

(2011) 08 KAR CK 0040
In the Karnataka High Court
Case No : COMPA No. 6 of 2005

Ultrafilter GMBH

APPELLANT

Vs

Ultrafilter (India) P. Ltd. and Another

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Companies Act, 1956 — Section 397, 398, 399, 402, 403

Citation : (2011) 08 KAR CK 0040

Hon'ble Judges : V.G. Sabhahit, J;Ravi Malimath, J

Bench : Division Bench

Advocate : Naganand, for M/s. Sundaraswamy Ramdas and Anand, for the Appellant; Poovayya for M/s. Poovayya and Co., for the Respondent

Final Decision : Dismissed

Judgement

Ravi Malimath, J.—Aggrieved by the order dated December 12, 2001, passed by the Company Law Board, Chennai in Company Petition No. 57 of 1998 (Ultrafilter (India) P. Ltd. v. Ultrafilter GmbH [2002] 112 Comp Cas 93), directing the petitioner-company therein to purchase the shares held by the respondent therein, among consequential reliefs, the respondent has filed the present appeal.

2. The first respondent is a private limited company. It was incorporated in December 1985, for the manufacture of filter equipment. The second respondent holds 51.82 per cent. of the shares. The appellant holds 26 per cent, of the shares. Respondent No. 1 and the appellant, initially entered into a technical collaboration agreement on February 17, 1986, by which the appellant was to provide technical know-how and assistance for the manufacture of industrial filters by the company. Thereafter a shareholders partnership agreement dated October 16, 1986, was entered into between the appellant and the second respondent by which the appellant was to subscribe to 26 per cent. shares in the company for a sum of Rs. 7.8 lakhs. This agreement also provided that the company and the appellant would enter into a name protection agreement, a distributor agreement, a trade mark registered user agreement along with an

amendment to the articles of the company. Accordingly, the appellant acquired 26 per cent. of the shares of the company. The company started manufacturing filters in the name and style of ultrafilter. The use of filters developed into the requirement and use of filters along with the dryers. Hence the company started manufacturing its own desiccant type of dryers to be sold along with the filters manufactured by it. As far as the other type, viz., fridge dryers are concerned, the same were being imported and sold along with the filters. The company consulted the appellant and on the recommendation of the appellant, the company started importing friulair dryers from Italy for being sold along with the filters being manufactured by the company. At the same point of time, a competitive dryer, manufactured by Sabroe was being marketed by one M/s. Pace Equipment, Bombay. Hence, there was a competition between the company marketing its filters with friulair dryers and Pace Equipment marketing filters along with Sabroe dryers. By a letter dated October 20, 1997, the appellant informed the company that the technical collaboration agreement had come to an end on February 16, 1991 and as such the company should not use the word ultrafilter in any of the products manufactured by the company under the technical collaboration agreement. Through this letter, the appellant also issued a notice of termination of the trade mark registered user agreement as on December 1, 1998. In spite of negotiations between them, no amicable settlement resulted. Various communications ensued between them. It was alleged that the appellant has commenced businesses along with the competitors resulting in a damage to the company. That the appellant was acting in an oppressive manner, adverse to the interests of the company. Under these circumstances, Company Petition No. 57 of 1998 was filed before the Company Law Board, Chennai under sections 397, 398, 402, 403 and 406 of the Companies Act, 1956, by the respondents, seeking to restrain the appellant from interfering with the conduct of the business of the company and to restrain the appellant, from doing any act or thing which would be in competition directly or indirectly with the business of the company, to restrain the appellant from claiming any right or to do any business in India under the name and style of ultra-filters either as a trade mark or as a part of a corporate name in India and to amend the articles of association or in the alternate, to direct the appellant to sell its 26 per cent, of the shares held in the company and other consequential reliefs.

3. the appellant entered appearance and contested the petition. The Company Law Board by the impugned order, granted relief to the respondent by directing the respondent/company to purchase the shares held by the appellant on a fair market value to be determined by the statutory auditors of the company on the basis of the balance-sheet as on March 31, 1999 and on such determination, the respondent was directed to pay the consideration within six months thereafter. Aggrieved by this order, the respondent before the Company Law Board, is in appeal.

4. Sri Naganand, learned senior counsel appearing for the appellant's counsel,

contends that the Company Law Board failed to follow the well settled principles of law governing the exercise of jurisdiction u/s 397/398 of the Companies Act. That the petition having been filed by the majority shareholders, is liable to be dismissed on this ground alone. It was contended that until and unless all the ingredients of section 397 are satisfied, no relief could be granted to the respondent. It is therefore for the respondent to prove, that the company is liable to be wound up on just and equitable grounds. Until this condition is satisfied, no relief could be granted. That there is no deadlock in the affairs of the company, since the company is run by the majority shareholders, viz., the respondent. That the relief claimed u/s 397, is an alternate to the winding up of the company and since no grounds have been made out for winding up, no relief could be granted. That the main basis for the grant of relief by the Company Law Board appears to be a finding that the principles of partnership are applicable to the first respondent-company. The finding of the Company Law Board is erroneous. That the principles of partnership are not applicable to the case on hand. Hence, the Company Law Board committed an error in so holding. That there is no material placed before the Company Law Board to establish a case of oppression and mismanagement. That only because the company was asked to sell a different product, the same would not amount to oppression. He further contends that the direction to sell the appellant's shares to the respondent, is wholly unjust and hence interference is called for. He therefore pleads that the appeal be allowed and the impugned order passed by the Company Law Board be set aside. In support of his case, he relies on the following judgments :

- (1) Shanti Prasad Jain Vs. Kalinga Tubes Ltd., ;
- (2) Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, ; and
- (3) Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, .

5. On the other hand Sri Poovaiah, learned counsel appearing for the respondents defends the impugned order. He contends that there is no error either on facts or in law committed by the Company Law Board, that calls for any interference. That even though the respondent is a majority shareholder, a petition under sections 397 and 398 is maintainable. That there is no prohibition u/s 397/398 for a majority shareholder to seek relief under the said provisions of law. He contends that section 399 provides the right to apply under sections 397 and 398 of the Companies Act and entitles the respondent to maintain a petition. Hence, the contention of the appellant that a majority shareholder cannot file a petition u/s 397/398 of the Act is erroneous and cannot be sustained. That various communications have been placed on record in order to establish the failed relationship between the parties as well as acts of oppression and mismanagement by the appellant. It is therefore evident that the interests of the respondent has been adversely affected due to the acts of omission and commission by the appellant. Even otherwise, the appellant through its competitors has commenced business of the very same products being dealt with

by the company. That the, appellant rather than performing its duty, is engaged in encouraging the competitors against the interest of the company. Hence a case for winding up of the company on just and equitable grounds has been established. Under the facts and circumstances of the case, rather than winding up the company, the impugned order has been passed by the Company Law Board, which is just and equitable. For all these reasons, the order passed by the Company Law Board is just, fair and reasonable and does not call for any interference. Accordingly, he pleads that the appeal be dismissed. In support of his case, he relies on the following judgments :

- (1) Shri V.S. Krishnan and Others Vs. Westfort Hi-tech Hospital Ltd. and Others, ;
- (2) M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, ; and
- (3) Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, .

6. Heard counsels and examined the records.

7. The appellant contends that the respondent holding 51.82 per cent. of the shares cannot maintain a petition u/s 397/398 of the Companies Act. He contends that an application seeking a relief on oppression and mismanagement, can only be filed by a minority shareholder complaining against the majority shareholders against such oppression and mismanagement. Since the majority controls the management of the company, no petition for oppression and mismanagement u/s 397/ 398 could therefore be maintained by a majority shareholder. Reliance is placed on the aforesaid judgments in support of his case.

8. On the other hand, the respondent's counsel contends that there is no prohibition under law for a majority shareholder to maintain a petition u/s 397/398. That acts of oppression have been committed by the minority, inasmuch as the minority has been conferred with a veto power. In the guise of the power conferred on it, the appellant has indulged in acts of oppression, which has adversely affected the respondents.

9. Reliance is placed by the respondents on Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, , to contend that in the said case even though the company petition was filed on the ground of oppression and no grounds were made out for interference, even though the petition was rejected, relief was granted. Therefore the respondent's counsel extends his contention by contending to the extreme, that even if the company petition were to be rejected, adequate relief can still be granted by the court.

10. In the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, , there is no finding recorded by the Supreme Court that a petition u/s 397 could only be filed by a minority and not by a majority shareholder. The fact that the petition was ultimately dismissed on merits is immaterial, since what is of relevance is that the petition was not dismissed on the ground that the petition has been filed by the minority.

11. On considering the various decisions relied upon, with regard to the scope of section 397/398, it would emerge that there is no prohibition for a majority shareholder to maintain such a petition. Any member of a company can complain of oppression and if the court were to opine, that there is an oppression to any member, rather than the winding up of the company, could pass such orders as it thinks fit and considers just and equitable. Therefore, section 397 does not postulate a difference between the majority and a minority shareholder. Any member of a company could complain u/s 397. u/s 398 also, any member could complain with regard to the mismanagement and the court could deal with it as in section 397. However, in terms of section 399, only those members holding not less than one-tenth of the issued share capital of the company and in the case of a company not having a share capital, not less than one-fifth of the total number of its members alone have a right to apply u/s 397/398. Therefore the only restriction to maintain a petition u/s 397/398 is as contained in section 399. If the conditions of section 399 are fulfilled, not only could such a member maintain a petition u/s 397/398 but has a statutory right to do so. It is not in dispute, that the respondent possessed the required qualification to maintain a petition u/s 397. When a majority complains of oppression, the majority therefore, becomes an artificial minority. Hence, we hold that even though the respondent is a majority, they are entitled to maintain a petition u/s 397/398. Under these circumstances, the petition by the respondent is maintainable.

12. It was further contended by the appellant, that the Company Law Board committed an error in applying the principles of partnership to the case on hand. That the Company Law Board was misguided by the nomenclature of the document titled as a shareholders partnership agreement. Only because the partnership agreement has been entered into, it cannot be held that the principles of partnership are applicable to the case on hand.

13. On the other hand, the respondent's counsel contends that on the very nature of the documentation between the parties and the manner in which the business is being conducted, leads to only one conclusion, that the same is being conducted, on the principles of partnership. That there was a very clear understanding between both of them, that the appellant acts in the nature of the partner by giving his technical know-how to the company. That the material on record clearly establishes the fact that the principles of partnership are applicable to the case on hand.

14. The Company Law Board held that the company is nothing but a glorified partnership between the appellant and the respondent. A technical collaboration agreement was entered into between the appellant and the company on February 17, 1985, by which the appellant had to provide technical know-how and assistance to the company for the manufacture of industrial filters. Therefore the technical collaboration agreement was the first agreement between the parties.

15. In the case of Synchron Machine Tools P. Ltd. v. U. M. Suresh Rao reported in [1994] 79 Comp Cas 868, the Karnataka High Court held as follows (page 892) :

A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in...

In the case of domestic or family companies, the courts have applied the dissolution of partnership principle where shareholdings are more or less equal and there is ousting not only from management but from benefits as shareholders. Lack of probity has to result in prejudice to the company's business, affecting rights of complaining parties as shareholders and not as directors. If a deadlock can be resolved by the articles there is no deadlock to bring in winding up and if there are alternative remedies the company should not be wound up. The learned company judge also held that he was unable to hold that the substratum of the company had gone. However, in the appeal, it was reversed and winding up was ordered. The matter was taken to the Supreme Court. After referring to *Ebrahimi v. West-bourne Galleries Ltd.* [1972] 2 All ER 492 (HL); [1973] AC 360 and also *Yenidje Tobacco Co. Ltd., In re* [1916] 2 Ch. D 426 (CA) and other cases, the Supreme Court held as follows (at page 104 of 46 Comp Cas)...

In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership.

16. In the light of the aforesaid judgment and in the facts of this case, it can therefore be held that the principles of partnership stand attracted to the case on hand. That sufficient material has been placed to establish the same.

17. The relationship between the parties commenced with the technical collaboration agreement. By virtue of this agreement a know-how fee of DM 2,25,000 was paid to the appellant in return for technical assistance/ technical information for the manufacture of industrial filters/fluid processing, etc. Thereafter they entered into a shareholders partnership agreement by which the appellant was to subscribe to a 26 per cent, shareholding. It is therefore apparent that a relationship as partners was born first. It thereafter culminated into a shareholders right by a separate agreement. The understanding, object and the relationship from the inception onwards, was that of a partnership. Furthermore, the shareholders' partnership agreement entered into between them, evidences the intention of the parties to carry on the business of the company in the same manner as that of a partnership. The cessation of agreements also adds meaning to the partnership relationship.

18. Therefore, the company can be held to be in the guise of a partnership. Even though it is a company in law, it is still a partnership. The real structure of the company appears to be that of a partnership. The finding of the Company Law Board in holding that the company is nothing but a glorified partnership between the parties, is just and proper. Hence, the principles of dissolution of partnership as applied by the Company Law Board, is just and reasonable and we find no

ground to interfere with the same.

19. It was contended by the appellant, that there is no material to show that there is either oppression or mismanagement. It is further contended that the shareholders' agreement having come to an end, the appellant is not bound by the same and he is entitled to carry on a rival business.

20. Reliance is placed on the judgment of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., , wherein the Supreme Court held at paragraphs 18, 19 and 26 as under (page 365) :

In H. R. Harmer Ltd., In re [1958] 3 All ER 689; [1959] 29 Comp Cas 305 (CA), it was held that "the word "oppressive" meant burdensome, harsh and wrongful". It was also held that "the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the "just and equitable" rule, but only to those cases of that character which have in them the requisite element of oppression". It was also held that "the result of applications u/s 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision". The circumstances must be such as to warrant the inference that "there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy. The phrase "oppressive to some part of the members" suggests that the conduct complained of "should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fairplay on which every shareholder who entrusts his money to a company is entitled to rely... But, apart from this, the question of absence of mutual confidence per se between the partners, or between two sets of shareholders, however relevant to a winding up, seems to me to have no direct relevance to the remedy granted by section 210. It is oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not... come within section 210. It is not lack of confidence between the shareholders per se that brings section 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs and oppression involves... at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder".

These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the

application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to section 397...

It is true that by the beginning of 1958 there were differences between the appellant and the Patnaik and Loganathan groups and there was loss of confidence between them. But mere loss of confidence between these groups of shareholders would not come within section 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his proprietary right as a shareholder.

21. Reliance is placed on *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, , wherein it was held as follows (page 781) :

In England, after the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] 29 Comp Cas 1, a restricted interpretation has been given to section 210 by the Court of Appeal in *Jermyn Street Turkish Baths Ltd., In re* [1971] 41 Comp Cas 999; [1971] 3 All ER 184, which has been adversely criticised by writers on company law (see Palmer's *Company Law*, 22nd edition, page 613, paragraphs 57-06, 57-07. Gore-Browne on *Companies*, 43rd edition, paragraph 28-12). In India, this restrictive development has no place, for, in *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, . Wanchoo J. accepted the broad and liberal interpretation given to the court's powers in *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] 29 Comp Cas 1 (HL).

In *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, , Wanchoo J. referred to certain decisions u/s 210 of the English Companies Act including *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] 29 Comp Cas 1 (HL) and observed (page 366) :

"These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the

question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts... with reference to section 397.

22. Reliance is placed on Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, , wherein it has been held as under (page 495) :

Section 397(2) of the Act provides that an order could be made on an application made under sub-section (1) if the court is of the opinion-(1) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members; (2) that the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; and (3) that the winding up order would unfairly prejudice the applicants. No case appears to have been made out that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members. Therefore, we have to pay our attention only to the aspect that the winding up of the company would unfairly prejudice the members of the company who have the grievance and are the applicants before the court and that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. In order to be successful on this ground, the petitioners have to make out a case for winding up. of the company on just and equitable grounds. If the facts fall short of the case set out for winding up on just and equitable grounds no relief can be granted to the petitioners. On the other hand the party resisting the winding up can demonstrate that there are neither just nor equitable grounds for winding up and an order for winding up would be unjust and unfair to them. On these tests, the Division Bench examined the matter before it.

23. By relying, on these decisions it is contended by the appellant, that the acts

of the appellant would not amount to either oppression or mismanagement.

24. On the other hand Sri Sajjan Poovaiah, learned counsel appearing for the respondents, relies on the judgment in V. S. Krishnan v. Westfort Hi-tech Hospital Ltd. reported in [2008] 142 Comp Cas 235, wherein the hon''ble Supreme Court held as follows (page 245) :

In a number of judgments, this court considered in extenso the scope of sections 397 and 398. The following judgments could be usefully referred to :

(a) Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, .

(b) M.S. Madhusoodhanan and Another Vs. Kerala Kaumudi Pvt. Ltd. and Others, .

(c) Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, .

(d) Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, .

(e) Kamal Kumar Dutta and Another Vs. Ruby General Hospital Ltd. and Others, .

From the above decisions, it is clear that oppression would be made out :

(a) Where the conduct is harsh, burdensome and wrong.

(b) Where the conduct is mala fide and is for a collateral purpose where although the ultimate objective may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis-a-vis the others.

(c) The action is against probity and good conduct.

(d) The oppressive act complained of may be fully permissible under law but may yet be oppressive and, therefore, the test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is mala fide or for a collateral purpose, it would amount to oppression under sections 397 and 398.

(e) Once conduct is found to be oppressive under sections 397 and 398, the discretionary power given to the Company Law Board u/s 402 to set right, remedy or put an end to such oppression is very wide.

(f) As to what are facts which would give rise to or constitute oppression is basically a question of fact and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact.

25. Reliance is placed on M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, , wherein the hon''ble Supreme Court held as follows (page 104) :

Section 398 of the Act provides for filing of an application for relief in cases of mismanagement.

Section 402 provides for the powers of the Company Law Board on an application made u/s 397 or section 398 of the Act which includes the power to pass any order providing for the purchase of the shares or interests of any member of the company by other member(s) thereof or by the company.

Ordinarily, therefore, in a case where a case of oppression has been made a ground for the purpose of invoking the jurisdiction of the Board in terms of sections 397 and 398 of the Act, a finding of fact to that effect would be necessary to be arrived out. But the jurisdiction of the Company Law Board to pass any other or further order in the interest of the company, if it is of the opinion, that the same would protect the interest of the company, it would not be powerless. The jurisdiction of the Company Law Board in that regard must be held to be existing having regard to the aforementioned provisions.

The deadlock in regard to the conduct of the business of the company has been noticed by the Company Law Board as also the High Court. Keeping in view the fact that there are only two shareholders and two directors and bitterness having crept in their personal relationship, the same, in our opinion, will have a direct impact on the matter of conduct of the affairs of the company.

26. It is further contended by the respondent that the various acts of the appellant would demonstrate the deadlock in the company. The appellant has failed, to perform his duties towards the company. Therefore, it is the majority herein that has become oppressed by the minority.

27. To support his case, the respondent relies upon various communications in order to show acts of oppression and mismanagement. The respondent wrote the following letter vide annexure A10 :

Ref : UIPL/CMD/Per 97

February 18, 1997

Mr. Dirk Kronsbein Ultrafilter GmbH Germany.

Ultrafilter India's image in India has taken a serious beating with ultrafilter's acquisition of Sabroe who have a collaboration with Pace Equipment in India. Ultrafilter India and Pace are competing daily against each other. As advised by you, we have a marketing tie up Friulair and we have been singing in praise of Friulair products duly highlighting their merits over Sabroe dryers. Now having come to know that Sabroe is bought by Ultrafilter, Pace has gained an upper hand. In the games Multinationals play, the small businesses in India fall a prey to the predators. It is becoming extremely difficult in the market place to face the customers. In addition, Friulair is also asking us what will happen now. They want immediate answer from us and also all our customers and I do not blame them. This is not only impacting our image and credibility but also our business.

That is why I had to set the deadline. We also have the pressure dies ready and the housings made for export. Earlier all this is resolved better for all of us.

With regards, Yours sincerely, Kris Kini.

28. By a letter dated March 19, 1997, vide annexure A13, the appellant wrote a letter to the respondent, which in part is extracted as follows :

March 19, 1997

Dear Mr. Kini

I hereby request that Ultrafilter India and their nationwide sales and service staff be instructed to support the effort of Pace rather than enter into competition on fridge dryers...

Kind personal regards, Ultrafilter GmbH, Dirk G. Kronsbein, Group Chairman.

29. By a letter dated March 20, 1997, vide annexure All, the appellant wrote a letter which in part is extracted as follows :

March 20, 1997

Dear Mr. Kini

To conclude, our existing relation is only that of a minority shareholder. Nothing else.

Therefore, if no agreement is reached for "Ultrafilter GmbH" to increase its share capital to 51 per cent., new agreements must be proposed-discussed-agreed and signed...

Kind personal regards, Ultrafilter GmbH, Dirk G. Kronsbein.

30. By a letter dated April 9, 1997, vide annexure A15, the appellant once again wrote to the respondent which in part is extracted as follows :

April 9, 1997

Dear Mr. Kini

I will not accept or tolerate this behaviour and must insist that you write to infantry compressors and in general to the market place stating clearly that the company Pace is the sole and exclusive importing distributor for Sabroe dryers and not Ultrafilter India.

Furthermore, I insist that you stop competing against Pace with fridge dryers as in the case of Gujarat Glass. In this respect, I also refer to my previous letters sent to you with copies to all board members and our legal consultant...

Yours sincerely, Ultrafilter GmbH, Dirk G. Kronsbein, Group Chairman.

31. By a letter dated October 20, 1997, vide annexure A17, the appellant wrote a letter to the respondent, which in part is extracted as follows :

October 20, 1997

Dear Mr. Kini

In view of the aforesaid termination we request you to establish a new identity and company name in lieu of "Ultrafilter (India) P. Ltd." at the latest by December 1, 1998...

Having herewith severed our entire business and collaboration relation, we will nevertheless maintain our share in the company even after it ceases to be called Ultrafilter (India) P. Ltd.

As a shareholder or that company we will continue to exercise and control our rights as laid down in the articles of association, and actively participate in the directors' board meeting...

Yours sincerely, Ultrafilter GmbH, Dirk G. Kronsbein, Group Chairman.

32. By the letter dated May 19, 1998, vide annexure A22, the appellant wrote to the respondent, which in part is extracted as follows :

May 19, 1998

Dear Mr. Kini

Having said this, you can be sure that I will reestablish the ultra-filter presence in India as of January 1, 1999, whatever effort and cost it may take. We will establish a strong ultrafilter made in Germany-position in India.

Yours sincerely, Ultrafilter GmbH, Dirk G. Kronsbein.

33. The respondent wrote a letter on September 26, 1998, vide annexure R3, which in part is extracted as follows :

September 26, 1998

Dear Mr. Kronsbein,

Thereby we strongly feel that you have forfeited the right under the agreement, both in terms and spirit to continue as a shareholder of the company you had the option of either being a competitor or a shareholder. You choose to be a shareholder and therefore promised not to be a competitor. Now you have taken the route of being a competitor and therefore have no right to be a shareholder. In this situation, we are left with no alternative but to call upon you to sell the shares to us, which we are willing to purchase at a value to be determined under article 10(g) of the articles of association. Immediately upon hearing from you, we shall request our auditors, M/s. Amarnath Kamath and Co., to determine the face value of the shares so that the formalities can be completed.

Yours sincerely, For Ultrafilter (India) P. Ltd., K. K. Kini, Chairman and Managing Director.

34. The appellant in reply to the respondent wrote a letter dated October 9.3.1998, vide annexure R4, which is extracted as follows :

October 9, 1998

Dear Mr. Kini

We have received your letter dated September 26, and would like to point out the following essential points;

1. Ultrafilter GmbH has not said or assigned any share of Ultra-filter (India) P. Ltd., (the company) to any competitor of the company.
2. There is no restriction in any document or agreement restricting the right of Ultrafilter GmbH to carry on its normal business including sales of its goods to customers in India.
3. Ultrafilter GmbH has not entered into any non-compete agreement with the company and is legally entitled to compete with the company. A shareholder can lawfully compete with the business of the company of which he is a shareholder unless he has agreed not to do so.
4. The mark "Ultrafilter" is the sole and exclusive property of Ultra-filter GmbH. The license granted to the company to use the trademark "Ultrafilter" and the mark "Ultrafilter" as part of the company's corporate name has been lawfully terminated and such termination will have effect on December 1, 1998.
5. Ultrafilter GmbH has not committed any breach of the basic collaboration agreement.
6. Ultrafilter GmbH has no fiduciary duty to the company and has violated no such duty.
7. Mr. Kronsbein has not violated any fiduciary duty that he may have to the company.
8. Ultrafilter GmbH has not forfeited any right to continue to be a shareholder and therefore has no obligation to sell its shares to Mr. Kini's group of shareholder. Article 10(g) has no application to the facts of the present case.
9. Ultrafilter GmbH have every right to use the trade name "Ultra-filter" in any part of the world including India. The company's limited permission to use the mark "Ultrafilter" as part of its corporate name and as a trademark has been terminated and such termination will have effect as of December 1, 1998.

Looking forward to meet you and all the board members on October 28, 1998, 14.00 at Ultrafilter (India) P. Ltd.

Sd/- Dirk G. Kronsbein, Group Chairman.

35. A reading of the above communications would clearly disclose the manner in which the parties are dealing with one another. By virtue of the letters written by

the respondent, it emerges as follows :

- (a) That the appellant has become a competitor and therefore has no right to be a shareholder;
- (b) That the appellant was asked to sell their shares to the respondent;
- (c) In view of the competition with Pace Equipment the respondent is unable to answer the queries of the customers and hence, the company is losing its credibility.

36. In the letters written by the appellant, the sum and substance of the same would be as follows :

- (a) That the respondent should support the business of Pace Equipment rather than enter into a competition with it;
- (b) That an agreement has to be reached to increase the appellant's share capital to 51 per cent.;
- (c) That the company Pace Equipment is the sole and exclusive importing distributor for Sabroe dryers and not the respondent-company;
- (d) That the respondent should stop competing against Pace;
- (e) That the respondent-company should establish a new identity;
- (f) That even though the business relationship is severed, the appellant would continue to exercise its rights in the directors board meeting;
- (g) That the appellant will re-establish the ultrafilter presence in India at whatever effort and cost it may take and that they will establish a strong ultrafilter made in Germany-position in India;
- (h) That there are no restrictions in any document or agreement restraining the right of the appellant to carry on its normal business including sales of its goods to its customers in India;
- (i) That the appellant is legally entitled to compete with the company;
- (j) That the appellant has no fiduciary duty towards the company;
- (k) From the correspondence it clearly emerges that there is an attempt by the appellant to acquire majority shares and to arrive at a controlling position in the company. On the refusal by the respondent, the appellant has threatened to market their own products in India at "whatever effort and cost it may take". That the respondent has to rely on the appellant for the success of the company. On the other hand, the appellant having acquired Sabroe are indulging in competition with the company.

Both parties have made allegations against each other that they are manufacturing filters in competition with the company.

(l) The appellant having acquired Sabroe dryers are indulging in competing business with the company. The company is therefore faced with a stiff competition with Pace Equipment, which is none other than the company having been taken over by the appellant. It is not just a mere competition that affects the company. What is of crucial importance is not a healthy competition, but a competition against a company, which is fully supported by the appellant himself. The appellant being a shareholder of the company cannot therefore indulge in deliberate acts or omission or commission against the company itself. The appellant therefore has failed in its duties towards the company. There has been an active, deliberate and negligent act by the appellant towards the company. The interest of the appellant should be only towards the company and none else. By being a shareholder of the company, the appellant cannot act against its interest.

(m) The communications also reveal that the appellant was pressurising the respondent to support the effort of the competitor, which competitor, was taken over by the appellant. It is therefore evident that even though the appellant was a shareholder in the company, in view of the fact that it had taken over Sabroe, its interest were only towards Sabroe whose products were being sold by Pace Equipment. The object of the appellant is to ensure its own success through Pace Equipment rather than that of the company. Hence, on the face of it, it is evident that the action of the appellant is harsh and burdensome. Therefore, absolute pressure was being exerted by the appellant to ensure the success of its competitor rather than to protect the interests of the company. The consistent pressure being made by the appellant is therefore hard and burdensome. Hence, the action of the appellant is a clear case of oppression.

(n) All these facts and circumstances lead to the conclusion that all is not well with the company and its two shareholders. In view of the present situation the company cannot be run effectively. That a case of oppression has been made out by the respondent. The appellant even though being a minority shareholder, is conferred with a veto power in all the board meetings. Admittedly the appellant has commenced rival competitive business directly and indirectly against the company by manufacturing and marketing the very same products. The appellant has openly threatened that it would start manufacturing "ultrafilter made in Germany" products in India at whatever effort and cost it may take". There is no possibility of the company being run normally, effectively or profitably under the given circumstances. The respondent alleges that the appellant is carrying on a rival business on its own and has even applied for tenders where the company has also applied for the same. The appellant admits to such a course of action and emphasises that there is no bar to do such a business. In the totality of the circumstances of the case, a fit case is made out for winding up of the company on just and equitable grounds. However, the winding up of the company would be prejudicial and hence it is just and necessary in the given circumstances of the case to direct the minority shareholder to sell his shares to the majority.

(o) In fact, the appellant has already initiated O. S. No. 54 of 1995 before the City Civil Judge, Bangalore with regard to the use of the trade mark against the respondent and the suit is still pending. Therefore, according to the appellant, the real dispute is with regard to the use of the trade mark "Ultrafilter" by the respondent.

(p) There is an absolute distrust between the parties. The appellant is indulging in direct competition against the company. The appellant has threatened withdrawals and cancellations of the agreements. The appellant is manufacturing and selling the same products that are being manufactured and sold by the company which is therefore adverse to the interests of the respondent. Admittedly there are only two major shareholders and both have joint management in terms of the articles. Even though the appellant holds 26 per cent. of the shares, it has been conferred with a veto power in the board meetings. A veto power would therefore mean, that until and unless the appellant agrees, no decision could be taken by the respondent even though he is a majority. The appellant has a veto power in the board meeting enabling it to scuttle the probables of the respondent. The material placed would show that there are a series of incidents attributable to the appellant. The acts complained of are not in isolation but continuous and are linked to one another. The appellant proposed to gain absolute control over the company by demanding additional shares. On the refusal to grant them, the respondent has been threatened. The threat is "at whatever effort and cost it may take". Competitive businesses have been embarked upon, by the appellant which is adverse to the interest of the company. The appellant has ill advised the respondent and has even threatened. On these materials it can thus be held, that the intention of the appellant is to gain a pecuniary advantage to the detriment of the respondent, for a wrongful usurpation of the authority and an intention to over throw the respondent. Hence it is a fit case that establishes oppression by the appellant. Such actions of the appellant is oppressive and is a continuing oppression. The conduct of the appellant is burdensome, harsh and wrongful, reflecting the lack of confidence between the two shareholders. The appellant by admittedly engaging himself with a competitive company has acted in breach of good faith and trust. He was expected to act only in the interest of the company and not against it. The appellant admits and justifies his actions by stating that the competitive businesses that it has undertaken, is not prohibited by law, since the agreements between them have been terminated. Thus the appellant seeks to justify his competitive businesses. He does not deny it. Under these circumstances and in view of the material on record, we have no hesitation to hold that sufficient grounds are made out by the respondent, for winding up of the company on just and equitable grounds. Consequently, it is necessary that the appellant being a minority be directed to sell its shares to the respondent.

(q) The Company Law Board considered all the materials placed before it while passing the impugned order. On the facts it held that the company is nothing but a glorified partnership between the petitioner and the respondent. That the

appellant having veto powers in major decisions of the company cannot compete with the business of the company. That there are allegations by both the parties against each other. It would mean that both of them have breached the doctrine of utmost good faith towards each other, thus, putting the interest of the company in jeopardy. Hence, it is a case where the majority alleges oppression by the minority and this minority has protective provisions in the articles. That the relationship between the two parties has become so sour that they cannot carry on the business of the company together and if so that itself would be a very valid ground for winding up of the company on just and equitable ground. Accordingly, the Company Law Board under these circumstances directed the respondent to purchase the shares held by the appellant on a fair value to be determined by the statutory auditors of the company. The findings recorded by the Company Law Board are based on material and on facts. We do not see any perversity in the findings recorded by the Company Law Board that calls for any interference. The conclusions arrived at by the Company Law Board are just and reasonable and are based on the material placed on record. Hence, we find no error that calls for any interference.

37. Under these circumstances, the order passed by the Company Law Board is just and proper and does not call for any interference. For the aforesaid reasons, the appeal being devoid of merits is dismissed.