

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH AT HYDERABAD

C.P.No. 81of 2011
(TP.No. 60/HDB/2016)
U/s 235, 397, 398, 399, 402, 403,
406 & 408 R/w Schedule XI
of the Companies Act, 1956
R/w 241/242 of Companies Act, 2013

In the matter of:

Starlite Spintech Limited,
Plot No. 14, Road No.2,
Banjara Hills, LV Prasad Marg,
Hyderabad-500033.

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

..... Petitioner

Versus

1. Dijaya-Malind Properties (India) Private Limited,
1-11-220/A, Gurusurthy Lane
(Adjoining lane to Reebok Store),
Begumpet, Hyderabad-500016, Andhra Pradesh.
2. Dijaya-Malind JV (Mauritius) Limited,
Suite No. 307, St. James Court,
St Denis Street, Port Louis,
Republic of Mauritius.
3. Tan Seng Chye
No.20, JalanDamai Jaya,
Batu 9, Cheras Selangor 43200,
Malaysia.
4. Dickson Tan Yong Loong
No.8, Jalan TR 5/2,
Tropicana Golf and Country Resort,
Petaling Jaya 47410, Malaysia.
5. Tong Kein Onn
No.8, LorongBurungSintar 3,
Taman Bukit Maluri, Kepong,
Kuala Lumpur 52100, Malaysia.
6. Murugayah Kanpathy
No.86, JalanCincin, Section 11,
40000 Shah Alam, Selangor DE,
40000, Malaysia.
7. Sanjay Patwari
Plot No. 151A, Old MLA Colony,
Road No.12, Banjara Hills,



8. Ramgopal Patwari
Plot No.14, Road No.2,
Banjara Hills, LV Prasad Marg,
Hyderabad-500033.
9. Dijaya (Mauritius) Limited
Suite No. 307, St. James Court,
St. Denis Street, Port Louis,
Republic of Mauritius.
10. S.N.R.L Investments Limited
C/o. First Island Trust Company Ltd,
Suite No: 308, St. Denis Street,
Port Louis, Republic of Mauritius.
11. Dijaya Corporation Berhard
C-06-02, 6th Floor, Block C,
Wisma TT, No.1, Jalan PJS 8/15,
DataranMentari, 46150 Petaling Jaya,
Selangor Darul Ehsan, Malasiya ...Respondents

Judgement pronounced on 14th November, 2017

CORAM:

Hon'ble Mr.Rajeswara Rao Vittanala, Member (Judicial)

Parties/Counsels Present:

For the Petitioner : Shri. PH Arvind Pandian,
Sr.Advocate along with
Shri. Y. Surya Narayana,
Advocate

For the Respondent No. 1 to 5: Shri. Niranjan Reddy,
Sr. Advocate along
K.V.Rusheek Reddy,
Advocate

For the Respondent No.9 &11: Shri. VimalVasi Reddy,
Advocate

Per: Rajeswara Rao Vittanala, Member (Judicial)



JUDGEMENT

1. The Company Petition bearing CP No. 81 of 2011 (TP No.60/HDB/2016) is filed by Starlite Spintech Limited, against Dijaya-Malind Properties (India) Private Limited and 10 others, U/s 235, 397, 398, 399, 402, 403, 406 & 408 R/w Schedule XI of the Companies Act, 1956 by inter-alia seeking that Board of Directors of 1st Respondent be superseded by a Committee constituted by this Hon'ble Board consisting of a nominee of the Petitioner, a nominee of the Respondent, and an Administrator/ Independent Director/ Special Officer appointed by this Hon'ble Board to take charge over the management and affairs of the Company in terms of a scheme of management and affairs of the Company in terms of a scheme of management framed by this Hon'ble Board which would be, in supersession of the Articles of Association of the 1st Respondent and in supersession of all Agreements which purport to vest parties with rights in affairs of the 1st Respondent, and of all books, papers, records and documents of the Company as well as its assets and properties; All decisions, including but not limited to managerial, administrative, and legal decisions taken by the Board of Directors of the 1st Respondent at its Board Meetings held on 16th August 2010, and 2nd September 2010 be declared and set aside as null and void: Direct the 2nd, 9th, 10th and 11th Respondents and their affiliates/ associates not to carry on any commercial activity in India directly in their own names or indirectly in any other name/s, other than through the 1st Respondent, which is similar to those objects of the 1st Respondent as stated in the Memorandum of Association of the 1st Respondent etc



2. The Brief facts, which are mentioned in the Company petition and are relevant to the issue in question, are as follows::

- 1) Dijaya-Malind Properties (India) Private Limited (Respondent No. 1 Company) was incorporated under the provisions of the Companies Act, 1956 and is a Company limited by shares. Its authorized share capital of the Company as on 31st March 2011 is Rs. 6,10,00,000/- made up of 1,00,000 equity shares of Rs. 10/- each and 60,00,000 convertible preference shares of Rs. 10/- each. The issued, subscribed, and paid-up share capital of the Company as on 31st March, 2011 is Rs. 92,08,300/- divided into 1,00,000 equity shares of Rs.10/- each and 8,20,830 convertible preference shares of Rs. 10/- each.

The business of the Company is to undertake property acquisition, property development, property construction, investment in properties, etc., and joint venture with reputed Indian partners etc.,

- 2) Dijaya-Malind JV(Mauritius) Limited (Respondent No.2 Company) is a Company registered under the laws of Republic of Mauritius and has its registered office at Suite No: 307, St. James Court, St Denis Street, Port Louis, Republic of Mauritius. It holds 7,400 equity shares of the 1st Respondent, which represent 74% of the paid up equity capital and also owns 8,00,000 preference shares of the 1st Respondent Company . The 2nd Respondent is a subsidiary of the 9th Respondent herein, and the 9th Respondent in turn is subsidiary of the 11th Respondent, which is a Company listed in the Malaysian Stock Exchange.

- 3) The Respondents Nos. 3, 4 and 5 are nominee Directors of the 2nd Respondent, on the Board of



No.20, Jalan Damai Jaya, Batu 9, Cheras Selangor 43200, Malaysia, & No.8, Jalan TR 5/2, Tropicana Golf and Country Resort, Petaling Jaya 47410, Malaysia, & No.8 Lórong Burung Sinar 3, Taman Bukit Maluri, Kepong, Kuala Lumpur 52100, Malaysia.

- 4) The respondent No.6 is a nominee Director of the 2nd Respondent on the Board of Directors of the 1st Respondent, and also having controlling interest in the 10th Respondent herein, and resides at No.86, Jalan Cincin, Section 11, 40000 Shah Alam, and Selangor DE, 40000, Malaysia.
- 5) The Respondent No.7 and 8 are nominee Directors of the Petitioner on the Board of Directors of the 1st Respondent, and have their residences at Plot No.151A, Old MLA Colony, Road No.12, Banjara Hills, Hyderabad- 500034, and Plot No.14, Road No.2, Banjara Hills, LV Prasad Marg, Hyderabad-500033.
- 6) The respondent No.9 is a Company registered under the laws of Republic of Mauritius, and has its registered office at Suite No: 307, St. James Court, St. Denis Street, Port Louis, Republic of Mauritius and is a wholly owned subsidiary of the 11th Respondent.
- 7) The Respondent No.10 is a Company registered under the laws of Republic of Mauritius and has its registered office at C/o. First Island Trust Company Ltd., Suite No: 308, St Denis Street, Port Louis, Republic of Mauritius, and holds 28% of the equity capital of the 2nd Respondent). The Respondent No.11 is a Company listed in the Malaysian Stock Exchange and is the ultimate holding Company of the 1st Respondent.
- 8) The petitioner (Starlite Spintech Limited) is a Public Limited Company, which is incorporated under the Companies Act, 1956. It has about 60



shareholders as on date of previous AGM. The petitioner holds 26% of the total equity shareholding of the Company and the petitioner is one amongst the 2 shareholders of the Respondent No.1 and the only other shareholder being the Respondent No.2. The petitioner had purchased a parcel of land admeasuring 46.18 acres for a sum of Rs. 30.24 Crores from M/s. Telangana Spinning & Weaving Mills Ltd (presently name changed to M/s. Starlite Global Enterprises (India) Ltd) with the approval of the Asset Sale Committee of BIFR on 09.01.2004, and thereafter an Agreement for sale was entered into on 22.03.2004 in respect of the said parcel of land between the petitioner and Telangana Spinning & Weaving Mills Ltd.

- 9) The Respondent No.11 (Dijaya Corporation Berhard) had contacted the petitioner and M/s. Telangana Spinning & Weaving Mills Limited (TSWM) and had evinced interest in promoting a commercial and residential building project, in respect of the land parcel admeasuring 25.416 Acres out of the land purchased by the Petitioner from M/s. Telangana Spinning and Weaving Mills Ltd and covered by the Agreement dated 22.03.2004.
- 10) The Petitioner submits, that based on such representations of the Respondent No.11, it entered into an Agreement dated 22.11.2006 titled "Deed of authorization & Declaration of 'No Interest'" between the Petitioner and M/s Telangana Spinning & Weaving Mills Ltd, wherein it renounced its interest in the aforementioned land to the extent of 25.416 acres in favour of M/s Telangana Spinning & Weaving Mills Ltd in order to enable the 2nd respondent (a subsidiary



Spinning & Weaving Mills Ltd to enter into a development agreement. It is stated that the Petitioner has renounced its interest upon the understanding that the 2nd Respondent and the Petitioner would become shareholders holding 74% and 26% of the share capital of a Company incorporated /to be incorporated in India, which would exploit and promote a commercial and residential project upon the aforementioned parcel of land belonging to M/s Telangana Spinning & Weaving Mills Ltd.

- 11) The Petitioner states that in pursuant to above agreement, the 2nd Respondent and M/s Telangana Spinning & Weaving Mills Ltd entered into an agreement dated 22-11-2006 titled "Development Agreement" whereby it was agreed, inter-alia, that the 2nd Respondent would be entitled to 64% of the sale price of each unit that is sold in the proposed commercial and residential project. It is stated that the 11th Respondent has carried out a thorough due diligence about the suitability and title of the parcels of the land where the aforementioned development would take place and thus it was satisfied about the outcome of such due diligence exercise and the same was communicated to the petitioner. It is further that vide electronic mail dated 19.01.2007, the 11th Respondent had further represented that an agreement titled "Shareholders Agreement" would be executed between the 2nd Respondent Company, and the Petitioner with regard to a project management Company, which would be in charge of the development and effective implementation of the project.

- 12) The petitioner states that on 09.04.2007, it executed an agreement titled "Shareholders



Agreement” with the 2nd Respondent, wherein it was agreed, inter-alia that the petitioner would be entitled to be a 26% shareholder of the 1st Respondent Company, and that the 1st Respondent is not a party to this Agreement.

- 13) It is stated that the 1st & 2nd Respondents and M/s. Telangana Spinning and Weaving Mills Ltd entered into an agreement dated 09.04.2007 titled as “Deed of Novation cum Joint Development Agreement cum G.P.A” whereby it was agreed that, inter-alia, the development activities would be undertaken by the 1st Respondent Company, and that M/s. Telangana Spinning and Weaving Mills Ltd would be entitled to 40% of the “Gross Development Value”. Under clause 2.2(b) of the said agreement, an obligation is cast upon the 2nd Respondent to submit and obtain approval of all relevant plans from the appropriate authorities at its cost.



Accordingly, it had subscribed to 26% of the share capital of the 1st Respondent, and it was issued and allotted 26,000 equity shares in the 1st Respondent and the Petitioner had paid vide cheque No. 766934 dated 30.01.2008 a sum of Rs.2,60,000/- towards the value of the said shares.

- 14) It had nominated the 7th and 8th Respondents herein as its Directors to the Board of Directors of the 1st Respondent; the Respondent herein had nominated the Respondent Nos. 3 to 6 herein as its Directors. The Respondent No.6 represents the interest of Respondent No. 10, which Company owns 22% capital of 2nd Respondent Company and the balance 78% being held by 11th Respondent. The Respondent No.2 and its nominee directors had represented that the Respondent No.2 had permitted...

1st Respondent as loan. However due to FEMA regulations, the same had to be treated as share capital of the 1st Respondent and as such the same could be used to issue redeemable preference shares to the 2nd Respondent and the same would be redeemed out of the earnings of the 1st Respondent since the 1st Respondent has assured source of income in view of the existing agreement to development the property of M/s. Telangana Spinning and Weaving Mills Ltd. Based on such assurances and representations, 8,00,000 11% Convertible Preference Shares of the 1st Respondent were issued to the 2nd Respondent. However, the petitioner alleged that the very issue and allotment of the aforementioned preference shares to the 2nd Respondent is illegal and void.

- 15) The 11th Respondent (ultimate holding Company of 1st and 2nd Respondent) and its nominee directors, without the knowledge of the petitioners nominee directors on the board of the 1st Respondent, had unilaterally and illegally caused a legal notice dated 17.05.2010 on behalf of the 1st and 2nd Respondent to M/s. Telangana Spinning & Weaving Mills Ltd., wherein, inter-alia, M/s. Telangana Spinning & Weaving Mills Ltd was asked to rectify certain breaches in the Agreement dated 09.04.2007. The said legal notice set out the breaches such as pending litigations; existence of a burial grave on the land; Certain encroachments by way of widening of Road from 40 Feet wide to 60 Feet wide etc The petitioner has strongly opposed the allegations in the notice and given a rely dated 22.06.2010 to the 2nd Respondent. The second issued a legal notice dated 26.07.2010 to the



the 1st Respondent were discussed at the Board Meeting held on 14.04.2009 and 11.08.2009, also notice dated 17.05.2010, state these are routine matters .

- 16) It is stated that respondent Nos. 7 & 8 , the nominee directors , were issued with a notice dated 30.07.2010 informing about a Board Meeting of the 1st Respondent to be held on 16.08.2010 in Malaysia ad agenda includes to ratify the notice for rectifying breach dated 17.05.2010 and to discuss and approve the notice of termination of the deed. By letter dated 04thAugust, 2010, the Agenda Item 11.2 was modified to read as "To ratify the Notice Termination of the Deed dated 03rd August, 2010". In pursuance to this letter, the Petitioner had addressed a communication dated 11.08.2010 to the 2nd Respondent stating, inter-alia, that the agenda for termination of the agreement dated 09.04.2007 at the board meeting to be convened on 16.08.2010 was an issue that cannot be decided at a board meeting and could only be decided at a general meeting of the shareholders since the termination of the said agreement would result in the loss of the substratum of the 1st Respondent, and also objected to the holding of the proposed Board Meeting in Malaysia at such a short notice.

- 17) The Petitioner states that the Respondent Nos. 3 to 6 had caused a legal notice dated 03.08.2010 to Telangana Spinning & Weaving Mills Ltd whereby the agreement dated 09.04.2007 was purportedly terminated and demanded for repayment of a sum of Rs. 12,70,80,000/- and another sum of Rs. 1,81,08,344/- as damages. And this notice is issued even before conducting proposed meeting on 16.08.2010. The nominee



directors, the 7th and 8th Respondent herein received a notice dated 12.08.2010 informing about the Board Meeting of the 1st Respondent to be held on 16.08.2010 to have been postponed to 02.09.2010 at Malaysia and one of the agenda items was to ratify the legal notices dated 17.05.2010 and 03.08.2010 in regard to rectifying of the breaches and in regard to termination of the Deed of Novation cum Development Agreement cum GPA dated 09.04.2007. The termination notice was issued prior to Board meeting. While taking into consideration of withdrawing CP No. 22 of 07 filed by Sri Ishwar Lal Patwari as against M/s. Telangana Spinning & Weaving Mills Ltd and others, the termination of the Deed dated 09th April, 2007 was surprisingly confirmed as per minutes dated 2nd September, 2010. It is also decided that the Board of Directors of the 1st Respondent also decided inter-alia, that a huge sum of Rs. 102.70 Crores be claimed as damages even while the legal notice dated 03.08.2010 purportedly issued on behalf of the 1st and 2nd Respondents does not demand such a sum. Furthermore, the Registered Office of the 1st Respondent Company has been unilaterally shifted and the same was not mentioned in the agenda stated in the notice dated 12.08.2010 calling for the Board Meeting to be convened on 02.09.2010. Thus the decision to shift the Registered Office of the 1st Respondent was taken at the back of the Petitioner.

- 18) It is stated that nominee Directors received a notice dated 03.12.2010 calling for a Board meeting of the 1st Respondent to be convened on 29.12.2010 in Malaysia. The petitioner vide its communication dated 22.12.2010 addressed to the 1st Respondent expressed the inability of its



nominee directors to be attend the said Board Meeting and had also made it comments/submissions to each of the proposed agenda items and had also specifically objected to the adoption of the purported minutes of the purported Board Meeting held on 02.09.2010.

- 19) The petitioner submits that vide electronic mail dated 27.01.2011 it had stated that it requires a copy of the minutes of the purported Board Meeting convened on 29.12.2010, however the same has not been provided to the Petitioner till 25.02.2011. It is further submitted that the Petitioner's nominees also received a notice dated 09.03.2011 calling for yet another board meeting to be held in Malaysia on 31.03.2011, and the Petitioner vide communication dated 24.03.2011 had stated that there was no necessity to convene a Board Meeting to consider any business other than to comply with legal requirement of convening a board meeting every quarter as the 1st Respondent had not yet commenced commercial operations and also stated that the convening of Board Meetings was prejudicial to the petitioner. The same was replied to vide a notice dated 07.04.2011 purportedly issued on behalf of the 1st Respondent which baldly and untenably denied the contents of the Petitioner's Communication dated 24.04.2011 in a per functionary manner.



- 20) The petitioner submits that its nominee directors received a notice dated 06.06.2011 wherein a board meeting of the 1st Respondent was sought to be convened on 29.06.2011 in Malaysia, along with an explanatory statement for the 13 agenda items, the proposed agenda items included approval of the director's report, to take note of

financial statements of the 1st Respondent for the financial year ended 31.03.2011.

- 21) The Petitioner submits that its nominee directors in response to the notice dated 06.06.2011 wrote communications dated 14.06.2011, wherein they expressed their concern that the directors report gave an impression that is misleading in as much as it sought to portray the pending litigation between the 1st Respondent and Starlite Global Enterprises (India) Ltd as a Contingent asset, that the directors also make a mention that the 1st Respondent is looking for new projects, and that board meetings be held in Hyderabad, these suggestions made by the Petitioner's nominee directors were rejected, without any explanation, vide communication dated 29.06.2011. The Petitioner further submits that the directors report that has been approved at the board meeting held on 29.06.2011 and which has been circulated along with the notice dated 26.08.2011 calling for the AGM of the 1st Respondent to be held on 23.09.2011 shockingly also states that the local working office of the 1st Respondent has been shifted from Hyderabad to Malaysia without any knowledge whatsoever to the Petitioner &/ or its nominee directors.

- 22) The Petitioner submits that the Respondent Nos. 3 to 6 who are the nominee directors of the 2nd Respondent on the Board of the 1st Respondent have consistently acted against the interest of the 1st Respondent but have only acted against the interest of the 1st Respondent but have only acted in the interest of the 2nd, 10th and 11th Respondents.

- 23) It is stated that it has come to its knowledge that the Respondents have caused the 1st and 2nd Respondents to commence arbitral proceedings



against M/s. Telangana Spinning & Weaving Mills Ltd (Name now changed to M/s. Startlite Global Enterprises (India) Ltd h) and that M/s. Starlite Global Enterprises (India) Ltd have also initiated proceedings under section 9 of the Arbitration & Conciliation Act, 1996. The petitioner submits that the 2nd, 9th, 10th and 11th Respondents are using the 1st Respondent as a tool to further their own agenda and commercial interest by illegally and untenably causing the 1st Respondent to terminate and attempting to abandon its only commercial activity, and have caused the 1st Respondent to be embroiled in frivolous litigations. he 2nd, 9th, 10th and 11th Respondents have caused the 1st Respondent to terminate the Deed dated 09.04.2007, and initiate the aforementioned legal actions against M/s. Starlite Global Enterprises (India) Ltd with the malafide intention and oblique motive of defeating the rights of the Petitioner, including but not limited to those rights arising from the agreement titled "Shareholders Agreement" with the 2nd Respondent dated 09.04.2007.



- 24) It is alleged that the Respondent No. 2 to 6 and 9 & 11 are running the Company at their own whims and fancies and without any mutual consultations with the petitioner. The Conduct solvency of the matter. The facts and circumstances clearly show that the respondents have acted in a manner harsh, burdensome and oppressive to the petitioner and in a manner prejudicial to public interest and also prejudicial to the interest of the Company and its bona fide shareholders. And all the circumstances as narrated supra would justify the Company to be wind up. However it would not in the interest of

petitioner as well as first respondent Company and other interested parties.

25) The Respondent No.1 to 6 and 9 to 11 have filed a common reply dated 16.11.2011. The following are main contentions in their reply.

1) The present Company petition is not maintainable in the light of Apex Court in the case of Inacable Net (Andhra) Limited and others Vs AP Aksh Broadband Limited and others in SLP No. 9110 of 2008). Wherein it is held that contractual relations of the Company with its shareholders would not come within purview of 397, 398 of the Companies Act 1956. The case was pending U/s 9 of the Conciliation Act 1996 before the Hon'ble Chief Judge, City Civil Court, Hyderabad, and Andhra Pradesh in O.P. No. 821 of 2011, filed by Respondent No.1 against TWSML of which the petitioner is also shareholders. The present petition is counter blast to the arbitration case.

2) It is stated that issuance of 8,00,000 11% convertible preference shares for the Respondent No.1 is validly made after obtaining necessary permissions from the RBI. Further the above issuances of preference shares are in accordance with the clause 3 of the Articles of the Respondent No.1 Company. The petitioner, who are also shareholders of TSWML have signed the board resolution authorizing the issue of above 8,00,000 11% convertible preference shares. The petitioner being on board of the Respondent No.1 Company have also authorized the issuance of further 20,8300, 11% fixed divided preference share



No.1 Company being a private limited Company is well within the rights to issue preference shares of any kind and it has complied with all extant statutory requirements for the same. Therefore, the petitioner is stopped from making any allegations about the issue.

- 3) It is alleged that TSWML is entered into an agreement title 'Deed of Novation- cum-Joint Development Agreement- cum-General Power of Attorney' dated 09.04.2017, under which huge investment were made by the respondents. The petitioner, after fully aware of the interim order dated 16.03.2007 passed in CP No. 22 of 2007, has enter into the said agreement thereby causing huge loss to the respondents. It is asserted that the managing director of the Respondent No.1 Company is fully empowered to issue of notice of the Respondent No.1. Moreover the issue of notice was discussed during board meetings and same was also ratified subsequently. It is not in dispute that notice board meeting held on 16.08.2010 was sent on 30.07.2010 there by 17 days' notice prior to the board meeting.
- 4) The Company is having right to terminate the agreement/ contract in order to protect interest of the defaulting Company (TSWML) as is member of the Company. The petitioner cannot question the merits of decisions taken in a Board meeting which are conducted in accordance with law
- 5) The respondents have filed bunch of documents to support their various



petitioner. Therefore they have prayed petition is to be dismissed.

3. The case was initially filed before the then Company Law Board, Chennai, and the same was subsequently transferred to this Bench on its constitution. Accordingly, the case has been taken on the records of this Bench and listed it on various dates viz., 26.07.2016, 16.08.2016, 02.09.2016, 29.09.2016, 19.10.2016, 07.11.2016, 07.12.2016, 21.12.2016, 06.01.2017, 19.01.2017, 20.01.2017, 13.02.2017, 20.02.2017, 20.03.2017, 07.04.2017, 21.04.2017, 26.04.2017, 28.04.2017 and 05.05.2017. The case has been adjourned on those dates at the request of one party or the other. After concluding the arguments of both the parties, the learned counsel counsels have taken time to file their written gist of pleadings and arguments since the case was filed long time back and so may developments have taken place in the meanwhile.



I have heard, Shri. P.H. Arvinth Pandian, Senior Advocate with Shri. Y. Surya Narayana for the petitioner and Shri. Niranjan Reddy, Senior Counsel with K.V.Rusheek Reddy for the Respondent No. 1 to 6 and Shri. Vimal Vasi Reddy, learned counsel for the Respondent No.9 to 11. have also carefully perused all the pleadings of both the parties along with extant provisions of Companies Act, 1956/2013.

5. Shri.P.H.Arvinth Pandian, the learned senior counsel for the petitioner, while reiterating various contentions raised in the pleadings filed on behalf of the petitioner, has further contended as follows(Since the petition is filed in the year 2011, and it is necessary to mention the pleadings of learned counsel as of date):

1. M/s Dijaya-Malind Properties (India) Private Limited (R-1 Company) is a Company

having its registered office at Hyderabad. M/s Dijaya-MalindJv (Mauritius) Limited (R-2 Company) is a Public Limited Company registered under the laws of Republic of Mauritius. It holds 74% of paid up capital of the R-1 Company and thus R-1 Company is a subsidiary of R-2 Company.

2. R-3 to R-6 are nominee directors of the R-2 Company in the Board of R-1 Company. R-6 (Murugayah Kanapathy) is also having controlling interest in the R-10 Company (S.N.R.L. Investments Limited). R-7 (Sanjay Patwari) & R-8 (Ramgopal Patwari) are nominee directors of the Petitioner in the Board of Directors of R-1 Company. R-9 (Dijaya (Mauritius) Limited), R-10 (S.N.R.L. Investments Limited) & R-11 (Dijaya Corporation Berhard) are Companies registered under the laws of Republic of Mauritius. R-11 is a listed Company in the Malaysian Stock Exchange, and it is holding Company of the R-2 Company, and thus, it is the ultimate holding Company of R-1 Company. The petitioner Company purchased a parcel of land admeasuring 46.18 Acres for a sum of Rs.30.24 Crores from M/s Telangana Spinning & Weaving Mills Ltd. (TSWML) with the approval of the Asset Sale Committee of BIFR on 09-01-2004 and thereafter an Agreement for sale was entered into on 22-03-2004 between the petitioner and TSWML.

3. "Deed of Authorization & Declaration of No Interest" was signed between Petitioner & M/s TSWML on 22-11-2006, wherein it renounced its interest in the aforementioned land to the extent of 25.416 Acres in favour of M/s. TSWML in order to enable the 2nd Respondent (Subsidiary of the 11th Respondent) & M/s. TSWML to enter into a Development Agreement. ("Deed of



Petitioner renounced its interest in the 25.416 acres on the understanding that the R-2 and the Petitioner would become shareholders holding 74% & 26% of the Share Capital of a Company to be incorporated in India.

4. Thereafter on 22-11-2006 the 2nd Respondent and M/s. TSWML entered into Development Agreement whereby it was agreed, inter-alia, that 2nd Respondent would be entitled to 64% of the sale price of each unit that it is sold in the proposed commercial & residential project. .
5. On 19-01-2007 the 11th Respondent vide email to Petitioner represented that an agreement titled "Shareholders Agreement" would be executed between the 2nd respondent and the petitioner with regard to a project management Company which would be in charge of the development and effective implementation of the Project.
6. On 09-04-2007 Petitioner and the 2nd respondent entered into a "Shareholders Agreement" wherein it was agreed, inter-alia that the Petitioner would be entitled to be a 26% shareholder of 1st Respondent Company. The 1st Respondent Company was incorporated as a special purpose vehicle only to take up the development project in the land admeasuring 25.416 acres.
7. On 09-04-2007 1st Respondent Company, 2nd Respondent Company and M/s TSWML entered into an "Deed of Novation Cum Joint Development Agreement cum G.P.A" whereby it was agreed, inter-alia, that the development activities would be undertaken by 1st Respondent Company and M/s TSWML would entitled to 40% of the "Gross Development Agreement".



8. After becoming 26% shareholder, the Petitioner Company nominated the 7th and 8th Respondents as its directors in the Board of the 1st Respondent Company. Likewise the 2nd Respondent which subscribed for 74% of the capital, has also nominated Respondents 3, 4,5 and 6 as its directors in the 1st Respondent Company. Apart from equity shares, the 2nd Respondent was also allotted 8,00,000, 11% convertible preference shares against the funds that were received as loans by the 1st Respondent Company. The allotment of the Preference Shares to the 2nd Respondent prima facie is illegal and void as the allotment is in contravention of FEMA Regulations.
9. The 3rd Respondent, who is a nominee director of the 2nd Respondent, without the authorization and approval of the Board of Directors of the 1st Respondent Company, suo-motu, wrote a letter on 24-04-2009 to M/s TSWML and also issued a legal notice on 26-05-2009 to the legal advisors of M/s TSWML asking to rectify certain breaches in the agreement dated 09-04-2007.
10. The resolution allegedly passed by the Board at the meeting held on 02-09-2010 terminating the agreement dated 09-04-2007 is illegal and invalid as Board of the 1st Respondent Company do not have the power to deal with the property of the Company as the said power is vested with the shareholders of the Company under the provisions of erstwhile section 293 (1) (a) of the Companies Act, 1956 that was in force at that point in time i.e., September 2010. The provisions of section 293 is applicable to Public Companies and also to Private Companies which are subsidiaries of public Companies, Section 293



(1) (a) of the Companies Act, 1956 is reproduced hereunder.

293. RESTRICTIONS ON POWERS OF BOARD

- (1) *The Board of directors of a public Company, or of a private Company which is a subsidiary of a public Company, shall not, except with the consent of such public Company or subsidiary in general meeting,*
- (a) *Sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the Company, or where the Company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking;*

The provisions of Section 293 (1) (a) of the Act is very much applicable to a Private Company that is a subsidiary of a Public Company and therefore the provisions are applicable to the 1st Respondent Company that is a Private Company subsidiary of a Public Company. By virtue of the Deed of Novation cum Joint Development Agreement cum GPA, the development activities were assigned to the 1st Respondent Company and the project is the one and only 'Undertaking' of the 1st Respondent Company. The illegal termination of the said agreement tantamount to 'disposing off' the Undertaking of the 1st Respondent Company and therefore the termination of the agreement ought to have been placed before the shareholders for their approval as required under the provisions of section 293 (1) (a) of the Companies Act, 1956.

11. The petitioner submits that the Respondent No.3 to 6 who are the nominee directors of the 2nd



have been consistently acting against the interest of the 1st respondent Company. The 2nd and 11th Respondents are very well aware that the one and only project assigned to the 1st Respondent Company is to develop the 25.416 acres of commercial and residential project. Apart from the said project there is no other project assigned to the 1st Respondent Company. The 1st Respondent Company was incorporated as a special purpose vehicle only to take up the Development activities in the 25.416 acres. Terminating the Development Agreement entered on 09-04-2007 would defeat the very purpose of its incorporation and the Company would virtually become a shell Company. The petitioner renounced its right in the 25.416 acres only on the agreement that development activities would be carried out by the 1st Respondent Company and therefore the Company would earn a decent profit out of the activities so carried out. Terminating the development agreement would be prejudicial to the interest of the petitioner as both the renouncement as well as the investment to the tune of 26% would go down the drains and the petitioner would be put to heavy financial crises. The 2nd and 11th Respondents have adopted invalid means to terminate the agreement.



12. The learned counsel contended that Petitioner is not a party to the Arbitration proceedings pending before Arbitral Tribunal. Further contended that it is not open for the respondents to raise the pleadings one by one and that too at this final stage, fact remains that respondents did not file any application under section 8 of Arbitration and Conciliation Act, 1996 to refer the Petition to Arbitration.

13. The issue raised in the present Company Petition has challenged the validity of the resolution passed at the Board meeting on 02-09-2010 cancelling the Development Agreement. The petitioner renounced its rights only in 25.416 acres on the agreement that development activities would be carried out by the R-1 Company in order to earn a decent profit out of the activities so carried out. So terminating the development agreement dated 09-04-2007 would defeat the very purpose of its incorporation as a special purpose vehicle. He has further contended that the disputes raised in the Company petition is not a contractual dispute as alleged by the respondents and it is purely a Company law dispute. The respondents violating the provisions of Companies Act, Section 293 (1) (a) of the Companies Act, 1956.

14. It is further stated that the term undertaking has been defined under the provisions of section 180 of the Companies Act, 2013. According to the explanation, an asset would be considered as an undertaking if the investment in such undertaking exceeds 20% of net worth or the asset generates 20% of the total income. Applying the criteria to the R-1 Company, the development activities would have constituted 100% of the net worth and income of the Company and therefore the development business would squarely fall under the definition of undertaking. Therefore the development activity is very much and 'Undertaking' and the illegal termination of the said agreement tantamount to 'disposing off' the Undertaking of the R-1 Company and therefore the termination of the agreement ought to have been placed



required under the provisions of Section 293 (1) (a) of the Companies Act, 1956.

15. It is submitted that the stand of the Respondents that the Board members and shareholders are same and therefore the powers of the shareholders can be exercised by the Board is untenable. Under the Act, certain powers are to be exercised by the Board and certain powers are to be exercised only by the shareholders of the Company. The powers that can be exercised by the Board have been provided under Section 292 of the Act (Section 179 under the Companies Act, 2013). The Act specifically has delegated the power under Section 293 of the Act to the shareholders and therefore the same cannot be exercised by the Board of Directors of the Company, even where the Board members and the shareholders are one and the same.

16. Firstly the nominee directors did not attend the Board meeting allegedly held on 02-09-2010. The respondents cannot presume that the nominee directors are the only representatives of the petitioner. The petitioner can nominate any director to represent in the general meeting, other than the nominee directors.
17. He has further contended that the single act can constitute an act of oppression under section 397 & 398 of the Companies Act. The termination of the agreement has a far reaching effect on the operations of the Company and the impact of such termination is of a continuing nature even as on date. The Company is unable to commence its operations because of the impugned termination and therefore the act of oppression and mismanagement has a continuing effect.



18. He has relied upon the following judgments in support of his case.

1. Booz Allen and Hamilton Inc Vs. SBI Home Finance Limited and others - AIR 2011SC2507, (2012) 173 CC 184 (SC) - SUPREME COURT
2. George Mayer and Another Vs.Scottish Co-operative Wholesale Society- 1958 S.C. (H.L) 40 - SUPREME COURT
3. Mysore Realty Private Limited Vs. H.P. Basavaraju& Another- Company Law Board

6. Shri. Niranjan Reddy, learned senior counsel for the R-1 to R-5, while reiterating all the averments made by the respondents, has further contended as follows:

- 1) The petitioner has given no objection and/or purported authority on 22-11-2006, Starlite Global to develop the land in question for 25.416 acres. Starlite Global executed agreement on 09-04-2007 with R-1 & R-2 for development of the land in pursuant to agreement; the petitioner signed a shareholders' agreement dated 09-04-2007. During 2007-2009, there were various breaches and/ or misrepresentations that were made by Starlite Global. Accordingly notice for rectification of breaches dated 17-05-2010 and another notice for termination of the agreement dated 03-08-2010 were issued.
- 2) On 02-09-2010, the notices were ratified at the Board Meeting of R-1 Company. However, the nominee directors on behalf of the Petitioner (R-7 & R-8) voluntarily remained absent. As on 11-02-2011 R-1 & R-2 issued a notice invoking arbitration against Starlite Global, subsequently petition was filed under section 9 of Arbitration and Conciliation Act, 1996 on 15-02-2011 against Starlite Global.



- 3) On 21-09-2011, the petitioner, after keeping silent more than 13 months from the date termination of the agreement, filed the present Company Petition praying for cancelation of the Board Resolutions dated 16-08-2010 and 02-09-2010. The petitioner and the R-7 & R-8 are attempting to agitate and protect their commercial interest as also that of its sister concern namely Starlite Global by this petition.
- 4) It is trite law that discretionary powers can be exercised by courts only when the party has approached it with clean hands as was held in the case of S.P Chengalvaraya Naidu vs Jagannath 1994 SCC (1). The impugned agreement was validly terminated by R-1 and the same was duly ratified by the Board meeting held on 02-09-2010.
- 5) The learned counsel further contended that in pursuance to the extraordinary meeting called vide a notice dated 27-03-2009, meeting was held on 12-04-2008, through which Articles of Association and/ or Memorandum of Association to increase the share capital to Rs.6,10,00,000/- and to empower the Board of Directors to issue redeemable preference shares to any person etc., unanimously. According with the respondent Company offered preference shares to the R-2 who purchased 8, 00,000 at 11% convertible preference shares. And it was also ratified by the Board of Directors in accordance with Memorandum of Association (MOA). AOA on 14-04-2009. The nominee directors of the petitioner were also present and quorum was maintained and the same was also communicated to the RBI.



- 6) The learned Senior counsel has relied upon the

following judgment in support of his case.

- a) Incable Net(Andhra Ltd. Ap Aksh Broadband Ltd (2010)6 SCC 719
- b) Sangrm Singh Gaekwad Vs. Shantadevi P.Gaekwad(2005)11 SCC 314
- c) M.Thimma Gowda & Anr. Vs. SPR Sugar Pvt. Ltd
- d) M.L.Thukral & Anr Vs. Krone Communication Ltd & Ors. 2003 113 Comp cas 63(CLB)

He has also filed length written arguments by reiterating the pleadings already on record and further made several contentions.

7. After considering various pleadings made by both the parties, following main issues, apart from other issues, arise for the consideration in the CP:

- a) Whether the notices given dated 12.08.2010 by Respondent No.1 proposing to conduct Board Meeting on 02.09.2010 is in accordance with Memorandum and Articles of Association and the Companies Act, 1956:
- b) Whether the decision taken in the above meeting to terminate Deed of Novation cum-Joint Development Agreement dated 9th April, 2007 is in accordance with law or not and falls within ambit of Sections 397/398 of Companies Act, 1956/ Sections 241/242 of Companies Act, 2013
- c) If so what is in relief, the petitioner is entitled for.

8. The main cause action arises for filing the present petition is termination of Deed of Novation- cum -Joint Development Agreement dated 09.04.2010. In order to adjudicate the validity of termination, it is necessary to advert



to how the affairs of R1 Company should be conducted.

9. As stated supra, it is not in dispute that Petitioner Company is a Public Limited Company, incorporation under the Companies Act, 1956. The petitioner has initially entered for agreement of sale with M/s Telangana Spinning & Weaving Mills Ltd on 22.03.2004 for purchase of land admeasuring Ac.46.18 gts for sum of Rs.30.24 Crores from Telangana Spinning & Weaving Mills Limited (TSWM), and this name has been to M/s Starlite Global Enterprises (India) Limited with the approval of Asset Sale Committee of BIFR on 09.01.2004..



10. In pursuant to the interest shown by Dijaya Corporation Bernhard (R-11), in promoting a commercial residential building project in respect of land admeasuring Ac 25.416 guntas out of the total land of Ac 46.1 guntas, a ' Deed of authorization and Declaration of No interest' was executed on 22.11.2006 between M/s Starlite Spintech Limited and TSWM, with the following declaration of no interest:

"1. Starlite unconditionally and irrevocably nominates and authorizes Telangana Spinning to enter into a Development Agreement which has been duly examined by M/s. Starlite Spintech Limited with M/s Dijaya Malind JV (Mauritius) Limited for the Development of the said 'Plot' for eventual sale as undivided shares by developing a mixed development comprising of a clubhouse including ancillary facilities attached to the same residential

development together with car park facilities and other necessary infrastructures and sale of units contained therein and declares that it has no objection, right, title and interest in the said 'Plot' owned by Telangana Spinning under the said Agreement dated 22.03.2004 or otherwise, whatsoever, hereinafter."
(Page 35).

11. There is another Development Agreement dated 22.11.2006 (Page 38 to 60) was executed between TSWM (Land Owner) and Dijaya Malind JV (Mauritius) Limited (Developer) and this agreement was executed to develop. (page 39 Clause G & H)



- "1. The parties hereto are now desirous of developing the said Plot under this Development Agreement into a mixed development comprising of inter-alia, a clubhouse including ancillary facilities attached to the same (hereinafter referred to as "the Clubhouse"), residential apartments and mixed commercial development together with car park facilities and other necessary infrastructures (hereinafter referred to as "the Project") subject to the approval of the relevant authorities.*
2. *The parties hereto have agreed that the Developer be given the exclusive rights to carry out and complete the Project on the Plot through its subsidiary Company incorporated in India, subject to the terms and conditions contained in this Agreement.*

1. Agreement to Develop

1.1 In consideration of and subject to the respective agreements, undertakings, covenants and obligations of the Parties hereto as hereinafter set out, the Landowner hereby appoints and the Developer or its subsidiary Company incorporated in India hereby agrees to undertake and complete the Project on the Plot upon the terms and conditions hereinafter appearing."

12. Subsequently the Shareholders Agreement dated 9th April, 2007 was executed between Dijaya Malind JV (Mauritius) Limited incorporated as a Private Limited Company in Mauritius under the Companies Act, 2001 and the Financial Services Development Act, 2001 and Starlite Spintech Limited, which is wholly owned subsidiary of Dijaya Corporation Berhard, (R-1). As per this Agreement that both the parties have agreed to subscribe shares of Dijaya Malind Properties (India) Private Limited (R-1 Company) in proposed to subscribe 74,000 ordinary shares of Indian Rupees Ten (Rs.10/-) each only representing 74% of the issued and Paid Up share capital of R-1 Company by R-2 and 26,000 shares representing 26% by the petitioner. The manner of conducting shareholding meetings of R-1 Company are detailed under Clause-4 of the agreement which are extracted below: (Page 67)



"Clause-4:

1. The quorum for all general meeting of members of the Company (including adjourned meetings) shall be two (2)

members, present in person (ie by their corporate representative) or by proxy. If a quorum is not present at any general meeting of the Company then the meeting (for the same agenda) shall be adjourned to the following week at the same time and place. Notwithstanding this Clause, in the event a quorum is not present at any two (2) consecutive adjournments the requirement for a quorum shall be then reduced to one (1) member, of which one (1) must be a representative of Party A, present in person (i.e by their corporate representative) or by proxy. The aforesaid general meetings may be held by way of teleconferencing or such other electronics means, as may be agreed by the Parties.

2. Prior written notice of all general meetings shall be sent to the Parties at least fourteen (14) days before the meeting specifying the time and place of the meeting and indicating all matters to be considered threat, and including copies of reports studies and documents relating thereto unless shorter notice has been agreed upon by the Parties.
3. All resolutions on any matter proposed at any general meeting of the Company or otherwise shall be passed by a simple majority of votes representing the shareholding of each shareholder or approval of the Parties in attendance.
4. notwithstanding Clause 4.1, 4.2 and 4.3 above, the provisions of the Companies Act 1956 of India ("the Act") shall prevail over the above mentioned clauses in the event



of conflict between the above mentioned clauses and the Act.”

13. So far as the Directors Meeting and Management is concerned, the same has been clarified under Clause-5 reads as under: (Page 67 Clause 5.1 to 5.8)

“5.1 Save as otherwise unanimously agreed between the Parties, the number of directors in the Company shall be Six (6) directors constituting the Board of Directors of the Company (“the Board”) who shall be nominated and appointed as follows:-

- i. Four (4) directors by Party A;*
- ii. Two (2) directors by Party B*

for so long so each party hereto remains a shareholder of the Company. For the avoidance of any doubt, the director(s) nominated by the respective Parties shall resign as director and/ or employee of the Company once the respective Parties are no longer a shareholder of the Company.

- 5.2 *The Parties hereto shall with respect to their respective appoints or appointees be entitled to determine the period he or they will hold office and may at any time remove either any or all of such persons and nominate and appoint another or others in his or their place. Any such nomination appointment determination and removal shall be made by notice in writing signed by or on behalf of the Party making the same and such notice shall take effect when it has been received by the Company.*

- 5.3 *The quorum at all meetings of the Board (including adjourned meetings) shall be any*



three (3) Directors, present in person or by their duly appointed alternates. If a quorum is not present at any meeting of the Board then the meeting (for the same agenda) shall be adjourned to the following week at the same time and place. The aforesaid meetings of the Board may be held by way of teleconferencing or such other electronics means, as may be agreed by the parties.

5.4 Prior written notice of all directors' meetings shall be sent to all directors of the Company at least fourteen (14) days before the meeting specifying the time and place of the meeting and indicating all matters to be considered thereat, and including copies of reports studies and documents relating thereto unless shorter notice has been agreed upon by all directors. The Board shall hold at least four (4) meetings in a year.

5.5 All resolutions on any matter proposed at any Board's meeting of the Company shall require the affirmative vote or approval of the majority of directors (or their respective alternates) present and voting.

5.6 Each of the directors shall have one vote each and in his absence, that director's vote shall be exercised by his respective alternate director present at the meeting.

5.7 It is hereby agreed by the parties hereto that the Chairman and the Chief Executive Officer of the Board will be appointed by Party A from amongst the directors nominated by the same.

5.8 The directors shall use their best effort to



telephone, fax or other means with one another and within a reasonable time prior to any meeting of the Board in which any of the matters mentioned aforesaid are to be discussed and shall be use their best efforts to conclude the matter for the benefit of the Company and to avoid any differences in the approaching meeting.”

14. The manner of Termination and Terms of the contract has been given under Clause-11 of the said Agreement. Clause 11.1 & 11.2 reads as under: (Page 75 to 77)

“Clause 11.1:

1. *This Agreement shall become effective on the date the Subscription Shares are duly registered under Party A and Party B in the Respective Proportions and shall continue in force and effect until the Company shall be dissolved or otherwise cease to exist as a separate entity or unless this Agreement is sooner terminated by mutual consent of the parties hereto or pursuant to any of the provisions herein contained.*

Clause-11.2

2. *Each of the following events shall constitute an event of default (“hereinafter referred to as an “Event of Default”) if any of the parties hereto (“the Defaulting Party”) shall:-*
 - 2.1. *Commit a material breach of its obligations and/ or undertakings under this Agreement which is non-rectifiable; or commits a material breach of its obligations and/ or undertakings under this Agreement*



but shall fail to take all necessary action to remedy such breach within thirty (30) days from the service of a written notice by the other party hereto complaining of such breach; or

- 2.2. go into winding up or liquidation (whether compulsory or otherwise) otherwise than for the purpose of bone fide reconstruction amalgamation or an order of Court is made for its compulsory bankruptcy or liquidation as the case may be; or*
- 2.3 enter into any composition or arrangement with its creditors; or*
- 2.4 have receiver and/ or manager appointed over the whole or any part of its undertaking or assets; or*
- 2.5 has presented against it a winding up petition or analogous proceedings in court in the place of its incorporation."*



15. Clause 14.8 and 14.9 deals with the issue of specific performance and arbitration. Clause 14.8 & 14.9 reads as under: (Page 87)

"Clause 14.8:

Specific Performance:

The Parties hereto shall be entitled to the remedy at law of specific performance of this Agreement.

Clause 14.9:

Arbitration:

Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and

nominating one person by each party and the nominated arbitrators on mutual consent appoint an umpire/ chairman, in terms of the provisions of Arbitration & Conciliation Act, 1996. The language of the arbitration shall be English."

16. Another deed namely 'Deed of Novation-cum-Joint Development Agreement cum GPA' was executed on 9th April, 2007 among the TSWM (Land Owner) and Dijaya Malind JV (Mauritius) Limited (R-2) (Page 103 to 119) and Dijaya Malind Properties (India) Private Limited (R-1 Company) which is incorporated in India. And the manner of termination of this agreement is a question in this case.
17. One of the reasons for the impugned termination of the agreement is that a declaration was given by stating that the Plot in question admeasuring Ac 25.416 guntas was currently free all encumbrances and the agreed total consideration is Rs.50,00,000 per acre as per the schedule given in the Clause-1.2: (Page 106) and this clause reads as under:



"1.2.1. In further consideration of the aforesaid, the Developer has paid/ shall pay the Landowner the sum of Indian Rupees Fifty Lakhs (Rs.50,00,000) per acre only (hereinafter referred to as "the Refundable Deposit") in the following manner and proportions:-

- 1.1. the sum of Indian Rupees twenty Five lakhs (Rs.25,00,000) which sum was paid to the Landowner on the 11th of August 2006, as advance,*

1.2. the sum of Indian Rupees Fifteen Lakhs (Rs.15,00,000) per acre (less the sum of Indian Rupees Twenty Five Lakhs (Rs. 25,00,000) which sum was paid to the Landowner on the 11th August 2006), i.e. making a balance sum of Indian Rupees Thirty Five Million Six Hundred and Twenty Four Thousand (Rs. 35,624,000) was paid to the Landowner on the 17th of January 2007.

1.3. the sum of Indian Rupees Fifteen Lakhs (Rs. 15,00,000) per acre, i.e. a total sum of Indian Rupees Thirty Eight Million One Hundred and Twenty Four Thousand (Rs. 38,124,000) to be paid to the Landowner upon the execution and registration of a general power of attorney to deal with the Plot in the manner aforesaid (hereinafter referred to as "the General Power of Attorney") and annexed hereto as Annexure "A" which is to be read as part of this Agreement, with the Sub-Registrar, Medchal, Ranga Reddy District, Hyderabad, Andhra Pradesh but in any event not later than the 30th of April 2007;

1.4. the balance of Indian Rupees Twenty Lakhs (Rs. 20,00,000) per acre to the Landowner on the date of initial sale of built-up areas in the Project viz., units/ flats/ apartments (including



Plot (hereinafter called "Units" under the Projects to the general public but in any event not later than the 31st October 2007."

As per Clause-1.3, the above refundable deposit shall be refunded to the Developer by the land owner forthwith with upon termination of the agreement pursuant to Clause 10.2 or completion of the relevant phase as defined in Clause 4.2.

Clause 1.3 reads as under: (Page 107) for ready reference

"1. The Refundable Deposit shall be refunded to the Developer by the Landowner forthwith upon:-

- i. termination of this Agreement pursuant to Clause 11.2 hereof, or*
- ii. completion of the Relevant Phase as defined in Clause 4.2 (proportionate amount);*

Whichever is the earlier.

In the event of a refund under Clause 1.3 (b), the Landowner shall, upon Completion of the Relevant Phase, forthwith refund the Refundable Deposit to the Developer proportionately in the percentage according to the actual built up area of the relevant phase constructed divided by the total built up area for the entire Plot according to the Approvals/Master plan. "

Clause-10.2 as given the consequence of default Clause 10.2 reads as under: (Page 116)

"Clause 10.2: Consequences of Default

Upon the happening of the Events of Default aforesaid in Clause 10.1 and Provided that the defaulting party shall have failed to remedy such



defaulting party shall be entitled at its election by notice in writing to the defaulting party to terminate this Agreement whereupon the following consequences shall ensue:

- a. the Landowner and the Developer together with the architect and the quantity surveyor shall within thirty (30) days carry out a joint inspection and measurement of works done;*
- b. the Refundable Deposit shall be refunded by the Landowner to the Developer free of interest within thirty (30) days from the completion of the joint inspection and measurement aforesaid;*
- c. in the event the defaulting party is the Landowner, the Developer shall be entitled to recover such damages which the Developer may have suffered;*
- d. Provided payment of the Refundable Deposit and damages assessed pursuant to Clause 10.2(c) (if any), has been made to the Developer, the Developer shall within thirty (30) days from the date of the joint inspection and measurement in the state as at the date of termination vacate, redeliver and forfeit the right to access to the Plot as provided in clauses 3.1 and 6.1.1 herein and all works and infrastructure thereon to the Landowner."*



18. It also contains arbitration clause vide Clause-23. Clause 23 which reads as under: (Page 119)

"Clause-23: *Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally*

by each party and the nominated arbitrators on mutual consent appoint on umpire/ chairman, in terms of the provisions of Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. ”

19. By alleging breach of conditions as per the deed of Novation cum Joint Development Agreement dated 9th April, 2007, R-1 & 2 Companies have issued a notice for rectifying breach dated 17.05.2010 to the TSWM, when the TSWM fail to rectify the breach of terms of the agreement as per the said notice, they have issued a notice of termination of agreement dated 03.08.2010 by calling upon the TSWM to refund the refundable deposit of Rs.12,70,80,000/- within 30 days of receipt of the notice and also claiming damages of Rs.18,108,344/.



20. The Petitioner has got issued a reply dated 11.08.2010 (Page 165) and 18.06.2010 (page 149 to 153) by denying all the contentions raised by respondents. Subsequently, the R-1 Company issued a notice dated 12.08.2010 to Board of Directors proposing to conduct Board meeting on 02.09.2010, by inter alia notifying agenda to ratify the notice for rectifying breach notice dated 17.05.2010, to rectify the notice of termination of the deed dated 03.08.2010, among other agenda mentioned therein. In pursuant to the above notice R.G.Patwari (R-8) & Sanjay Patwari (R-7) the nominee Directors of petitioner, have addressed a joint letter dated 27.08.2010 to the Chairman of R-1 Company by expressing their inability to attend the proposed Board Meeting to be held on 02.09.2010 in Malaysia. due to their pre-occupation at

Hyderabad, India and request the Chairman to grant leave to absence (page 182). The R-1 & R-2 have also given a reply by Kochhar Company dated 19.08.2010 (Page 179 to 181) by informing them that impugned action is being taken strictly in accordance with law and that too in the better interest of R-1 Company and it can be done the Board Directors Meeting and not in the General Body Meeting of the shareholders as contended. They have denied that the impugned termination would lead to destruction of substratum of the Company.

21. As proposed, the meeting of the Board Directors of R-1 Company was held on 02.09.2010 at Board Room (Page 185). The minutes of the Board Meeting are filed at (Page 185 to 193). During this meeting 4 Directors have attended with leave of Ramgopal Patwari and Sanjay Patwari , who are nominee Directors of petitioner. The issue of ratification issuance of notice for rectifying the breach dated 17.05.2010 and the notice of termination of agreement dated 03.08.2010 was taken up during the meeting. After discussing the entire issue as per the above notices and the dissent note made by the nominee Directors of the R 1 Company, the Board ratified and confirmed the notices as required under Article 38 of Article of Association of the Company and also authorized the Managing Director to take consequential action to implement the decisions.

22. The R-1 Company is incorporated under Companies Act, 1956. The R-1 and R-9 (Dijaya (Mauritius) Limited) are subsidiaries to the Memorandum and Articles of Association by



respectfully. As per Article-19 Articles of Association of R-1 Company, Mr.Poh Pai Kong, Tong Kien Onn, G.Narasinga Rao, Dickon Tan Yong Loong are four life time Directors.

Article 12 deals with borrowing powers of Directors, Articles 35 & 38 deals with the powers of the Directors. Articles-12, 35 & 38 are extracted below for ready reference:

"Article-12:-*The Directors have powers to raise or borrow monies without any limit at any point of time.*

The Directors shall exercise the following powers without reference to General Body:

- a. to sell, lease or otherwise dispose of the whole of the whole of substantially the whole of the undertaking of the Company.
- b. to remit or give time for repayment of any debt due by a Director.
- c. to contribute to Charitable and other funds not directly relating to the business of the Company subject to a maximum of Rs.50,000/- in a year.
- d. to issue further shares in the Company either by private placement, rights or bonus.

Article-35: *The Quorum necessary for the transaction of business of Directors shall be two or one-third of total number of Directors, whichever is higher, subject to section 287 of the Act.*

Article-38: *Subject to Article 35 the management of the business of the Company shall be vested in the Director and the Director may exercise all such acts and things, as the Company is by its Memorandum of Association or otherwise, authorized to exercise or do, and as are not hereby or by statute directed or required*



General Meeting but subject to nevertheless the provision of the Companies Act and or these presents, and to any regulations from time to time made by the Company in General Meeting not being inconsistent with provisions of these presents, provided that no such regulations shall invalidate any prior act of the Directors which would have been valid if such regulation had not been made."

23. By reading of above articles of Association of R1 Company, it is clear that the Board of Directors of the Company have absolute powers to consider and pass appropriate resolutions during its meetings, in the best interest of Company. And the meeting in question is conducted after duly following procedure as prescribed under the Articles of Association of the R1. Company and also principles of natural justice. Therefore, the impugned actions are declared to be legally valid and taken in accordance with law, and they do not call for any interference by the Tribunal.



24. It is also not in dispute that CP No. 22 of 2007 was filed by Ishwarlal Patwari and others before the then CLB, Chennai under section 111A, 235, 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956, by inter-alia seeking to allow proportionately representation of the petitioners the Board of Directors of the Company; to declare Board meeting held on 11.02.2002 and consequently resolutions; to declare the annual returns dated 31.07. 1997 and 22.09.1997 as null and void. The CLB passed interim order dated 16.03.2007, by inter-alia stating that any allotment further shares and dealing with the petitioner. So the contention of the petitioner that the land in question is free from all encumbrances is not borne out of record. And

the contentions raised contrary by the petitioner are not tenable.

25. Subsequently, the R-1 & R-2 Company has filed O.P No.821 of 2011 before City Civil Court of Andhra Pradesh, Hyderabad (Telangana now) against Starlite Global Enterprises (India) Limited (TSWM earlier) under Section 9 of Arbitration and Conciliation Act, 1996 R/w Order VII Rule-1, Order 39 Rule-1 and Section 151 of CPC 1908, by inter-alia seeking interim order.

It is contended therein that in pursuance to arbitration Clause-23 available in the Deed of Novation dated 09.04.2007, the petitioner has already initiated arbitration proceedings by sending notice to the Respondent (petitioner herein) and thus the arbitration proceedings is appropriate forum to decide the issue in question. Therefore they sought the interim relief by inter-alia directing not to alienate the property admeasuring Ac 25.416 gts pending arbitration proceedings.

26. Subsequently, Starlite Global Enterprises (India) Limited (Earlier TSWM) has also filed O.P.No.1768 of 2011 before Hon'ble City Civil Court, Hyderabad, against the Respondent Nos. 1, 2, 10 & 11 under section 9 of Arbitration and Conciliation Act, 1996, under order VIII and Section 151 of CPC, 1908, by inter-alia seeking to pass an order directing the respondents to furnish security for sum of Rs.300 Crores by way of Bank Guarantee/immovable property/3rd Party Security and undertaking not to alienate their properties to the extent of Rs.300 Crores in time bound manner.

27. It is also not in dispute that the quorum for conducting said board meeting is maintained and the Deed is also fully empowered by Articles of



Association of R 1 Company and the same is also in consonance with provisions of the Companies Act, 1956/2013. As stated supra, the Respondent No.7 & 8 who are nominee directors of the Company, are given due notice for conducting of impugned board meeting. They have also expressed their inability to attend the board meeting due to their pre-occupation with activities in Hyderabad. It is settled position of law by various judgments rendered by various courts that Tribunal cannot interfere with wisdom of a Company to take decision(s) in the best interest of Company unless there is an arbitrary exercise of powers contrary to extant Articles of Association of a Company and taken contrary to principles of natural justice. Share holders and their Board of Directors of a Company are best judges to take decisions and run the affairs of a company. Tribunal/Court cannot interfere in the policy matters of a Company, which are taken by duly constituted Board of Directors by following articles and memorandum of Association of a Company and principles of natural justice. In the instant case, it is not the case of petitioner that they are not associated with impugned action as their nominee Directors are still on Board and they are given due notice for the impugned meeting conducted by the Company. However, as stated supra, for the reasons best known to them, they have not availed the opportunity of it. It is and admitted fact that a proper notice is given for meeting, Board meeting in question was conducted strictly in accordance Memo and Articles of Association of R 1 Company and the decisions taken are falls within competency of Board of Directors as detailed supra. It is also



relevant to point out here that minutes of Board meeting held on 2nd September, 2010 was duly communicated to the nominee Directors of the petitioners. And subsequent meetings, as detailed supra, were conducted duly giving proper notice to the nominee directors of the petitioner. As rightly contended by the learned senior counsel for respondent, the impugned action cannot come under the ambit of section 397/398 of the Act, 1956 as held in the case of **Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd** [AIR 1965 Guj 96], where, the Hon'ble Gujarat High Court has categorically and in no uncertain terms observed as follows:

"A resolution may be passed by the board of directors which may in the passing contravene a provision of law, but it may be very much in the interest of the Company and of the shareholders. Such a resolution may be attacked as invalid in a suit or other appropriate proceeding, but not being oppressive to the minority shareholders or prejudicial to the interests of the Company, it cannot be challenged in a petition under section 397 or 398."

The above finding was upheld by the Hon'ble Supreme Court in the case of **Sangram Singh Gaekwad v. Shantadevi P. Gaekwad** (supra). Thus, even assuming that the Board Resolution dated September 2, 2010 confirming the terminating the said Agreement is in contravention of Section 293 of the Companies Act (now Section 180 of Companies Act, 2013), the same cannot be deemed to be oppressive under Section 397 and 398 of the Companies Act



(now Section 241 and 241 of Companies Act, 2013).

28. As stated supra, there is an arbitration proceeding pending before City Civil Court. The Respondent is also stated to have appointed its arbitrator namely, Shri K.Gopinathan, and petitioner also appointed its nominee namely Justice Usha Mehta (Retd.) Judge of Delhi High Court. The contentions of the petitioner that they are not concerned with the Starlite Global Enterprises (India) Limited, it is not a party to arbitration proceedings are not all tenable and baseless. Admittedly, Starlite Global Enterprises Limited formerly known as TSWM and which is stated in the Company petition itself. And all the Agreements in question are interlinked with petitioner, TSWM, and respondents and the cause of action for the impugned action in the present petition and arbitration proceedings as mentioned supra, arise out of various agreement executing among the same parties. Moreover, the Respondent Nos. 7 & 8 are nominee Directors in R-1 Company and also Directors in Starlite Global Enterprises Limited. When the issue in question in the present company and in arbitration proceedings arise out of same cause of action, principles of natural justice demands that court/Tribunal should not entertain cases, which leads multiplicity of litigation. It is also not in dispute, as discussed supra, in all the agreements in question, there is an arbitration clause available.

29. The contentions of the petitioner that the R-2 being holding Company of R-11 cannot issue any notice for allotment of Development Agreement is not at all tenable as stated supra the R-1



Company, in its Board meeting on 02.09.2010 has ratified the notices of breach dated 17.05.2010. So far as the contentions of allotment on Rs.8 00,000 is concerned record shows that allotment was made in accordance with law, and nominee Directors of the petitioners have also participated in the decision taken for the above. The allegations including of FEMA of the petitioner with regard to above allotment is an afterthought and they are also estopped to question it now after a lapse of so much time.

30. As stated supra, the Board of Directors of the Company is fully empowered to take the impugned action. It is relevant to point out here, the Directors of the Company is in the ratio of 2(petitioner); 4 (respondents) and that of shareholding is 26% (petitioner): 74 % respondent. The impugned decisions have been taken, after duly conducting the Board meeting held on 2nd September, 2009 and the nominee directors were duly intimated about. Moreover, if the petitioner is having any serious objections about the impugned action being taken by the respondent, it has to ensure its nominee Directors to present in the impugned Board meeting and oppose it. It is a different matter whether the view of nominee Directors would prevail or not in the meeting. And without availing the opportunity of participating in the impugned meeting, the petitioner cannot raise litigation before the Tribunal. As stated supra, the nominee Directors of the petitioner for the reasons best known to them were absent. As stated supra, the Board has taken the dissent note of nominee directors, during the meeting, and, thereafter, only the impugned action was taken. The contentions of the Respondent that



the impugned conducting of meeting, the board of directors of R-1 Company did not have authority to terminate the impugned development agreement, which is the basic subject of R-1 Company and only the shareholders have to decide the issue is not at all correct. As stated supra the Articles of Association has clearly empowered the Directors to take action as per objects mentioned in MOA of R-1 Company. The other contentions that the Board of Directors of the public Company, or of a private Company which is subsidiary of a public Company shall not, without the consider the Public Company are subsidiary in general cannot sell, lease or otherwise dispose of the whole of the whole or substantially the whole of the undertaking of the Company, not putting the same in a General Meeting etc are not all tenable for the reasons stated supra. Therefore, they are hereby rejected. Since R-1 Company is a Private Company and subsidiary of R-2 which is registered under section 24 of the Companies Act, 2001 of Mauritius. Only R1 Company is registered under the provisions of the Companies Act, 1956 and it is governed by its provisions.



31. Another point relevant here is that Respondent No. 3 to Respondent No. 5, have already resigned as nominee directors of the R-1 Company. They are Mr. Tan Seng Chye (R-3) resigned on 08.10.2012, Mr. Dickson Tan Yong Loong (R-4) resigned on 19.12.2013, Mr. Tong Kien Onn (R-5) resigned on 07.09.2015.



7. For the reasons stated above, the petitioner failed to make out any case so as to interfere in the issue by the Tribunal. Therefore, the present Company Petition bearing CP No.81 of 2011 (TP No 60/HDB/2016) is liable to be dismissed. Accordingly, it is hereby dismissed. All CA_s, if any pending in the case, are also stands dismissed, and interim order(s), if any subsisting, stands vacated. No order as to costs.

8d/-

RAJESWARA RAO VITTANALA
Member (Judicial)

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL


Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER CP No. 81 of 2011 (TP No. 60/HDB/2016)
निर्णय का तारीख
DATE OF JUDGEMENT 14.11.2017
प्रति तैयार किया गया तारीख
COPY MADE READY ON 15.11.2017