc.

(II) Additional equipments (a) Take-up units model F1L 23 to prepare bobbins from the tapes; and (b) Modification kits for the tape production equipment;

(III) Other auxiliary machines like fabric cutting machine, stitching machine, sack printing machine, baling machine etc.

8. The other terms of the agreement were more or less the same.

9. Mr. F.X. Huemer was not keeping good health and wanted to nominate alternate Director to which the Lohia family objected, giving rise to a dispute between the Starlinger and Lohia family. On the death of Mr. Huemer, his daughter Ms. Angelika Huemer took over as one of the Managing Directors and made a protest that Starlinger was not communicated with the shareholders' meetings well in advance to be duly represented. She was also denied the

opportunity to be represented in the meeting through an alternate director.

10. The differences between the parties could not be resolved giving rise to and resulting into the exchange of legal notices in which the appellant alleged infringement of trade mark under the Indian Trade and Merchandise Market Act, 1958 and loss of good will and reputation. The appellant, thereafter, filed a Company Petition No. 62 of 2005 u/s 397 and 398 read with Section 402, 403 and 408 of the Companies Act, 1956, complaining oppression and mis-management with following reliefs and interim orders:

It is therefore, most humbly submitted that in the facts and circumstances of the case, it would be just and equitable to Wind Up the Company. However, since a Winding Up order would unfairly prejudice the petitioner, the petitioner most respectfully prays for the following reliefs;

8.1. to direct the company to appoint Mrs. Angelika Huemer as the Director on the Board of the company;

8.2. to direct the company to allow the director(s) representing the petitioner on the Board of the Company to appoint their alternate in terms of Section 313 of the Companies Act, 1956 read with the AoA of the Company even if such representative are not member of Mr. Huemer's family.

8.3. To direct the Board of Directors of the company and any other officer responsible for the conduct of affairs of the respondent company to give a notice of atleast 30 days of the meeting of board of directors and the shareholders meetings of the company to the petitioner, henceforth and further direct the notices to be also faxed and e-mailed to the petitioner at its fax numbers -43-2674-80024 and the e-mail address ahuemer@starlinger.com.

Pending final decision on the petition, the petitioner seeks issue of the following ad-interim ex-parte orders:

(a) to direct the Company Respondents to give sufficient notice of all the shareholders meeting in the timely fashion to the petitioner;

(b) to direct the appointment of nominee of the Petitioner on the Board of Directors of the Company till the disposal of the Petition;

(c) to direct the Company to permit appointment of an alternate director of nominee of the Petitioner, if allowed to be appointed under (b) above;

(d) any other order or direction or any such other relief in the nature thereof as this Hon''ble Bench may deem just fit and proper in the facts and circumstances of the case as may render justice may also be granted.

11. The parties exchanges pleadings in CLB. The respondent company filed its reply on 25.11.2005 and thereafter filed the Original Suit No. 788 of 2006 in the Court of Civil Judge (SD) Kanpur Nagar, Raj Kumar Lohia and Anr. v. Lohia Starlinger Ltd. and Ors. impleading Starlinger & Co. Ges. m.b.H. as defendant

No. 2, with the following reliefs:

(a) Pass a Decree of Declaration declaring that a valid, concluded, subsisting and binding contract exists between Plaintiffs and Defendant No. 2 for the sale and transfer of STACO Shares namely 17,60,000 fully paid up equity shares of the par value of Rs. 10.00 (Rupees Ten) each in the issued and paid up equity share capital of Defendant No. 1 Lohia Starlinger Limited held by Defendant No. 2 and as more fully described in Annexure A.

(b) Pass a Decree of Mandatory Injunction directing the Defendant No. 2;

(i) to execute and deliver to the Plaintiff No. 2 the Share. Transfer Deeds, in favour of Plaintiff No. 2, in respect of the STACO Shares namely 17,60,000 fully paid up equity shares of the par value of Rs. 10.00 (Rupees Ten) each held by the Defendant No. 2 in the issued and paidup equity share capital of Defendant No. 1 and as described in Annexure "A" hereto along with consent letter in the form at Annexure "B" of the Plaint addressed to the Reserve Bank of India, and

(ii) to deliver to the Plaintiff No. 2 share certificates in original in respect of the STACO Shares namely 17,60,000 fully paidup equity shares of the par value of Rs. 10.00 (Rupees Ten) each held by the Defendant No. 2 in the issued and paidup equity share capital of Defendant No. 1 and as described in Annexure "A" hereto;

(c) Pass a Decree for Permanent Injunction restraining the Defendant No. 2, its officers, employees and representatives and its successors, administrators and assigns from alienating or transferring in any way or manner the STACO Shares briefly described Annexure "A" hereto and/ or creating any charge, lien or encumbrance whatsoever in any form, way or manner on the said STACO Shares in favour of any person or persons save and except in favour of the Plaintiff No. 2.

(d) Pass a Decree for Permanent Injunction against the Defendant No. 1, its officers, employees and representatives and its successors, administrators and assigns restraining them from recognizing the Defendant No. 2 as a share holder in respect of the said STACO Shares and from permitting the said Defendant No. 2 to exercise any share holder rights as holder of the said STACO Shares in the issued and paidup equity share capital of Defendant No. 1 Company.

(e) Decree of Injunction be passed directing the Defendant No. 1 to register the transfer of shares in favour of the Plaintiff No. 2 in respect of STACO Shares, the details whereof is given in the Annexure "A" of the Plaint.

(f) Grant such other and further reliefs as may be required by the nature and circumstances of the case, and

(g) Costs of the suit.

12. The cause of action to file the suit is stated to have arisen (para 44 of the plaint) to the plaintiff firstly on 5th August, 2005, when the defendant No. 2 filed the Company Petition No. 62 of 2005 before the Company Law Board and

thereby sought to repudiate the contract for sale and transfer of STACO shares by the defendant No. 2 to plaintiff No. 2 and then on 1st December, 2005, when the legal notice of the plaintiff demanding specific performance of the contract was served on defendant No.2 and then again on 17.1.2006, when a reply notice dated 17.1.2006 was given purportedly to deny the concluded valid and binding contract between the plaintiffs and defendant No. 2 for the sale of STACO shares.

13. During the pendency of the company petition in CLB, the respondents issued notices to convene an AGM on 30.9.2006 for amending the objects clause, for manufacturing automotive parts and accessories and obtained an injunction from the Civil Court, Kanpur purportedly on the basis of shareholders' agreement, directing Ms. Anjelika Huemer to vote in the AGM along with the respondents. By the injunction order dated 30.5.2006 the Starlinger and Co. Ges. m.b.H., defendant No. 2 was directed that until further orders it will not sell the shares to any third party or to create any charge over it and to vote in the company meetings along with the plaintiffs. Further defendant No. 1 was directed that in case defendant No. 2 sells the shares to any third party, they (the Lohia Starlinger Ltd.) will not take any steps to transfer the shares.

14. Faced with the injunction Ms. Anjelika Huemer did not participate in the meeting and that following, Clause III (c)-20 after existing Clause III (c)-19 was added to the object clause u/s 17 of the Companies Act, 1956; "To carry on business as manufacturers, assemblers, designers, importers, exporters, distributors, processors and dealers of all kinds of components, parts, assemblies etc. made of metals and/ or elements of all kinds and description, whether man made or natural."

15. In the company petition before CLB the appellant took a stand in para 6.31 that since the matter with regard to use of trade name "Starlinger" is already under the judicial scrutiny of the Kanpur Court for reference to arbitration, the same is not being agitated and made a subject matter of the petition. It however, appears that an application for arbitration was rejected against which an appeal was preferred to this Court and in the situation in which the amendment of the objects clause and injunction that the respondents were likely to manufacture and sell products other than the machinery covered by contract with the trade name of "Starlinger", the appellant filed an application in Company Law Board on 04.11.2006 under Regulation 46 of CLB Regulations 1991 to amend the company petition. The appellant in support of the amendment application stated that a proposal was made on July 21st, 2006 during the submissions made by the counsels appearing on behalf of both the parties, at an interim stage, that respondent No. 2 purchases the shares of the company held by the petitioner at a price to be determined by CLB and to delete the name "Starlinger" from the corporate name of respondent No. 1. The respondents, however, declined to amicably settle the matter and to end the oppression and mismanagement. Having regard to breakdown of relationship, lack of confidence between each other, and the exclusion of the petitioner from participating in the affairs of the

company, coupled with the fact that company wanted to start business in an area in which the petitioner is not involved to continue to use the word "Starlinger" as part of its corporate name, illegally implying the trade connection between petitioner and the said products, it would be just and fair that the respondents be directed to buy out the shares of the petitioner at a price determined by the Board and further to direct the respondent No. 1 to omit the word "Starlinger" from its corporate name since the joint venture between the parties had come to an end.

16. The application for amendment in the pleading is still pending and is likely to come up before CLB on the next date.

17. In the meantime as the special resolution was passed in AGM on 30.9.2006 and that the appellant apprehended commencement of new business by the respondents to be detrimental to the interest of the petitioner and to damage its reputation and good will world over, an application was filed to restrain the respondents from using the name "Starlinger" in their products and to give effect to the amendment in the object clause. The respondent-company on its turn filed an application seeking permission to the company to implement the resolution passed in AGM for commencing new business. The CLB upon hearing the counsels for both the parties has held that under Sections 397/ 398 of the Companies Act, 1956 the paramount object is to protect the interests of the company. Only if it is established that the conduct of the affairs of a company is prejudicial to its interest, preventive orders are warranted. Since it was not the case of the petitioner that entering into new business would prejudicially affect the interest of the company, and that its claim is that it would affect the business/ reputation of the petitioner because of the using the name "Starlinger" the growth and prosperity of the company cannot be stalled. Whether the respondent should purchase the shares of the petitioner and whether the respondent retain the name "Starlinger" are the matters to be decided on the conclusion of the main proceedings and not at the interim stage. The CLB permitted the company to implement the decision taken in AGM relating to amendment of objects clause of the Memorandum of Association with the stipulation that till the disposal of the petition, it shall not commence any business other than the automotive parts and electrical accessories.

18. Shri P.V. Kapoor, Sr. Advocate appearing for the appellant submits that the offending amendment in the objects clause was passed with the aid of an illegal injunction from the Kanpur Court, which had no jurisdiction to entertain the suit on a cause of action that the minority shareholders have filed a company petition in the CLB. A legitimate action in CLB for statutory remedy by a party in the competent Court cannot be made a cause of action to file a suit to frustrate the entire efforts and jurisdiction of the Board. The agreements between the parties have come to an end on November 4th, 1998. Thereafter, the respondent company has engaged itself in the illegal activity of using the name "Starlinger" in manufacturing and selling the machinery. The action not only infringes the

appellant's trade mark and amounts to "passing of goods", in the name of "Starlinger", it also amounts to misleading the public/ consumer and at the same time damaging the reputation/ goodwill of the appellant. The manufacture of automotive parts and accessories was not the objective for which the new company was initially set up. The essence of the agreement between the parties was to manufacture machinery described in the agreement and use of name "Starlinger" as part of corporate name, which has come to an end. The CLB has failed to exercise its jurisdiction in protecting the intellectual property rights of the appellant. As a minority shareholder under an agreement, which basically transferred the technical knowhow with certain conditions, the interest of the minority shareholder is intricately mixed with the protection of its intellectual property rights.

19. Shri P.V. Kapoor has relied upon the judgment in *Pearson Education Inc. v. Prentice Hall India (P) Ltd. and Ors.* 2005 VII AD (Delhi) 693 in which the Court held:

However, wisdom of CLB's remarks was questioned by the learned Counsel for the petitioner, and rightly so, by submitting that under the garb that it would be against the interest of the company the company cannot be allowed to take what is not legitimately due to it (for example, trade mark, deposit of outgoing director, technical know-how provided by outgoing group or the bank guarantees submitted by the outgoing group (refer *Suresh Kumar Sanghi v. Supreme Motors Ltd.* [1983]54 C.C. 235 pp. 240-241). To my mind, even de hors the agreement, dated 6th June 1963 between the petitioner and the company, the very conceptualization of the company was because of the permission of the company to use its name and to use it long as the foundation and the basic understanding of the arrangement remains, namely, the petitioner allows the company to publish and sell the books in which company has the copyright. Therefore, it is either the petitioner who should be allowed to continue to control the company and as a result the respondent No. 2 should sell its shareholding to the petitioner or, in the alternative, if the petitioner is to be forced out of the company, it has right to take away its name with it, which it lent to the petitioner. Thus, the respondent cannot raise the plea that such a course would not be in the interest of the company....

20. Shri P.V. Kapoor submits that the unfair prejudice caused to the minority shareholders, is well within the scope of the petition u/s 397 and 398 of the Companies Act, 1956. The CLB has acted contrary to the settled judicial principles and has fallen into a patent error of jurisdiction in holding that the powers of CLB are limited only to the interest of the subject company.

21. Shri Ravi Kant, Sr. Adv. on the other hand has firstly taken a preliminary objections to the maintainability of the company appeal. He submits that an appeal u/s 10F of the Companies Act is maintainable only on a question of law. The Supreme Court in *Meenakshi Mills. Madurai v. The Commissioner of Income Tax, Madras* defined as long ago as in 1956 reported in *Meenakshi Mills, Madurai*

Vs. The Commissioner of Income Tax, Madras, the tests as to what is the question of law in the context of Section 66(1) of the Indian Income Tax Act and held that the construction of a statute or a document of title, the legal effect of the facts found where the point for determination, is a mixed question of law and fact, and a finding of fact unsupported by evidence or unreasonable and perverse in nature is a question of law on which the appeal may be filed.

22. In the present case Shri Ravi Kant submits that the questions raised in the ground of appeal are questions of fact and not questions of law to be considered by the Court. Further he submits that the appellant had clearly held out in para 6.31 of the company petition that the misuse of trade mark was already under judicial scrutiny of the Kanpur Court for reference to arbitration, and thus the same could not be agitated and made subject matter of the petition. The prayers made in the company petition have not been amended so far, and thus the issue with regard to use of the trade name "Starlinger" could not be raised and considered by the CLB. He further submits that the appellants have not produced the resolution of Board of Directors authorising Ms. Manjula Chawla to represent the company registered in Austria. Without prejudice to these preliminary objections he submits that on merits the objects clause has been amended in the AGM, which was not attended by the appellant company and that the issue in the present case is not the use of trade name but the name of the company under a contract between the parties. He submits that although it was not necessary to amend the objects clause as objects given in the Memorandum of Association were wide enough to include the manufacture of automotive parts and electrical accessories. The right of the respondent-company to manufacture and sell these goods cannot be curtailed and in any case they were not subject matter of the proceedings before the CLB. He submits that change in object clause does not constitute amendment to the expired agreement and that Suit No. 788 of 2006 for specific performance filed by Lohia family for enforcing the concluded contract or sale of shares is still pending. The shareholder's agreement dated 10.11.1992 basically provides for exit route and forms part of Article of Association. It does not provide for change of name in the event of exit of the appellant from the respondent company.

23. The objections taken in the written submissions regarding the ignorance of caveat by the High Court in issuing ex parte order dated 05.2.2007, has no substance as no such caveat was reported nor Shri Ravi Kant pressed this objection during the course of hearing. Since the appeal was heard within short span of two months, the respondents have not suffered any prejudice.

24. In Dale and Carrington Inv. (P) Ltd. and Another Vs. P.K. Prathapan and Others, the Supreme Court had an occasion to consider in detail, the law relating to jurisdiction of Courts in the matter of complaints of minority shareholders of oppression and mismanagement, in a situation where two group of shareholders, one Indian group and one foreign group were engaged. The Managing Director and his wife represented the Indian group were allotted additional shares to

themselves and in the process became the majority shareholders, thus reducing the non-resident to a minority holder. The Supreme Court having considered the entire case law on the subject held that perversity of findings itself becomes a question of law, hence an appeal is maintainable, though an appeal is permissible only on a question of law. The Court relying upon *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, ; *Piercy v. S. Mills & Co. Ltd.* (1920) 1 Ch.77; *Hogg v. Cramphorn Ltd.* (1967) 1 Ch 254; and *Tea Brokers (P) Ltd. v. Hemendra Prasad Barooah* (1998) 5 Comp LJ 463 held in para 29 as under:

In the present case we are concerned with the propriety of issue of additional share capital by the Managing Director in his own favour. The facts of the case do not pose any difficulty particularly for the reason that the Managing Director has neither placed on record anything to justify issue of further share capital nor has it been shown that proper procedure was followed in allotting the additional share capital. Conclusion is inevitable that neither was the allotment of additional shares in favour of Ramanujam bona fide nor was it in the interest of the company nor was a proper and legal procedure followed to make the allotment. The motive for the allotment was mala fide, the only motive being to gain control of the company. Therefore, in our view, the entire allotment of shares to Ramanujam has to be set aside.

25. The facts and circumstances prima facie demonstrate that both the groups, in which the appellant has 34.67% shares and is in minority, cannot continue as partner in the joint venture. The reliefs claimed in the company petition, are sought to be amended after the subsequent events in which the uncalled for injunction was obtained from the Civil Court at Kanpur restraining the appellant to participate and vote in the AGM for amendment of object clause, which caused serious prejudice to it. The aggrieved minority wants a way out with fair valuation of its shares and prohibition to use the word "Starlinger" in the company's name.

26. The issue whether the use of the trade name "Starlinger" in the name of the respondent-company was an essence of the agreement and that the company will have to change its common name, with the exit of the minority shareholders, who had contributed the technical knowhow for the machinery described under the agreement with certain restrictions and payment of royalty, are intricately connected with the issue of oppression and mismanagement of the company. The CLB will be failing to exercise its jurisdiction in deciding the issues of oppression and mismanagement, if it takes a narrow and pedantic approach of considering the interest of the company alone in deciding the matter.

27. The interest of the minority shareholders in joint venture in which the transfer of technology and use of goodwill of the minority shareholder as company is involved, is well within the scope of the dispute to be considered by the CLB. In *Pearson Education Inc. (M/s.)* (Supra) the Delhi High Court had no doubts that in order to protect the rights of the minority shareholders, which

may be individual to them, and which may concern the interest of the company as a whole, the Company Law Board has powers u/s 402 of the Companies Act to pass necessary orders. The logical corollary to exercise of such powers is that the CLB must, during the pendency of the proceedings before it, protect the rights of such minority shareholders. The agreement between the parties for transfer of technology for specific machines detailed in the agreement and the fact that the appellant allowed the name "Starlinger" as part of trade name of the joint venture on which 40% shareholding was given to it shows that the respondents acquired the right to use the name "Starlinger" in terms of the contract. There was no other permission or license to use the name "Starlinger". Once the agreement has come to an end and cannot be enforced between the parties, the right to use the name "Starlinger" is also not available to the respondents.

28. In *Baker Hughes Ltd. and Another Vs. Hiroo Khushlani and Another*, the Supreme Court upheld the judgment of the single Judge and set aside the appellate judgment holding that the single Judge acted well within its jurisdiction in granting an interim injunction that the respondent company shall not use the name "Baker" as part of their corporate name or in any other manner. The injunction was granted keeping in mind the well established principles, which governed the grant of injunction in an action of passing off and in which the appellant's transporter's reputation and goodwill was likely to be affected. The Supreme Court upheld the reasoning given by the single Judge that the use of name by the respondents is likely to cause confusion and dispassion and that the appellant will suffer damage, if the interim relief was not granted.

29. In *Dhaneshwar Nath Tewari Vs. Ghanshyam Dhar Misra*, the Court followed the observation of Woodroffe J. in the decision of Calcutta High Court in 1933 Cal 927 which held, "For my part I am always slow to believe that the Court's powers are unequal to its desire; to order that which it believes to be just."

30. The powers u/s 402 of the Companies Act, 1956 are without prejudice to the generality of the powers of the Company Law Board under Sections 397 or 398 and may provide for directions to achieve the objects for which Sections 397 and 398 were enacted. These statutory powers have been vested to administer justice and equity giving broad discretion applying general standard of fairness to decide the case on merits. These are inherent powers of the Court to give directions to meet the ends of justice. These powers can also be used, to provide for interim arrangement, so that parties may not be unfairly prejudiced at the time of final decision. The exercise of these powers are not restricted to. strict application of law, pleading in evidence, which may frustrate the very purpose of grant of these powers. Clause (g) of Section 402 has illustrated these extraordinary powers in which the Company Law Board may provide for any other matter, which in the opinion of the Company Law Board is just and equitable. A failure to exercise these powers on a narrow and pedantic approach that powers under Sections 397 or 398 are only for the purposes of protecting the interest of the company, is a self-destructive attitude to the exercise of the

equitable jurisdiction under Sections 397 and 398 of the Companies Act.

31. In *Kilpest Pvt. Ltd. and Others Vs. Shekhar Mehra*, the Supreme Court held that analogy of the partnership is to be confined to rare case for invoking jurisdiction u/s 433, for winding up a small private company where the company has broken up because of inability of the feuding factions the distribution of business and assets as in the case of dissolution of partnership is permissible, the fact whether partnership principles are applicable or not depends upon factors like equal shareholding, possession of commercial success and state of dead lock.

32. In the present case the conduct of the parties in which the respondents have not allowed the Huemer to appoint alternate Director and to take part in the meeting and then slapped them with an injunction of a Court with doubtful jurisdiction, along with them in AGM in pursuance of agreement, which had fallen apart and was no longer enforceable, has brought the parties to an situation, where they cannot swim and/ or sail together. When the parting of ways is inevitable, the rights and liabilities of the shareholders have to be protected to be adjusted in a fair and equitable manner. In such a case allowing unfair advantage to a party, which has not only taken the benefit of the corporate name of the minority shareholder, in manufacture and sale of specified machinery, but also made an attempt to take away the trade name and the goodwill acquired by minority shareholder globally, would visit them with Consequences, which may not only affect the grant of damages in a passing off action, but will also prejudice the others to seek such ventures in India. The use of corporate name even if it was not a registered mark at the time of agreement, having no legal right of property in the name, may not be an infringement of the trade mark, it may however, be a contractual right granted by joint venture agreement, which is to be withdrawn as soon as the agreement is terminated by an efflux of time or falls apart.

33. In *Dawnay Day and Co. Ltd. and Anr. v. Cantor Fitzgerald the International Court of Appeal (Civil Division)* recognised the rights to use the name by joint venture agreement to be substantive rights created by the contract. The contract may not have contained all the classes and the points on which the parties to the agreement may have been reached in the course of negotiation. The implied condition that DDCL will continue to be part of Dawny Day group was seeded in under the agreement.

34. The principle is equally applicable in the present case where the right to use the word "Starlinger" for specified machinery under contract, which has come to an end, was the essence of the contract, and which came to an end together with that right to use the name "Starlinger" in the corporate name.

35. These issues will have to be considered by the Company Law Board at the time of determining the value of shares, on which there is serious dispute between the parties. Whereas the appellant claims a fair and reasonable value of

the share, work out on the basis of the agreement between the parties and the settled principles for valuation of shares, the respondent-company seeks to deny any value to these shares on the ground that on giving adjustment to the dividends the share value is in the negative. The use of name "Starlinger" in the corporate name is intricately linked with the parting of minority shareholders from the joint venture agreement under which the new company was born. It would be unfair to ask the appellant to leave the company with their name behind to be used by the respondent in any manner to harm the goodwill, which the appellant has earned in the last 167 years. The contract has come to an end and the shareholders' agreement could last so long everything was well between the parties.

36. In these circumstances, the CLB erred in exercise of its jurisdiction in refusing an injunction to the appellant even if the amendment was not allowed as the issue was wide open before it with necessary material to be brought on record.

37. The objection that Ms. Manjula Chawla is not authorised by Ms. Anjelika Huemer has been set at rest by the rejoinder affidavit sworn by M/s Anjelika Huemer, daughter of late Mr. F.X. Huemer, Managing Director and authorised signatory of "Starlinger & Co. Ges.m.b.H. with its registered office at Sonnenuhrgasse 4, A-1060 Vienna, Austria sworn before a notary at Wien-Favoriten dated 26.3.2007. The document reiterates the authority given to Ms. Manjula Chawla to represent the appellant.

38. For the aforesaid reasons, the appeal is allowed with an injunction directing M/s Lohia Starlinger Ltd.- respondent No. 1 and other respondents or their agents, assignees or servants from using the name "Starlinger" in their products other than the goods manufactured by Lohia Starlinger Ltd. with knowhow provided by Starlinger & Co., the appellant from time to time and covered under the agreement entered between appellant and the respondents. A further injunction is issued restraining the respondent company to manufacture any goods other than the machinery in respect of which knowhow has been supplied to respondent No. 1 - the company by the appellant.

39. The appellant is made entitled to Rs. 50,000/- as costs to be recovered from the respondents for pursuing these proceedings.