Shri Rajeev Kapur, Shri Rajeev Kapur (HUF) and Smt. Sharda Kapur Vs Grentex and Company Private Limited and Others

Court: Bombay High Court

Date of Decision: March 6, 2013

Acts Referred: Companies Act, 1956 â€" Section 10F, 397, 398, 402, 403

Citation: (2013) 114 CLA 503 : (2013) 178 CompCas 81 : (2013) 178 CompCas 28 : (2013) 3 CompLJ 461

Hon'ble Judges: S.J. Kathawalla, J

Bench: Single Bench

Advocate: N.H. Seervai, along with Mr. Rahul Chitnis and Mr. I.J. Nankani, instructed by M/s. Nankani and Associates, for the Appellant; E.P. Bharucha , along with Mr. Snehal Shah, instructed by M/s. Wadia Ghandy and Co., for Respondent Nos. 2 and 5 and Mr. S.U. Kamdar with Ms. Pooja Patil, instructed by M/s. Navdeep Vora and Associates, for Respondent Nos. 3 and 4 and Mr. Sanjay Jain, instructed by M/s. L.J. Law, for the Respondent

Judgement

S.J. Kathawalla, J.
The above Appeal is filed u/s 10F of the Companies Act, 1956 (""the Act""). By the above Appeal, the Appellants have

impugned the order passed by the Company Law Board, Mumbai Bench (""CLB"") dated 30th January 2010 dismissing Company Petition No.

112 of 2008 which was filed by the Appellants (Original Petitioners) against the Respondents on the ground of oppression of the Appellants who

are the minority shareholders of Respondent No. 1 Company and mismanagement of the Respondent Company. The Appellants have submitted

that the following important questions of law require determination by this Court.

(1) Whether in a family Company, where there are essentially two groups of shareholders, and two Directors, and when admittedly there is

deadlock with regard to the conduct of the business of the Company, the CLB ought to have granted reliefs so as to put an end to the oppression

and mismanagement?

(2) Whether in a family Company, where all the other Directors and Shareholders received salaries and allowances from the Company, the non-

payment of salary to one Director and non-payment of allowances to the Shareholders, so also to the Group Company''s staff working for those

Directors and Shareholders would amount to per se acts oppressive to those Shareholders?

(3) Whether the Appellants, having been specifically asked to disengage from the management of the affairs of the Company pursuant to a

Memorandum of Understanding entered into between the members of the family for dividing the group companies and their assets, can ever be

stopped from filing a Company Petition under Sections 397 and 398 of the Companies Act, 1956?

(4) Whether one Director could allege that the other party had breached his fiduciary duty as a Director by allegedly commencing a business that

allegedly competed with the business of the Company, when he himself had breached his fiduciary duty as a Director by commencing a business

that competed with the business of the Company?

(5) Whether siphoning off and diversion of funds for setting up a proprietary business by the Director/Shareholder who is in charge of the day to

day affairs of the Company thereby causing huge losses to the Company, is not per se mismanagement of the Company by such

Director/Shareholder?

(6) Whether, in a Company Petition under Sections 397 and 398 of the Companies Act, 1956, in respect of a family Company, the presence of an

''outsider'' shareholder is enough to refuse reliefs of ''buy out'' or ''sell out'' by one group of shareholders of the other group of shareholders?

(7) Whether conducting the affairs of the Company in a manner which is in gross contravention of several provisions of the Act by a group of

shareholders who are in charge of the day to day affairs of the Company, is not per se oppressive to the other shareholders?

2. By the consent of the parties, the above Appeal is taken up for hearing and final disposal at the stage of admission.

3. Briefly set out, the relevant facts are as under:

4. Originally Respondent No. 1 - Grentex & Company Private Limited (""the Company"") was a family partnership which commenced business in

the name and style of Grentex & Company in the year 1980 with late Shyamsunder Kapur, Appellant No. 1 and Respondent No. 2 as its

Partners. Subsequently on 28th September 1992, the Company was incorporated as a Company limited by shares under the provisions of the Act.

The authorised share capital of the Company is Rs. 500 lakhs divided into 50 lakhs equity shares of Rs. 10/- each. The issued, subscribed and

paid up capital of the Company is Rs. 373 lakhs divided into 37.3 lakhs equity shares of Rs. 10/- each. The Company is engaged, inter alia, in the

business of combers, worsted/semi-worsted/woolen spinners of yarns, etc. The Appellants therefore together hold 30.7775% of the issued,

subscribed and paid up capital of the Company. A statement indicating shareholding of all the shareholders in the Company is reproduced

hereunder:

5. Appellant No. 3 is the mother of Appellant No. 1. Appellant No. 2 is the HUF of which Appellant No. 1 is the Karta.

6. Respondent Nos. 2 and 3 are the brothers of Appellant No. 1 and sons of Appellant No. 3. Respondent No. 4 is the sister of Appellant No. 1

and Respondent Nos. 2 and 3 and daughter of Appellant No. 3. Respondent No. 5 is the HUF of which Respondent No. 2 is the Karta.

Respondent Nos. 6 to 8 are Group Companies owned by the Appellants and Respondent Nos. 2 to 5. Respondent No. 9 is a Company

incorporated overseas and owned by a very old family friend Mr. Dogra of the Kapur family.

7. The said Shyamsunder Kapur, husband of Appellant No. 3 and father of Appellant No. 1 and Respondent Nos. 2 to 4 expired on 24th

December 2002. During the life time of Shri Shyamsunder Kapur and upto December 2007, Appellant No. 1 was handling the production, quality

control, sales/marketing, product development and customer service of the said Company and Grentex Wools Private Limited - Respondent No.

8 whereas Respondent No. 2 was handling the accounts, finance, administrative, raw material purchases, logistics and legal matters. Respondent

No. 2 was also handling the legal proceedings and liaison with various Government bodies for and on behalf of Respondent No. 7 upto December

2007 and liaisoning with various Government bodies in matters relating to the properties owned by/leased to Respondent Nos. 6 and 8, upto

December 2007.

8. According to the Appellants, from December 2003, several disputes arose between Appellant No. 1 and Respondent No. 2 with regard to the

running of the said Companies of the Kapur family. Inspite of attempts made by family members and close relatives to sort out the matters and to

divide the assets, no finality was arrived at. According to the Appellants, Respondent No. 2 was conducting the affairs of the Company unilaterally

and without consulting the Appellant No. 1. However, Appellant No. 1 did not object to every action taken by Respondent No. 2 as he was his

elder brother. One instance of conducting the affairs of the Company unilaterally was a resolution dated 26th March 2004 purportedly passed by

the Board of Directors of the Company by which the Company had taken the Lonavala property belonging to Respondent No. 2 on leave and

license basis for using the same as an Extension-office-cum-guest house for employees and guests of the Company at a monthly compensation of

Rs. 9000/- and the furniture, etc. at the said Lonavala property was to be maintained by the Company.

9. According to the Appellant No. 1, he would not be sent minutes of the Meeting of the Board of Directors of the Companies of the Kapur

Family immediately after a particular meeting, but would be sent the same after several reminders. By an e-mail dated 5th January 2005 addressed

by the Appellant No. 1 to the Company Secretary of the Company, Appellant No. 1 recorded that he had received copies of various minutes of

the meetings ""purported"" to be held by the Board of Directors of the said companies of the Kapur Family. He also recorded that henceforth the

resolutions should bear the signature of Appellant No. 1 so that the resolutions are to his knowledge. Though the Company received the said e-

mail, the resolutions were not forwarded to him for his signature. On or about 27th June 2007, the Appellant No. 1 and his son incorporated a

company named Kaposta Carpets Private Limited.

10. According to Appellant No. 1, during September 2006, there was an oral agreement between Appellant No. 1 and Respondent No. 2 qua

division of assets of the Companies. However, the said proposal was subsequently cancelled by Respondent No. 2 in September 2006 itself.

Several proposals were discussed/revoked with close relatives acting as mediators or directly by all shareholders. However, no conclusion or

agreement was arrived at.

11. According to the Appellants, after several months of further negotiations, on 24th December 2007 a new proposal was discussed and agreed

upon in the presence of the family mediator Mr. Pawan Mahendro. As per the said agreement, the said Companies of the Kapur family were

divided into two parts, one called the "business assets group" and the other called the "property assets group". It was further agreed that the

business assets group was to be controlled by Respondent No. 2 whereas the property assets group was to be controlled by Appellant No. 1. It

was further agreed that Appellant No. 3 and Respondent Nos. 3 and 4 would also be part of the property assets group of Appellant No. 1. The

Respondent Nos. 3 and 4 settled their claim of shares substantially against the immovable properties coming to the share of the property assets

group and the minuscule balance was to be paid to them upon Respondent No. 4 vacating the residential property being occupied by her within 2

years and additional one year in the event of one of the immovable properties coming to their share (Amritsar property) not being sold. The

business assets group was to consist of the Company and assets and liabilities of Respondent No. 1 and ownership land of Respondent No. 8

(except the corporate entity of Respondent No. 8) and godown land belonging to Respondent No. 7. The property assets group was to consist of

all balance assets/properties including residential properties of Amritsar, Punjab, Delhi, Haridwar, UP and Ghatkopar (Mumbai) and assets of or

leased to Respondent No. 6, residential flats and commercial properties owned by Respondent No. 7, excluding the godown land and some

properties belonging to Shri Rattanchand Kapur HUF at Amritsar, Punjab, Delhi, Haridwar, U.P. and Ghatkopar (Mumbai) which had been

leased to Respondent No. 8. It was also agreed that an aggregate amount of Rs. 5 crores was to be paid to the property assets group. Thereafter

the Solicitors of the Kapur Family were instructed to draw up a detailed document. According to the Appellants, Respondent No. 2 asked the

Appellant No. 1 to permit him to conduct the day to day business of the Company immediately after the agreement and asked Appellant No. 1 not

to interfere in the same. On 2nd January 2008, Respondent No. 2 and the Appellant No. 1 circulated a note informing all concerned that as per

the internal arrangement, the business assets group would be under the purview/control of Respondent No. 2 and Respondent No. 4 would assist

him. By the said note it was also confirmed that all functions and management related to some properties of the property assets group would be

carried out by Appellant No. 1 with the assistance of his son and employee of Respondent No. 1. In the said note it was stated that any matter

relating to the business and affairs of the Company should be referred directly to Respondent No. 2 for any decision to be taken in the matter.

12. According to the Appellants, since 24th December 2007, Appellant No. 1 started withdrawing himself from the day to day affairs of the

business group though he continued to be a Director of the Company as well as a shareholder and guarantor of the loans taken from Banks and

financial institutions. The Respondent No. 2 also took over the production, sales, marketing and customer service of the Company and

Respondent No. 8 which was being earlier handled by Appellant No. 1. The Respondent No. 2 also took from Appellant No. 1 the details/status

of pending orders and various matters which were till then handled by Appellant No. 1. On 8th January 2008, the Appellant No. 1 addressed a

note to Respondent No. 2 requesting him to handover the keys of the flats belonging to Respondent No. 7 and also to hand over the books of

account of Respondent No. 7 along with all statutory records. As there was no response from Respondent No. 2, the Appellant No. 1 addressed

a letter dated 28th January, 2008 to the Company Secretary of the Company requesting him to hand over charge of all documents pertaining to the

property assets group. On 25th February 2008, the Appellant No. 1 addressed a letter to the Accounts Manager of the Company informing him

that there was no balance in the account of Respondent No. 7 for making pending payments. He also recorded that for the last two months he had

been asked for cheque books and other account particulars. The Accounts Department of the Company endorsed a note stating that there was no

balance in the account of Respondent No. 7 but did not mention anything about the cheque books at the behest of Respondent No. 2.

13. According to the Appellants, the Appellant No. 1 addressed a letter dated 3rd April 2008 to the Company Secretary of the Company

requesting him to furnish to the Appellant No. 1 minutes of the meetings held during the year 2006-2007 for his records (including AGM of all the

Companies of the Kapur family) to which there was no reply. Appellant No. 1 also addressed a letter dated 26th April 2008 to the Company

Secretary of the Company inter alia asking for share certificate numbers and their distinctive numbers of all shareholders in Companies where

returns were being filed. Though the said letter was received by the Administration Department, there was no reply. On 6th May 2008, Appellant

No. 1 addressed a letter to Respondent No. 2 requesting for an updated statement of the personal account of Appellant No. 1 with all the

Companies of the Kapur Family. The Appellant No. 1 also stated that he had not been receiving the accounts and bank statements since long and

wanted the same to be provided to him on a regular basis till the implementation of the Memorandum of Understanding. Appellant No. 1 did not

receive any response to the said letter dated 6th May 2008.

14. On 29th May 2008, Appellant No. 1 along with his wife and son incorporated another company named Kapotex Industries Private Limited.

15. According to the Appellant No. 1, his telephone bills were earlier paid by the Company but since about July 2008, the bills were not paid in

time. The Appellant No. 1 vide his letter dated 26th August 2008 addressed to Respondent No. 2 recorded that he had requested for various

payments several times but the same were not paid. Appellant No. 1 also stated that he needed cheque books of Respondent No. 7 Company to

facilitate various statutory and other relevant payments. Appellant No. 1 also stated that arrears had not been paid to the staff that was working for

him whereas all the other staff had been paid arrears. Thus the staff that was working for Appellant No. 1 was being discriminated against by

Respondent No. 2 and clearly efforts were made by Respondent No. 2 to harass the staff working under Appellant No. 1. According to Appellant

No. 1, his son was also getting some allowances from the Company, in addition to his salary on a monthly basis but since October 2007 the

allowances were not paid to the son of Appellant No. 1. In view thereof, the son of Appellant No. 1 addressed a letter dated 4th September 2008

to the Company and requested that payments be reimbursed to him. The son of Appellant No. 1 is not paid his salary and/or allowances since

August 2008 for his services and he has not even been paid arrears which were paid to all other employees for the last two years. The Appellant

No. 1 by his letter dated 9th September 2008, requested the Accounts Department of the Companies to furnish him with a copy of the balance

sheet of Grentex Wools Pvt. Ltd. as on 31st March 2008, along with the trial balance and day book from 1st April 2008 till date. The Appellant

No. 1 also addressed a letter dated 10th September 2008 to the Accounts Department of the Company and requested that the salaries of the staff

working for Appellant No. 1 which was not paid since August 2008 be paid. A letter dated 22nd September 2008, was also addressed by

Appellant No. 1 to the Accounts Department of the Company stating that the Auditors of Grentex Wools Pvt. Ltd. have informed him that no

papers had been given to them for audit purposes. The Appellant No. 1 also requested the Accounts Department of the Company to provide the

details including provisional balance-sheet, profit and loss account, trial balance, etc. for audit purposes and for scrutiny by Appellant No. 1, which

was not done. According to the Appellant No. 1, the trial balance-sheets of Respondent Nos. 6 and 7 were forwarded to the Appellant No. 1 by

Respondent No. 2 and on perusing the same, Appellant No. 1 required certain clarifications. The Appellant No. 1 addressed a letter dated 25th

September 2008 to the Accounts Department of the Company and requested for certain clarifications as mentioned therein which the Accounts

Department failed and neglected to reply. The Appellant No. 1 by his letter dated 8th November 2008 addressed to the Respondent No. 2 called

upon him to release payments of two of the employees for the month of October, 2008 and the salary of Appellant Nos. 1 and 3 and his son and

one Shri Kamlesh. Respondent No. 2 was also requested to release bonus to three of the employees and to clear some of the bills set out in the

said letter.

16. According to the Appellant No. 1, he was therefore systematically excluded from the business of the Company and no information regarding

the Company was furnished to him despite repeated requests. Even the staff working for Appellant No. 1 was harassed by Respondent No. 2 by

not paying them their dues/salaries on time including the arrears and yearly bonus as had been paid to all other employees of the group Companies.

According to the Appellants, the Company did not have a proper functioning Board of Directors because there were only two Directors on the

Board of the Company viz. Appellant No. 1 and Respondent No. 2. Both the Appellant No. 1 and Respondent No. 2 are permanent Directors of

the Company and not liable to retire by rotation. About 10 years ago, one Mr. Jayaprakash Shetty was appointed as a Director of the Company

but in or about August 2008, the said Jayaprakash Shetty discontinued as a Director from the Company in view of having reached the retirement

age and submitted his resignation from the Board of Directors of the Company to Respondent No. 2.

17. According to the Appellant No. 1, though from 24th December 2007, the Appellant No. 1 withdrew himself from the day to day affairs of the

business assets group as requested by Respondent No. 2, Respondent No. 2 did not withdraw himself from the property assets group. According

to the Appellant No. 1, since January 2008 onwards various "without prejudice" notes and/or letters were exchanged between the Appellant No.

1 and Respondent No. 2 and other family members and also the Solicitors of the Kapur Family. In or about May 2008, the Solicitors of the Kapur

Family circulated a draft of the detailed Memorandum of Understanding to be executed between the Appellant Nos. 1 and 3 and Respondent

Nos. 2 to 4 with a suggestion to meet at the office of the Solicitors of the Kapur family on 3rd June 2008, to discuss the same. However,

Respondent Nos. 2 and 4 called off the said meeting. Thereafter several meetings were held in the offices of the Solicitors of the Kapur family to

finalise the detailed Memorandum of Understanding but till date no Memorandum of Understanding has been signed. As the draft of the detailed

Memorandum of Understanding (which was drawn up in furtherance of the agreement dated 24th December 2007), was neither finalised nor

signed, the Appellants have neither relied upon nor annexed the same to the Company Petition.

18. According to the Appellants, on 23rd October 2008, the Company received an e-mail from the Department of Company Affairs informing

them that the Company had not filed the balance-sheet and statement of profit and loss account and annual returns for the financial year ended 31st

March 2008, with the Registrar of Companies. According to the Appellants, the said e-mail shows that Respondent No. 2 is conducting the affairs

of the Company in a manner which is in contravention of the provisions of the Act.

19. According to the Appellants, on 13th November 2008, Respondent No. 2 forwarded an e-mail to the Appellant No. 1 admitting that the

Companies of the Kapur Family were without a fully functioning Board. The Respondent No. 2 offered two choices to Appellant No. 1 to save

the Companies, to let them run with full support by either of them i.e. (a) either Appellant No. 1 takes over the running of the business and

properties, etc. and Respondent No. 2 goes out of Directorship or (b) Respondent No. 2 takes over the running of the business and properties

etc. and Appellant No. 1 goes out of Directorship. The Respondent No. 2 falsely alleged that Appellant No. 1 had a deadlock with Respondent

Nos. 3 and 4 for about a year which was allegedly compounded by a serious conflict of interest by Appellant No. 1 setting up a competing wool

spinning business along with his wife and son. The Respondent No. 2 also stated that the long delay and change in circumstances had completely

destroyed the very basis of attempting any family settlement. Further, Respondent No. 2 alleged that his work was constantly sabotaged by

Appellant No. 1 and/or at his instance. The Respondent No. 2 also stated that there were many issues concerning the said Companies of the

Kapur family which could not be resolved till the management was full and complete and there was a fully functional Board of Directors, committed

to the well being of the companies. The Respondent No. 2 also forwarded his resignation in advance, addressed to the Board of Directors.

20. According to the Appellants, by another e-mail dated 13th November 2008, addressed by Respondent No. 2 to the son of Appellant No. 1,

the Respondent No. 2 as a Director of the Company purported to terminate the services of the son of Appellant No. 1 allegedly on account of his

misusing the Company''s information, goodwill, etc. and also allegedly for poaching the key employees of the Company, by setting up and working

for a competing factory as a co-promoter with his father i.e. Appellant No. 1.

21. According to the Appellants, since the Respondent No. 2 took over the exclusive control of the day to day affairs of the Company including

the functions being handled by the Appellant No. 1, the capacity utilization of the Company came down substantially. A majority of the skilled

employees left or were removed by Respondent No. 2 and consequently the income of the Company also dropped/was reduced by over 50%.

The Company also faced several complaints from their customers. The relations with the customers and business associates started deteriorating

due to lack of follow up visits by the Company personnel since January, 2008. Thus, since the Respondent No. 2 took over the control of day to

day affairs of the Company, both the performance and the image of the Company steadily declined, contrary to the performance of the Company

when the Appellant No. 1 was in control, as was evident from the production figures for April to November 2005, 2006 and 2007.

22. According to the Appellants, in view of the resignation of the Respondent No. 2 as a Director of the Company, the Appellant No. 1 addressed

an e-mail to Respondent Nos. 2 to 4 and Appellant No. 3 and convened an urgent meeting of the Board of Directors of the Company on 15th

November 2008, which meeting was not attended to by Respondent No. 2. Instead, Respondent No. 2 addressed an e-mail to Appellant No. 1

alleging that his email dated 13th November 2008 was misinterpreted. Respondent No. 2 alleged that Appellant No. 1 was picking and choosing

issues that suited Appellant No. 1 without addressing the major issues and that Appellant No. 1 was holding the Company to ransom. Respondent

No. 2 also alleged that his advance offer to resign was taken by Appellant No. 1 in isolation and without consulting other members of the Board of

Directors and thus the said resignation was infructuous. Respondent No. 2 also stated that a general meeting ought to be called. According to the

Appellants, by an e-mail dated 22nd November 2008, addressed by Respondent No. 2 to the Appellant No. 1, the Respondent No. 2 made false

and frivolous allegations and on the basis of the same called upon Appellant No. 1 to resign from the Board of the Company and Respondent No.

8.

23. According to the Appellants, the Appellant No. 1 by his letter dated 2nd December 2008 (few days prior to the filing of the Company Petition

No. 112 of 2008 on 5th/11th December 2008) addressed to the Respondent No. 2 inter alia denied and disputed the allegations made by

Respondent No. 2 against the Appellant No. 1 and his son in the three e-mails dated 13th November 2008, 15th November 2008 and 22nd

November 2008.

24. According to the Appellant No. 1, as far back as September 2006, it became evident to Appellant No. 1 that the assets belonging to the

Companies of the Kapur Family would be divided and he would be going his own way. In view thereof, on or about 23rd June 2007, the

Appellant No. 1 along with his son incorporated a Company named Kaposta Carpets Private Limited (""Kaposta""). The said Company was kept

dormant and did not carry on any business. On or about 29th May 2008, the Appellant No. 1 along with his wife and son incorporated another

Company named Kapotex Industries Private Limited (""Kapotex"") and purchased land, machinery, etc. in GIDC, Sarigam, Dist. Valsad, Gujarat

for setting up a factory for the manufacture of woollen textiles. In the Company Petition, Appellant No. 1 has stated that as on 5th/11th December

2008 (i.e. the date of filing of the Company Petition), no commercial production had commenced by Kapotex or Kaposta. It is submitted that

Appellant No. 1 having totally withdrawn from the day to day management of the Company, the question of competing with the Company did not

and does not arise.

25. According to the Appellants, ""recently"" the Appellants became aware that as far back as January 2006, Respondent No. 2 had formed a

proprietary firm named M/s. Gorashyam Enterprises for offering products of scoured wool, tops and yarns, carpets, etc. Further, the Appellants

have also ""recently"" learnt that Respondent No. 2 unilaterally imported a scouring plant from New Zealand despite objections from Appellant No.

1 during September/October 2005 and paid for all the costs/expenses through the Company. Respondent No. 2 also declared M/s. Gorashyam

Enterprises as supporting manufacturer of the Company for the said plant to various government authorities. The Appellants have also learnt that

during the period 2006 to 2008, large amounts were withdrawn from the Company towards expenses for building a factory for M/s. Gorashyam

Enterprises on farm land belonging to Respondent No. 2 at Khopoli, Maharashtra. M/s. Gorashyam Enterprises also applied to the Director of

Industries, Maharashtra for converting farm land at Khopoli, Maharashtra from agricultural use to industrial use with increased FSI thereon.

According to the Appellant No. 1, he vehemently opposed the import and installation of the scouring plant as it was not required by the Company.

According to Appellant No. 1, when the said permission sought by M/s. Gorashyam Enterprises was not granted by the Director of Industries,

Mantralaya, for conversion of land from agricultural to industrial use, Respondent No. 2 in or about May/June 2008 shifted the said plant to the

Company''s factory at Sarigam. According to the Appellants, the business of M/s. Gorashyam Enterprises thus directly competes with the business

of the Company and Respondent No. 8. The Respondent No. 2 has been in a competing business since the past couple of years in a clandestine

and surreptitious manner inspite of being a Director of the Company and being in control of the day to day management of the Company. In fact,

Respondent No. 2 also placed advertisements in the name of M/s. Gorashyam Enterprises, in the official publications of the Wool Industry Export

Promotion Council. Since there was an impending division of assets, Appellant No. 1 signed the balance-sheets and profit and loss accounts of the

earlier years uptil 31st March 2007 in good faith.

26. According to the Appellants, the Respondent No. 2 has thus systematically but in a fraudulent manner, taken the support of Respondent Nos.

3 and 4 to gain full control of the Company and hijack the Company and its Board of Directors. On the other hand, the Appellant No. 1 had stood

Guarantor for the Company and Respondent No. 8 from time to time, and was to be relieved of the same on implementation of the family

arrangement. Therefore, on the one hand the Appellant No. 1 has been ousted from the day to day management of the Company (though he

continues to be a Director of the Company and also a guarantor for the Company) which is now run by Respondent Nos. 2 to 4, and on the other

hand the Appellant No. 1 has not been released from the Guarantees given by him. It is submitted that the Respondent Nos. 2 to 4 are therefore

together acting contrary to the provisions of the Act and are also acting against the interests of the Company. The Respondent Nos. 2 to 4 are not

acting in accordance with legal and commercial probity and morality. It is submitted that by the aforesaid acts of oppression and mismanagement,

Respondent No. 2 has brought about a situation where the Company''s operation and business is carried on for the sole benefit of Respondent

Nos. 2 to 4. The Appellants therefore on 5th December 2008 filed the Company Petition No. 112 of 2008 before the CLB, Mumbai Bench for

the following reliefs:

(a) For appropriate orders, reliefs and directions u/s 397, 398, 402 and 403 of the Companies Act, 1956, to bring an end to the aforesaid acts of

oppression and mismanagement perpetrated by Respondent Nos. 2 to 4 and for necessary orders and reliefs in respect thereto, including as

prayed for herein;

(b) That appropriate orders, reliefs and directions u/s 397, 398, 402 and 403 of the Companies Act, 1956, be passed for the management of the

Company, and for that purpose, such fit and proper person be appointed, as this Hon''ble Board may deem fit as Administrator and/or Special

Officer and/or an independent Chairman of the Board of Directors be appointed to carry on the business of and to manage the affairs of the

Company for such period and on such terms and conditions as this Hon''ble Board may deem fit;

(c) That this Hon''ble Board be pleased to direct the present auditors and for carrying out special audit of the books and accounts of the

Company, in a manner as this Hon''ble Board deems fit and proper, particularly with regard to the utilization and disbursement of funds and the

properties of the company;

(d) Without prejudice to prayers (b) and (c) above, this Hon''ble Board be pleased to appoint such number of persons as may be deemed fit and

proper to hold office as an independent Board of Directors to assume charge of the management and affairs of the Company, in manner as this

Hon''ble Board may deem fit and proper, and on such terms and conditions as may be fixed by this Hon''ble Board;

(e) This Hon''ble Board be pleased to direct the Central Government to appoint Directors in respect of the Company u/s 408(1) of the Companies

Act, 1956;

(f) That the Respondent No. 2 himself and/or through his supporters and/or their servants and/or agents be ordered and directed to make a full,

free and complete disclosure of records of the Company with regard to the affairs of the Company, the contracts entered into between the

Company and the loans given by the Company, inter alia being:

i. The audited profit and loss accounts, balance sheets accompanied by the auditor''s reports of the Company from 1st April 2007 till the date on

which provided;

ii. Minutes of Meetings of the Annual General Meetings of the company from 30th June 2005 till date on which provided;

iii. Minutes of Meetings of the Board of Directors of the Company from 30th June 2005 till date on which provided;

iv. Detailed report of inflow and outflow of funds, and manner in which the same have been deployed/expended by the Company from 1st April

2007 including any expenditure of capital nature till the date on which provided, together with supporting documents;

v. Bank statements of all bank accounts of the Company from 1st April 2007 till date on which provided;

vi. Details of investments made and loans/advances of any nature whatsoever given by the Company from 1st April 2007 till date on which

provided;

vii. Details of financial arrangements entered into with Banks/Financial Institutions for availing loans by the Company and/or Guarantees/securities

furnished by the Company for any third party from 1st April 2007 till date on which provided;

viii. Details of all the creditors of the company as on date.

(g) That this Hon''ble Board be pleased to restrain the Respondent No. 2 and/or his supporters and/or their servants and/or agents, by an order

and injunction of this Hon''ble Board, from in any manner.

i. increasing, issuing and/or allotting any further shares in any form or manner whatsoever in the Company, save and except with the prior written

consent of the Petitioners;

ii. investing, selling, disposing off, encumbering or alienating any property or assets of the Company save and except with the prior written consent

of the Petitioners;

iii. interfering with or disturbing the shareholding of the Petitioners in the Company;

iv. creating any liability and/or incurring any capital expenditure in the Company, giving loans or transfers in the Company save and except with the

prior written consent of the Petitioners;

v. utilizing the funds of the Company for the purpose of any litigation between the parties hereto in any manner whatsoever;

vi. making any payment from the accounts of the Company save and except with the prior written consent of the Petitioners;

vii. taking any steps towards and/or making any changes in the constitution of the Board of Directors of the Company, including for removal of

Petitioner No. 1 as a director of the Company;

viii. holding any board meetings without the presence of petitioner No. 1 and in the absence of proper notice and agenda.

(h) costs of and incidental to this Petition be paid by the Respondents;

(I) Such further or other order or orders be made and/or direction or directions given as to this Hon''ble Court may seem fit and proper.

27. Respondent Nos. 2 and 5 filed their Affidavit-in-reply to the Company Petition dated June 2009 before the CLB wherein they denied and

disputed all the allegations made by the Appellants against them. According to them, the Appellant No. 1 voluntarily took up a back seat in the

management of Respondent No. 1 Company. They further urged that having voluntarily withdrawn from the affairs of Respondent No. 1

Company, the Appellants are estopped from filing a petition under the guise of Sections 397 /398 of the Act alleging oppression and

mismanagement of Respondent No. 1 Company. In view thereof, the grievance of the Appellants about the alleged ousting of the Appellants and

the alleged oppression and mismanagement of Respondent No. 1 is nothing but a mala fide and vain attempt on the part of the Appellants to defeat

the rights and powers of the Respondents.

28. According to Respondent Nos. 2 and 5, the Appellant No. 1 has, contrary to what is set out by him in the Company Petition and in complete

violation/breach of his fiduciary duty, inter alia, indulged in the following:

(i) carrying on and establishing competing business of Kapotex to the complete detriment of the business of Respondent No. 1 Company;

(ii) under-cutting the contracts/agreements of Respondent No. 1 Company with its regular customers;

(iii) poaching the employees of Respondent No. 1 Company;

(iv) utilising the business contacts (including the same suppliers, logistics companies, Chartered Accountants, etc.) of Respondent No. 1 Company

to further his said competing business;

(v) utilising the assets (including the office premises, office equipment, furniture & fixtures, vehicles, utilities, stationary, IPR data, technical &

commercial information, etc.) of Respondent No. 1 Company to further the said competing business;

(vi) misrepresenting and falsely portraying to the bankers of Respondent No. 1 Company that Kapotex is a group company of the Respondent

No. 1 Company and on the basis of the goodwill of Respondent No. 1 Company in the market, obtaining loans from the bankers of Respondent

No. 1 Company to aid the said competing business;

(vii) utilising the funds from the loans so availed for setting up a competing business to that of Respondent No. 1 Company.

29. The Respondent Nos. 2 and 5 have submitted that it is due to the arbitrary and obstructive whims and fancies of Appellant No. 1 that

Respondent No. 2 was constrained to set up M/s. Gorashyam Enterprises for housing the scouring/wool washing plant (along with a dryer,

accessories and effluent treatment plant) purchased by Respondent No. 1 Company from the year 2005 and was declared as a supporting

manufacturer to Respondent No. 1 Company for the specific purpose. M/s. Gorashyam Enterprises has till date not carried out any business

whatsoever. All the monies towards setting up and housing the said scouring/wool washing plant (along with a dryer, accessories and effluent

treatment plant) have been expended with full knowledge and consent of Appellant No. 1 and that the same have been accounted for in the books

of Respondent No. 1 Company and Appellant No. 1 has even signed the audited balance sheets for the financial year 2005-2006 and 2006-2007

which clearly reflect the above expenses. In any event, the said scouring/wool washing plant (along with a dryer, accessories and effluent treatment

plant) has since some time in May-June 2008 been transported to and installed at the factory of Respondent No. 1 Company at Sarigam, Gujarat

and the same has also commenced operations/production as on 21st March, 2009.

30. According to Respondent Nos. 2 and 5, the Appellants were at all times aware of all the facts pertaining to the setting up of M/s. Gorashyam

Enterprises. However they have falsely and knowingly indulged in misrepresentation by alleging that M/s. Gorashyam Enterprises competes with

the business of Respondent No. 1 Company. According to Respondent Nos. 2 and 5, upto December, 2007, Appellant No. 1 and Respondent

No. 1 were handling/carrying out the following duties in respect of Respondent No. 1 Company:

Appellant No. 1:

* the production and quality control, sales/marketing, product development and customer service in respect of yarn production of Respondent No.

1 Company; and

* some administrative, raw material purchases, logistics and legal matters;

Respondent No. 2

* the production, quality control, sales, marketing, product development and customer service in respect of wool combing and scouring of

Respondent No. 1 Company; and

* some administrative, raw material purchases, logistics and legal matters;

* liaisoning with various government bodies on behalf of Respondent No. 1 Company;

The accounts and finance were jointly managed by Respondent No. 2 and Petitioner No. 1.

31. The Respondent Nos. 2 and 5 have submitted that some time in April 2004, Appellant No. 1 raised disputes inter alia with regard to the profit

sharing and running of Respondent No. 1 Company. Despite attempts made by family members and, close relatives, to sort out matters and to

separate the family interests/assets, no finality was arrived at. Several proposals were discussed and discarded as Appellant No. 1 was not

interested in a final settlement which was fair not only to Respondent No. 2 and Appellant No. 1, but also to the other members of the family

including Appellant No. 3 and Respondent Nos. 3 and 4. Thereafter one Mr. Pawan Mahendro (cousin of Appellant No. 1 and Respondent Nos.

2 to 4) acted as a mediator and attempted to mediate over a period of a few days in the years 2005 and 2006 and for a period of about 11 days

in the year 2007. The said mediation however failed to bring about any compromise between the parties. Ultimately the father-in-law of Appellant

No. 1 intervened and a meeting was called by Appellant No. 1 on 23rd December 2007 in the presence of the said Pawan Mahendro, when a

broad, without prejudice proposal came to be agreed and executed between Respondent Nos. 2, 3 and 4, and Appellant Nos. 1 and 3. The

family assets were to be divided into two lots, on a melting pot basis, viz. The ''Property Assets Group'' and the ''Business Assets Group''.

Respondent No. 2 was allotted the entire Business Assets Group and Appellant No. 1 elected to partake in the Property Assets Group along with

Appellant No. 3 and Respondent Nos. 3 and 4. According to Respondent Nos. 2 and 5, the said division of assets was agreed upon and the

without prejudice proposal was executed on the basis of a clear understanding that having elected to take the Property Assets Group, it would not

be open to the Appellants to commence the same business or compete with Respondent No. 1 Company''s business in any manner whatsoever.

According to Respondent Nos. 2 and 5, if the Appellants would have been allowed to so compete, then the whole purpose of separating the

Property Asset Group from the Business Asset Group would have been rendered futile/nugatory. In fact, the Business Asset Group was evaluated

on that very basis, though without any formal valuation.

32. According to Respondent Nos. 2 and 5, though Appellant No. 1 withdrew from the management of the Business Asset Group, Appellant No.

1 however refused to co-operate with Respondent No. 2. Appellant No. 1 did not do a systematic handover of the data and information with

regard to the customers and contracts of Respondent No. 1 Company which were handled by him. Respondent No. 2 despite the non co-

operative and selfish attitude of Appellant No. 1 and the current global economic downturn, independently and successfully managed the business

of Respondent No. 1 Company (save and except complying with the statutory and non-statutory obligations which require a functional Board of

Directors), details whereof are as under:

(a) Exports (during the last three years) (Value/Quantities)

(b) Export orders booked (w.e.f. January, 2008) (Approximately)

33. According to Respondent Nos. 2 and 5, while Respondent No. 2 selflessly and single handedly worked in the interest of Respondent No. 1

Company, the Appellants continued to draw their remuneration, salaries, benefits and/or expenses from Respondent No. 1 Company to the tune of

over Rs. Sixty lacs. In fact, substantial amounts were withdrawn by Appellant No. 1 himself signing the cheques for the same. Respondent Nos. 2

to 5 have also relied on copies of cheques dated 8th January 2009 and 5th February 2009 along with their corresponding vouchers, bearing the

signature of Appellant No. 1, to bear out the same.

34. According to Respondent Nos. 2 and 5, disputes arose within the Property Assets Group i.e. between Appellant Nos. 1 and 3 and

Respondent Nos. 3 and 4, so much so that Respondent No. 2 was even constrained to address a letter dated 23rd January 2008 to the Appellant

No. 1 requesting him to resolve the disputes between the Property Asset Group and cautioned Appellant No. 1 that in the event the said disputes

between the Property Asset Group were not resolved, the same may result in litigation. Thereafter, despite the fact that disputes remained

unresolved between Appellant Nos. 1 and 3 and Respondent Nos. 3 and 4 with regard to the Property Asset Group, Appellant No. 1 suo motu

started giving instructions to the Advocates to prepare a draft Memorandum of Understanding on the basis of the without prejudice proposal. This

was objected to by Respondent No. 4 as is recorded in her letter dated 10th April 2008 addressed to Appellant No. 1, with a copy marked to

Appellant No. 3, Respondent Nos. 2 and 3 and Mr. Pawan Mahendro. Subsequently, meetings were held between Respondent No. 2, Appellant

Nos. 1 and 3 and Respondent Nos. 3 and 4 but no settlement could be arrived at between the Property Assets Group. Due to the disputes that

arose within the Property Assets Group, more particularly between Appellant No. 1 and Respondent Nos. 3 and 4, Appellant No. 1 refused to

implement the without prejudice proposal and with ulterior motives stalled the same.

35. Respondent Nos. 2 to 5 have in paragraph 3.13 of their Affidavit-in-reply dated 8th June 2009 set out the circumstances under which M/s.

Gorashyam Enterprises was established and have in paragraph 3.13(c) set out how the Appellant No. 1 along with his wife and son established the

competing business and started indulging in under-cutting the contracts/agreements and poaching the employees and clients of the first Respondent

Company. According to Respondent Nos. 2 and 5, therefore, the Appellants have of their own free will handed over the control and management

of Respondent No. 1 Company to Respondent No. 2; the Appellant No. 1 has thereafter attempted to ruin Respondent No. 1 Company inter alia

by starting the said competing business, poaching employees and clients and undercutting the contracts/agreements of Respondent No. 1

Company; Appellant No. 1 has and is misusing the assets of Respondent No. 1 Company towards furthering the said competing business;

Appellant No. 1 thus completely breached his fiduciary duties towards Respondent No. 1 Company; and under no circumstances whatsoever can

the Appellants be either said to be oppressed nor can Respondent No. 1 Company be said to have been mismanaged.

36. Respondent Nos. 3 and 4 also filed their reply on lines similar to the submissions advanced by Respondent Nos. 2 and 5.

37. The Appellants filed their Affidavits-in-Rejoinder on 9th November 2009 and 26th November 2009 wherein they denied and disputed the

submissions advanced by the Respondent Nos. 2 and 5, and 3 and 4. The Appellants did not initiate any proceedings to amend the Company

Petition and bring on record any of the subsequent events. However, the Appellants have admitted that in February, 2009, Kapotex started trial

production and in March, 2009 started its normal production. The Company Petition was finally heard by the learned Member of the CLB,

Mumbai Bench and the Company Petition was dismissed by an order dated 30th January 2010. A perusal of the order passed by the CLB,

Mumbai Bench shows that the learned Member framed the following issues for consideration:

(1) Whether the affairs of the company were conducted unilaterally?

(2) Whether the memorandum of Understanding dt. 24.12.2007 between the parties would be subject matter of jurisdiction of this Bench?

(3) Whether the Company is functioning with proper Board of Directors?

(4) Petitioner No. 1 commencing withdrawing himself from day to day affairs of business asset group and non hand over of keys of flats belonging

to R7 and non payment of bills/dues to Petitioner No. 1 and discriminating the staff working for P1, whether amounts to oppression?

(5) Whether M/s. Gorashyam Enterprises belonging to R2 is in competing business with R1 Company and whether Kapotex Industries belonging

to P1 is in competing business with R1?

(6) Whether the Company is in deadlock situation?

(7) Whether any case is made out by the Petitioners to grant reliefs as prayed for?

(8) To what relief?

38. As regards issue No. 1, the learned Member has recorded that it is an admitted fact that the Appellant No. 1 approved the audited accounts

for the relevant period. The learned Member has held that the Appellant No. 1 being a Director of the Company and having full knowledge of the

decision of the Board and having approved the accounts, now at a later point of time cannot allege that the Respondent No. 2 had taken decisions

unilaterally. The learned Member has therefore answered the issue No. 1 in the negative.

39. Issue No. 2 is also answered by the learned Member in the negative.

40. As regards issue No. 3, the learned Member has observed that it is an admitted fact that the Appellant No. 1 and Respondent No. 2 are the

Directors of the Company. One Mr. Jayprakash Shetty was also appointed as a Director of the Company about 10 years ago. However, Mr.

Shetty retired after reaching the retirement age in August, 2008. The learned Member held that in view of the precarious situation of the Company,

the Company has to act in accordance with its Articles of Association and also in accordance with the law, keeping in mind the paramount interest

of the other shareholders of the Company.

41. As regards issue No. 4, the learned Member has held that non-handing over of keys of the flats belonging to Respondent No. 7 and non-

payment of bills/dues to Appellant No. 1 and discriminating the staff working for Appellant No. 1, whilst recording that the Appellants have also

drawn several amounts towards their remuneration, salaries, benefits and/or expenses, does not constitute an act of oppression.

42. As regard issue No. 5, the learned Member has held that M/s. Gorashyam Enterprises is not in a competing business with Respondent No. 1.

However, M/s. Kapotex Industries is directly in contact with the customers of Respondent No. 1 Company.

43. As regards issue No. 6, the learned Member has come to a finding that there is no dead-lock in the Respondent No. 1 Company and the

Company is directed to hold the Board Meeting and General Meetings as per the Articles of Association and the law and accordingly comply with

the statutory requirements of law.

44. As regards issue No. 7, the learned Member has held that in view of the facts of the present case, the decision of the Hon''ble Supreme Court

in Dale & Carrington Investments Pvt. Ltd. would not apply and therefore he is not inclined to pass any orders directing the parties to buy out or

sell out their respective shareholding in the Respondent No. 1 Company.

45. Mr. Seervai, the learned Senior Advocate appearing for the Appellants, has submitted before me that the learned Member of the CLB has not

applied his mind to the plethora of facts placed before him and has also failed to appreciate the law applicable to the facts and circumstances of the

present case and has therefore erroneously dismissed the Company Petition. I have, by consent of the parties, heard the above Petition finally at

the stage of admission at great length.

46. Since the learned Advocates appearing for the parties differed as regards the exact contents of the MoU, this Court, only with the intention of

exploring the possibility of a settlement between the parties, called for the original MoU deposited in escrow with M/s. Kanga & Company,

Advocates and Solicitors. However, the parties were unable to arrive at any settlement.

47. Mr. Seervai, the learned Senior Advocate appearing for the Appellants reiterated before this Court the facts set out in the Petition which are

narrated hereinabove. Mr. Seervai took me through the letters written by the Appellant No. 1 dated 8th January, 2008, 28th January 2008, 25th

February 2008, 3rd April, 2008, 6th May, 2008 and 23rd October, 2008 to show that the Appellant No. 1 had called upon the Respondent No.

2 to hand over the keys of the flats and books of accounts of Respondent No. 7; all the documents pertaining to the Property Assets Group,

minutes of the meeting of the Company held during 2006-2007, statement of the personal account of Appellant No. 1 in the books of Respondent

No. 1, etc. However, he was not provided with the same. The Company received an e-mail dated 23rd October 2008 from the Department of

Company Affairs, informing it that the Company had not filed the balance-sheet and statement of profit and loss account and annual returns for the

Financial Year ended 31st March 2008 with the Registrar of Companies. It is submitted that this e-mail clearly shows that Respondent No. 2 is

conducting the affairs of the Company in a manner which is in contravention of the provisions of the said Act. It is submitted that for the financial

year ended 31st March 2008, the accounts ought to have been placed for approval before the Board of Directors in June 2008 and the AGM

ought to have been called on or before 30th September 2008. It is submitted that the Company Petition was filed on or about 11th December

2008 and the ex parte ad-interim order restraining the Company from holding any Board of Directors Meeting or any General Meeting of the

Company was passed on 14th December 2008. It is submitted that nothing prevented the Respondent No. 2 from preparing and circulating

accounts of the Company on or before 30th September 2008 as there was no injunction of the CLB restraining the Company from holding any

Board Meeting or General Meeting of the Company. Even after 30th January, 2010 i.e. the date when the said Company Petition was dismissed,

no audited accounts were presented by the Respondent No. 2 to the Board for approval. To date the last profit and loss account and balance

sheet that the Company has filed with the Registrar of Companies is for the financial year ended 31st March 2007. As Respondent No. 2 was

solely in management of the Company since January 2008, it is clear that the affairs of the Company are conducted by Respondent No. 2 and his

supporters in gross contravention of several provisions of the Act. This ex facie and per se constitutes oppression of the other shareholders and

mismanagement of the affairs of the Company. Mr. Seervai submitted that Respondent No. 2 has repeatedly admitted that the Company is without

a proper functional Board (E-mail/s dated 13th November, 15th November 2008 and 22nd November 2008 from the Respondent No. 1 to the

Appellant No. 1, Annexures A23, A27 and A28 @ Pgs. 145, 149 and 150 of the Compilation Part I). Mr. Seervai submitted that despite the

Company admittedly facing a deadlock with regard to the conduct of the Company, the CLB while recording that there is difference of opinion

between the Appellant No. 1 and Respondent No. 2, has held that it is not in a situation where the Company cannot hold Board meetings and take

decisions and that therefore the Company is not in a deadlock situation. The CLB therefore directed the Company to hold Board Meetings in

accordance with the Articles of Association of the Company, and the law, and accordingly with the statutory requirements of the law. The CLB

however does not suggest or explain how such Board Meetings can actually be held, given the admitted facts of the case and the conduct of

Respondent No. 2. Therefore it is submitted that the direction of the CLB to hold Board Meetings is farcical, meaningless and unworkable.

48. Mr. Seervai further submitted that Respondent No. 2 failed to pay the telephone bills of Appellant No. 1 since about July 2008. He relied on

the letter written by Appellant No. 1 dated 26th August 2008 addressed to the Respondent No. 2 stating that he needed cheque books of

Respondent No. 7 Company to meet various statutory compliances and for making relevant payments. He also recorded that arrears have not

been paid to the staff that was working for him in the Company whereas all other staff of the Company have been paid their arrears. Thus, the staff

that was working for Appellant No. 1 was being discriminated against by Respondent No. 2 and steps were being consciously taken by

Respondent No. 2 to sideline Appellant No. 1 from the affairs of the Company. According to him, those working for Appellant No. 1 within the

Company were not paid their salaries for the month of August, 2008. It is submitted that various bills raised by Appellant No. 1 were not paid by

the Company. Even Appellant No. 3 who is the mother of Appellant No. 1 and Respondent Nos. 2, 3 and 4 was deprived of her legitimate

reimbursements including medical expenses. Respondent No. 2 in order to impress the court has later issued a personal cheque of Rs. 2,00,000/-

to his mother towards her medical expenses and as a favour to her, which she has not encashed as she wants her legitimate dues from the

Company. The Appellant No. 1 addressed an e-mail dated 8th November 2008 to Respondent No. 2 requesting for payments to be released to

him at the earliest. Mr. Seervai has submitted that therefore the conduct of Respondent No. 2 in not paying salaries to Appellant No. 1 and

allowances to the Appellants and salaries and allowances to the staff working for the Appellant in the Group Company, is per se oppressive.

However, Mr. Seervai also admitted that the Appellants have during the period January 2008 to November 2009 withdrawn over Rs. 60 lacs

towards remuneration, salaries, benefits and other expenses from the Company as they were compelled to do so by reason of the conduct of

Respondent No. 2 and the employees of the Company who acted on his dictates. However, since amounts due as aforestated, were not promptly

paid, the conduct of Respondent No. 2 is per se oppressive. Mr. Seervai also admitted that an amount of Rs. 38 lakhs is withdrawn by the

Appellant No. 1 in October, 2011 since he was asked by Respondent No. 2 to do so. It is submitted that the findings of the CLB that the amounts

towards remuneration, salaries, bonus, having been paid to the Appellants, there was no default on the part of the Respondents, and that

nonpayment of salaries to the staff working for the Appellants does not constitute oppression are erroneous in view of the fact that not paying the

remuneration, salaries, and benefits on time itself is oppressive, as it is meant to pressurize and brow beat the Appellants.

49. Mr. E.P. Bharucha, the Learned Senior Advocate appearing for Respondent Nos. 2 and 5, submitted that it is disclosed in the Petition that

Appellant No. 1 had voluntarily withdrawn from the functioning of the Respondent No. 1 Company, i.e. he himself had stopped participating in the

management of the Company, and therefore as such Appellant No. 1 is estopped from filing the petition on the ground of oppression and

mismanagement. It is submitted that the Board is not functioning on account of the non-co-operative attitude of the Appellant No. 1. The

Respondent No. 1 Company had not been able to hold an Annual General Meeting for appointment of Directors so that Respondent No. 1

Company could have a fully functional Board. It is submitted that there is no deadlock as suggested by the Appellants i.e. there is no deadlock

between the shareholders of Respondent No. 1 Company. The allegations made by Appellant No. 1 against the Respondents are in his capacity as

a Director and not as a shareholder/member. The so-called deadlock of the Board of Directors has been occasioned by the acts of Appellant No.

1 and he cannot seek to take advantage of the deadlock created by himself. He submitted that if permitted, the Respondent No. 1 can hold a

meeting and appoint Directors and have a functional Board so that corporate democracy can prevail. It is submitted that in fact the Respondent

No. 1 Company had a third Director, Mr. Jayaprakash Shetty, who tendered his resignation in August, 2008. Neither has the said resignation been

accepted by Respondent No. 1 nor has any Form 32 been filed with the Registrar of Companies in that regard. However, it is learnt that the said

Jayaprakash Shetty has been poached by Appellant No. 1 and appointed as a Director in the competing business set up by the Appellant No. 1

i.e. Kapotex. Form No. 32 filed by appointing Mr. Shetty as a Director from 1st September 2008 is produced before the Court. It is submitted

that as a continuing Director drawing remuneration, nothing prevented the Appellant No. 1 from calling a meeting of the Board of Directors. It is

submitted that there is no dispute that upto January 2008, meetings of the Board of Directors were regularly held. It is the case of the Appellant

No. 1 that from January 2008, the Appellant No. 1 had himself voluntarily withdrawn from the functioning of Respondent No. 1 Company. As

such it is the Appellant No. 1 who did not cooperate with Respondent No. 2 in holding meetings of the Board of Directors. The e-mail dated 23rd

October 2008 relied upon by the Appellant No. 1 suggesting that statutory compliances are not being met with, was in fact sent by Respondent

No. 1 Company to the Appellant No. 1, inasmuch as the statutory compliance had not been fulfilled on account of the non-co-operative attitude of

Appellant No. 1. Therefore such reliance upon the said e-mail is misplaced. Further, there was no default in filing of the accounts with the Registrar

of Companies, on the date of this e-mail. In support of these submissions, Respondent Nos. 2 and 5 have relied on the decisions in: (i) Hanuman

Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, ; and (iii) Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad

(Dead) thr. Lrs. and Others, .

50. As regards non-payment of salaries to employees of Appellant No. 1, it is submitted that this allegation is made in paragraph 26 of the Petition

on the basis of a letter dated 10th September 2008 addressed by the Appellant No. 1 to the Accounts Department of Respondent No. 1 wherein

Appellant No. 1 has set out a list of employees whose salaries were not paid for the month of August 2008. The Respondent No. 1 has not

received the said letter. In any event, the list mentioned includes the Appellant No. 1 and his son. It is submitted that despite admittedly having

withdrawn from the management and not having done any work whatsoever for the Respondent No. 1 Company, the Appellant No. 1 has

withdrawn over Rs. 1 crore from the account of Respondent No. 1 towards his own expenses i.e. Appellant No. 1 has withdrawn a sum of over

Rs. 60 lakhs by signing cheques towards his own expenses. Further, on 11th May 2009, the Appellant No. 1 withdrew an amount of Rs.

2,50,000/- (less TDS) purportedly towards Directors remuneration. Furthermore, the Appellant No. 1 has in October, 2011 withdrawn a sum of

Rs. 38,00,000/- from the account of Respondent No. 1 Company towards his own expenses. It is submitted that the expenses claimed by

Appellant No. 1 are on behalf of his son. The said expenses include expenses towards restaurant, bars, hair dressing and spas. It is submitted that

the employment of the son of the Appellant No. 1 is terminated on 13th November 2008 for breach of the secrecy clause set out in his

appointment letter. It is submitted that the other person mentioned in the said list is one Sashidharan. The said Sashidharan as of August 2008

withdrew from the services of Respondent No. 1 and has joined as an employee of Kapotex i.e. the competing business set up by Appellant No. 1

and his family members. It is submitted that the persons mentioned at Sr. Nos. 2 to 6 of the letter dated 10th September 2008 have at no point of

time been the employees of Respondent No. 1, and therefore no question arises of paying any salary to them. It is submitted that the claims made

for salaries, reimbursements etc. by the Appellants are made in their capacity as Directors of Companies and not as shareholders. The question

thereof of oppression of Appellants as shareholders does not arise.

51. As regards the allegation that the Appellant No. 3 (mother of Appellant No. 1 and Respondent Nos. 2, 3 and 4) is not reimbursed even qua

her medical expenses, it is submitted that there does not appear to be any allegation in the petition with regard to reimbursement of the expenses of

Appellant No. 3 and that the allegations are only made across the Bar at the time of oral arguments. It is submitted that in the report of the

Company Registrar who was appointed by this Court vide order dated 17th March 2010, to attend the EOGM of the Respondent No. 1

Company, it is clearly recorded that Respondent No. 2 handed over a cheque of Rs. 2,00,000/- from his personal account which was accepted

by Appellant No. 3. The Respondent No. 1 in fact vide a letter dated 5th May 2011 forwarded a cheque in the sum of Rs. 2,27,240/- to his

mother towards her medical expenses. Strangely by a letter dated 20th June 2011 (after a period of one year had elapsed since the aforesaid

cheque of Rs. 2,00,000/- was handed over to Appellant No. 3, a letter was addressed by the Advocates for the Appellants to Respondent No. 2

enclosing the original cheque. It is submitted that this conduct shows the mala fides and oblique motives of the Appellants in trying to invoke the

sympathy of this Court. In support of this contention, Respondent Nos. 2 and 5 have relied on the decision in Mohta Bros. (P.) Ltd. and Others

Vs. Calcutta Landing and Shipping Co. Ltd. and Others, . It is submitted on behalf of Respondent Nos. 2 and 5 that in view of the withdrawal of

the Appellant No. 1 from the functioning of Respondent No. 1 Company, it was anticipated that the Appellant No. 1 would resign as a Director

also. In these circumstances, with a view, not to precipitate matters, the Respondent No. 2 did not take any immediate action. It is therefore

submitted that the learned member of the CLB has correctly held that the Appellants have not made out any case of oppression and

mismanagement.

52. The Learned Senior Advocate appearing for Respondent Nos. 3 and 4 has reiterated the submissions made on behalf of Respondent Nos. 2

and 5. It is further pointed out that Respondent No. 4 had requisitioned a meeting by a notice dated 12th March 2010 for appointment of

Additional Directors because by that time the Appellant No. 1 and the Second Respondent who were the only Directors of the Respondent No. 1

Company were not able to concur on any issues, resulting in total breakdown in the functioning of the first Respondent Company. The said notice

was challenged by the Appellants by filing a Company Application. By an order dated 17th March 2010, the said meeting was allowed to be

conducted. However, it was ordered that the Resolutions passed at the said meeting would not be implemented. The Respondent No. 4 was

elected as a Director along with two Additional Directors for the purpose of functioning of the Board of Directors of the first Respondent

Company so as to enable effective discharge of the functioning of the first Respondent Company. However, due to the order passed by this Court,

the new Board of Directors could not take charge. It is submitted that therefore the so-called deadlock has been occasioned by acts of Appellant

No. 1 and he cannot seek to take advantage of the deadlock created by himself. It is submitted that there is no deadlock and if the principles of

corporate democracy are followed, the Company would certainly be able to function without any hindrance and/or obstruction from any

shareholder. It is submitted that during the period 2008 to 2011, the Appellants have withdrawn from the first Respondent Company a sum of Rs.

1,44,55,441/- from time to time and even after deducting the amounts paid to the mother (Appellant No. 3), the amount withdrawn still remains at

Rs. 1,37,07,951/-.It is submitted that the Appellants have been fleecing the first Respondent Company and at the same time making huge profits in

their own Company by running a rival business and enjoying benefits both from the first Respondent Company as well as their own Company. It is

submitted that the Appellants had made an application before this Court for withdrawal of remuneration on the ground that they need money for

their subsistence. Though this Court did not pass any order, the Appellant No. 1 unilaterally withdrew a sum of Rs. 38 lacs from the first

Respondent Company by signing his own cheque and thereafter addressed a letter to the second Respondent falsely stating ""Thank you very much

for arranging the funds for remuneration"". He submitted that from the correspondence of the State Bank of India, it is clear that the Bank refused to

continue with the financial facilities granted to the Respondent No. 1 Company because the Appellant No. 1 refused to sign the revival letters,

which caused serious financial problems. It is submitted that all the allegations pertaining to non-payment of medical expense to the mother i.e.

Appellant No. 3, are only made by the Appellants and their Advocates to gain false sympathy of this Court, despite the fact that in 2010, the said

amount was paid to the mother by issuing the cheque. It is submitted that as far as the allegation pertaining to non-finalization of accounts, not

convening calling of the Board Meetings, not paying the salary and expenses of Appellant No. 1 are concerned, it is important to note that

admittedly till 2nd January 2008, the Appellant No. 1 was in charge of and running the business of the first Respondent Company. It is only on 2nd

January 2008 that Appellant No. 1 executed a note and circulated the same under which he gave up the charge of the first Respondent Company

and G.R. Woollen Mills to Respondent No. 2. It is also an admitted position that in December 2008, Appellant No. 1 filed Company Petition and

obtained various interim orders preventing the first Respondent Company from calling the meetings. Thus, at the highest it is a matter of less than

one year that Respondent No. 2 took charge of Respondent No. 1 Company. It is submitted that it is settled law that an isolated act of not calling

meetings and not passing or finalizing accounts cannot amount to oppression and mismanagement as has been held by the Hon''ble Supreme Court

in the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, . It is submitted that in the

case of Chatterjee Petrochem (I) Pvt. Ltd. Vs. Haldia Petrochemicals Ltd. and Others, , following the decision in Needle Industries Ltd., it has

been held that an isolated act of not calling meetings or not finalizing the accounts cannot amount to oppression and mismanagement under Sections

397 and 398 of the Companies Act, 1956.

53. Mr. Sanjay Jain, the Learned Advocate appearing for Respondent No. 9 expressed a strong grievance against the conduct of CLB in not

giving an opportunity of being heard to Defendant No. 9. However, he submitted that Respondent No. 9 has always remained neutral qua the

affairs of the Company and are anxious that they should be bought out either by the appellant Group or by the Respondent group.

54. In rejoinder, Mr. Seervai, Learned Senior Advocate appearing for the Appellants, whilst denying and disputing the submissions made on behalf

of Respondent Nos. 2 to 5, submitted that Mr. Jayprakash Shetty was a Director of the Company till he reached his age of retirement in August

2008. Therefore, from January 2008 till August 2008, Respondent No. 2 could have called a Board Meeting with Mr. Jayprakash Shetty as there

was no deadlock. There was also no injunctive order during this period. He submitted that the allegation that Mr. Jayprakash Shetty was induced

not to act on behalf of the Company is incorrect and Respondent No. 2 had signed the annual returns of the Company for the year 2006-2007 on

30th April 2008 along with Mr. Shetty. He submitted that Appellant No. 1 was admittedly asked to disengage from the affairs of the Company

from 2nd January 2008. He also had no access to statutory registers, accounts, documents, etc. of the Company and therefore it was not possible

to call any meeting of the Board of Directors as no purpose would have been served by him ""calling"" such a Board meeting. He submitted that

Respondent No. 2 had more than six months to call the AGM of the Company for the financial year ended 31st March 2008, which he failed to

call. It is submitted that even after 30th January 2010 i.e. when the Company Petition was dismissed, Respondent No. 2 chose not to call the

meeting of the Company for approving the accounts of the Company when there was no injunction operating against the Company. Mr. Seervai

submitted that not holding meetings is not an ""isolated"" act because it is an act of oppression which will have a continuing effect on the management

of the Company. He submitted that the decisions cited in support of this argument by the Respondents i.e. the decisions of the Hon''ble Supreme

Court in the case of Needle Industry Ltd. (supra) and Chatterjee Petrochem (India) Pvt. Ltd. (supra), that an isolated act of not calling meetings or

non finalization of the accounts, cannot amount to oppression and mismanagement under Sections 397 and 398 of the Act do not apply to the facts

of the present case as there is ""no isolated act"" in the present case. In the present case, there are several continuing acts of oppression and

mismanagement u/s 397 and 398 of the Act.

55. Mr. Seervai further submitted that the Respondents relied on the decision of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., in support of the

proposition that a petition for oppression can succeed if a case is made out for just and equitable winding up of the Company. He submitted that

the said Judgment was considered in Needle Industries (India) Limited (supra) and thereafter the Hon''ble Supreme Court of India held that even

though the Company Petition fails and the Appeals succeed on the finding that the holding company has failed to make out a case of oppression,

the Court is not powerless to do substantial justice between the parties. In this regard, Mr. Seervai has also relied on the decision in M.S.D.C.

Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, . Mr. Seervai submitted that the decision of the Hon''ble Supreme Court in

Hanuman Prasad Bagri (supra) relied upon by the Respondents is not applicable to the facts of the present case. Further the judgment has been

considered in the case of MSDC Radharaman (supra) but not followed by the Hon''ble Supreme Court of India. As regards the decision in re:

Lundie Bros. (supra) relied upon by the Respondents, Mr. Seervai submitted that non-maintaining statutory records of the Company, not giving

inspection of statutory documents, not holding shareholders meeting, non-filing of statutory returns in the RoC, siphoning of funds to set up

Gorashyam, etc. are acts of oppression against the shareholders. Referring to the decision of the Hon''ble Supreme Court in Sangramsinh Gaikwad

(supra) relied upon by the Respondents in support of their submission that Respondent No. 2 in his capacity as a Director, did not act against the

interest of the Company, Mr. Seervai submitted that the said submission is negated from the facts as brought out by the Appellants and the

documents produced by the Sarpanch. It is now clear that Respondent No. 2 always intended to start a small scale industry on his lands at

Khopoli and such an industry would compete with the business of the Company.

56. Mr. Seervai has submitted that the Respondents cannot suggest that the Appellants are not entitled to salary and allowances or that the salary

and allowances drawn by the Appellants were either illegally or improperly done, inasmuch as Respondent No. 2 had himself signed several

cheques for payments to the Appellants towards the same as late as on 30th July 2010. The Respondents have not informed the Court that an

amount of Rs. 54.36 lacs is still due and payable by the Company to the Appellants as per the details furnished vide letter dated 6th July 2012. He

submitted that Respondent No. 2 had consented to the withdrawal of Rs. 38 lacs by the Appellant No. 1 and later on with mala fide intentions

backed out of this and filed Company Application (Lodging) No. 44 of 2011 for refund of money withdrawn by Appellant No. 1. Mr. Seervai

submitted that vide Resolution dated 1st January 2003 passed in Respondent No. 6 Company, the Appellant No. 3 is entitled to salary plus perks

which was being paid by the Company. The perks have not been paid to Appellant No. 3 from the year 2009 upto 30th June 2012 and an amount

of Rs. 5,53,388/- is yet payable. Mr. Seervai has submitted that the Appellant No. 1 was in no way responsible for the delay in finalization of the

accounts for 2007-2008 and 2008-2009, nor for the accounts being audited. Appellant No. 1 is being made a convenient bogey for this gross

dereliction on part of Respondent No. 2. It is submitted that the Respondents wish to suppress the accounts from the scrutiny not only of the

minority shareholders but also of the Court for reasons too obvious to labour. Mr. Seervai has on behalf of the Appellants denied and disputed the

allegations that the Banking facilities of the Company had been cancelled owing to non-co-operation of Appellant No. 1 as he refused to sign for

the renewal of the said facilities. He submitted that the Banking facilities were cancelled owing to non-submission of the financial accounts of the

Company as is evident from the numerous letters addressed by the Bank between June 2008 and March 2011 to the Company. Mr. Seervai

submitted that the payments made by the Company to the Solicitors of Respondent No. 2 and 5 are required to be recovered from Respondent

No. 2 personally. Mr. Seervai therefore submitted that it is clearly established from the above facts and submissions that the Respondents by not

paying salaries/reimbursements due to the Appellants; son of Appellant No. 1 and the staff working for the Appellant No. 1; not calling any Board

Meeting and/or EOGM and non-finalization of accounts of the Respondent No. 1 Company have committed acts amounting to oppression of the

minority shareholders and mismanagement of the Respondent No. 1 Company.

57. I have considered the submissions advanced by the learned Advocates appearing for the parties as regards the unilateral decisions taken by

Respondent No. 2, not providing records, not making payments due to the Appellants and the staff members working for the Appellants, failure to

reimburse the Appellants, not calling meetings, non-finalization of accounts and the alleged deadlock in the first Respondent Company. According

to the Appellants, disputes have arisen between the Appellant No. 1 and Respondent No. 2 since December 2003 and despite attempts made by

the family members and close relatives to sort out the same, no settlement has been arrived at. It is alleged in the Petition that Respondent No. 2

was conducting the affairs of the Company unilaterally and without consulting Appellant No. 1 and that the Appellant No. 1 did not object to every

action taken by Respondent No. 2 as he was his elder brother. However, the only instance of the Respondent no. 2 allegedly conducting the affairs

of the Company unilaterally, which is pointed out by the Appellants in the Petition is a Resolution dated 26th March 2004 whereby the Company

had taken the Lonavala property belonging to the Respondent No. 2 on leave and license basis at a monthly compensation of Rs. 9000/-. As

explained by Respondent No. 2, the said premises were taken by Respondent No. 1 Company to use it as an extension of the office-cum-guest

house for its employees. The Leave and Licence was for a period of 11 months and not renewed thereafter. In fact, the audited accounts for the

relevant period were approved by the Appellant No. 1 himself in 2005. No objection has been raised in writing by the Appellant No. 1 qua this

decision of Respondent No. 2 to take the Lonavala property of Respondent No. 2 for a period of 11 months on leave and license basis. In

paragraph 38 of the Petition, the Appellants have also admitted that prior to December 2007, the Appellant was looking after the day to day

affairs of Respondent No. 1 Company. In case of any unilateral decision by Respondent No. 1 as alleged, the Appellant No. 1 would surely have

recorded the same at least once. The explanation that the Appellant No. 1 did not object as Respondent No. 2 was his elder brother is not at all

convincing. It therefore cannot be held that the said decision qua the Lonavala property of the Respondent No. 2 was unilateral. In fact, in the

Appeal, the Appellants have not relied on the said instance as an act of oppression or mismanagement.

58. The Appellants have next alleged in the Company Petition that the minutes of the Meeting of the Board of Directors of the Companies of the

Kapur Family were not sent to Appellant No. 1 immediately but the same were sent to him much later, after several reminders from the Appellant

No. 1, as the division talks were initiated. In support of his case, Appellant No. 1 has relied on an e-mail dated 5th January 2005 addressed by

him to the Company Secretary. It is stated in the Petition that Appellant No. 1 has recorded in the said e-mail that he has received copies of

various minutes of meetings purported to be held of the Board of Directors of the said Companies and he has also stated that henceforth the

Resolution should bear the signature of Appellant No. 1 so that the Resolutions are to his knowledge. The said e-mail is annexed as Annexure A-

5, page 122 of the Petition. A reading of the said email shows that the Appellant No. 1 has neither made any reference to the alleged ""several

reminders"" in the said e-mail nor has he referred to the meetings as ""purported to be held"". Again, the said e-mail is addressed only to the

Company Secretary of the Respondent No. 1 and not to Respondent No. 2. Even a copy of the said e-mail is not marked to Respondent No. 2.

This also shows that the Appellant No. 1 did not hold the Respondent No. 2 responsible for the alleged delay in forwarding the minutes to the

Appellant No. 1. After the said letter, the Appellant No. 1 admittedly continued active participation in the business and affairs of the Respondent

No. 1 Company for two years until he withdrew from the day to day affairs of the Company on 24th December 2007/2nd January, 2008.

However, not a single letter is produced by the Appellants to show that the instructions recorded in the said letter dated 5th January 2005 were

thereafter not followed by the Respondent No. 1 Company. Therefore, this too cannot be treated as an allegation of oppression and/or

mismanagement against the Respondent No. 2.

59. Thereafter the Appellants have alleged in the Petition that during September 2006 there was an oral agreement between the Appellant No. 1

and Respondent No. 2 whereby certain terms as regards division of assets were arrived at between the parties. However, the proposal was

subsequently cancelled by Respondent No. 2 in September 2006 itself. Thereafter a new proposal was discussed and agreed upon only on 24th

December 2007 after which Appellant No. 1 started withdrawing from the day to day affairs of Business Assets Group, though he continued to be

a Director of the Company as well as the shareholders. A note to this effect dated 2nd January 2008 was also circulated to all concerned. Thus,

no case of oppression of minority shareholders or mismanagement of the first Respondent Company prior to 2nd January, 2008 is made out by the

Appellants. In fact, it can also be said that no allegation of oppression or mismanagement of the first Respondent Company prior to 2nd January

2008 (except the allegation pertaining to Gorashyam which is in detail dealt with hereinafter) is found in the Petition.

60. On 24th December 2007, it was agreed between the parties that the Companies of Kapur Family would be divided into two parts. One called

the ''Business Assets Group'' and other called the ''Property Assets Group''. It was further agreed that the Business Assets Group was to be

controlled by Respondent No. 2 whereas the Property Assets Group was to be controlled by Appellant No. 1 and that Appellant No. 3 and

Respondent Nos. 3 and 4 were also to be part of the Property Assets Group of the Appellant No. 1. However, it is an admitted fact that the draft

of the detailed MoU which was drawn up in furtherance of the Agreement dated 24th December 2007 was ""neither finalized nor signed"" by the

parties (Paragraph 33 of the Petition). It is only since the parties had tentatively agreed to distribute the assets of the Respondent No. 1 Company

between the two groups, that on 2nd January 2008, Appellant No. 1 and Respondent No. 2 circulated a note informing all concerned that the

business and production units of Respondent No. 1 and G.R. Woollen Mills including the production units of G.R. Woollen Mills at Ghatkopar,

Grentex Woollen Godown, Grentex & Company, Sarigam and the plant and machinery at Khopoli will be handled by Ravikant Kapur and the

matters pertaining to Grenville Park ""A"" Wing and flats/Grentex Wools Pvt. Ltd. along with the leasehold land of GRWM at Ghatkopar will be

handled by Shri Rajeev Kapur. Appellant No. 1 has alleged that he withdrew from the day to day affairs of the Company as he was specifically

asked by Respondent No. 2 to disengage from the management and affairs of Respondent No. 1. Respondent No. 2 has denied this and has

submitted in paragraph 19(b) of his Affidavit-in-Reply: "" As set out herein, it is admittedly Petitioner No. 1 who has, ostensibly for implementation

of the Without Prejudice Proposal but as it now transpires with a view to devote time for his own hidden plans of setting up a parallel and

competing business, with mala fide intent withdrawn himself from the day to day affairs of the business assets group (including Respondent No. 1

Company) and therefore voluntarily executed the note dated 2nd January, 2009."" No evidence in support of this allegation is produced by

Appellant No. 1 and therefore the allegation made by the Appellant No. 1 that he was asked by Respondent No. 2 to disengage from the

management and affairs of Respondent No. 1 cannot be accepted. It is therefore clear that the Appellant No. 1 has voluntarily withdrawn from the

day to day affairs of the Respondent No. 1. The said note does not provide for a change in the Board of Directors of any of the Companies

including the first Respondent Company. It is therefore clear that even after 2nd January 2008, Appellant No. 1 also continued to be on the Board

of Directors of Respondent No. 1 along with Respondent No. 2. It is only because the business and production units were to be actually handled

by Respondent No. 2 that all concerned were directed to refer the matters relating to the business and affairs regarding Respondent No. 1 and

G.R. Woollen Mills to Respondent No. 2. The note did not include any fetters on the Appellant No. 1 who worked/functioned as a Director of

Respondent No. 1. It appears from the correspondence that ensued thereafter that attempts were continuously made to work out the arrangement

incorporated in the MoU. However, the same was not working out in view of the disputes in the Property Assets Group comprising of Appellant

Nos. 1 and 3 and Respondent Nos. 3 and 4. This is evident from the letter dated 23rd January 2008 addressed by Respondent No. 2 to the

Appellant No. 1 requesting him to resolve the disputes between the Property Assets Group and cautioning him that in the event the said disputes

between the Property Assets Group are not resolved, the same may result in litigation. Respondent No. 4 (sister of Appellant Nos. 1 and

Respondent Nos. 2 and 3) have also written a letter dated 16th April 2008 to the Appellant No. 1 making serious allegations against him and

explaining why the MoU could not be worked out.

61. The Appellant No. 1 has relied on certain letters purportedly sent by him to the Respondent No. 1 Company/Respondent No. 2, between 8th

January 2008 and 6th May 2008, and which according to him were ignored by the Respondent No. 2 thus constituting acts of oppression of the

Appellants as minority shareholders by Respondent No. 2 and his supporters. I have perused the said letters. The letter dated 8th January, 2008

purportedly written by the Appellant No. 1 pertains to the keys of the flat belonging to Respondent No. 7 and the books of accounts of

Respondent No. 7 and does not pertain to the first Respondent Company. The letter dated 28th January, 2008 purportedly written by the

Appellant No. 1 also does not concern the first Respondent Company and admittedly pertains to the Property Assets Group. The letter dated 25th

February 2008 also admittedly pertains to Respondent No. 7 and not the Respondent No. 1. According to the Appellant No. 1, he addressed a

letter dated 3rd April, 2008 to the Company Secretary of the Company requesting to furnish him Minutes of the Meetings held during the year

2006-2007 for his records including the AGM of all the companies of the Kapur Family. According to him, though the said letter was received by

the Administration Department, there was no reply. According to him, he had also addressed a letter dated 26th April 2008 to the Company

Secretary of the Company inter alia asking for share certificate numbers and their distinctive numbers of all shareholders in Companies where

returns were being filed. Again, according to him though the said letter was received by the Administration Department, there was no reply. As

regards both the letters dated 3rd April 2008 and 26th April 2008, Respondent No. 2 has pointed out on affidavit that since the Company, to the

knowledge of the Appellant No. 1, does not have any ""Administration Department"", the question of the ""Administration Department"" of

Respondent No. 1 receiving and replying to the alleged letters dated 3rd April 2008 and 26th April 2008 does not arise. Without prejudice to the

said contention, it is submitted by Respondent No. 2 that assuming whilst denying that Respondent No. 1 has received the alleged letters dated 3rd

April 2008 and 26th April 2008, the same do not bear the signatures of Appellant No. 1 and the question therefore of Respondent No. 1

Company responding to letters by unidentified and/or unauthorized persons also does not arise. The Appellant No. 1 has also contended that on

6th May 2008 he has addressed a letter to Respondent No. 2 requesting for an updated statement of his personal account with all the Companies

wherein he has stated that he had not been receiving the accounts and bank statements since long and wanted that the same be provided to him on

a regular basis till implementation of the MoU. The Respondent No. 2 has in his affidavit denied that the alleged letter dated 6th May 2008 was

received by him or that he is aware of the same. According to Respondent No. 2 since he has not received the letter, the question of him replying

to the alleged letter never arose. Without prejudice to his submission that he has not received the letter, Respondent No. 2 has pointed out that the

said letter does not bear the signature of Appellant No. 1 and the question therefore of Respondent No. 2 responding to such a letter by

unidentified and/or unauthorized persons does not arise. The Respondent No. 2 has further pointed out that at the time of inspection of the originals

of the documents referred to and relied upon by the Appellants in the Company Petition, the Appellant No. 1 was unable to identify the signature

affixed on the alleged letter dated 6th May 2008 and in fact the Appellants have through their Advocates letter dated 8th April 2009 (received on

9th April 2009) addressed to the Advocates for the Respondents contended that the name of the signatory of the alleged letter dated 6th May,

2008 is not relevant. Respondent No. 2 has therefore submitted that this itself shows that the said letter dated 6th May 2008 is not a genuine letter.

The Appellant No. 1 has in his rejoinder dated 9th November 2009 only denied what is stated by the Respondent No. 2 qua the said letters.

Appellant No. 1 has not produced any evidence to show that the said letters were in fact signed by him or on his behalf by an authorized signatory

and the same were received by the Respondent No. 2 and/or his office. In any event, the said letters are admittedly either unsigned or not signed

by the Appellant No. 1 and the Respondent No. 1 cannot be blamed for not responding to the letters signed by unidentified individuals. There is

also no follow up found for these letters in the documents annexed to the petition. It therefore cannot be held that the conduct of the Respondent

No. 2 is oppressive qua the Appellants for not responding to the said three letters dated 3rd April 2008 calling for minutes of meetings held in

2006-2007; 26th April 2008 calling for share certificate numbers/distinctive numbers of all shareholders; and 6th May, 2008 calling for his

updated statement of personal account.

62. Section 397 of the Act can be invoked by any member of a company who complains that the affairs of the company are being conducted in a

manner oppressive to the member or members. It is well settled that member/members means the shareholder/shareholders of the Company. As

held in re: Lundie Brothers Ltd. (supra), the grievance of a member that he has been ousted as a working Director or his remuneration has been

reduced has nothing to do with his status as a shareholder in the Company. That relates to his status as a Director of the Company and not to his

status as a shareholder of the Company. The letter dated 26th August, 2008 from Appellant No. 1 informing Respondent No. 2 that he has not

been reimbursed for the amount spent and that he should receive a cheque for his telephone, the last date being 29th August, 2008; the letter dated

4th September 2008 seeking reimbursements by the son of Appellant No. 1; the letter dated 10th September 2008 regarding salary of 9

employees including Appellant No. 1 and his son and the letter dated 8th November 2008 to Respondent No. 2 for the salary/bonus of few

employees including Appellant Nos. 1 and 2 and the son of the Appellant and certain reimbursements required to be made, are letters not written

by the Appellant No. 1 in his capacity as a shareholder of the Company but are letters written in his capacity as the Director of the Company. In

any event, the said letters show that the amounts sought by the said letters are not some old arrears but a letter is written in October 2008 qua the

amounts which were to be paid in September 2008 and a letter is written in November 2008, for the amounts which were payable in October

2008. These delays on the part of the Company/Respondent No. 2 in making payments to the employees and/or the Directors as alleged can by

no stretch of imagination be termed as oppression of minority shareholders. Again, apart from the fact that there are disputes as to whether all the

persons named in the letters sent by the Appellant No. 1 seeking the salary/bonus are in fact the employees of the Respondent No. 1 Company, it

is very pertinent to note that the Appellant No. 1 has admittedly withdrawn monies from the Bank accounts of the Companies by using his authority

as a Director of the Company and has appropriated the said sums towards the salaries allegedly due to Appellant No. 1, the son of the Appellant

No. 1 and the staff working for him. In fact, as pointed out on behalf of Respondent Nos. 3 and 4, though this Court in Company Application

(Lodging) No. 14 of 2011 (Pg. 385 of the Compilation of documents submitted by Respondent Nos. 3 and 4) had not given any directions to the

Company qua certain payments/reimbursements to be made to the Appellants, Appellant No. 1 has signed a cheque for Rs. 38 lakhs and after

withdrawing the said amount, appropriated the same towards the said payments/reimbursement and has written a note to the Respondent No. 2

stating, ""Thank you very much for arranging the funds for remuneration"". The argument now advanced by the Appellant No. 1, that this was done

in view of the consent given to him by the Respondent No. 2 cannot be accepted. In my view, therefore the Appellants by making the aforestated

allegations of non-payments/delayed payments of salaries/reimbursements etc. of the Appellants, the son of Appellant No. 1 and certain employees

of the Respondent No. 1 Company have failed to establish any oppression of the Appellants shareholders by Respondent Nos. 2 to 5. In fact, no

averment is found in the Petition as regards the reimbursements not made to the Appellant No. 3 mother. Question No. 2 set out in paragraph 2 of

this judgment is therefore answered in the negative.

63. It is submitted on behalf of the Appellants, that the Respondent No. 2 has repeatedly admitted that the Companies are without a fully functional

Board. Respondent No. 2 has therefore also admitted that there is a deadlock with regard to the conduct of the business of the Company.

Respondent No. 2 therefore since 2nd January 2008 did not call any meeting of the Board of Directors and has also not called the Annual General

Meeting of the first Respondent Company on or before 30th September 2008 and therefore also failed to table the Accounts for the year ending

31st March 2008. The Appellant No. 1 has relied on the e-mail addressed to him by the Respondent No. 2 dated 13th November 2008 and has

submitted that by the said e-mail Respondent No. 2 after admitting that the Companies are without a fully functional Board had offered two

choices viz. that the Companies and properties be run by Appellant No. 1 with Respondent No. 2 going out of Directorship or Respondent No. 2

should take over the running of business and properties and Appellant No. 1 should go out of Directorship. It is submitted that the Respondent

No. 2 had also forwarded his resignation from the Company to the Appellant No. 1. However, when the Appellant No. 1 called a meeting in view

of the resignation of Respondent No. 2, Respondent No. 2 did not attend the same. It is true that in the said e-mail, Respondent No. 2 has stated

that the Companies are without a fully Functional Board. However, in my view, the said e-mail is required to be read in its entirety. The statement

in the e-mail that the Companies are without a fully Functional Board is immediately followed by the statement that: ""the only avenue available to

cure this is by due legal process in which the shareholders will have to exercise their rights, and majority wishes will have to be accepted"". The two

choices are thereafter offered by the Respondent No. 2 since as recorded in the e-mail, Appellant No. 1 had through his friends rebuked

Respondent No. 2 on the ground that Appellant No. 1 was removed from the Company. Referring to the disputes and deadlock in the Property

Assets Group consisting of Appellant Nos. 1 and 3 and Respondent Nos. 3 and 4, Respondent No. 2 also recorded in the said e-mail that the

deadlock between Appellant No. 1 and Respondent Nos. 3 and 4 for about a year is now further compounded by the serious conflict of interest

due to setting up of a competing Wool Spinning business by the Appellant No. 1 along with his wife and son. The deadlock as well as the setting

up of a competing business coupled with long delays and change in circumstances has completely destroyed the very basis of attempting any family

settlement. Respondent No. 2 has also recorded in his said e-mail that his work is constantly being check-mated and/or sabotaged by the

Appellant No. 1 and/or at his instance. Respondent No. 2 has therefore called upon Appellant No. 1 to immediately answer which of the two

choices he wants to exercise and has only with a view to show his seriousness, forwarded his resignation in advance, addressed to the Board of

Directors. The Appellant No. 1 could have immediately disputed the allegations made in the said e-mail dated 13th November 2008. However, he

chose not to do so. Instead, immediately on the next day he addressed a letter to the Respondent No. 2 wherein he has not denied or disputed the

allegations made by the Respondent No. 2 in his e-mail dated 13th November 2008 but has after referring to the email received from the

Respondent No. 2, informed Respondent No. 2 that he has called an urgent meeting on Saturday, 15th November, 2008 at 2 p.m. at the

registered office of the Company ""in view of resignation of Mr. Ravikant Kapur"". It is obvious/natural that Respondent No. 2 did not attend the

said meeting since the Appellant No. 1 has clearly misconstrued the e-mail dated 13th November 2008 sent by the Respondent No. 2 to the

Appellant No. 1 pointing out the situation prevailing in the Company qua its working and asking the Appellant No. 1 to select one of the two

choices offered by him in the said e-mail and only with a view to express the seriousness of the matter and his concern qua the interest of the

Company Respondent No. 2 had sent his resignation letter to the Appellant No. 1. Instead Appellant No. 1 accepted the resignation of the

Respondent No. 2 as if the Respondent No. 2 has by his e-mail dated 13th November, 2008 only forwarded his resignation to the Appellant No.

1. Respondent No. 2 has therefore correctly addressed an e-mail dated 15th November 2008 to the Appellant No. 1 pointing out how the

Appellant No. 1 can choose to misinterpret the e-mail dated 13th November 2008 forwarded by the Respondent No. 2 to the Appellant No. 1.

By the said e-mail, Respondent No. 2 also recorded that unfortunately the attitude of Appellant No. 1 has not changed and his response to the e-

mail dated 13th November, 2008 discloses that all that he (Appellant No. 1) wants is to pick and choose what suits him, without addressing the

major issues and for which unfortunately the Company has been held to ransom. Respondent No. 2 further recorded that in the circumstances

what is required is not a Board Meeting but a meeting of the shareholders, to thrash out the issues affecting the running of the Companies including

issues affecting the Company''s interest and therefore a General Meeting ought to be called. Respondent No. 2 thereafter by his e-mail dated 22nd

November 2008 further recorded that the Appellant No. 1 has put himself in a serious conflict of interest with his interest in the businesses of

Respondent No. 1 and Grantex Woollen Mills by secretly setting up a competing business - Kapotex Industries Pvt. Ltd. - and therefore obviously

the Appellant No. 1 cannot look into or look after the interest of Respondent No. 1''s business or the business of Grentex Woollen Mills having

debarred himself and vacated his position as Director under the Act. Respondent No. 2 gave the Appellant No. 1 the choice to voluntarily step

down as Director of the Respondent No. 1 Company or have the said issue dealt with in accordance with law. Respondent No. 2 also recorded in

the said letter that the statutory compliances are pending and the Board is stuck because of his (first Appellant) insistence of having only two

Directors on the Board. Respondent No. 2 therefore called upon the Appellant No. 1 to immediately formally resign from the Board of

Respondent No. 1 and Grentex Woollen Mills Pvt. Ltd. to allow the Companies to work. The Appellant No. 1 by his reply dated 2nd December

2008 addressed to Respondent No. 2 i.e. three days before the Company Petition was prepared (Pg. 37 of the Petition) for the first time inter alia

raised a grievance that the Board Meetings of the Company are not convened, and repeated requests for information of the Group Companies

have fallen on deaf ears. The Appellants thereafter on 5th December 2008/11th December 2008 filed Company Petition No. 112 of 2008 before

the CLB, Mumbai Bench, alleging oppression and mismanagement of the Appellants by Respondent Nos. 2 to 5, inter alia alleging that no

meetings of the Board of Directors of the first Respondent Company was held from January 2008 to 5th December 2008 and the AGM was not

held on or before 30th September 2008 and accounts for the year ending 31st March 2008 were not placed before the shareholders.

64. From the aforesaid facts it is clear that there is no deadlock between the shareholders of the Respondent No. 1 Company. The allegations

made by the Appellant No. 1 against the Respondents are in his capacity as Director and not as a shareholder/member. As repeatedly stated by

Respondent No. 2 in his e-mails dated 13th November 2008 and 22nd November 2008, what is required is a General Meeting of the

shareholders where Directors can be appointed for the Company to have a functional Board. This will also ensure corporate democracy. The first

question therefore raised by the Appellants whether the CLB ought to have granted reliefs to put an end to the oppression and mismanagement

when ""admittedly there is deadlock with regard to the conduct of the business of the Company"" is answered in the negative.

65. From the aforesaid facts it is further clear that Appellant No. 1 and the Respondent No. 2 after circulating the note dated 2nd January 2008

(Annexure A-7 Page 127 to the Petition) had realised that the arrangement arrived at in the MoU had several difficulties in its way, before the

same was implemented. However, both the Appellant No. 1 as well as Respondent No. 2 continued to hope that the MoU would ultimately be

finalised and implemented. The parties carried out correspondence as regards the implementation of the MoU at least upto May 2008. It is clear

beyond any doubt that from 2nd January 2008, Appellant No. 1 did not participate in the day to day affairs of the first Respondent Company

though he continued to be the Director of the first Respondent Company along with Respondent No. 2. Respondent No. 2 carried the entire

burden of running the business/production activity of Respondent No. 1 Company as well as of G.R. Woollen Mills. At the same time, he was also

conscious of the fact that tension was mounting between the members of the Property Assets Group viz., Appellant Nos. 1 and 3 and Respondent

Nos. 3 and 4. He also wrote a letter on 23rd January 2008 itself to the Appellant No. 1 requesting him to resolve the disputes between the

Property Assets Group and cautioned Appellant No. 1 that in the event of the said disputes between the Property Assets Group not getting

resolved, the same may result in litigation. In the meantime, in May 2008, Appellant No. 1 floated a Company viz. Kapotex Industries Pvt. Ltd. to

carry out business similar to that of Respondent No. 1. This conduct on the part of Appellant No. 1 who also continued to be a Director of

Respondent No. 1, obviously created tension between Appellant No. 1 and Respondent Nos. 2, 3 and 4. In view of the MoU not being worked

out and some delays caused in making payments to the Appellants by way of salary and reimbursements, again further friction arose during this

period between Appellant No. 1 and Respondent Nos. 2, 3 and 4 and there being only two Directors on the Board of Respondent No. 1, no

Board Meeting was called by the Directors of the Company which they ought to have called. These circumstances also resulted in the AGM not

being called by 30th September 2008 and the accounts not being finalised. By 5th/11th December 2012, the Appellant No. 1 filed the above

Petition and by an order dated 14th December 2008, the Company was restrained by an order of injunction from calling any meetings. The

aforestated circumstances which prevailed from January 2008 to December 2008 resulted in non-calling of Board Meetings and the Annual

General Meeting and passing of annual accounts by 31st September 2008. However the said defaults cannot be attributed only to one Director i.e.

Respondent No. 2. Appellant No. 1 himself admittedly being a Director of Respondent No. 1 could have called a Board Meeting and as a

shareholder of the Company could have also requisitioned an Annual General Meeting to voice his grievances if his complaints qua Respondent

No. 2 had fallen on deaf ears as alleged. However, it appears that the Appellant No. 1 as well as Respondent No. 2 both were waiting in the hope

that the MoU would be implemented and their problems/grievances qua each other would consequently stand resolved. The meetings were not

held and accounts not placed before the General Body in view of the aforestated circumstances, and on 5th/11th December 2008 the Appellants

filed the Company Petition and obtained a stay on meetings. Under such circumstances in my view it cannot be held that Respondent No. 2 is to

be solely blamed for not calling the meetings of the Company and not finalising the accounts for the year ending 31st March 2008 by 30th

September 2008. It therefore cannot be held that non holding of Board meetings and the Annual General Meeting and passing of accounts for the

year ending 2008 constitutes oppression of shareholders and mismanagement of Respondent No. 1 by Respondent Nos. 2, 3 and 4 of the minority

shareholders i.e. the Appellants. The Respondent No. 2 also cannot be blamed solely for contravening the provisions of the Companies Act. The

Appellant No. 1 has voluntarily stayed away from the day to day affairs of the first Respondent Company. However, he has continued to be the

Director of the Respondent No. 1 during the period 2nd January 2008 to 5th/11th December 2008 i.e. the day on which the Appellants filed the

Company Petition No. 112 of 2008 and continues to be the Director till date. Even in the note dated 2nd January 2008, jointly issued by the

Appellant No. 1 and Respondent No. 2, there are no fetters provided qua the functioning of Appellant No. 1 as Director of the first Respondent

Company. Despite this, the Appellant No. 1 has not called for any meeting or written a single letter to Respondent No. 2 making a grievance about

not calling any meetings or qua accounts not being filed, except on 2nd December 2008 i.e. just before the filing of the Company Petition on

5th/11th December 2008. Appellant No. 1 has also not called upon Respondent No. 2 to call a Board Meeting or a General meeting of

Respondent No. 1. The excuse now given that the Appellant No. 1 did not have any papers cannot be accepted. The Appellant has alleged that

Mr. Shetty was a Director upto August 2008 and Respondent No. 2 could have called a Board meeting since there was no deadlock on the

Board. The Appellant No. 1 could also have done the same thing. Instead as stated in detail hereinafter the Appellant No. 1 in May 2008 floated

Kapotex Industries Pvt. Ltd. along with his wife and son to carry out similar business to that of Respondent No. 2 and later took Mr. Shetty in his

fold. It also cannot be lost sight of, that the Respondent No. 2 was slow in calling meetings and parting with information of the Respondent No. 1

being vary of the fact that the Appellant may use such information for promotion of the competing business set up by him and his family members at

the cost of Respondent No. 1. Such an apprehension would be the immediate reaction of any prudent person/s after coming to know that a

continuing Director on the Board of the Company has started or is in the process of starting business similar to the business of the Company. It is

also well settled that a Director of a Company cannot do any business in competition with the business of the Company in which he is a Director.

In fact, the Appellants have admitted that Kapotex Industries Ltd. started trial production in February 2009 and commercial production by March

2009 i.e. after filing of the Company Petition before the CLB. Therefore in my view it is not established by the Appellants that Respondent Nos. 2

to 5 are solely responsible for not calling the meetings and not passing accounts and are therefore guilty of oppression of the Appellants or

conducting the affairs of the Company in a manner which is in gross contravention of the provisions of the Act, thereby responsible for

mismanagement of Respondent No. 1 Company. Question No. 7 set out in paragraph 2 of this Judgment is therefore answered in the negative.

66. The Respondents have submitted that the MoU dated 24th December, 2007 could not be the subject matter of a Petition under Sections 397

and 398 of the Act. A perusal of the Company Petition shows that no relief is sought by the Appellants in the Petition with regard to the MoU. In

my view, the MoU was referred to in the Petition solely as background facts, inter alia to explain why Appellant No. 1 started withdrawing from

the day to day operations of the Company in January 2008. Therefore, though I have already given my finding that the Appellant No. 1 was not

specifically asked to disengage from the management of the affairs of the Company but he has voluntarily done so, I am of the view that only

because the facts pertaining to the MoU are mentioned in the Company Petition, it cannot be said/contended that the Appellants cannot file the

Company Petition under Sections 397 and 398 of the Companies Act, 1956. Question No. 3 set out in paragraph 2 of this Judgment is answered

accordingly.

67. Mr. Seervai has submitted that in 2005, Respondent No. 2 in direct competition with the Company''s business formed his personal proprietary

firm viz. Gorashyam Enterprises, offering products of scoured wool, tops and yarns, carpets, etc. Respondent No. 2 unilaterally and for ulterior

purposes declared his proprietary concern M/s. Gorashyam Enterprises as a supporting manufacturer of the Company without any Board

Resolution for the same. However, the Registration-cum-Membership Certificate which is signed by Respondent No. 2 does not show the said

M/s. Gorashyam Enterprises as the supporting manufacturer of the Company. The said Registration-cum-Membership Certificate was valid till

March 2010 and was being renewed year after year and also shows that the said M/s. Gorashyam Enterprises dealt with identical products. It is

submitted that starting in or about October, 2005 and upto 31st March 2007 itself, Respondent No. 2 unilaterally spent an amount of Rs.

1,60,44,000/- for importing, in the name of the Company, an old outdated mid 80''s make scouring plant from New Zealand, and for building on

his personal property at Khopoli, the factory shed to house the said imported machinery. Respondent No. 2 as the Proprietor of M/s. Gorashyam

Enterprises in furtherance of his desire and determination to start competing business applied to the Director of Industries, Maharashtra for

converting his personal farm land at Khopoli, Maharashtra from agricultural use to industrial use with increased FSI. However, permission was not

granted. Amounts were paid to the Maharashtra Pollution Control Board (""MPCB"") for ''project work in progress'' of the factory. Amounts were

also paid to Maharashtra State Electricity Board for 3 phase connection for the new factory. It is submitted that it is pertinent to note that as the

Company does not have any factory in Maharashtra, the question of making any payments to any authorities in Maharashtra for ''work in progress''

for the factory, did not arise. A key employee of the Company was unilaterally transferred to Khopoli which affected the day to day operations of

the Company. The communication dated 27th September 2006 speaks about the plant having been purchased by Respondent No. 2''s proprietary

concern M/s. Gorashyam Enterprises. Ultimately after a period of two and half years i.e. around May/June, 2008, the plant was shifted to the

Company''s factory at Sarigam, Gujarat, as N.A. Permission had been refused with increased FSI and as the Appellant No. 1 was consistently

opposing and objecting to it. It is submitted that the infrastructure constructed by Respondent No. 2 on his farm land at Khopoli at the cost of the

Company, continues to be used by Respondent No. 2 for his personal use till date. It is submitted that Respondent No. 2 also advertised his

proprietary concern M/s. Gorashyam Enterprises in the official publications of the Wool Industry Export Promotion Council (alongside the

Company and another Group Company) as doing business similar to that of the Company. It is submitted that this clearly shows that for the past

two years, Respondent No. 2 in breach of the trust and confidence reposed by the Appellants in Respondent No. 2 in relation to the management

and affairs of the Company and in breach of his duties and obligations which are of a fiduciary nature owed to the Company and its shareholders,

including the Appellants has been directly competing with the business of the Company and such conduct is prejudicial to the interest of the

Company and is also prejudicial to the shareholders of the Company. The Respondent No. 2 was diverting the funds and resources of the

Company for his proprietary business for competing with the Company.

68. Mr. Seervai has further submitted that though it is alleged by Respondent No. 2 that due to the arbitrary and obstructive whims and fancies of

Appellant No. 1, Respondent No. 2 was constrained to set up his proprietary concern M/s. Gorashyam Enterprises for ''housing'' the

scouring/wool washing plant due to the alleged ''flip flop'' attitude of Appellant No. 1, no evidence in support of the same is produced by the

Respondent No. 2. It is submitted that assuming without admitting that the date mentioned in the Mutation Entry No. 853 is erroneous, it in no way

detracts from the case of the Appellants that the Respondent No. 2 had every desire to set up a small scale industry on his land at Khopoli

competing with the products of the Company. It is submitted that the argument that the Respondent No. 2 was forced to buy the land due to the

conduct of Appellant No. 1 is also false. Respondent No. 2 need not have purchased about 7 acres of land just to house the machinery. This only

further exposes his desire to set up a full fledged industry. It is submitted that the statement in the list of dates that on 10th January 2006, the

Respondent No. 2 with his personal funds purchased land near Khopoli to house the said machinery is also false and contrary to the documents

tendered by Respondent Nos. 2 and 5 which clearly reveals that payments for purchase of various parcels of land near Khopoli were made even

prior thereto. Most significantly, the application made by Respondent No. 2 in the name of Gorashyam to the Wool Industry Promotion Council on

5th January 2006 mentioned Gorashyam''s address as the lands for which Respondent No. 2 claims to have made payment of token money only

on 10th January 2006 for the first time. Amongst the documents required for obtaining membership is a copy of the Import Export Code Number

(""IEC""). It is therefore obvious that when Respondent No. 2 applied for and obtained such a Membership-cum-Registration Certificate in the

name of Gorashyam, he had every intention of setting up an independent export oriented industry.

69. It is submitted by Mr. Seervai that the records produced by the Sarpanch, Village Thane Nhave, pursuant to the orders of this Court show that

on 18th May 2007, the Advocate for Respondent No. 2 went to the extent of issuing legal notice to the Sarpanch, in respect of lands bearing

Survey nos. 59/3B, 60/1, 61/7 recording that (I) the District Collector, Raigad had given permission for NA use for small scale industry on 12th

March 2007; (ii) Respondent No. 2 had started NA use and spent Rs. 5 lakhs till that date and the project cost was Rs. 3 crores; (iii) Respondent

No. 2 wanted to set up a wool washing unit on the land; (iv) Respondent No. 2 had applied for financial assistance to banks, etc.; and (v)

Respondent No. 2 wished to commence business in six months. Thus, the Advocate stated that the stop work notice issued by the Sarpanch was

illegal. Mr. Seervai submits that it is evident from the above that the Respondent No. 2 wanted to set up a full fledged small scale industry on the

land at Khopoli. This explains the systematic large scale purchase of land of about 7 acres. It also explains the need to register in early January

2006 Gorashyam with the Wool Industry Export Promotion Council as a merchant exporter/manufacturer exporter. It also explains why

registration was sought for several products, most of which were to be manufactured in direct competition with the Company. Obviously, the

import by Gorashyam of the Wool Scouring Plant was merely the first step towards the desired setting up of a full-fledged small scale industry on

Respondent No. 2''s personal land at Khopoli. It is submitted that till the middle of May 2008, Respondent No. 2 was trying to get NA permission

and requesting for permission to construct on the land at Khopoli, which was not granted. Hence the Respondent No. 2 shifted the machinery from

Khopoli to Sarigam in May/June, 2008. It is therefore submitted that the Respondent No. 2 has been in a competing business since the past couple

of years in a clandestine and surreptitious manner in spite of being a Director of the Company and being in control of the day to day management

of the Company. Such conduct on the part of Respondent No. 2 is prejudicial to the interest of the Company and is also prejudicial to the

shareholders of the Company.

70. Mr. Bharucha, the Learned Senior Advocate appearing for Respondent Nos. 2 and 5 submitted that in early 2005, it was realized that

Respondent No. 1 did not possess the machinery of sufficient capacity for its business. It was therefore decided to purchase a scouring/wool

washing plant including an effluent treatment plant for Respondent No. 1. Initially the Appellant consented to the import of the said machinery and

accordingly an advance of US $ 25,000/- was paid. In August 2005, the Appellant without justification objected to the purchase of the machinery

despite the advance having been paid. The purchase was therefore cancelled. In October 2005, since the machinery was still required for the

growth of Respondent No. 1 Company, after Appellant No. 1 for a second time gave his consent to such purchase, Respondent No. 2 went

ahead with the purchase of the same. In view of the Appellant''s consent on 5th October, 2005 a sum of US $ 25,000 earlier paid towards

advance was appropriated towards the purchase of the said machinery. The consent given by the Appellant is recorded in the letter of the

Technical Engineer, Plant and Machinery, Mr. Ozwald D''Souza addressed to Respondent No. 2 wherein he has inter alia recorded that "" Actually

the earlier deal was struck off after my report in September 2005 and then later interest was shown in buying the effluent treatment plant by the

Appellant No. 1. This got the interest in the plant revived, but ETP to run effectively the existing venus was not matching and the Andar Wool

Opening and Scouring was needed to make ETP work and our good luck a lot of ancillaries were cheaply available"". In the month of November

2005, the machinery had been dispatched to India from the factory in New Zealand. In December 2005, the Appellant No. 1 again objected to

the purchase of the said machinery. However, the machinery had already been shipped to India and arrived on 3rd January 2006. Though the

machinery was intended to be installed at Respondent No. 1''s factory at Sarigam, on account of objection raised by the Appellant, the machinery

could not be brought to the said factory. The machinery was required to be stored somewhere and in early January 2006, the Respondent No. 2

therefore purchased the land for the purpose of housing and storing the said machinery. The fact that the destination of the machinery had to be

changed at the last minute due to the flip flop attitude of the Appellant No. 1 is established from the voyage notes which shows that initially the

machine was to be brought to Sarigam and, later the destination was changed to Khopoli. It was due to the aforesaid arbitrary and obstructive

whims and fancies of Appellant No. 1 that Respondent No. 2 was constrained to set up M/s. Gorashyam Enterprises for housing the

scouring/wool washing plant. On 5th January 2006, Gorashyam was registered with the Wool Industry Export Promotion Council (WIEPC).

Since the import of the said machinery was at a concessional import duty under the EPCG scheme, the said import had to adhere to the ''actual

user condition'' under the Foreign Trade Policy for the relevant period. Under the ''actual user condition'' it was necessary for the importer to either

use the machine in his own industrial unit or manufacture for his own use in another unit. In view of the resistance shown by the Appellant No. 1 to

Respondent No. 2, there was no question of housing the machinery at Respondent No. 1''s factory at Sarigam. Thus, the Respondent No. 2 was

constrained to purchase the land near Khopoli to store the said machinery to comply with the EPCG scheme. To protect the machinery from the

vagaries of nature, a shed was required to be built wherein the machinery could be stored. The Respondent No. 2 paid various amounts from his

funds towards the erection of the said shed and other expenses. The said expenses were subsequently reimbursed to Respondent No. 2 by the

Respondent No. 1 Company.

71. Mr. Bharucha has further submitted that the audited accounts which have been duly signed by the Appellant No. 1 himself reflect the above

position. Importantly Gorashyam Enterprises has till date not conducted any business whatsoever. The allegation in the Petition that Gorashyam is

continuing its competing business is a bald allegation intended to create prejudice against Respondent No. 2. The Certificate dated 26th February

2009 issued by Wool Industry Export Promotion Council [Ex.F @ pg. 291 of the Compilation Part-II] shows that the exports to Gorashyam are

nil from the date of its registration till the date of the said certificate.

72. Mr. Bharucha further submitted that in May-June 2008 (after the Appellant No. 1 had withdrawn himself from the functioning of Respondent

No. 1 Company), the said machinery was transported to and installed at the factory of Respondent No. 1 at Sarigam where it was originally

intended to be installed. It is submitted that the allegation that the scouring plant was shifted to the factory of Respondent No. 1 in Sarigam, Gujarat

because Respondent No. 2 was unable to get requisite permissions in order to convert the land to NA use is false, motivated and has been made

with a view to prejudice the Court against the Respondents. The Respondent No. 2 had in fact obtained permission to convert the land to NA use.

It is submitted that the accounts for the year 2005-06 and 2006-07 have been signed by the Appellant No. 1. The said accounts reflect the

acceptance of approximately Rs. 1,60,44,000/- incurred towards the import of the said machinery and building of the said shed. It is submitted

that it is indeed unfathomable that the occurrence of such a huge amount in the books of accounts and in the audited balance sheet signed by the

Appellant No. 1 could have gone unnoticed by Appellant No. 1. The Respondent No. 1 Company had no other capital works project at that time.

The Appellant No. 1 had in fact consented to the said expenses and is in any event estopped from contending to the contrary. Mr. Bharucha has

further submitted that in the MOU dated 24th December, 2007 signed by Appellant No. 1 and Respondent No. 2, the plant and machinery lying

at Khopoli was recognized, and was to form part of the Business Assets Group, which was to belong to Respondent No. 2. Even at this stage no

objection had been raised to the plant and machinery lying at Khopoli as being an act of alleged oppression or competing business. In view of the

aforesaid arrangements not fructifying the Appellants who have acquiesced to the same, have with mala fide intentions subsequently raised the

competing business bogey as an afterthought to justify their setting up and running of Kapotex. In support of his submissions, Mr. Bharucha has

relied on the following decisions:

(i) Administrator of the Specified Undertaking of the Unit Trust of India and Another Vs. Garware Polyester Ltd.,

(ii) Mohta Bros. (P.) Ltd. and Others Vs. Calcutta Landing and Shipping Co. Ltd. and Others, ,

(iii) P.S. Offshore Inter Land Services Pvt. Ltd and another Vs. Bombay Offshore Suppliers And Services Ltd. and others, ;

(iv) (2007) 137 CompCas 605 .

73. Mr. Bharucha has produced the statement of the Bank Account of M/s. Gorashyam Enterprises for the period 16th December 2005 till early

August 2012 which would show that the said account was funded only for Rs. 25,000/- and is virtually dormant as of now. Mr. Bharucha has

submitted that the Respondent No. 1 Company"s older machine of Indian make (Venus) based on the technology of 1950"s, had a working width

of 1.2 meters and an inferior/inefficient dryer and could not meet the increasing demand of wool combing whereas the scouring plant imported from

New Zealand although of a make of mid 80, was of new technology (used even today) and has a width of 2.4 meters and could wash more than

400 tonnes of wool a month. In any event, it is submitted that the Form 8 filed with the Registrar of Companies, by Kapotex Industries Pvt. Ltd.

annexed in the affidavit in rejoinder filed by Respondent Nos. 2 and 5 in Company Application No. 282 of 2009 as Exhibit-Q, discloses the year

of manufacture of the four machines purchased by Kapotex as being 1963, 1977, 1973 and 1985. It is submitted that it is indeed shocking that the

allegation of buying outdated machinery has been levelled against Respondent No. 2 at the time of the hearing of the captioned appeal, especially

when Appellant No. 1 has himself purchased machinery for Kapotex, the year of manufacture being as old as 1963 and even after being well

aware that it is standard industry practice to purchase old machinery if found to be in a good condition and suitable for its use. It is submitted that

the Appellants have sought to show the intention of the Respondent No. 2 to start a competing business on the basis of the construction of the

shed. Further, an allegation has been made that a sum of Rs. 9 lacs has been expended towards the construction of the shed to house the

machinery. It is submitted that the shed was constructed to protect the scouring plant/machinery from the vagaries of nature and to ensure its

safety. In order to install and run the scouring plant/machinery a shed of minimum 250 ft. is required. The size of the existing shed was much less,

roughly 100 ft. Mr. Bharucha has therefore submitted that the allegation that the scouring plant was imported by Respondent No. 2 to start his

competing business is totally bogus and does not disclose an instance of oppression and mismanagement.

74. As regards the letter dated 18th May 2007 addressed by the Advocate for the Respondent No. 2 to the Sarpanch of the Gram Panchayat,

Mr. Bharucha submitted that it was inter alia recorded that arrangements were being made to get financial assistance to the tune of Rs. 3 crores

from financial institutions to commence the activity of wool washing/scouring within a period of six months. It is submitted that the aforesaid letter

does not, at any place mention that financial assistance was required for the operations of M/s. Gorashyam Enterprises. Although preliminary talks

were held with Banks for financial assistance, no bank finance was in fact drawn or sanctioned by the Banks for either Respondent No. 2 or M/s.

Gorashyam Enterprises. It is submitted that in spite of having obtained land conversion permissions and building permissions for industrial use as far

back as 12th March, 2007, Respondent No. 2 chose to shift the machinery to Respondent No. 1''s factory in Sarigam, Gujarat in May - June,

2008 (where it was originally intended to be installed) which goes to show the bona fides of the Respondents.

75. Mr. Kamdar, the learned Senior Advocate appearing for Respondent Nos. 3 and 4 has adopted the arguments advanced on behalf of

Respondent Nos. 2 and 5 qua the allegations made by the Appellants in respect of setting up of Gorashyam Enterprises. He has submitted that the

said Scouring machine can be used only for the purpose of washing wool and drying the same. The said machine is imported because it has a

larger capacity for wool washing and drying which is required for the purpose of manufacture of the yarn. Thus, at the highest, even if the said

machine is used by Gorashyam Enterprises it could only take job work for the purpose of carrying out activities of wool washing and drying for

any yarn manufacturing company, owing to the export obligation to be fulfilled by the first Respondent Company. It is submitted that therefore even

if the argument of the learned Counsel for the Appellants is correct that the business would have been established by the Respondent No. 2 for

manufacturing under the name and style of Gorashyam Enterprises, still it is submitted that such a business not being a competing business, it cannot

be said that Respondent No. 2 has committed any breach of fiduciary duty towards the first Respondent Company. It is submitted that the balance

sheet for the years ending 31st March 2006 and 2007 of the first Respondent Company have been signed by Appellant No. 1 as a director. The

said balance-sheet reflects the import of the said machine and the payment made for the plant and machinery. The Appellant No. 1 was in charge

of the factory at that time and obviously had knowledge of the balance sheet which pertained to the purchase of the said plant and machinery for

the first Respondent Company. The Appellant No. 1 does not dispute the signing of the balance sheet or its contents but falsely avers that he

signed in good faith. It is submitted that the payment for the machine has been made in foreign currency. The balance-sheet also shows on pages

258 and 285 item 12(a) value of imports on CIF basis ""Purchase of Machinery"" for the years ended March 2006 and 2007. The said plant and

machinery was imported in the name of the first Respondent Company. Thus, there was no question of the plant and machinery being imported for

the purpose of starting any independent separate business by the Second Respondent, who in any case was the registered supporting manufacturer

to Respondent No. 1. Since the said machine was kept at the land which was an agricultural land it was necessary to obtain permission for

conversion of the said land from agricultural land to non-agricultural land which permission was granted on 12th March, 2007. It is submitted that

the said machine is also shown as part of the machines of the first Respondent Company in the said MoU dated 24th December 2007 and the

letter dated 2nd January 2008 and subsequently the said machine was shifted to the first Respondent Company premises some time in May/June

2008. It is submitted that the facts in the matter clearly shows that there has never been any competing business by Gorashyam Enterprises.

Therefore, the allegations advanced on behalf of the Appellants that the Respondent No. 2 started a competing business in the name of Gorashyam

Enterprises is completely baseless and without any merit.

76. Before I deal with the aforestated submissions, it is necessary to record that after the submissions pertaining to the scouring plant and

Gorashyam Enterprises were made on behalf of the Respondents, Mr. Seervai, the learned Senior Advocate appearing for the Appellants

submitted before this Court that the submissions made before the Court on behalf of the Respondents pertaining to the purchase of land for setting

up the scouring plant are not only incorrect but are made with a deliberate intention of misleading the Court. Mr. Seervai submitted that the

outcome in the matter is not of such concern to him as compared to his serious concern about attempts made to misguide the Court, which is not

only detrimental to the functioning of the Courts, but would damage and destroy the entire legal/judicial system. He therefore submitted that it will

be in the interest of the institution of justice and the judicial system that in order to ascertain the truth of the submissions made, the land records

available with the office of the Talathi/Sarpanch, under whom the lands of Respondent No. 2 at Khopoli are situated and the applications made by

the Respondent No. 2 in regard thereto, be called for. The learned Senior Advocates appearing for Respondent Nos. 2 and 5 and Respondent

Nos. 3 and 4 submitted that it is settled law that the Appellants have to establish their allegations as regards oppression and mismanagement on the

basis of the evidence produced along with the Petition and they cannot take the assistance of the court in gathering evidence to enable them to use

the same and to prove their allegations as regards oppression and mismanagement against the Respondents. However, since serious allegations are

made not only against the Respondents but also against the Advocates appearing for the Respondents viz. that they have misguided the Court and

that such conduct will damage and destroy the entire judicial institution/judicial system, the Court may call for the papers from the Talathi/Sarpanch

to ascertain as to when the said land on which the scouring plant is housed was purchased by the Respondent No. 2. It is under these

circumstances that this Court directed the Office of the Gram Panchayat/Talathi, Tal. Khalapur, Dist. Raigad, to produce before this Court all the

files/registers containing papers/entries, as also any applications made by Ravi Kapur and Gorashyam Enterprises for the development of lands

bearing several survey numbers as mentioned in the order. Thereafter the registers produced by the authorities were taken in the custody of the

Court. The Register contains handwritten Minutes of the Meetings of the Grampanchayat in Marathi. Almost all the documents contained in the file

produced before this Court are handwritten in Marathi and some of the letters are not in original but are carbon copies of the originals. Though

going through these documents was time consuming, and which consequently substantially delayed the pronouncement of this Judgment, in view of

the serious allegations made on behalf of the Appellants involving the judicial system, I have gone through each and every page of the documents

produced and I am satisfied that as regards entry 853, there is only a clerical error to the extent of the year 2006 being wrongly shown as 2005

and the statement made by Respondent Nos. 2, 3 and 4 that the lands were purchased in 2006 were not false and/or incorrect as alleged by the

Appellants.

77. I have considered the above submissions qua the allegations advanced by the Appellants that the Respondent No. 2 had imported the scouring

plant from abroad and has set up Gorashyam Enterprises in order to start a business competing with the business of Respondent No. 1 and the

response thereto on behalf of the Respondents. From the Company Petition filed on 5th/11th December 2008, I have noted that the Appellants

have avoided stating as to when they came to know that Respondent No. 2 had imported a scouring plant from New Zealand and as to when they

came to know that during the period 2006 to 2008 large amounts were withdrawn from the first Respondent Company towards expenses for

building a factory for M/s. Gorashyam Enterprises on farmland belonging to Respondent No. 2 at Khopoli, Maharashtra. Instead, the Appellants

have in paragraph 43 of the Petition avoided giving the precise date, month or year by stating that: ""Recently, the Petitioners became aware"". The

Appellants have in paragraph 44 of the Petition stated that ""Though the Petitioner No. 1 objected to the import of the scouring machine through

various letters exchanged and proposed for the expenditure of scouring plant be debited to Respondent No. 2 and since there was an impending

division of assets Petitioner No. 1 signed the Balance Sheets and Profit and Loss Accounts of the earlier years uptil 31st March 2007 in good

faith"". In paragraph 49 of his Affidavit dated 9th January, 2009, the Appellant No. 1 has stated "" With regard to renewal of Bank Guarantees, I

say that during the months of June/July 2008, I became aware that Respondent No. 2 has shifted machinery belonging to Gorashyam Enterprises

(the proprietary concern of Respondent No. 2) from Khopoli to Sarigam. The expenses incurred for this project were objected to by me on

several occasions because I was not satisfied about the need to spend huge amount as far as capital expenditure was concerned as the Company

had an existing scouring plant"". The Appellant No. 1 has stated in the petition that disputes had arisen between him and Respondent No. 2 since

December 2003. He has also relied on his e-mail dated 5th January 2005 addressed to the Company Secretary informing him that whatever

resolutions are ""hereafter made"" should bear his signatures so as to ensure that all Resolutions are to his knowledge and the said request should be

enforced with immediate effect. With the relations between the parties having reached such a stage and further aggravated by the fact that the

Appellant No. 1 has alleged that even his said instructions were not followed by the Respondent No. 1 Company, it is difficult rather impossible to

accept that the accounts of the Respondent No. 1 Company wherein the expenditure of the scouring plant imported from New Zealand and

construction of shed, in all aggregating to Rs. 1.60 crores have been reflected, were signed by Appellant No. 1 ""in good faith"" on 6th September

2006 and 6th September 2007.

78. The above allegation made by the Appellants in the Company Petition viz. that the Appellants ""recently "" became aware that the Respondent

No. 2 had unilaterally imported a scouring plant from New Zealand despite objections from the Petitioner No. 1 during September/October 2005

and paid for all the costs/expenses through the Company and had set up M/s. Gorashyam Enterprises for offering products of scoured wool, tops

and yarns, carpets etc., is belied by the contents of the letter dated 2nd December 2008 addressed by the Appellant No. 1 to the Respondent No.

2 just a few days prior to the filing of the Company Petition on 5th/11th December 2008, wherein the Appellant No. 1 did not make any allegation

whatsoever as regards importing the scouring plant/machinery from New Zealand without the knowledge/consent of the Appellant No. 1 as alleged

in the Petition. In paragraph 16 of the said letter, the Appellant No. 1 did not even allege that he has ""recently"" come to know about the

establishment of a propriety firm in the name of M/s. Gorashyam Enterprises by the Respondent No. 2. Instead in paragraph 16, the Appellants

have stated as follows:

16. It is a matter of record that you continue to spend huge amount of money from our companies to set up and maintain your farm land at Khopoli

(Raigad District) and your proprietary firm M/s. Gorashyam Enterprises. You went to the extent unauthorisedly and probably falsely, declaring that

Gorashyam Enterprises was supporting manufacturer of Grentex & Co. Pvt. Ltd. Be that as it may, there is no occasion to pay for the import of

machinery for the same, construction of factory on your private land and spend huge amount towards other expenses. Consequently you

unilaterally decided to shift the machinery to the factory premises of Grentex at Sarigam, Gujarat unilaterally after the family agreement and also

only after setting up business of Gorashyam Enterprises at your private land which became impossible due to rejection of permission sought from

Government Authorities. As on date, there is huge expenditure in the books of account of Grentex for the above which is recoverable from you in

your capacity as proprietor of Gorashyam Enterprises.

The contents of the letter dated 2nd December 2008 shows that the Appellants were at all relevant time aware of all the facts pertaining to the

import of the plant and machinery, the same being housed at Khopoli, setting up of Gorashyam Enterprises, Respondent No. 2 declaring that

Gorashyam Enterprises was the supporting manufacturer of Respondent No. 1 and that the said machine was transferred from Khopoli to the

factory premises of Respondent No. 1 at Sarigam.

79. The allegation on the part of the Appellants in the Company Petition filed on 5th/11th December 2008 that they ""recently"" became aware that

the Respondent No. 2 had unilaterally imported a scouring plant from New Zealand is further belied by the fact that in the proposed MoU

admittedly executed between the parties as far back as in December 2007, the plant and machinery at Khopoli has been included as the assets of

Respondent No. 1 Company and it is agreed that the same will form part of the Business Assets Group. This fact is also reiterated in the joint note

dated 2nd January 2008 circulated by the Appellant No. 1 and the Respondent No. 2.

80. Though the Appellants have stated in the Petition that they ""recently"" came to know about the import of the scouring plant, the Appellant No. 1

has in his affidavit dated 9th November, 2009 stated that the expenses incurred for this project were objected to by him on several occasions

because he was not satisfied about the need to incur huge capital expenditure by spending large amounts thereon. However, no objection allegedly

raised by the Appellant No. 1 prior to the letter dated 2nd December 2008 qua the expenses incurred for this project is produced by the

Appellants. These facts further go to show that the Appellant No. 1 was always aware at least of the fact that the said scouring plant has been

imported in the name of the Company but is housed at Khopoli by the Respondent No. 2 and a shed has been constructed to house the scouring

plant, and the expenses of importing the machinery as well as putting up the shed etc. are incurred by the Company. The Appellant No. 1 has for

reasons best known to him not objected to the same but has in fact signed/approved the accounts of the Company for the year ending 2006-2007

and 2007-2008, and has also agreed in the proposed MoU dated 24th December, 2007 and the joint note dated 2nd January, 2008 that the plant

and machinery at Khopoli belongs to Respondent No. 1 Company and shall form part of the Business Assets Group. The Appellants have raked

up this issue for the first time in the letter dated 2nd December 2008 i.e. few days prior to the filing of the Company Petition on 5th/11th December

2008 and only after receiving strong protest from the Respondent No. 2 as regards the setting up of competing business (Kapotex Industries Pvt.

Ltd. and Kaposta Carpets Pvt. Ltd.) by the Appellant No. 1 and his family members.

81. The scouring plant was despatched from New Zealand some time in November, 2005. The voyage policy dated 7th November, 2005

(Exhibit-Q at page 172 of the Additional Compilation) and the endorsement on the insurance policy dated 23rd December 2005 (Exhibit-R at

page 173 of the Additional Compilation) shows the destination of the consignment as ""any Indian Port & thence to Mills at Sarigam, Gujarat"" i.e. at

the factory premises of Respondent No. 1. However, the endorsement dated 24th January, 2006 (Exhibit - S at Pg. 174 of the Additional

Compilation) reads as under:

At the request of the insured, it is hereby declared and agreed that the correct voyage under the within mentioned policy should read as under and

not as stated therein

From New Zealand to JNPT Port and thence to Khopoli, Dist. Raigad.

From these documents it is clear that originally the scouring machine was to reach the factory premises of the Respondent No. 1 at Sarigam and it

is only because of the opposition on part of the Appellant No. 1 that the delivery of the scouring plant/machinery was taken at Khopoli. As

submitted by Respondent No. 2, each container containing the dismantled scouring plant was 40 ft. long and 8 ft. wide. There were 11 containers

of the said specifications amounting to a total of 3250 sq. ft. of tightly locked area. It appears that Respondent No. 2 therefore purchased land for

storing the scouring plant and also constructed a structure/shed to protect the scouring plant from the vagaries of nature and its general safety. The

Learned Advocate appearing for Respondent No. 2 has also explained that since the import of said machinery was at a concessional import duty

under the EPCG scheme, the said import had to adhere to the ''actual user condition'' under the Foreign Trade Policy for the relevant period.

Under the ''actual user condition'' it was necessary for the importer to either use the machine in his own industrial unit or manufacture for his own

use in another unit. In view of the resistance shown by Appellant No. 1 to Respondent No. 2, there was no question of housing the machinery at

Respondent No. 1''s factory at Sarigam. Thus the Respondent No. 2 was constrained to purchase the land near Khopoli to store the said

machinery to comply with the EPGC scheme.

82. The Appellants have themselves stated in the letter dated 2nd December 2008 addressed to the Respondent No. 2 that ""It is a matter of

record"" that he has declared M/s. Gorashyam Enterprises the proprietary concern of Respondent No. 2 as the supporting manufacturer of

Respondent No. 1 Company. The Appellants have also relied on the advertisements of M/s. Gorashyam Enterprises in the official publication of

the Wool Industry Export Promotion Council. The said advertisement has appeared along with the advertisement of the first Respondent Company

and Gokalchand Rattanchand Woollen Mills Pvt. Ltd. If the Respondent No. 2 was carrying on any competing business on the sly in the name of

Gorashyam Enterprises he would certainly not have issued advertisement of Gorashyam Enterprises along with the advertisement of Respondent

No. 1 and the advertisement of Gokalchand Rattanchand Woollen Mills Pvt. Ltd. The advertisement therefore supports the contention of

Respondent No. 2 that Gorashyam Enterprises was started as a manufacturing supporter of the Respondent No. 1 and it further goes to show that

such an advertisement in the official publication could not have been missed by the Appellant No. 1. He having not taken any objection to the same

shows that he was aware of the establishment of Gorashyam Enterprises as a supporting manufacturer of Respondent No. 1 Company.

Gorashyam Enterprises has opened an account with Axis Bank on 16th December 2005. Respondent No. 2 has tendered a confirmation issued

by Axis Bank, that Gorashyam Enterprises was holding current account No. 029010200013095 with Axis Bank, Ghatkopar Branch since 16th

December, 2005 and the statement of account of M/s. Gorashyam Enterprises submitted in Court would show that the said account was funded

only Rs. 25,000/- and is virtually dormant as of date. This further goes to show that Gorashyam Enterprises has not carried out any competing

business as alleged or otherwise by the Appellants. As submitted by Respondent No. 2 though preliminary talks were held with the Bank for

financial assistance, no bank finance was in fact drawn or sanctioned by the Banks for Respondent No. 2 or Gorashyam Enterprises. In fact, in

spite of having obtained land conversion permissions and building permissions for industrial use, as far back as 12th March 2007, Respondent No.

2 chose to shift the machinery to Respondent No. 1''s factory in Sarigam, Gujarat in May/June, 2008 where it was originally intended to be

installed.

83. In the circumstances, I am of the view that the Appellant No. 1 was at all relevant times aware that in view of his objection qua housing the

scouring plant imported by the Company from New Zealand, the Respondent No. 1 housed the same on the land purchased by him, had put up a

structure and had set up Gorashyam Enterprises as his proprietary concern to function as a supporting manufacturer of Respondent No. 1 and later

shifted the said machinery to the factory premises of Respondent No. 1 at Sarigam. No mala fides can be attributed to Gorashyam Enterprises for

stating in one letter that it has imported the machine when the records of the Company including its accounts have at all times been transparent

about the fact that the scouring plant is imported by the Respondent No. 1 Company. The Appellants have failed to establish their allegation that

Respondent No. 2 in fact was or has been in competing business since the past couple of years as alleged or for any period in a clandestine and

surreptitious manner, in spite of being a Director of the Company in control of the day to day management of the Company through Gorashyam

Enterprises. The notice addressed by the Advocate for Respondent No. 2 also does not establish that Respondent No. 2 or Gorashyam

Enterprises are wanting to set up a small scale industry to do competing business with Respondent No. 1. It is established that from its inception

Gorashyam Enterprises was to only act as a supporting manufacturer of the Respondent No. 1 Company. However, this object too did not

materialise. As stated hereinabove, from the records produced before this Court, it is established beyond any doubt that Gorashyam Enterprises

has at no point of time done any business (competing or otherwise) despite it being established in December, 2005. The statements made by the

Appellants in the Petition, including the statement that they ''recently'' came to know about the facts pertaining to import of the scouring plant and

Gorashyam Enterprises, are false to the knowledge of the Appellants. The Appellants have therefore not approached the Court with clean hands.

The CLB has therefore correctly come to the conclusion that M/s. Gorashyam Enterprises is not in competing business with the Respondent No. 1

Company. I am also of the view that the allegation raised by the Appellant No. 1, that the Respondent No. 2 started a competing business through

Gorashyam Enterprises is raised only with a view to counter the protest registered by Respondent Nos. 2 to 5 that the Appellant No. 1 and his

family members have in competition with the Respondent No. 2 Company started business in the name of Kapotex and Kaposta.

84. The Appellants have in the Petition filed on 5th/11th December, 2008 admitted that on or about 23rd June 2007, Appellant No. 2 along with

his son incorporated a Company named Kaposta Carpets Pvt. Ltd. The said Company was kept dormant and did not carry on any business. On

or about 29th May 2008, the Appellant No. 1 along with his wife and son incorporated another Company named Kapotex Industries Pvt. Ltd.

and has purchased land machinery etc. in GIDC, Sarigam, Dist. Valsad, Gujarat for setting up a factory for the manufacture of wool textile.

Appellant No. 1 stated in the Petition that till the date of filing of the Petition, neither Kapotex nor Kaposta has commenced commercial production

nor sold any products in the market. This Court has noted that it is not the case of the Appellant No. 1 in the Petition that commencing commercial

production or selling products in the market through Kapotex Industries Pvt. Ltd. or Kaposta Carpets Pvt. Ltd. would not amount to competing

with the Company. Instead, the Appellants have stated in the Petition that Appellant No. 1 having totally withdrawn from the day to day

management of the Company, the question of competing with the Company did not and does not arise. Therefore the Appellants have impliedly

admitted in the Petition that the business of Kapotex and Kaposta is similar to the business of Respondent No. 1, but only since Appellant No. 1

has totally withdrawn from the day to day management of the Company, carrying on similar business by Appellant No. 1 and his family members

would not amount to competing with the business of Respondent No. 1 Company. The Appellants also stated in the Petition that as the draft of the

detailed MoU (drawn up in furtherance of the Agreement dated 24th December, 2007) is neither finalised nor signed, the Appellants have neither

relied upon nor annexed the same to the Petition. The Appellants have in the Petition admittedly not sought any reliefs qua the MoU between the

parties including its specific performance. From the prayers sought in the Petition, it is clear that the Appellants have accepted that the proposed

agreement has failed to materialise and the Respondent No. 2 and his supporters be restrained from taking any steps qua the running/functioning of

the Company without the consent of the Appellants and without holding any meetings in the absence of the Appellant No. 1 and in the absence of

proper notice and agenda, the Respondent No. 2 and his supporters be further restrained from making any changes in the constitution of the Board

of Directors of the Company, including removal of Appellant No. 1 as Director of the Company. It is therefore clear beyond any doubt that the

Appellant No. 1 in the Petition submitted that Kaposta and Kapotex have not done any business and therefore he should not be stopped from

continuing as the Director of Respondent No. 1 Company and from carrying on the day to day affairs of the Respondent No. 1 Company. On the

basis of these submissions/representations, the Appellants obtained various reliefs against the Respondents including restraining Respondent No. 1

from holding any meetings and thereafter immediately from February/March 2009 i.e. within two/three months from filing of the Petition, started

commercial production through Kapotex without any restriction from any one. Even if the story of the Appellants is to be believed that there was

an understanding that after withdrawing from the day to day affairs of Respondent No. 1, the Appellant No. 1 and his son would start a new

business of wool textile and with that intention they incorporated Kaposta Carpets Pvt. Ltd. and Kapotex Industries Pvt. Ltd. prior to the filing of

the Petition, by the time the Appellants filed the Petition, they were aware that the understanding had not fructified and they in fact prayed in the

Company Petition that the Appellant No. 1 should not be removed as Director of Respondent No. 1 and be allowed to participate in the day to

day business of Respondent No. 1. In view thereof, the Appellant No. 1 and his family members could have never commenced business after filing

of the Company Petition similar to the business carried on by Respondent No. 1 thereby being in direct competition with the Respondent No. 1.

Faced with the fact that the Appellant No. 1 along with his family members have started business in direct competition with Respondent No. 1

Company, Appellant No. 1 contrary to his aforestated contention in the Petition that since he has fully withdrawn from the Respondent No. 1, the

question of Kapotex/Kaposta competing with Respondent No. 1 does not arise, thereafter sought to contend that the business of Kaposta has a

different business model, being forward integration and would go into finished products, whereas the business of Respondent No. 1 is of backward

integration and is concentrating on early stage processing which is disputed by the Respondents. The fact that Appellant No. 1 has admitted that

Kaposta has supplied to the customer of the Respondent No. 1 the same material (by undercutting or otherwise) which was earlier supplied by

Respondent No. 1 to its said customer is enough to hold that Kapotex is doing business in direct competition with Respondent No. 1. I am

therefore of the view that the Appellant No. 1 and his family members are through Kapotex carrying on business in direct competition with the

Respondent No. 1 Company. I am also of the view that the Appellants have approached the CLB with unclean hands i.e. after making a

representation that Kaposta/Kapotex have not commenced any production and after obtaining interim orders against the Respondents, have

immediately started similar business as of Respondent No. 1, thus entering into direct competition with the Respondent No. 1.

85. Respondent Nos. 2 to 5 have also submitted that one Southern Yarns Dyers Inc., USA is a regular customer of Respondent No. 1 since

2005. Respondent No. 1 has been exporting 100 per cent woollen worsted yarn to the said Southern Yarns Dyers Inc. USA. During 2008

Respondent No. 1 sold to Southern Yarns various amount of Woollen worsted yarn at the rate of US $ 3.15 per lbs. Respondent No. 1 Company

also had orders worth US $ 3 lakhs from Southern Yarns. For the said orders raw materials have been procured by Respondent no. 1 Company

since April, 2008. While Respondent No. 1 was following up with Southern Yarn with regard to the said outstanding purchase orders, it was learnt

that the Appellant No. 1 through Kapotex had exported to Southern Yarn approx. 101 bales of 100% woollen worsted yarn of various counts at

a flat rate of US $ 2.8 per lbs. thus undercutting the first Respondent Company. The said rates offered by Kapotex are lower than the rates agreed

and accepted by Southern Yarn from Respondent No. 1. Kapotex also provided a longer credit period of 120 days to Southern Yarn against 60

days offered by Respondent No. 1. The invoice evidencing the said sale by Kapotex by Southern Yarn is at Exhibit-K page 311 of the

compilation. Furthermore, between the years 2009-2011, huge consignments of goods were exported by Kapotex to the existing clients of the

Respondent No. 1 Company, more particularly Southern Yarns Dyers Inc. and Bloomsburg Carpet Industries Inc. Some invoices evidencing the

same are annexed at Exhibit-J at pages 61-65 of Company Application (L) No. 13 of 2011.

86. It is further submitted on behalf of Respondent Nos. 2 to 5 that on 23rd September 2008 and 6th November 2008, Respondent No. 1

accidentally received an e-mail from the machine supplier which e-mail was intended for Kapotex Industries Pvt. Ltd. in response to queries raised

by the Appellant No. 1 with regard to the purchase of the same. The said e-mail is dated 23rd September, 2008 whereas the Petition is filed on

5th/11th December, 2008.

87. The Respondent Nos. 2 to 5 have further pointed out that not content with merely diverting business of Respondent No. 1, the Appellant No.

1 also poached several employees of Respondent No. 1 Company. Mr. Jayaprakash Shetty who was one of the senior employees of Respondent

No. 1 Company (who was an Additional director and also the occupier of the unit at Sarigam) was poached by Appellant No. 1 and appointed as

Director in Kapotex. Form No. 32 filed by Kapotex Industries Pvt. Ltd. showed Mr. Shetty as a Director from 1st September, 2008. A list of

employees who have left the services of Respondent No. 1 and joined the business supported by the Appellant No. 1 is at Exhibit-L, page 312 of

the compilation. It is also pointed out by Respondent Nos. 2 to 5 that Kapotex has managed to obtain loans and banking facilities to the tune of

Rs. 8 crores from the Bankers of Respondent No. 1 in August 2008 and as such the said funds are being used by Kapotex for carrying out the

competing business. The Agreement of Loan is at Page 278 of the Company Application No. 282 of 2009 in Company Appeal No. 15 of 2009 in

CLB Company Application No. 57 of 2008 in CLB Company Petition No. 112 of 2008. It is submitted that it is inconceivable that Kapotex

would take a loan of this large an amount if no business had been commenced or was being carried out by the said Kapotex. It is apparent that the

Appellant No. 1 is using the business connection of Respondent No. 1 to further the competing business of Kapotex.

88. According to the Appellants, the customers of Respondent No. 1 had stopped dealing with Respondent No. 2 in view of his conduct. Within

five months of Respondent No. 2 taking over marketing responsibility of the Company, disputes and differences arose between Respondent No. 2

and the Sales Agent/Customer in USA Mr. Chandrashekharan. On or about 11th/12th December 2008 the matter was resolved when Appellant

No. 1 on request of Respondent No. 2 and the Logistic Manager mediated and thereafter the Company received about Rs. 70 lakhs towards dues

which enabled the Company to despatch 240 feet containers of wool yarns valuing about Rs. 150 lacs, for which the Company received payment

subsequently. It is further submitted on behalf of the Appellants that the price at which the goods were supplied to the foreign buyers by Kapotex

was higher than the price at which the Company supplied to the same buyers. When Kapotex sales were made the Dollar to Rupee conversion

rate was 1:50:40 resulting in Kapotex getting Rs. 141 per lb. It is also submitted on behalf of the Appellants that the price at which the Company

was selling was not known to the Appellants. Assuming for the sake of argument and without accepting that the price quoted of dollar 3.15 was

valid upto November, 2008 when the contract expired, it is not correct to compare the price quoted in Kapotex''s invoice of March 2009 as

against a price quoted in May 2008 which was valid upto November 2008. The Appellants denied that Appellant No. 1 used the telephone of the

Company for the work of Kapotex. According to the Appellants, the telephone in question is allotted for personal use of Appellant No. 1 and is

also his residential telephone number. It is submitted that the allegation of Respondent No. 2 that the Appellants and/or Kapotex has poached

employees is also incorrect. It is submitted that about 25 staff members left and about 150 workers were retrenched by Respondent No. 2 from

the Group Companies. It is submitted therefore there is no question of Kapotex undercutting the Company or poaching the employees of

Respondent No. 2 Company.

89. In response, it is again submitted by Respondent Nos. 2 to 5 as follows:

i. The e-mail dated 2nd May, 2008, addressed by the Respondent No. 1 Company to one Chandrasekharan V. (Exhibit ""I"" @ pg. 305 of the

Compilation (Part 2) clearly evidences that between June to November 2008, Respondent No. 1 was supplying woollen yarn to Southern Yarn at

USD 3.15/LB. It is submitted that woollen yarn was supplied to Southern Yarn by the Respondent No. 1 Company at the rate of USD 3.15/LB

till the end of December, 2008.

ii. Furthermore, these Respondents submit that the invoice dated 26th March, 2009, evidences that 33,168.26 LBS of woolen yarn was supplied

by Kapotex to Southern Yarn in the month of March 2009 at the rate of USD 2.85/LB (Exhibit ""K"" @ pg. 311 of the Compilation (Part 2);

iii. These Respondents submit that the aforesaid invoice pertains to a time period which is only 3 to 4 months subsequent to the date when

Respondent No. 1 Company supplied Southern Yarn wool at USD 3.15/LB. These Respondents further submit that, for Appellant No. 1 to have

supplied 44, 168.26 LBS of woolen yarn to Southern Yarn in the month of March, 2009, it would have been necessary for it to have

manufactured the same over a 2 to 3 month period prior to 26th March, 2009.

iv. In view of the above, it follows that the distinction which is sought to be drawn by the Appellants between the prices for the year 2007 and

2009, to counter the allegation of undercutting is baseless, false and inaccurate.

v. In the circumstances, these Respondents submit that Appellant No. 1 has while being a director of the Respondent No. 1 Company, in breach

of his fiduciary duty deliberately, through Kapotex, attempted to undercut the Respondent No. 1 Company during the same time period in which

Respondent No. 1 Company has conducted its business with Southern Yarn.

vi. In view of the above, it is submitted that the argument of the Appellants that there was time frame of almost 3 years (2007 to 2009) between

the price of USD 3.15/LB offered by Respondent No. 1 vis-Ã¯Â¿Â½-vis the price of USD 2.85/LB offered by Kapotex, in an attempt to disprove the

allegation of undercutting against the Appellant No. 1 apart from being patently false (as has been demonstrated from the material on record) has

been made deliberately with the intent to mislead the Hon''ble Court.

It is also submitted that the denial on the part of Appellants that they have not poached the employees of the Respondent No. 1 and the reasons

given in support of the said denial are belied by the records produced before the Court.

90. Mr. Kamdar, learned Senior Advocate appearing for Respondent Nos. 3 and 4 has adopted the arguments advanced on behalf of

Respondent Nos. 2 and 5 and has submitted that the explanation furnished by the Appellants for conversion of US $ into Indian Rupee by virtue of

the foreign exchange rate fluctuation is bogus and frivolous. As far as the buyer of yarn is concerned, when he pays in US $ he is not concerned or

interested in ascertaining what would be the conversion amount in Indian Rupees. The buyers are only interested in the amount in terms of the US $

thus supplying the goods to the very same buyer at lesser US $ rate suits the Appellants. This indicates that the Appellants herein are admittedly

undercutting the business of the first Respondent Company and poached its employees thereby gravely affecting the business of the first

Respondent Company.

91. I have already held hereinabove that the Appellant No. 1 and his family members have approached the CLB with unclean hands and after

obtaining interim orders against the Respondents have commenced business similar to the business of Respondent No. 1, thereby directly

competing (by undercutting or otherwise) with the business of Respondent No. 1. After considering the aforestated submissions of the parties, I am

also satisfied that the Appellant No. 1 along with his family members are undercutting the business of Respondent No. 1 and are poaching the staff

of Respondent No. 1 Company.

92. Since Respondent No. 2 has not breached his fiduciary duty as a Director as alleged by the Appellants, question No. 4 set out in paragraph 2

of this Judgment is answered in the negative. Again it is not established that the Respondent No. 2 has siphoned of or diverted funds of the

Company for setting up his proprietary business and has not caused any loss to the Company. The accounts of the relevant years are signed by the

Appellant No. 1. Question No. 5 set out in paragraph 2 of this Judgment is therefore also answered in the negative.

93. As regards the grievance of the Appellants that the learned Member of the CLB ought to have intervened and exercised the wide powers

conferred upon it u/s 402 of the Act and passed appropriate orders for buy out/sell out in accordance with the law, I am of the view that the CLB

is not bound to pass orders for buy out/sell out in every petition filed u/s 397/ 398 of the Act. Though the Appellants have alleged that the facts of

the present case cried out for appropriate orders u/s 402 for buy out/sell out in accordance with law and have relied on the ratio laid down by the

Hon''ble Supreme Court in the case of M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, , I am of the view that the

decision of the Hon''ble Supreme Court in the said case does not apply to the facts of the present case. In the present case, the Appellants and the

Respondents do not hold the entire shareholding in the Respondent No. 1 Company equally. Apart from the Kapur family, the Respondent No. 9

also holds 10% of the equity in Respondent No. 1 Company. The Appellants are admittedly the minority shareholders. Respondent No. 1

Company is not in a deadlock situation. Though the Appellant No. 1 and Respondent No. 2 are permanent Directors of the Company, it is not that

the shareholders of the Company at its AGM/EOGM cannot appoint Directors on the Board of Respondent No. 1 Company in addition to

Appellant No. 1 and Respondent No. 2. In the instant case, as held hereinabove, both the sides avoided calling meetings and appointing Directors

on the Board of the Respondent No. 1 Company in the hope that the MoU sought to be entered into by and between the parties would be

finalised and implemented and therefore bitterness/unpleasantness could be avoided. Now since it is clear between the parties that the question of

the said MoU being implemented does not arise, the parties can call a General Meeting and pass necessary resolutions including passing of

accounts as required by the statute. The CLB is correct in holding that the Company is not in a deadlock situation. Once the Respondent No. 1

holds its General Meeting and appoints Directors and has a functional Board, corporate democracy shall prevail in the Company. I have already

held hereinabove that the Appellants approached the CLB with unclean hands and have started business in the name of Kapotex Industries Pvt.

Ltd., in competition with the business of Respondent No. 1. Therefore, even on this ground, the Appellants do not deserve any order of buy

out/sell out u/s 402 of the Act. If a buy out/sell out is allowed, the same would amount to levying pressure on Respondent Nos. 2, 3 and 4 to buy

the shareholding of the Appellants or to displace them from the current business by sale of their shares without inconveniencing the Appellants who

are already established in the same business by incorporating Kapotex. This, in my view, would amount to granting a premium on dishonesty.

Therefore, for the reasons stated herein, the Appellants are not entitled to any reliefs of buy out or sell out u/s 402 of the Act. It is not that only

because apart from the Kapur family since a group of shareholders not belonging to the Kapur family holds 10 per cent of the issued and paid up

capital of the Respondent No. 1 Company, that reliefs of buy out or sell out are not granted to the Appellants. Question No. 6 set out in paragraph

2 of this judgment is therefore answered accordingly. In the circumstances, the Appellants have not established any case of oppression of

shareholders by the Respondent Nos. 2 to 5. The Appellants have also failed to establish that Respondent Nos. 2 to 5 are solely responsible for

not calling the meetings or are guilty of siphoning funds or causing loss to Respondent No. 1 Company thereby mismanaging the Respondent No. 1

Company. The above Appeal is therefore dismissed with costs. The Appeal is accordingly disposed of. The Company Applications taken out in

the Appeal also stand disposed of.