IN THE HIGH COURT OF JUDICATRE AT MADRAS

DATED: 21-02-2011

CORAM:

THE HONOURABLE MR. JUSTICE V. RAMASUBRAMANIAN

Company Appeal No.6 of 2009

1.K.Muthusamy

2.P.Durai .....Appellants.

vs.

1.S.Balasubramanian

2.P.Kannan

3.K.Murugan

4.S.Murugan

5.K.Muthukrishnan

6.Aruna Theatres and Enterprises Private Limited

7.S.Venkatachalam

8.Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.) (Amendment carried out pursuant to Court Order passed in M.P.No.20 of 2009 dated 23.6.2009)

9.N.Sankaranarayanan

10.N.Arunchalathammal

11.P.Muthurajeswari

12.M.Shanmugasundari

13.G.Vasugi

14.R.Lakshmi

15.Dr.Uma Shankari

16.M.Indira Muthuvel

17.S.Paramasivam Pillai

18.M.Paramasivam

19.D.Anantha Valli

20.V.Manthiram

21.S.Saraswathi

22.K.Shanmugasundaram

23.Mr.N.Gomathinayagam .... Respondents.

Appeal preferred under Section 10F of the Companies Act, 1956, against the order in Company Petition No.64 of 2006 dated 25.2.2009, on the file of the Company Law Board Additional Principal Bench Chennai.

For Appellants : Mr.T.K.Seshadri,
Senior Counsel.

For Respondent-3 : Mr.P.H.Arvind Pandian

For Respondent-6 : Mr.Satish Parasaran

For Respondents-9&10 : Mr.A.K.Raghavelu

For Respondent-22 : Mr.Neelakandan

For Respondent-23 : Mr.C.Umashankar

JUDGMENT

This is an appeal filed under Section 10F of the Companies Act, 1956, challenging an order passed by the Company Law Board in C.P.No.64 of 2006, instituted under Sections 397, 398, 402 and 403 read with Sections 235, 237 and Schedule XI of the Companies Act, 1956.

2. I have heard Mr.T.K.Seshadri, learned Senior Counsel for the appellants, Mr.P.H.Arvind Pandian, learned counsel for the third respondent, Mr.Satish Parasaran, learned counsel for the sixth respondent, Mr.A.K. Raghavelu, learned counsel for respondents 9 and 10, Mr.C.Umashankar, learned counsel for the 22nd respondent and Mr.Neelakandan, learned counsel for the 23rd respondent.

3. Six brothers by name S.Narayanan Pillai, S.Subramaniam Pillai, S.Karuppasamy Pillai, S.Paramasivam Pillai, S.Sundaram Pillai and S.Kalyanasundaram Pillai promoted Aruna Theatres and Enterprises Pvt Ltd., as a private limited company in the year 1979. Out of the six brothers, 5 are no more. The lone surviving brother is the 17th respondent herein.

4. The family had another business venture run by another closely held company by name Annai Mookambigai Flour Mills (Private) Limited, which borrowed funds from Karur Vysya Bank. The loan was secured by a corporate guarantee executed by Aruna Theatres and Enterprises Pvt Ltd. For the default committed by them, the bank initiated proceedings in O.A.No.178 of 2004, before the Debts

Recovery Tribunal. Pending the main application, the DRT passed an order on 17.5.2005 in I.A.No.414 of 2004, appointing Justice K.Swamidurai (Retd.) as Receiver/Administrator. He has now been replaced by Mr.Justice K.P.Sivasubramaniam (Retd.), as Receiver and he is now in charge of the business of the company.

5. In the meantime, the respondents 1 to 5 herein, filed C.P.No.64 of 2006 (out of which the present appeal arises) on the file of the Company Law Board, under Sections 397, 398, 402 and 403 read with Sections 235, 237 and Schedule XI of the Act, seeking the following reliefs:-

(a) to direct the respondents 2 to 4 to restore the money and property which have been retained and misapplied and to compensate such sum to the assets of the company on account of misfeasance and breach of trust in relation to the company;

(b) to appoint one or more competent persons to investigate into the affairs of the company for the period from 2000 to 2005 and submit a report before this Bench;

(c) to dissolve the present Board of Directors and call for an extraordinary general meeting of the company to constitute a new Board of Directors;

(d) to declare all the resolutions passed at the Board meetings since January 2003 as null and void; and

(e) to pass such other further orders in the interest of the company and its shareholders.

6. After enquiry, the Company Law Board passed an order, the operative portion of which reads as follows:-

"12. In view of my foregoing conclusions and in exercise of the powers vested in Sections 397 and 398 read with Section 402 of the Act, as envisaged in Harikumar Raja vs. Sovereign Dairy Industries Ltd and others (supra) and with a view to bringing to an end the acts complained of by the aggrieved shareholders, thereby regulating the conduct of the company's affairs, it is ordered as under:

(i) The present Board of Directors comprising of the petitioners will continue to carry on the management of affairs of the company, in strict compliance with the articles of association, subject to the stipulations (i) to (iii) imposed in the order dated 9.8.2007 made in C.A.No.41 of 2007;

(ii) Shri R.A ghoramurthy, Chartered Accountant, Chennai, (Mobile No.9444322347) is authorized to carry out an investigative audit of the accounts of the company for the period from 1.4.2000 to 31.3.2005 by scrutinizing the books of account, vouchers and other connected records of the

company and on hearing submissions of all the connected parties. The Chartered Accountant will submit a report on the financial transactions of the company for the relevant period, which shall include all the receipts, payments, expenses incurred on behalf of the company, together with the fund utilization thereof and irregularities, if any, and serve copies of the report on all the parties, who are bound by the report of the Chartered Accountant. The whole process shall be completed by 30.4.2009. The company will bear the Chartered Accountant's remuneration and towards this end, an initial amount of Rs.50,000/- may be paid by 31.3.2009. The matter will be heard on 15.5.2009 at 2.30 PM for issue of appropriate consequential directions, after hearing the parties concerned, to safeguard the interests of the company and its members.

13. With the above directions, the company petition and all the connected applications stand disposed of, however reserving the right to issue necessary directions, in terms of this order. No order as to costs."

7. Challenging the said order, the respondents 2 and 3 before the Company Law Board have come up with the present appeal. Pending appeal, the appellants also sought stay of the order of the Company Law Board in M.P.No.1of 2009.

8. On 21.4.2009, while ordering notice in the appeal, this Court granted a limited interim order, paragraphs-3 to 5 of which read as follows:-

"3. Having regard to the rival contentions, this Court feels that as an interim measure it is suffice if the appointed Chartered Accountant is directed to scrutinize the books of account and vouchers and other concerned records of the company and make an interim report on his findings about the various transactions and submit the interim report in a sealed cover to this Court on or before 11.6.2009. Such course of action will not cause any prejudice to the rights of the appellant herein pending consideration of the appeal before this Court.

4. It is hereby made clear that the Chartered Accountant shall not part with the interim report to the parties in the appeal. In view of the orders of this Court, there shall be an order of interim stay of the order dated 25.2.2009 passed by the Company Law Board till 22.6.2009. It is further made clear that while preparing the report, the Chartered Accountant shall not call for the views or response from any of the parties on this matter.

5. Since the records are already with the Receiver appointed, the same shall be handed over to the Chartered Accountant to scrutinise the records. The Receiver shall offer explanation as regards any

doubt on which the Chartered Accountant may seek clarification from the Receiver."

9. In pursuance of the above interim order, the Chartered Accountant appointed by the Company Law Board filed his Interim Investigative Report in a sealed cover in June 2009. Though all the learned counsel appearing for the respondents wanted to peruse the report and make submissions, the said request was stoutly opposed by the learned Senior Counsel appearing for the appellants. As a matter of fact, I even suggested in the course of hearing that a perusal of the Interim Report by all the parties

would clear the air of suspicion about the conduct of the affairs of the company and that the opening of the seal on the Interim Report would show whether it contains a can of worms or a can of juice. But the appellants were not prepared to take chances. In the days when the right to information has acquired new dimensions, the appellants contended that when the very appointment of the Chartered Accountant by the Company Law Board is assailed as wholly illegal, any exercise undertaken by such Chartered Accountant is also illegal and hence the Interim Report submitted by him should not even be looked into. The contention of the learned Senior Counsel for the appellants, reminiscing the Official Secrets regime of the colonial past, was that even this Court should not open the sealed cover, but confine it to the dustbin. In view of such a stiff opposition, which in my opinion, bordered on adamancy, I did not open the sealed cover, but permitted the learned counsel on both sides to make submissions only on the correctness and validity of the order of the Company Law Board. As a matter of fact, despite the fact that forbidden fruit is the sweetest, I also imposed upon myself, a restriction not to see the Report at all, till I prepared this judgment upto the concluding part. I decided to keep the sealed cover submitted by the auditor in tact, so that the issues raised in the appeal could be addressed independently. I will come back to the issue of opening or not opening the sealed cover submitted by the auditor, at the end of the discussion, if it becomes necessary.

10. With the above background, let me now take a dive into the pool of contentions, whose water appears to be murky.

11. The facts leading to the disputes between the parties, are as follows:-

(a) M/s.Aruna Theatres and Enterprises Pvt. Ltd., was incorporated as a Private Limited Company on 9.11.1979. Six persons by name (i) S. Narayana Pillai (ii) S.Subramania Pillai (iii) S.Karuppasamy Pillai (iv) S. Paramasivam Pillai (v) S.Sundaram Pillai and (vi) S.Kalyanasundaram Pillai, all of whom were the children of one N.Sankaranarayana Pillai and S.Anandammal, subscribed to 1,266 equity shares each, in the said company. In other words, the 6 subscribers to the Memorandum of Association, together held 7,596 shares (at the rate of 1,266 shares each).

(b) Apart from promoting the aforesaid company, the 6 brothers above named floated two more private limited companies and 4 partnership firms. Thus they had 7 business concerns in all.

(c) Out of the 6 subscribers, only one by name S.Paramasivan Pillai is now alive. All the other 5 have died, each leaving behind several legal heirs. The equations and the under currents which keep the flame of litigation between the parties burning forever, can be well understood only if we get the details of the legal heirs of each of the 5 out of 6 deceased subscribers to the Memorandum of Association. Therefore, the details are given as follows:-

S.Narayana Pillai (Late)

N.Arunachalatammal (Wife)

V.Muthulaukshmi-Daughter (Late)

V.Manthiram

C.Aruna

N.Sanakaranarayanan-Son

N.Gomathinayagam-Son

S.Saraswathi-Daughter

N.Lakshmanan-Son (Late)

L.Chinnammal

L.Aruna

L.Vellammal

L.Muthulakshmi

K.Subha-Daugther

S.Subramania Pillai (Late)

S.Shanmugathammal-Wife (Late)

S.Muthuvel-Son

S.Sankaran-Son

S.Venkatachalam-Son

S.Anandha Saraswathi-Daughter

M.Bhagavathi-Daughter

S.Ramalingam-Son

S.Narayanan-Son

S.Muthulakshmi-Daughter

S.Murugan-Son

S.Paramasivan-Son

S.Selvaraj-Son

S.Karuppaswamy Pillai (Late)

K.Parameswari Ammal-Wife (Late)

K.Muthulakshmi-Daughter

S.Indira-Daughter

K.Vadivel Murugan-Son

K.Muthukrishnan-Son

K.Muthu Selvakumar-Son

S.Paramasivan Pillai

P.Bhagavathi Ammam (Late)

P.Mani-Son

P.Durai-Son

B.Muthulakshmi-Daughter

P.Kannan-Son

S.Anandhi-Daughter

P.Krishnamurthy-Son

S.Meena-Daughter

S.Sundaram Pillai (Late)

S.Gomathi Ammal-Wife

M.Shanmugasundari-Daughter

P.Muthurajeswari-Daughter

G.Vasuki-Daughter

S.Balasubramanian-Son

R.Lakshmi-Daughter

R.Umasankari-Daughter

S.Kalyanasundaram Pillai (Late)

K.Ulageswari Ammal-Wife (Late)

K.Muthuswami-Son

V.Anandhi-Daughter

K.Shanmuga Sundaram-Son

M.Sundari-Daughter

S.Sankari-Daughter

K.Murugan-Son

R.Vallidevi-Daughter

(d) When the Tamil Nadu Housing Board promoted the Ashok Nagar Neighbourhood Scheme, a plot measuring an extent of 23 grounds and 1,930 sq. fts., was earmarked for Cinema Theatre and an adjoining plot measuring an extent of 5 grounds and 800 sq. ft., was earmarked for a Petrol Bunk. These two properties were allotted to the company. On these two properties, a Multiplex Cinema Theatre, a Kalyana Mandapam and a Petrol Bunk were constructed by the company.

(e) On 28.6.2002, M/s.K.Muthuswamy, P.Durai and S.Venkatachalam, who are the appellants 1 and 2 and the 7th respondent in this appeal, executed a registered Lease Deed in respect of 13,200 sq. ft., of land, on which the Kalyana Mandapam is located, for a period of 10 years on a monthly rent of Rs.50,000/- in favour of the son of K.Muthuswamy (first appellant herein).

(f) Similarly, the land on which the Petrol Bunk is located, was also sold by M/s.K.Muthuswamy, P.Durai and S.Venkatachalam, who are the appellants 1 and 2 and the 7th respondent in this appeal, to and in favour of K. Muthuswamy and his wife by a Sale Deed dated 1.9.2003 for a sum of Rs.60 lakhs. However, the possession of the Petrol Bunk site could not be taken, on account of the refusal of the tenant M/s.Aruna Agencies, to vacate the Petrol Bunk.

(g) One of the companies promoted by the 6 brothers, by name Annai Mookambigai Roller Flour Mills Pvt. Ltd., had earlier availed a term loan and working finance facility from the Karur Vysya Bank. Apart from the first charge created on the movables of the borrower company in favour of the Bank, the company in question viz., Aruna Theatres and Enterprises Pvt. Ltd., also gave a corporate guarantee in favour of the said Bank, in addition to mortgaging the Theatre Complex to the Bank. When the borrower company committed default, the Bank initiated recovery proceedings in O.A. No.178 of 2004. Pending the main application, the Bank sought the appointment of a Receiver to collect the income from the Theatre Complex and the Tribunal appointed Justice K.Swamidurai (Retd.), as a Receiver.

(h) The Receiver so appointed filed 3 reports, in the second half of the year 2006, before the Debts Recovery Tribunal, pointing out certain facts. Thereafter, contending that the facts disclosed in those reports established oppression and mismanagement, the respondents 1 to 5 herein filed a petition in C.P. No.64 of 2006 on the file of the Company Law Board, Additional Principal Bench, Chennai, under Sections 397, 398, 402 and 403 read with Sections 235 and 237 and Schedule XI, seeking various reliefs, indicated in para-5 above. Originally, the company was impleaded as the first respondent and M/S K.Muthuswamy, P.Durai and S.Venkatachalam (who are the appellants 1 and 2 and the 7th respondent in this appeal) were impleaded as respondents 2 to 4 in the Company

Petition C.P.No 64 of 2006. The Receiver appointed by the DRT was impleaded as fifth respondent. However, in the course of hearing of the company petition before the CLB, all the other shareholders also got impleaded as respondents 6 to 20.

(i) The acts of oppression and mismanagement complained of by the respondents 1 to 5 herein in their petition C.P.No.64 of 2006 were (1) the leasing out of the Kalyana Mandapam to the son of the first appellant herein on 28.6.2002 for a rent far below the market value (2) the sale of the Petrol Bunk in favour of the first appellant and his wife for a consideration of Rs.60 lakhs (3) the receipt of Rs.99,000/- per month by the first appellant, as interest on the sale consideration fixed for the Petrol Bunk, on the ground that the possession of the property could not be taken (4) the appropriation of the rent (license fee) paid by RPG Cellular Company, for the tower installed in the terrace of the Kalyana Mandapam building, by the son of the first appellant (5) the salary drawn unauthorisedly by the first appellant, claiming to be the Managing Director and (6) the failure to conduct Annual General Meetings from the year 2001 and the failure to file annual returns. It is to be pointed out that after the appointment of the Receiver by the Debts Recovery Tribunal, the payment of Rs.99,000/-, allegedly towards interest, to the first appellant and his wife, was stopped since 1.6.2006. Similarly, the receipt of the rent/license fee by the son of the first appellant from RPG Cellular Company has also been stopped.

(j) Apart from pleading the above direct acts of mismanagement, the respondents 1 to 5 herein also pleaded certain circumstances, as pointing out mismanagement. According to the respondents 1 to 5 herein, the income of the company rose upto Rs.4 crores immediately after the Receiver took over, while it remained at Rs.2 crores, when it was under the management of the appellants herein. The Receiver also reported that the company had received Rs.45.10 lakhs as advance from the tenants of the shops, while the Income Tax Return filed by the appellants for the assessment year 2004-2005 accounted only for a sum of Rs.15 lakhs towards the advances, indicating thereby that there was siphoning of the funds.

(k) It was also pleaded by the respondents 1 to 5 herein in their company petition that the first appellant released films in the theatres, not in the name of the company, but in the name of his wife who was running a concern by name Kanthimathi Films and Investments, after taking advances from the company. The appellants did not screen films for several shows in the theatres during the period from 1.4.2005 to 18.6.2006, thereby causing losses.

(l) The company petition was hotly contested by the appellants herein, first on the ground of maintainability and also on merits. The Company Law Board rejected the objection relating to maintainability, after a survey of the case law on the point and on a consideration of the plain language of the statute. Thereafter the Company Law Board took up for consideration, each one of the acts of mismanagement complained of and came to a prima facie conclusion that the business of the company had been conducted in a manner oppressive of the members of the company at the hands of persons in management. The Company Law Board also came to the conclusion that the surplus income shown by the Receiver prima facie supported the charge of mismanagement, requiring a detailed investigation by an independent agency. Even while holding so, the Company Law Board was careful enough to hold that the process of any investigation would certainly involve the grant of adequate opportunity of hearing to all the parties. It is only after reserving such a right of opportunity to the appellants that the Company Law Board passed the order, which is the subject matter of the appeal herein.

12. At the initial stages, the very maintainability of the present appeal was also questioned by the respondents. Therefore, the learned Senior Counsel appearing for the appellants invited my attention to Section 10F of the Companies Act, 1956 and contended that there are questions of law arising out of the impugned order of the Company Law Board and that therefore, the present appeal is maintainable.

13. But I do not think that the question of maintainability of the present appeal should detain us for a long time. Section 10F of the Companies Act, 1956, is not akin to Section 100 of the Code of Civil Procedure. Section 10F entitles any person aggrieved by any order of the Company Law Board to file an appeal to this Court against such decision on any question of law. Section 10F does not use either the expression substantial question of law or the expression substantial question of law of public importance. The present appeal certainly rises a question of law, as to whether the company petition was maintainable before the Company Law Board or not and whether in the absence of the continuance of the alleged acts of misconduct on the date of filing of the petition, a petition for oppression and mismanagement was maintainable. Therefore, I will take it that the appeal is maintainable.

14. Assailing the order of the Company Law Board, the learned Senior Counsel for the appellants raised the following contentions:-

(i) The Receiver appointed by the Debts Recovery Tribunal had taken over charge of the management of the theatres with effect from 19.6.2006. He admittedly stopped the alleged acts of oppression and mismanagement thereafter. The Company Petition was filed subsequently in November 2006. Consequently, there were no continuing acts of oppression and mismanagement as on the date of filing of the company petition in November 2006. In the absence of continuing acts of oppression and mismanagement as on the date of filing of the company petition and when the appellants were not in management at that time, the petition was not maintainable.

(ii) The order passed by the Company Law Board was not merely based upon the allegations made in the company petition by the respondents 1 to 5 herein. Some of the newly impleaded respondents made fresh set of allegations in their counter statements before the Company Law Board, which have also been taken into account by the Company Law Board in violation of the law relating to pleadings and evidence. The relief granted by the Board was based upon an entirely new case neither pleaded nor proved.

(iii) The findings recorded by the Company Law Board on the alleged acts of mismanagement pleaded by the complainants, were erroneous and were not continuing as on the date of filing of the petition.

(iv) The Company Law Board cannot order investigation under Section 237 (b), in a petition under Sections 397, 399 and 402. In any case, the essential requirements of Section 237(b) are also not satisfied.

(v) The Company Law Board erred in reaching conclusions on the basis of the report of the Receiver appointed by the Debts Recovery Tribunal. The Receiver was appointed to carry on the administration and management, with prospective effect and hence the reports filed by him in respect of the events of the past, were of no value.

(vi) The act of the Company Law Board in accepting photo copies of certain documents filed by the parties, after the conclusion of the arguments, without either a proper pleading and proof or an opportunity to the appellants, was violative of the procedure prescribed by law. Therefore, the findings recorded on the basis of these documents are wholly illegal.

(vii) The order of the Company Law Board bye-passing the directions issued by this Court in CMA No.1900 of 2007 is erroneous. So long as the Receiver appointed by the Court is in charge of the management, the present Board of Directors cannot act independently.

(viii) The Company Law Board erred in accepting the complaint of Vadivel Murugan, who was not a party to the proceedings, without any kind of evidence or affidavit.

From the above contentions, it can be deciphered that the following questions of law would arise for consideration in this appeal :

i. Whether in the light of the appointment of a Receiver and in the absence of continuing acts of oppression and mismanagement upto the date of filing of the petition, the petition under Section 397/398 was maintainable?

ii. Whether the Company Law Board was right in deciding the petition on the basis of new facts pleaded by newly impleaded respondents, without adhering to the rules relating to pleadings and evidence, which are applicable to proceedings before the Board by virtue of Sections 10E(4C), 10E(4D), 10E(5) and 10E(6) of the Act ?

iii. Whether the findings of the Company Law Board on the six acts of oppression and mismanagement complained of by the respondents 1 to 5 herein, were based upon any acceptable evidence or were perverse ?

iv. Whether the order of the Company Law Board directing an investigative audit, in terms of Section 237(b), is in tune with the requirements of Clauses (i), (ii) and (iii) of Section 237(b) and whether in a petition under Section 397/398, such an investigation could be ordered ?

v. Whether the reports filed by the Receiver appointed by the Debts Recovery Tribunal could be taken to be a proof of facts, without any evidence being let in to establish the same ?

vi. Whether the procedure adopted by the Company Law Board in relying upon the photocopies of documents filed after the conclusion of the hearing was in tune with Section 10E(5) and (6) ?

vii. Whether the impugned order is in tune with the order of this Court in CMA.No.1900 of 2007 ? and

viii. Whether the procedure adopted by the Company Law Board in relying upon a letter written by one Vadivel Murugan, who was neither a party nor a witness to the proceedings, is in tune with the procedure prescribed by law ?

Let me now take up these questions of law one after another.

QUESTION No.1:

15. There is no dispute about the fact that in I.A.No.414 of 2004 in O.A. No.178 of 2004, the Debts Recovery Tribunal-II, Chennai, passed an order dated 17.5.2005, appointing Justice K.Swamidurai (Retd.) as the Receiver. The said order was challenged on appeal by the company represented by the second appellant herein, in M.A.No.69 of 2005, before the Debts Recovery Appellate Tribunal, Chennai. But the same was dismissed by an order dated 9.12.2005. Thereafter, the Receiver took charge on 19.6.2006, of the management and administration of the Theatre Complex comprising of 4 theatres viz., Udayam, Chandran, Suriyan and Mini Udayam and the Kalyana Mandapam. Ever since then, the Receiver is incharge till date, though the previous Receiver was replaced by Justice K.P.Sivasubramaniam (Retd.).

16. The above company petition was filed on 14.11.2006, 5 months after the Receiver took over the management and administration of the theatres and the kalyana mandapam. Therefore, the first and foremost issue raised by the appellants is that even assuming that the appellants were guilty of oppression and mismanagement, those acts can be traced only to the past and not to the present. An application under Sections 397 (1) and 398 (1) is maintainable only if the complaint by a member of the company is to the effect that the affairs of the company "are being conducted" in a manner prejudicial to public interest or in a manner oppressive to any member or members or in a manner prejudicial to the interests of the company. According to the appellants, when the affairs of the company are not alleged of being conducted in such a manner as on the date of filing the petition, the petition was not maintainable. In other words, the contention of the appellants is that there is a great deal of difference between the expression "were conducted" and the expression "are being conducted".

17. The question as to whether (i) isolated acts (ii) past conduct (iii) a single act or (iv) future apprehensions, would constitute a cause of action for an application under Sections 397 and 398, has engaged the attention of the Courts time and again. While dealing with an application under Section

210 of the English Act (which is similar to Section 397 of the Companies Act, 1956), ROXBURGH, J., put it succinctly that "the purpose of Section 210 of the English Act, is not so much to rake up the past as to redeem the future". When the case went on appeal to the court of Appeal in In Re, H.R.Harmer Ltd {1958 (3) All.E.R. 689} Jenkins, L.J., also pointed out that "the phrase 'the affairs of the company are being conducted' suggest prima facie, a continuing process and is wide enough to cover oppression by any one who is taking part in the conduct of the affairs of the company".

18. The decision In Re, H.R.Harmer along with two other English decisions Elder's case and Meyer's case, were quoted with approval in one of the earliest decisions of the Supreme Court in Shanti Prasad Jain vs. Kalinga Tubes Ltd {1965 (35) Com. Case 351}. It was held in the said decision as follows:-

> "There must be continuous acts on the part of the majority shareholders, continuing upto the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members."

19. Following the decision of the Apex Court in Shanti Prasad Jain vs. Kalinga Tubes, a Division Bench of this Court held in V.M.Rao vs. Rajeswari Ramakrishnan {1986 (1) Comp. LJ 1 (Mad.)}, that there must be continuous acts constituting oppression upto the date of the petition and that the events have to be considered not in isolation but as a part of a continuous story.

20 In Needle Industries (India) Ltd vs. Needle Industries Newey (India) Holding Ltd {1981 (3) SCC 333}, the Supreme Court held that an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. It was also pointed out that a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are part of the same transaction, of which, the object is to cause or commit the oppression of persons against whom those acts are directed.

21. In Tea Brokers P. Ltd vs. Hemendra Prosad Barooah, (1998) 5 Comp LJ 463 (Cal), a majority shareholder was reduced to the position of minority by the allotment of new issue of shares wholly to the minority group. The circumstances were such that if the aggrieved majority shareholder was called upon to dispose of his stake in the company to the other group, he would not be able to get adequate compensation because the business which he had built in the name of the company was of great value to him. The Court held that such a single act was sufficient to constitute oppression so as to enable the Company Law Board to exercise its powers under Section 402. The single act was capable of causing perpetual damage to the shareholder. His removal from directorship and the new allotment were both set aside. While doing so, the Division Bench of the Calcutta High Court observed (at para 46):

> "This is undoubtedly, a right and privilege which a member enjoys in his capacity as a member of the company. It will ordinarily be an act of oppression on the member if he is deprived of a privilege and right. Such an act will undoubtedly be harsh, burdensome and wrongful and will necessarily be an act oppression to the member concerned. Such an act may be even a single act

done on one particular occasion, if the effect of such an act will be of a continuing nature and the member concerned is deprived of his rights and privileges for all time to come in future".

22. In Ramashankar Prosad vs. Sindri Iron Foundry (P) Ltd., AIR 1966 Cal. 512, it was held by a Division Bench of the Calcutta High Court that if the oppression was of a short duration but is of such a lasting character that redress is impossible by calling board meetings or general meetings of the company, a case for intervention under section 397 is made out. It was further held that it was not necessary that the petitioner who comes to Court for redressal under Section 397 should have submitted himself to oppression over a period before he can invoke the powers of the Court. If the effects of the single act which is burdensome, wrongful and oppressive are of continuing nature, and the member concerned is deprived of a right and privilege for all time to come in future, then the petition under Section 397 of the Act can be filed even in respect of a single act.

23. Agreeing with the said view, a learned Judge of the Bombay High Court held in Maharashtra Power Development Corpn. Ltd vs. Dabhol Power Co. Ltd., (2003) 117 Com Case 506, that it is ordinarily correct to say that a single act of oppression would not give rise to a cause of action for filing a petition under Section 397. However, the learned Judge pointed out that it is not a rule of law, but a rule of prudence and that if the effects of a single act which is burdensome, wrongful and oppressive are of continuing nature, then a petition can be filed.

24. In Bhagirath Agarwala vs. Tara Properties P. Ltd., (2002) 51 CLA 57 (Cal), also the removal of a Director and allotment of shares were set aside as they were done at a meeting which was convened without complying with the requirements of Section 286 and also reflected an oppressive policy. The allotment was made only to one member without simultaneous offer to others on pro rata basis. A single act of issue of additional shares which would have a continuous effect was held to constitute oppression.

25. In the light of the law laid down by various Courts, let us now have a look at the acts of oppression and mismanagement pleaded in the company petition filed by respondents 1 to 5 herein. As pointed out earlier, the company petition as it was originally filed, alleges the following acts of oppression and mismanagement:-

(i) that after the induction of the first respondent as a Director in 2003, he was not issued with any notice of any meeting of the Board of Directors and that his letter dated 29.4.2004, sent by registered post, enclosing a demand draft for Rs.500/- with a request to send all notices for the meetings of the Board and the meetings of the company was returned as refused;

(ii) that the Kalyana Mandapam was leased out by the appellants, to the son of the first appellant by a registered Lease Deed dated 28.6.2002 for a monthly rent far below the market rate of rent;

(iii) that the land on which the Petrol Bunk was located was sold to the first appellant and his wife for a consideration of Rs.60 lakhs and that the appellants started paying a sum of Rs.99,000/- per month towards interest to the first appellant and his wife, on the ground that they could not take possession of the property;

(iv) that the rental income of Rs.22,000/- per month from RPG Cellular Company was received by the first appellant's son, though it was payable to the company;

(v) that the first appellant and another person by name Gomathy Nayagam were drawing salary, despite objections; and

(vi) that the advances and rents received from tenants are not accounted for.

26. The above allegations, if true, cannot be dismissed as isolated acts. It is true that the lease of the Kalyana Mandapam was granted on 28.6.2002 and the sale of the Petrol Bunk property was made on 1.9.2003. It is also true that after the Receiver appointed by the Debts Recovery Tribunal took over charge on 19.6.2006, the payment of Rs.99,000/- per month towards interest on the sale consideration of the Petrol Bunk property, was stopped. But the first appellant and his wife have filed a Civil Suit in C.S.No.756 of 2004 for recovery of Rs.22,99,680/- towards arrears of rent, from the person now running the Petrol Bunk. From 1.10.2003 till 31.5.2006, the first appellant and his wife had already received a sum of Rs.31,68,000/- towards interest on the sale consideration of Rs.60 lakhs paid by them at the time of purchase of the Petrol Bunk property.

27. Therefore, the mere fact that the Receiver kept on hold any further payments, would neither mean that they were isolated acts nor mean that their recurrence was voluntarily stopped. It must be remembered that the Receiver appointed by the Debts Recovery Tribunal, was actually to take care of the interests of the secured creditor. Therefore, the fact that he stopped further payments and the fact that such stoppage enured to the benefit of the company and the respondents 1 to 5 herein does not mean that normalcy had returned. The appointment and continuation of the Receiver for the management of the properties, was actually like the imposition of a curfew and it was not a voluntary act on the part of the persons in management, with a view to stop all alleged acts of oppression and mismanagement. It was something that was imposed upon the persons at the helm of affairs, by an order of the Debts Recovery Tribunal. It was a supervening act, which took away the management of the business alone from the appellants and hence cannot be equated to cases where the alleged acts are voluntarily stopped. It is only in cases where stray and isolated acts had occurred as a result of some aberration on the part of the persons in management, that the provisions of Sections 397 and 398 cannot be invoked.

28. Continuous acts of oppression and mismanagement, carried out upto the date of filing of the petition under Sections 397 and 398, are similar to conventional warfare. Nevertheless, acts of terror, unleashed at different places and at different points of time, as part of a larger design, could also be construed as a war. If isolated acts, performed at some intervals of time, are found to be part of a larger design, they would certainly come within the parameters of the expression "affairs are being conducted".

29. Moreover, an act could be an act of omission or commission. The gravity of an act, may at times depend upon the act itself. At times, it would depend also upon the consequences that flow out of such an act. There are acts, whose consequences, may not last forever or for a long time. There are also acts, whose consequences, may linger for a long time or whose consequences, would not even be

known in the immediate future. Such acts, like the infection of hepatitis-B virus, may sit dormant and inactive for a long time before striking a fatal blow. Therefore, the interpretation given by various Courts that the acts complained of should be continuous acts, extending upto the date of filing of the petition, has to be understood not merely in the context of the acts performed, but also in the context of the consequences that followed.

30. In the case on hand, the consequences that arose as a result of the acts complained of, certainly continued upto the date of filing of the petition. The stoppage of payments by the Receiver, was actually in the nature of a temporary insulation or like a circuit breaker to the company. In the event of the Receiver being removed by the DRT, the right of the beneficiaries to the payments stopped by the Receiver, would get revived. Therefore, I am unable to accept the first contention raised by the appellants that the ingredients of Sections 397 (1) and 398 (1) were not satisfied.

31. Apart from the above, it is necessary to take note of the role assigned to the Receiver by the Debts Recovery Tribunal, by its order dated 17.5.2005, passed in I.A.No.414 of 2004 in O.A.No.178 of 2004. Paragraphs 17, 18 and 23 of the order dated 17.5.2005, read as follows:-

"After due consideration, this Tribunal hereby appoints Hon'ble Justice K.Swamidurai, Judge (retd.) (High Court of Madras) as Receiver/Administrator. It is further ordered he shall be assisted by a panelist advocate Mrs.Swarnlatha. In order to assist the Receiver/Administrator to take over the management of the R2 company and to discharge its duty smoothly with a view to safeguard the interest in general of the shareholders as well as of the applicant bank, other secured/unsecured creditors, workers, staff of the R2 company and for payment of necessary expenses of the R2 company including statutory dues, it would be appropriate to constitute an Advisory Committee consisting of

a) One representative from the applicant bank not below the rank of AGM of the Nationalised Bank.

b) Managing Director of the D1 company or any nominee authorised by the Board of Directors of the D1 company duly certified by the Company Secretary.

c) Managing Director of the R2 company duly or any nominee authorised by the Board of Directors of R2 company duly certified by the Company Secretary.

d) One nominee among the respondents 7, 9, 11, 12 and 13 and common shareholders.

18. The name of the nominee shall be furnished by the concerned party to the Official Receiver/Administrator within a week from the date of this order. Thereafter, the Receiver can go ahead with the assigned task without the aid of such Advisory Member.

23. It is further made clear that the members of the Advisory Committee are having only consultative status before the Receiver/Administrator and the Receiver is at liberty to take any decision as per law and in normal prudence to see the larger interest of the R2 company and subject to concurrence of this Court as the case may be.

In case of any dispute or ambiguity of the order passed or decision taken by the Receiver, the matter may be referred to this Court and it would be decided in accordance with law after hearing both the parties."

32. The above order of the Tribunal was passed on an application taken out by the bank before the issue of the Certificate of Recovery, during the pendency of an original application under Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Consequently, the order could be said to be one passed by virtue of the powers conferred upon the Tribunal by Section 19(18)(a). The power of the Tribunal under Section 19(12) to issue interim prohibitory orders, is akin to Order XXXIX, Rules 1 and 2, CPC. Similarly, the power under Section 19(13) is akin to Order XXXVIII, Rule 5, CPC. Likewise, the power under Section 19(18) is similar to Order XL, Rule 1, CPC. As a matter of fact, clauses (a), (b), (c) and (d) of sub section (18) of Section 19 are in pari materia with clauses (a), (b), (c) and (d) of sub rule (1) of Rule 1 of Order XL.

33. What could be done by an order of the Tribunal, under Section 19 (18) of the 1993 Act, could also be done by the secured creditor himself, by virtue of Section 13(4)(c) of the SARFAESI Act, 2002. While a person appointed by the DRT under Section 19(18) of the 1993 Act, is called a Receiver, the person appointed by the secured creditor under Section 13(4)(c) of the 2002 Act, is called a Manager. A Receiver is appointed under Section 19(18) of 1993 Act, for the realisation, management, protection, preservation and improvement of the property and the collection of rents and profits thereof. A Manager is appointed under Section 13(4)(c) to manage the secured assets, the possession of which had been taken over.

34. Therefore, it is clear that the Receiver appointed by the Debts Recovery Tribunal was for the management and administration of the business of the company in question. The Receiver did not and could not actually replace the Board of Directors of the company. Moreover, a Debts Recovery Tribunal is not an institution which can really remove a Director and appoint any person in his place.

35. At the most, the Receiver appointed by the Tribunal, could be treated only like the Chief Executive Officer of a company, with a small difference. While a Chief Executive Officer is obliged to report to the Board and carry out the directions of the Board, the Receiver appointed by the Tribunal is answerable only to the Tribunal.

36. If the appointment of the Receiver is understood in the above context, it will be clear that the mere appointment of a Receiver and the stoppage of future payments by him, would not lead to the automatic conclusion that the acts of oppression and mismanagement discontinued long before the company petition was filed. Even after the appointment of the Receiver, any failure to do or refrain from doing any act, expected of persons who were in the Board and who continued to have statutory duties imposed upon them, may constitute an act of oppression and mismanagement.

37. It is relevant to note that a retired Judge of this Court was appointed as the Receiver by the Debts Recovery Tribunal by an order dated 17.5.2005. The Receiver took charge on 19.6.2006 and the company petition was filed on 14.11.2006. By a resolution passed on 5.1.2007 by a majority of the shareholders, the appellants 1 and 2 herein were removed from the Directorship and the respondents 2 to 5 herein were inducted in their place. But the said resolution could not be given effect to, till 9.8.2007, on account of an interim order passed by the Company Law Board in CA.No.41 of 2007. By a final order dated 9.8.2007, the Company Law Board permitted the new Board to take charge and the said order got confirmed by this Court in CMA No.1900 of 2007, by order dated 19.9.2007. Therefore, it is clear that despite the appointment of Receiver on 17.5.2005 and his taking over charge on 19.6.2006, the appellants continued to be the Directors of the company, not only upto the date of filing of the company petition namely 14.11.2006, but even upto 19.9.2007 when this Court confirmed their removal from the Board by the resolution dated 5.1.2007. In other words, despite the appointment of the Receiver, it was the appellants who were in the Board till the date of filing of the company petition. In such circumstances, the decision relied upon by the appellants in C.B.Pardhanani Vs M.B.Pardhanani {1990 (69) Comp.Cases 106} is of no relevance.

38. Therefore, I hold on the first question of law that the petition before the Company Law Board was maintainable, in view of the fact that the series of acts complained of against the appellants herein, had a continuing adverse effect upon the company. The temporary suspension of the perpetration of those acts, by the Receiver appointed by the DRT for the benefit of the secured creditor, would not entitle the appellants to contend that the affairs of the company "were not being conducted" in the manner alleged, as on the date of filing of the company petition.

QUESTION No.2:

39. The second contention of the appellants is that the law of pleadings and the provisions of the Indian Evidence Act, apply to the proceedings before the Company Law Board. Therefore, the Company Law Board ought not to have taken note of the new pleadings made by the impleaded parties and ought not to have accepted the pleadings made without any evidence.

40. Section 10E(4C) of the Companies Act, 1956, vests with the Company Law Board, the same powers, as are vested in a Civil Court under the Code of Civil Procedure, 1908, for (i) discovery and inspection of documents (ii) enforcing the attendance of witnesses (iii) compelling the production of documents (iv) examining witnesses on oath (v) granting adjournments and (vi) reception of evidence on affidavits. Sub section (4D) of Section 10E declares that the Company Law Board shall be deemed to be a Civil Court for the purposes of Section 195 of the Code of Criminal Procedure. However, sub section (5) of Section 10E states that the Board, in the exercise of its powers and discharge of its functions, shall be guided by the principles of natural justice and shall act in its discretion. Sub section (6) of Section 10E also empowers the Board to regulate its own procedure.

41. Therefore, it is clear that strict rules of pleading and proof, as required in Civil Courts, are not applicable to the proceedings before the Company Law Board. As a matter of fact, the rules of procedure to be followed by this Court as a Company Court, are regulated by The Companies (Courts) Rules 1959. Rule 2(4) defines the word "Code" to mean the Code of Civil Procedure, 1908 and Rule 6 of The Companies (Courts) Rules, 1959, makes it clear that the practice and procedure of the Court and the provisions of the Code, so far as applicable, shall apply to all proceedings under the Act and

these rules. Rule 6 also states that the Registrar (Registrar of the Company Court) may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court.

42. In contrast, the Company Law Board Regulations 1991, issued in exercise of the powers conferred by Section 10E(6) of the Act, do not either define the word "Code" or contain a provision similar to Rule 6 of the Companies (Courts) Rules 1959. Regulations 11 to 13 indicate the form and contents of a petition to be filed before the Board. Regulation 14 prescribes the procedure for filing the petition. Regulation 18 makes it necessary to enclose documents as prescribed in Annexure III, to the petition. Regulation 22 requires every respondent before the Board to file a reply to the petition along with the documents relied upon by the respondents. Regulation 38 imposes a bar upon the withdrawal of a petition under Section 397 or 398, without the leave of the Board. Regulation 47 declares that the Bench of the Board will be deemed to be a Court for the purpose of prosecution or punishment of a person who willfully disobeys any order of the Bench. More importantly, Regulation 48 empowers the Board, for reasons to be recorded in writing, to dispense with the requirements of any of these regulations subject to such terms and conditions as may be specified.

43. Thus, the law makers have maintained a clear distinction between the rules of procedure to be adopted by the Company Court under the Companies (Courts) Rules, 1959 and the rules of procedure to be adopted by the Company Law Board under the Regulations of 1991. Not only does Section 10E(5) & (6) confer a discretion upon the Board to regulate its own procedure and be guided by the principles of natural justice, but Regulation 48 goes a step further by empowering the Bench to dispense with the requirements of any of the regulations.

44. In Needle Industries (India) Ltd., the Supreme Court observed as follows:-

> "It is generally unsatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit himself to cross-examination. It is true that men may lie but documents will not and often, documents speak louder than words. But a total reliance on the written word, when probity and fairness of conduct are in issue, involves the risk that the person accused of wrongful conduct is denied an opportunity to controvert the inference said to arise from the documents".

> But, it must be remembered that at the time when Needle Industries was decided, sub sections (5) and (6) of Section 10E were differently worded. They were replaced by new sub sections (5) and (6) only with effect from 31.5.1991. Before 31.5.1991, the conduct of the proceedings before the Board was governed by The Company Law Board (Bench) Rules 1975. They were replaced by the Company Law Board Regulations 1991. Therefore, the procedure to be followed by the Board has to be understood in the context of the amended sub sections (5) and (6) of Section 10E and the provisions of the Company Law Board Regulations 1991.

45. Keeping in mind the above frame work of law, relating to pleadings and proof, if we now look at the pleadings and the documents, it is seen that the company petition filed by respondents 1 to 5 contain allegations of oppression and mismanagement, which are listed in para-22 above. The appellants herein who were cited as respondents 2 and 3 in the company petition C.P.No.64 of 2006,

filed a counter on 14.12.2006, which was confined only to the interim reliefs sought in the main petition. Subsequently, the appellants 1 and 2 herein filed a detailed counter on 19.12.2007 to the main petition. The stand taken by the appellants herein, in their counter to the main company petition, with regard to the alleged acts of oppression and mismanagement, can be summarised as follows:-

(i) With regard to the lease of the Kalyana Mandapam, the appellants have stated in para 7 of the counter that the Lease Deed was executed by the third petitioner as per the Board Resolution dated 21.6.2002, for a fair and reasonable rent.

(ii) With regard to the sale of the Petrol Bunk property, the appellants have taken a stand in paragraphs 10 to 16 of their counter that the Board passed a resolution on 3.2.2003, authorising the sale of the property, due to the pressure exerted by the Karur Vysya Bank. An offer for sale was made to the Indian Oil Corporation as well as to the person now running the Petrol Bunk, to buy the property. Since they did not take the offer, the first appellant came forward to purchase the property and the Board authorised the first and third petitioners as well as the Founder Director S.Paramasivan Pillai, by a resolution dated 30.6.2003 to negotiate and sell the property. The first appellant borrowed funds and purchased the property in the joint names of himself and his wife, for a sale consideration of Rs.60 lakhs. The amount was utilised for payment to the bank and the first and third petitioners were signatories to the Sale Deed. Thereafter, the first appellant and his wife made a demand for the cancellation of the Sale Deed and the refund of the sale consideration or payment of compensation at the rate of Rs.99,000/- per month, when the person running the Petrol Bunk refused to vacate the property. The Board accepted the request by a resolution dated 14.10.2003 and acknowledged its liability by a letter dated 15.10.2003.

(iii) With regard to the rental income from RPG Cellular Company, the appellants have taken a stand in para 17 of their counter that the company borrowed funds from the Lessee of the Kalyana Mandapam, to the tune of Rs.11,95,914/- and that towards repayment of the same, the company sent a letter dated 15.3.2004, authorising the Lessee to collect the rent from RPG Cellular Company.

(iv) The allegations of non convening of the meetings of the Board of Directors and the non service of notices of the Annual and Extraordinary General Meetings of the company, are denied by the appellants, in para 6 of their counter. According to the appellants, notices were duly sent to the respondents 1 to 5 herein and that the first respondent herein (first petitioner in the CP), attended the Board Meetings on 3.2.2003 and 30.6.2003, but failed to attend the meetings on 30.11.2004, 14.6.2005, 4.12.2005, 15.2.2006 and 25.10.2006.

(v) In so far as the allegation of receipt of advances from the shop tenants to the tune of Rs.45,10,000/- is concerned, the appellants had denied the same in para 22 of their counter.

(vi) The allegation of receipt of Rs.20,000/- by the first appellant as remuneration, is admitted in para 23 of the counter.

46. A careful perusal of the counter filed by the appellants to the main company petition discloses that at least 4 out of 6 acts of oppression and mismanagement alleged in the main petition are not actually denied. The sale of the Petrol Bunk property, the lease of the Kalyana Mandapam, the receipt of the rents from RPG Cellular Company and the receipt of remuneration by the first appellant, are actually admitted in the counter filed by the appellants. Only 2 acts complained of viz., the receipt of advances from shop tenants and the failure to convene meetings and serve notices, are denied.

47. It is true that the 4 acts admitted by the appellants herein, viz., the sale of the Petrol Bunk property, the lease of the Kalyana Mandapam, the receipt of the rents from RPG Cellular Company and the receipt of remuneration by the first appellant, are sought to be explained by the appellants, as acts carried out in good faith, after following due process and after taking the consent of the respondents 1 to 5 herein. It means that the fundamental facts on the basis of which the allegations of oppression and mismanagement are built, are not in dispute.

48. Now in the backdrop of the above pleadings, let me test the second contention of the appellants, assuming for a minute that strict rules of pleading and evidence are applicable to proceedings before the Company Law Board.

49. It is a fundamental principle that a fact admitted, need not be proved. If the admission of a fact is made, along with a statement containing an explanation or along with a contention that a different inference is possible in the light of other facts, then the burden of proof shifts. Section 3 of the Indian Evidence Act, 1872, defines a "fact" to mean and include "(i) any thing, state of things or relation of things, capable of being perceived by the senses and (ii) any mental condition of which any person is conscious". It also defines "facts in issue" to mean and include "any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows". The Explanation under the definition of the expression "facts in issue" clarifies that whenever any Court records an issue of fact, the fact to be asserted or denied in answer to such issue, is a fact in issue. Section 5 requires evidence to be given on the existence or non-existence of every fact in issue. But Section 58 of the Evidence Act, 1872, makes it clear that facts admitted need not be proved. Section 58 actually uses the expression "fact" and not "facts in issue".

50. In the light of the above provisions of the Evidence Act, it is clear that the respondents 1 to 5 herein, pleaded certain facts in their company petition. Those facts viz., the sale of Petrol Bunk, the lease of Kalyana Mandapam and the receipt of rent from RPG Cellular Company, are admitted by the appellants. Therefore, there were no question of the respondents 1 to 5 herein, leading any evidence, to prove these admitted facts.

51. On the contrary, by accepting the things that constituted those facts and by pleading other facts to denounce the allegations arising out of those facts, the appellants herein had raised certain "facts in issue", within the meaning of the expression, by virtue of the Explanation under Section 3. Therefore, the burden of proof actually shifted on them. As provided in Section 102 of the Evidence Act, the real test to find out the person on whom the burden of proof lies, is to see who would fail if no evidence at all were given on either side. In this case, if no evidence is let in, on either side, it is the appellants who would fail, at least in respect of 4 fundamental facts viz., the purchase of the Petrol Bunk property, the lease of Kalyana Mandapam, the receipt of salary and the receipt of rental income,

since the appellants have admitted these facts, but only pleaded other facts, to take the rigour out of the allegations arising out of those facts.

52. In so far as the allegation of non-convening of the meetings of the Board and non-service of notices for the General and Extraordinary General Meetings of the company are concerned, they are in the negative. It is the appellants who have asserted in their counter that meetings were duly held and notices were properly served. Therefore, even in respect of this allegation, the burden of proof was only on the appellants, since they made positive assertions in their counter that the respondents 1 to 5 attended a few meetings and failed to attend other meetings, despite the service of notices on them.

53. Therefore, even if strict rules of pleadings and evidence had been applied, as desired by the appellants, the Company Law Board could not have reached a different conclusion. This is in view of the fact that in respect of 5 out of 6 alleged acts, the burden of proof was on the appellants.

54. It is only in respect of the allegation of receipt of advances from the shop tenants to the tune of Rs.45,10,000/- that the burden was on the respondents 1 to 5. But even here, the allegation made by respondents 1 to 5 was on the basis of the reports filed by the Receiver before the Debts Recovery Tribunal. As stated earlier, the appellants denied this allegation. Therefore, the respondents 1 to 5 herein were obliged to prove this allegation viz., that the appellants collected advances to the tune of Rs.45,10,000/- from the shop tenants. Let met see if this allegation was proved before the Company Law Board.

55. Since the Receiver was impleaded as the fifth respondent before the Company Law Board, he filed a statement on 28.11.2006 and an additional statement on 26.2.2008. He termed them as "statements", in view of the fact that he is not a contesting party and hence he cannot file a counter. In view of the objections raised, the Receiver also filed a verifying affidavit in terms of the Company Law Board Regulations 1991. In paragraph 8 of the statement and in paragraph 1(m) of the additional statement, the Receiver pointed out that a sum of Rs.45,10,000/- had been collected towards advances from shop tenants.

56. In response to the Statement and Additional Statement filed by the Receiver before the Company Law Board, the appellants herein filed a reply. In para 18 of their reply, the appellants denied the averment contained in para-8 of the Statement filed by the Receiver. For reasons best known to them, the appellants did not choose to advert to the averments contained in para 1(m) of the Additional Statement filed by the Receiver, though it is to the same effect. Therefore, it is not as though the appellants did not have adequate opportunity before the Company Law Board.

57. Interestingly, the appellants who make a big hue and cry about strict rules of pleadings and evidence, have not taken note of the relevant provisions of the regulations. Regulation 22 (2) of the Company Law Board Regulations 1991, enables a respondent before the Company Law Board to file a reply containing such additional facts as may be found necessary for the just decision of the case. Regulation 23 empowers the Company Law Board to give an opportunity to the petitioner before the Board to file a counter-reply to the reply of the respondent, whenever additional facts are pleaded in the reply. Therefore, there is no bar for a respondent before the Company Law Board to plead

additional facts. But there is no provision for a contesting respondent to file a counter-reply to the reply of a co-respondent, since the opportunity available under Regulation 23 is actually to the petitioner. However, without sticking on to the dry letter of the law, as always done by persons who have no case on merits, the Company Law Board permitted the appellants herein (who were respondents 2 and 3 before them) to file a reply to the Statements filed by the Receiver (5th respondent). By doing so, the Board actually complied with the letter and spirit of Section 10E(5).

58. Apart from their failure to deny in their reply, the averments contained in para 1(m) of the Additional Statement of the Receiver, the appellants also failed to take any steps to summon the Receiver for cross-examination. The main CP itself was based on the reports filed by the Receiver. Apart from makin wild allegations against him, the appellants did nothing. As pointed out earlier, the Receiver had nothing to do with the internecine quarrel between the parties. He is a retired Judge of this Court, appointed by the Debts Recovery Tribunal. Though the appellants attributed bias and collusion against the Receiver, they never even sought to prove the same. Their challenge to the appointment of the Receiver, failed before the Debts Recovery Appellate Tribunal and before this Court. Subsequently, the Receiver first appointed by the DRT resigned for other reasons and a new Receiver is in place as on date. Therefore, the second question raised by the appellants that the CLB committed an error of law in arriving at conclusions on the basis of new pleadings, insufficient pleadings and lack of sufficient proof is wholly untenable and baseless.

QUESTION No.3:

59. The third question raised by the appellants is about the correctness of the findings recorded by the Company Law Board on the allegations of oppression and mismanagement. Since the appellants have dwelt at length, the 6 acts of oppression and mismanagement complained against them and the manner in which the Company Law Board dealt with the same, let me now take up each one of them.

SALE OF PETROL BUNK:

60. According to the appellants, no exception can be taken to the sale of the petrol bunk property in favour of the first appellant and his wife, for the following reasons:-

(i) All the shareholders as well as the Indian Oil Corporation were given an option to purchase the property. It is only after they failed to exercise the option, the property was purchased by the first appellant and his wife to wriggle the company out of the financial mess.

(ii) The respondents 1 to 5 have not sought to set aside the Sale Deed. Their grievance is only about the payment of Rs.99,000/- per month towards interest.

(iii) In any case, the first appellant's wife is not made a party and hence the validity of the Sale Deed cannot be tested nor can it be set aside, in terms of Section 402 (e) of the Act.

(iv) The sale was made in pursuance of Board Resolutions, to which the respondents 1 and 4 were parties and the respondents 1 and 3 were also signatories to the Sale Deed. The sale is also disclosed in the balance sheet.

(v) The demand made by the first appellant's wife for at least refund of the sale consideration, did not meet with any positive response. However, the Board passed a resolution agreeing to pay compensation.

(vi) The property cannot be said to have been sold for a consideration lesser than the market value, since the petitioners before the Company Law Board did not produce proof of market value and the guideline value cannot be taken to be the market value. Considering the fact that the property is in occupation of a Lessee, the sale consideration cannot be said to be low.

(vii) A civil suit in C.S.No.570 of 2006 is already pending adjudication with regard to the Sale Deed. Therefore, at one stage, the Company Law Board itself pointed out that it would refrain from dealing with the validity of the Sale Deed. But nevertheless, it went on to deal with the same and pronounce a finding.

(viii) The finding that stamp duty was paid by the company was wrong, since it was paid by the first appellant's wife. The Company Law Board exceeded the jurisdiction in recording a finding in this regard without even making one of the purchasers as a party and that too without any evidence.

61. It is true that the validity of the Sale Deed dated 1.9.2003, by which the Petrol Bunk property was sold in favour of the first appellant and his wife, is under challenge in a civil suit C.S.No.570 of 2006. But the first appellant and his wife have admittedly initiated two proceedings, one in C.S. No.756 of 2004 for recovery of arrears of rent from N.Sankaranarayanan, who is in occupation of the property and another in RCOP No.2202 of 2004 for eviction on the ground of willful default and willful denial of title. Though the Rent Controller dismissed the eviction petition, it was taken up on appeal. Despite the initiation of proceedings by the purchasers, for recovery of the arrears of rent, the Board of Directors passed a resolution on 14.10.2003, approving the payment of compensation at the rate of 22% on the sale consideration of Rs.60 lakhs paid by the first appellant and his wife. It is this act on the part of the first appellant who was a member of the Board, that made the Company Law Board doubt the bona fides of the transaction, though it also took note of the pendency of the suit and consequently did not record any finding on the validity of the Sale Deed.

62. The fact that opportunities were given to all the shareholders as well as to the Indian Oil Corporation to purchase the property and the fact that the respondents 1 to 5 did not seek to set aside the Sale Deed, would hardly be of any consequence in these proceedings. The respondents 1 to 5 did not seek to set aside the Sale Deed, since a suit was already pending for the said purpose. Their objection was to the payment of Rs.99,000/- per month towards compensation, despite the filing of a suit for recovery of arrears of rent also.

63. The non-impleadment of the wife of the first appellant as a party to the proceedings, does not vitiate the order of the Company Law Board in as much as the respondents 1 to 5 did not seek to set

aside the Sale Deed in terms of Section 402 (e). It is only when the CLB decides to set aside the sale deed that she should be made a party. The fact that the respondents 1 and 4 were parties to the resolutions and the respondents 1 and 3 were also signatories to the Sale Deed, can perhaps be put against them, in a civil proceeding as and when they seek to set aside the Sale Deed. But on a complaint that a Director (first appellant herein) was seeking to derive three benefits, one in the form of a Sale unto himself, another in the form of compensation at the rate of 22% per annum and the third in the form of a suit for recovery of arrears of rent, the Company Law Board was justified in testing the bona fides, for the limited purpose of an enquiry into the allegations of oppression and mismanagement. The Company Law Board's enquiry into the question of adequacy of consideration for the sale and the correct market value of the property, should be understood to be a limited one, in the context of the attempt made by one of the Directors to derive certain pecuniary advantage for himself at the cost of the company. As a matter of fact, though the sale consideration was admittedly Rs.60 lakhs, the first appellant and his wife themselves have declared the market value of the property to be more than Rs.90 lakhs, in Annexure 1-A to the sale deed. They had paid stamp duty on the basis of their own declaration of the market value. They cannot now go back on such a declaration and contend that there was no evidence before the CLB, that the market value was more than the sale consideration.

64. Assuming that the finding regarding stamp duty is wrong, it may not by itself vitiate the whole order of the Company Law Board. Therefore, none of the contentions questioning the correctness of the approach adopted by the Company Law Board with regard to the sale of the Petrol Bunk property, can be said to be faulty.

LEASE OF KALYANA MANDAPAM:

65. With regard to the validity of the lease of the kalyana mandapam, the appellants have raised similar contentions as they have raised in respect of the sale of the Petrol Bunk property. It is their contention that the lease was validly granted in pursuance of a resolution of the Board validly passed and that the third respondent is a signatory to the Lease Deed. It is their further contention that without making the Lessee a party to the company petition, the respondents 1 to 5 were not entitled to challenge the validity of the lease.

66. But unfortunately, the appellants have omitted to take note of the fact that the respondents 1 to 5 were not actually seeking to set aside the Lease Deed. The lease of the kalyana mandapam was just raised only as an act of oppression and mismanagement on the part of the appellants therein. For the Company Law Board to hold an enquiry for the limited purpose of finding out if there was any oppression and mismanagement, there was no necessity either to challenge the Lease Deed or to make the Lessee a party. The Lessee will certainly get an opportunity, if and when the respondents 1 to 5 seek the setting aside of the lease.

RECEIPT OF RENTS FROM RPG CELLULAR COMPANY:

67. In respect of the allegation of receipt of license fees/lease rental from RPG Cellular Company, for the installation of their tower on the terrace of the kalyana mandapam, it is the contention of the appellants that huge amounts were due to the Lessee from the Company. Therefore, according to the

appellants, no exception can be taken to the receipt of the rentals, especially without making the RPG Cellular Company, a party. It is the further contention of the appellants that the allegation of oppression and mismanagement, cannot continue to hold good after the Receiver appointed by the Debt Recovery Tribunal stopped payments to them.

68. Here again the contention of the appellants tend to over look the fundamental feature viz., that the allegation is made in the context of an allegation of oppression and mismanagement. There was no need to implead the Lessee as a party, since the respondents 1 to 5 were not seeking to set aside the lease. The fact that the Receiver stopped payment of this lease amount, cannot really enure to the benefit of the appellants. It was not a voluntary act on the part of the appellants, but an involuntary act imposed by the Receiver. Therefore, the sting is not taken out.

RECEIPT OF REMUNERATION BY THE FIRST APPELLANT:

69. The only contention raised by the appellants in this regard is that the Receiver appointed by the DRT stopped the payment of remuneration to the first appellant, as the Managing Director of the company and that he also stopped payment of remuneration to Mr.Gomathinayagam and to the drivers appointed.

70. But as pointed out by me while dealing with the first contention, the fact that the alleged acts did not continue upto the date of filing of the petition, cannot be taken advantage of by the appellants. It is not as though the appellants suddenly turned out to be angels and voluntarily stopped receiving the payments. Therefore, the stoppage of future payments by the Receiver could not be taken to be a condonation of their acts.

RECEIPT OF ADVANCES FROM SHOP TENANTS:

71. The allegation that a sum of Rs.45.15 lakhs was collected as rental advances from the shops, stems from a report filed by the Receiver. According to the appellants, there was no iota of evidence to support the said allegation.

72. It is true that apart from the report filed by the Receiver on 28.11.2006, there was no evidence on record before the Company Law Board to come to the conclusion that a sum of Rs.45.10 lakhs was collected. But the statement was made by a Retired Judge of this Court, appointed as Receiver by the Debts Recovery Tribunal. He has stated in para 8 of his report dated 28.11.2006, that he was informed by the shop tenants about this. Unless the shop tenants are examined or any receipts issued to them are produced, it may not be possible to find out the truth. But the statement of the Receiver together with all other facts and circumstances, has merely persuaded the Company Law Board to order an investigative audit. Therefore, the limited reliance placed by the CLB on this statement of the Receiver, cannot be said to be wholly unjustified, in the light of the finding recorded by the Company Law Board (in internal page 44 of its order) that the process of investigation will certainly involve the providing of adequate opportunity of hearing to the appellants.

FAILURE TO CONVENE MEETINGS AND SERVE NOTICES:

73. In so far as this grievance is concerned, the Company Law Board has observed that any default in compliance with statutory provisions, would attract penal provisions and that such grievances cannot be remedied by the present proceedings. The Company Law Board also pointed out that the sweeping prayer made by the respondents 1 to 5 for setting aside all resolutions passed from the year 2003, cannot be accepted. These observations and findings are actually in favour of the appellants and hence they cannot make an issue. As a matter of fact, the findings of the Company Law Board on this issue discloses that the CLB proceeded with due care and caution while analysing the allegations made by the respondents 1 to 5.

74. Therefore, it cannot be said that the findings recorded by the CLB on the alleged acts of oppression and mismanagement, were perverse or without any evidence worthy of consideration. Hence the third question of law raised by the appellants is also answered against them.

QUESTION No.4:

75. The fourth question is as to whether in a petition under Sections 397 and 398, an investigation can be ordered under Section 237 (b) and whether in any case, the requirements of the provisions of section 237 (b) were satisfied so as to order an investigation under that Section.

76. To understand the significance of this question and to find out an answer, it is necessary to have a look at the provision and the way the courts have explored it judicially.

77. Section 237 (b) confers a discretion upon the CLB to appoint one or persons as Inspectors to investigate the affairs of the company, if in its opinion, there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud the creditors or members or any other persons or in a manner oppressive of any of its members; (ii) that persons concerned with the management of its affairs are guilty of fraud, misfeasance or other misconduct towards the company or its members; or (iii) that the members of the company have not been given all the information with respect to its affairs.

78. In Barium Chemicals Ltd vs. Company Law Board and others {AIR 1967 SC 295}, a Constitution Bench of the Supreme Court was concerned with the validity of an order passed by the Company Law Board, appointing 4 persons as Inspectors, for investigating the affairs of the company relating to the alleged irregularities and contraventions of the provisions of the Companies Act, 1956. A challenge was made to the said order by the company, by way of a writ petition under Article 226. The High Court of Punjab dismissed the writ petition and the company took it on appeal to the Supreme Court. By a majority of 3:2, the Apex Court allowed the appeal, even while upholding the validity of Section 237 (b). In the minority view expressed by Mudholkar.,J., as he then was, for himself and on behalf of A.K.Sarkar, C.J., it was held in para 10 of the report, that the discretion conferred to order an investigation is administrative and not judicial since its exercise one way or the other does not affect the rights of a company nor does it lead to any serious consequences, as for instance, hampering the business of the company. Following an earlier decision, it was further held in para 10 of the report

that "the investigation undertaken under this provision is for ascertaining facts and is thus exploratory" and that "the scope for judicial review of the action of the Board must therefore be strictly limited".

79. Even the majority view on the above aspect, was not totally different. In para 61 of the report, which contained the opinion of Shelat., J., it was pointed out that "the power is executive and the opinion requisite before an order can be made is of the Central Government or the Board as the case may be and not of a Court". It was further pointed out therein that the Court cannot substitute its opinion for the opinion of the authority. However, the Court also pointed out in para 64 that there must exist circumstances, which in the opinion of the authority, suggest what has been set out in sub-clauses (i), (ii) or (iii) and that if it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom, suggestive of these things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed for collateral grounds and was beyond the scope of the statute.

80. While following the decision in Barium Chemicals, another Bench of the Apex Court held in Rohtas Industries Ltd vs. S.D.Agarwal {AIR 1969 SC 707}, that "if the existence of the conditions is challenged, the Courts are entitled to examine whether those circumstances were existing when the order was made" and that "the existence of the circumstances in question are open to judicial review though the opinion formed by the Government (now Company Law Board) is not amenable to review by the Courts". It is interesting to note that the decision in Rohtas Industries is that of a three member bench. However, separate opinions were rendered by Hegde, J., and Bachawat, J. In para 3 of the opinion rendered by Bachawat, J., the learned Judge pointed out that Section 237 (b) confers an administrative and not a judicial power. Bachawat, J., was a party to the view of the majority in Barium Chemicals. Therefore, it is clear that there was no difference of opinion between the Constitution Bench decision in Barium Chemicals and the three member Bench decision in Rohtas Industries, at least on one aspect namely that the power under Section 237 (b) is administrative in nature.

81. In A.Ramaiya _x0016_ Guide to the Companies Act, 1956 {16th Edn., Reprint 2006} page 2532, the learned author has pointed out that under clause (b), the Company Law Board may take the initiative suo motu or on the application of or information supplied by any shareholder or other person.

82. It is interesting to note that while interpreting Section 165(b)(ii) of the English Companies Act of 1948, Lord Denning M.R., held in Norwest Holst Ltd vs. Department of Trade {1978 (3) All.ER 280} that though the appointment of Inspectors puts a company under a cloud, neither the provisions of the Act nor the rules of natural justice require an opportunity of being heard to be given to the company before ordering an investigation. It was further held that the order directing an investigation is merely an administrative act in the nature of a fact finding enquiry and that the only requirement for the exercise of the discretionary power was that it should be exercised in good faith. It is this view that is perhaps reflected in the opinion of the minority in Barium Chemicals, in para 10 of the report as well as in the opinion of the majority expressed by Shelat,J., in para 61 of the report.

83. In Delhi Flour Mills Co. Ltd., In re: {1975 Com. Cases (Vol.45) 33 (Delhi)}, relied upon by the learned Senior Counsel for the appellants, it was held that since an investigation ordered under Section 237 can lead to several consequences such as prosecution or winding up or recovery of

damages, the petition under Section 237 must disclose some material. It was also held therein that where a petition discloses merely facts which are apparent from the balance sheet of the company, an investigation will not be ordered and that at least prima facie evidence should exist concerning circumstances which would lead to the conclusion that an investigation was necessary.

84. A careful consideration of the statutory provision and the decisions discussed in the previous paragraphs, make it clear (i) that the power under Section 237(b) is administrative in nature, in view of the observations of the Apex Court in paras 10 and 61 of the judgment in Barium Chemicals and in para 3 of the decision in Rohtas Industries; (ii) that the power conferred by the provisions can be exercised even suo motu by the Company Law Board and (iii) that while testing the correctness of an order of the Company Law Board, directing investigation, the powers of the Company Court are restricted to the parameters laid down in the above decisions.

85. Once it is seen that the power is administrative and can be exercised even suo motu, there is no merit in the contention that in a petition under Sections 397 and 398, the Company Law Board was not entitled to appoint an Auditor to conduct an investigative audit. The Company Law Board, before appointing an Auditor, has taken note of the existence of the circumstances, as stipulated by clauses (i), (ii) and (iii) of Section 237 (b). In view of the decision of the Apex Court in Rohtas Industries, I have also examined independently, whether the circumstances pointed out by the Company Law Board existed or not and I am satisfied that they did. Therefore, the fourth contention on the scope of the power under Section 237(b) cannot be sustained.

86. In any case, the Company Law Board has not exercised the power to direct an investigative audit, suo motu in this case. It has done so only on a petition filed by the respondents 1 to 5 herein. The company petition filed by the respondents 1 to 5 herein was not only under Sections 397 and 398, but also under Sections 402 and 403 read with Sections 235 and 237 and Schedule XI. Therefore, all that was required of the Company Law Board was to see whether there were circumstances suggesting the existence of the contingencies stipulated in clauses (i) to (iii), warranting the Board to form an opinion under Section 237 (b). It is clear from the materials on record (i) that the Board actually formed an opinion; and (ii) that the opinion was based upon the parameters prescribed in the three clauses under Sections 237 (b). Since this Court has the power, in view of the decision in Rohtas Industries, to satisfy itself about the existence of those circumstances, I have also independently analysed under question No.3, the existence of those circumstances. Therefore, the contention based on the scope of Section 237 (b) is not well founded.

87. Moreover, the order of the Company Law Board impugned in this appeal, need not necessarily be read strictly in the context of Section 237(b). In an application under Section 397 or 398, the Board has certain powers under Section 402. The Board also has powers to pass interim orders under Section 403, upon such terms and conditions as may appear to the Board to be just and equitable. "Just and equitable test", is prescribed not only to find out if the company is to be wound up, but also prescribed for passing any interim order. As held by a learned Judge of the Andhra Pradesh High Court in SRM Transport vs. Karedla Suryanarayana {2002 (110) Com. Cases 193}, even if the Board cannot exercise its powers under Section 402 without proving the acts of oppression and mismanagement, Regulation 9 empowers the Board to exercise inherent powers to do substantial justice and to put an end to the acts complained of. However, this decision of the learned single Judge, was reversed by the Division Bench in Sri Ramdas Motor Transport vs. D.S.Rao {2005 (127) Com. Cases 336}, on the ground that the learned single Judge ought not to have confirmed the order of the Company Law Board, after having found that there was scanty evidence and that no opportunity was given to the appellants to

show that the records were tampered with. Therefore, the reversal was actually on other questions and not on this proposition of law.

88. A similar view as expressed by the learned Judge of the Andhra Pradesh High Court, was expressed by A.K.Sikri, J., of the Delhi High Court in Caparo India Ltd vs. Caparo Maruti Ltd {128 (2006) DLT 425}, where the learned Judge held in para 36 that even if a case of oppression is not made out, the Court can grant relief and pass necessary orders, in exercise of its equitable jurisdiction. The learned Judge took note of the fact that in that case, two sets of shareholders were fighting litigation for years and that there was lack of probity amongst the parties.

89. Moreover, the powers of the CLB have to be understood in the light of various provisions of the Act. By virtue of Section 406, the provisions of Sections 539 to 544 are made applicable to proceedings under Sections 397 and 398, in the modified form as set out in Schedule XI. The difference in the language employed is not very substantial. While Section 539 as found in the body of the Act, uses the expression "contributory of a company", Section 539 in Schedule XI, uses the expression "member of a company". Section 539 as found in the body of the Act, applies to a company "which is being wound up", while the corresponding Section in Schedule XI applies to a company in respect of which an application under Section 397 or 398 has been made. Similarly, Section 540 as contained in the body of the Act, applies to a company which is subsequently ordered to be wound up or which subsequently passes a resolution for voluntary winding up. But the corresponding provision in Schedule XI, applies to a company in respect of which an order under Section 397 or 398 is made subsequently.

90. Therefore, it is clear that the powers conferred upon the winding up Court, in relation to "antecedent offences" under Sections 539 to 544, have been extended to proceedings under Sections 397 and 398, by virtue of Section 406, in a modified form as found in Schedule XI. Since the modifications are only cosmetic in nature, it is clear that the Company Law Board has similar powers in relation to proceedings under sections 397/398. In such circumstances, the impugned order passed by the Company Law Board, cannot be said to be vitiated by any error of jurisdiction.

91. But the question does not rest at that. There is yet another dimension to the interpretation to section 237 (b) as seen from an ancilliary contention raised by the appellants on the basis of a decision of the Division Bench of this court in M.Rajendra Naidu vs. Sterling Holidays Resorts (India) Ltd {2009 (148) Com. Cases 170 (Mad.)(DB)}. It was held therein that even when an order is made under Section 237, a petition for winding up would have to be made on the basis of the report of the Inspectors. The provisions of Section 397/398, being an alternative to winding up of the company, the persons seeking the intervention of the Company Law Board, should also prove "just and equitable cause". Without establishing the same, they cannot, in the contention of the appellants, seek an order under Section 237(b).

92. It is true that as early as in Shanti Prasad Jain, the Supreme Court pointed out that Section 397 was introduced on the lines of Section 210 of the English Companies Act, 1948, as an alternative remedy to winding up, in case of mismanagement or oppression. The law always provided for winding up, in case it was just and equitable. But, at times, when it is found that the company is solvent and that it is not fair to wind up the company for that reason, Section 397 provides an alternative remedy.

93. Similar views were echoed in Needle Industries, where it was pointed out that in an application under Section 397, the Court has to satisfy itself before granting relief that to wind up the company would unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable to wind up.

94. Therefore there can be no dispute about the proposition that in a petition under Sections 397 and 398, the Court must find just and equitable cause, apart from oppression, as held by the Division Bench in V.M.Rao vs. Rajeswari Ramakrishnan {1986 (1) Comp. LJ 1 (Mad.)}. But what is just and equitable is a question which can be addressed only from the facts and circumstances of each case. As pointed out in Needle Industries, following the decisions of the Court of Appeal and the Privy Council, the fact that the company is prosperous and makes substantial profits, is no obstacle to its being wound up if it is just and equitable to do so. Similarly, a legally valid resolution may turn out to be oppressive and a resolution in contravention of the law may be in the interests of the shareholders. Therefore, as pointed out in Needle Industries, every illegality may not per se be oppressive nor every legally valid action, per se non oppressive.

95. In Hanuman Prasad Bagri Vs. Bagress Cereals Pvt.Ltd. {2001 (105) Comp.Cases 493 (SC)} the Supreme Court upheld the view of the Division Bench of the Calcutta High Court to the effect that if the facts fall short of a case upon which the Company Court feels that the company should be wound up on just and equitable grounds, in that event, no relief can be granted to the petitioners in regard to Section 397 of the Act.

96. The next question as to what constitutes oppression, was answered in detail in Sangramsinh P.Gaekwuad Vs Shantadevi P.Gaekwuad {2005 (123) Comp.Cases 566 (SC)}. After extracting paragraph 1011 from the Halsbury's Laws of England (4th Edition Vol.7), defining the conduct amounting to oppression, the Supreme Court opined that a proceeding under Section 397 would be maintainable only when an extraordinary situation is brought to the notice of the Court, keeping in view, the wide and far reaching power of the Court in relation to the affairs of the company. It was further held in the said decision that the illegalities alleged in the conduct of the majority shareholders should be pleaded and proved with sufficient clarity and precision. The Court also pointed out that in a case of oppression, the Court must strictly go by the pleadings.

97. At the same time, the Supreme Court pointed out in Sangramsinh P. Gaekwuad (i) that in an application under Sections 397 and 398, the Court must look into the conduct of the parties (paragraph 206 of the report) and (ii) that though the burden to prove oppression or mismanagement is upon the petitioner, the Court will have to consider the entire materials on record and may not insist upon the petitioner to prove the acts of oppression (paragraph 215 of the report). However, it must be noted that where an allegation of fraud is made, the strict rules of pleading as prescribed by Order VI Rule 4 CPC, which applies to the proceedings before the Company Court by virtue of Rule 6 of the Companies (Courts) Rules would apply (paragraphs 218 and 219 of the report).

98. Hanuman Prasad Bagri was followed in M.S.D.C.Radharamanan Vs. M.S.D. Chandrasekara Raja {2008 (83) SEBI & Corporate Law Reports 451 (SC)}. But at the same time, the Court pointed out in paragraph 13 of its decision, after referring to Section 402, that "jurisdiction of the Company Law Board to pass any other or further order in the interests of the company, if it is of the opinion that the same would protect the interests of the company, it would not be powerless." Again in paragraph 19,

the Court pointed out that "the Company Law Board may not shut its doors only on sheer technicality even if it is found as of fact that unless the jurisdiction under Section 402 is exercised, there will be a complete mismanagement in regard to the affairs of the company." As pointed out in paragraphs 20 and 21 of the same decision, the Company Law Board is not powerless to pass appropriate orders, if the consequences of refusal to exercise jurisdiction would lead to a total chaos or mismanagement of the company and that the Courts should lean in favour of such construction of statute whereby its jurisdiction is retained, enabling it to mould the relief, subject of course, to the applicability of law in the fact situation. Therefore, the power under Sections 397 and 398 has to be read together with Section 402.

99. It is interesting to note that in M.S.D.C.Radharamanan, the Apex Court made out a distinction in paragraph 33, between the approach to be made in certain cases and the approach to be made in a certain other cases. It reads as follows :

> "In a case of this nature, it is necessary to take a holistic approach of the matter. What might not be permissible for the affairs of a public limited company or even a private company having large number of shareholders and Directors, may be permissible in a case of this nature where a company for all intent and purport a quasi-partnership concern. The Parliament, while enacting a statute, cannot think of all situations which may emerge in giving effect to the statutory provision.
>
> The situation obtaining in the present case in that sense is a pathetic one. Both the Company Law Board as also the High Court has no doubt that the acrimony between the parties is resulting in mismanagement of the conduct of affairs of the company. Therefore, a conclusion as regards the dead lock in the affairs of the company cannot be faulted with."

100. What was pointed out in paragraph 33 of the decision in M.S.D.C. Radharamanan would squarely apply to the case on hand. The company in question is a closely knit private limited company, in which, the descendants of five brothers of a family alone are shareholders. There is lot of litigation between the parties and some of the shareholders themselves requested the Debts Recovery Tribunal to appoint a Receiver to manage the affairs of the company. There was utter chaos and confusion. Therefore, the Company Law Board could not have remained a mute spectator, turning down the petition on hyper technicalities as pleaded by the appellants. It must be noted that the petition was filed not only under Sections 397 and 398, but also under Sections 235, 237, 402 and 403 and Schedule XI. Therefore, on the fourth question of law raised by the appellants, I hold that the order of the CLB cannot said to be contrary to the stipulations of section 237 (b) and that the impugned order was perfectly justified.

QUESTION No.5:

101. The fifth question of law raised by the appellants is about the evidentiary value of the reports filed by the Receiver appointed by the Debts Recovery Tribunal. It is the contention of the appellants that the Receiver actually exceeded his brief, by investigating into past transactions and filing reports, though the purpose of his appointment was to run the management of the Theatre prospectively.

102. But the above contention is thoroughly misconceived. The very necessity to appoint a Receiver arose, due to the failure of the company to pay its dues to the Bank. When the Karur Vysya Bank moved an application in I.A.No.414 of 2004 in O.A.No.178 of 2004 for the appointment of the Receiver, the application was supported by the patriarch of the family Mr.S. Paramasivam Pillai, who is the eldest surviving member of the family. In its order dated 17.5.2005, the Debts Recovery Tribunal noted in para 7 that some of the respondents therein raised disputes about the mismanagement of the company and also sought the intervention of the Court to secure not only the interest of the Bank, but also the interest of the shareholders. Though the Debts Recovery Tribunal rightly rejected the request to go into the inter se disputes between the parties, the Tribunal ultimately appointed a retired Judge of this Court to be the Receiver. While appointing the Receiver, the DRT also constituted an Advisory Committee especially to take care of the interest of the Bank as well as all the interest of the shareholders/Directors. This can be seen from the last portion of paragraph 16 of the order of the DRT dated 17.5.2005. In paragraph 23 of its order, the DRT gave liberty to the Receiver to take any decision as per law and in normal prudence to see the larger interest of the company. Therefore, the contention that the Receiver was expected only to look forward and not to look back, is neither consistent with the order of the DRT, nor consistent with the purpose for which a Receiver is normally appointed.

103. Under Order XL, Rule 1 of the Code of Civil Procedure, 1908, a Receiver may be appointed in respect of any property and he can be conferred with all such powers for the management, protection, preservation and improvement of the property, the collection of rents and profits, the application and disposal of such rents etc. Take for instance a case where a Receiver is appointed for collecting the rental income. The duty of the Receiver does not stop merely by recovering the future rents and leaving the claim for arrears of past rents to get barred by limitation. A Receiver actually steps into the shoes of the actual owner and is expected to carry out all duties which the owner himself would carry out for the benefit of all persons concerned with the property. Therefore, it is futile to contend that the Receiver has no business to dig into the past.

104. The contention that the reports of the Receiver cannot partake the character of evidence, is partly correct and partly incorrect. A Receiver is an Officer of Court. If his report does not portray the true and correct picture, it is open to the parties to file objections. The evidentiary value of the report has to be tested in the light of the objections to the contents. The contents of the report have not been used by the Company Law Board to arrive at any conclusive finding in this case, as against the appellants herein. All that the Company Law Board has done is to take into account the contents of the report of the Receiver just for the purpose of forming an opinion and arriving at a subjective satisfaction as to the existence of the materials prescribed in clauses (i), (ii) and (iii) under Section 237 (b) for ordering an investigation. Therefore, the attack in this regard is wholly misconceived and question no.5 is answered against the appellants.

QUESTION No.6:

105. The next question is about the action of the Company Law Board in allowing the respondents 1 to 5 to produce photo copies of certain documents, after the conclusion of the arguments, thereby depriving the appellants of an opportunity to answer the documents and also violating the rules of evidence.

106. But this objection, even if sustained, does not advance the cause of the appellants. As pointed out elsewhere in this order, the respondents 1 to 5 went before the Company Law Board complaining of six concrete acts of oppression and mismanagement. Out of them, the appellants actually admitted at least the core transactions relating to four of the allegations. In other words, the sale of the Petrol Bunk property, the lease of kalyana mandapam, receipt of rental income from RPG etc., were not denied as matters of fact, but were denied only as amounting to oppression and mismanagement. Therefore, the fact that the Board accepted a few documents, even if procedurally incorrect, did not tilt the balance against the appellants.

QUESTION No.7:

107. The next question raised by the appellants is with regard to the first part of the impugned order of the Company Law Board, contained in paragraph 12(i). In the said paragraph, the Company Law Board directed the present Board of Directors comprising of the petitioners (before the Board) to continue to carry on the management of affairs of the company in strict compliance with the Articles of Association subject to the stipulations (i) to (iii) imposed by the order dated 9.8.2007 made in CA.NO.41 of 2007.

108. According to the appellants, the aforesaid directions were in conflict with the directions contained in the order of this Court passed in CMA.No.1900 of 2007 dated 19.9.2007. The appellants also contended that when a Receiver has been appointed, he alone is competent to manage the affairs of the company and hence, the direction issued by the Company Law Board in paragraph 12(i) of its order is illegal.

109. To test the correctness of the above contention, it is necessary to take note of certain facts. They are as follows :

(a) By a notice dated 14.11.2006, the shareholders holding about 64% of the paid up capital of the company sent a requisition to the Board of Directors under Section 169 to convene an extraordinary general meeting for the removal of Mr.K.Muthusamy, Mr.P.Durai (the appellants herein) and Mr.S.Venkatachalam from the Directorship of the company and to appoint the respondents 2 to 5 herein as Directors in their place. Since the Board of Directors failed to convene a meeting, the requisitionists themselves called for a meeting on 5.1.2007, by issuing a notice dated 8.12.2006.

(b) When it was challenged, the Company Law Board issued an order dated 14.12.2006 restraining the company from implementing any of the resolutions that may be passed at the extraordinary general meeting convened on 5.1.2007. A similar order was passed by this Court in OA.No.2 of 2007 in C.S.No.4 of 2007 filed by one of the shareholders (N.Sankaranarayanan). A condition was imposed by this Court that none of the resolutions passed at the meeting on 5.1.2007 shall be implemented without the leave of the Company Law Board.

(c) Accordingly, the meeting was held on 5.1.2007 and 36 members took part. Members holding 5359 shares voted for the removal of the appellants herein (K.Muthusamy and P.Durai) and

S.Venkatachalam and for the appointment of the respondents 2 to 5 herein as Directors. Members holding 1459 shares opposed the resolutions.

(d) Thereafter, CA.No.41 of 2007 was filed before the Company Law Board by the respondents 1 to 5 herein seeking leave of the Board to implement the resolutions passed on 5.1.2007. In that application, the Company Law Board passed an order on 9.8.2007 permitting the respondents 1 to 5 herein to implement the resolutions passed on 5.1.2007 subject to the following conditions :

"i. The Board of Directors of the company shall act subject to the order dated 17.5.2005 made in IA.No.414 of 2004 in OA.No.178 of 2004 by the DRT;

ii. The notice of Board Meetings together with Agenda thereon shall be forwarded to the 18th respondent, fifteen days prior to every Board Meeting of the company;

iii. The 18th respondent is entitled to attend the Board Meetings convened periodically by the company as an invitee and shall not exercise any of the rights of a Director;

iv. This order is subject to the outcome of the main petition."

(e) It is seen from the above order that the Company Law Board took care to see that its order dated 9.8.2007, synchronised with the order of the Debts Recovery Tribunal appointing a Receiver.

(f) The above order of the Company Law Board dated 9.8.2007 passed in CA.No.41 of 2007 was challenged by the appellants herein in C.M.A.No.1900 of 2007 on the file of this Court. By an order dated 19.9.2007, this Court disposed of the said miscellaneous appeal. As seen from paragraph 10 of the order, this Court confirmed the order of the Company Law Board dated 9.8.2007, holding that it was not vitiated by any error of law or illegality. However, taking into account the facts and circumstances of the case and in the interests of justice, this Court directed the Company Law Board to dispose of the main CP.No.64 of 2006 on or before 30.1.2008. While doing so, this Court also issued certain additional directions, which were as follows:

"a. No major policy or important decisions to be taken by the Board of Directors without the consent of the Company Law Board;

b. No alienation, transfer, encumbrances of the company assets without the consent of the Company Law Board;

c. The Board of Directors shall take only decisions to manage the day to day affairs of the company till the Company Law Board passes final order."

110. In accordance with the directions issued by this Court in CMA.No. 1900 of 2007, the Company Law Board disposed of the main petition CP.No. 64 of 2006 by the order dated 25.2.2009. While doing so, the Company Law Board took note of the further directions issued by this Court in CMA.No. 1900 of 2007 and only thereafter the Company Law Board issued the direction contained in paragraph 12(i) of its final order, which is impugned in this appeal.

111. It is clear from a perusal of paragraph 11 of the impugned order that the Company Law Board did not pass any order, which was in conflict with the further directions contained in the order passed in CMA.No.1900 of 2007. The order is also not in derogation of the order of appointment of Receiver made by the Debts Recovery Tribunal.

112. What was made absolute by paragraph 12(i) of the impugned order, was the order dated 9.8.2007 passed in CA.No.41 of 2007. In the order dated 9.8.2007, the Company Law Board made it clear that the newly constituted Board of Directors should act only subject to the order of the Debts Recovery Tribunal dated 17.5.2005 passed in IA.No.414 of 2004 in OA.No.178 of 2004. In other words, the newly constituted Board of Directors were directed by the Company Law Board to act in tune with the order of the Debts Recovery Tribunal appointing the Receiver. Therefore, the seventh contention of the appellants that the direction contained in paragraph 12(i) of the impugned order tends to over reach the order of appointment of Receiver is wholly untenable.

113. The direction in paragraph 12(i) of the impugned order is also not in conflict with the further directions issued by this Court in CMA.No.1900 of 2007. In CMA.No.1900 of 2007, this Court directed the Board of Directors not to take major policy decisions and not to alienate, transfer or encumber the assets of the company without the consent of the Board. These directions are not modified by paragraph 12(i) of the impugned order. Therefore, the seventh question raised by the appellants on the premise that the impugned order was in conflict with the order passed in CMA 1900 of 2007 is wholly misconceived.

114. The contention that so long as the Receiver appointed by the Debts Recovery Tribunal continues, the Board has no independent role to perform, is also unsustainable. The Debts Recovery Tribunal did not appoint a retired Judge of this Court as Receiver, in supersession of the Board of Directors. The Receiver was appointed only for the purpose of running the management of the affairs of the company. The powers conferred upon the Debts Recovery Tribunal under Section 19(18) of the 1993 Act, are akin to the powers conferred upon the Civil Courts by Order XL of the Code of Civil Procedure. As pointed out elsewhere, the Receiver is not like the Special Officer appointed to a Cooperative Society, who supercedes the Committee of Management. He is only like the Chief Executive Officer of any business enterprise. Therefore, his role is entirely different from that of the Board of Directors. If the role of a Receiver is misunderstood to be equivalent to that of the Board of Directors, he will be imposed with the obligations even to comply with statutory requirements such as the convening of general meetings, passing of accounts etc. This was not the purpose for which the Receiver was appointed by the Debts Recovery Tribunal, as seen from the Tribunal's order dated 17.5.2005. Therefore, it is futile to contend that the Board cannot function, so long as the Receiver continues.

QUESTION No.8 :

115. The next question relates to the letter dated 1.9.2006 allegedly sent by K.Vadivel Murugan to the Receiver. According to the appellants, the letter was erroneously accepted, despite the fact that he was not a party to the proceedings and despite the fact that there was no opportunity to challenge the veracity of the contents of the said letter.

116. It is true that K.Vadivel Murugan was not a party to the claim petition. The respondents 1 to 5 herein, who were the petitioners in the main CP, did not drag K.Vadivel Murugan into the picture by themselves. When the appellants herein attempted to justify the purchase of the petrol bunk property on the ground that some of the respondents were parties to the Board resolutions and also parties to the sale deed, the respondents 1 to 5 relied upon the letter of K.Vadivel Murugan dated 1.9.2006 addressed to the Receiver. As a matter of fact, the letters dated 10.2.2003, 19.2.2003 and 28.2.2003 sent to N.Sankaranarayanan and Indian Oil Corporation, under the signatures of K.Vadivel Murugan were relied upon by the appellants to show that before the property was sold to the first appellant and his wife, an offer was made to the lessee in occupation. The Company Law Board held that these letters would not insulate persons in management of the company from the losses suffered by the company.

117. Therefore, a reading of the entire text of the impugned order shows that the letter dated 1.9.2006 allegedly sent by K.Vadivel Murugan, did not weigh so much in the mind of the Company Law Board to come to the conclusion that it did. Hence, the contention on the basis of which the eighth question is raised, is also liable to be rejected.

FINALE

118. In view of what is stated above, the appeal is liable to be rejected. But before I do so, I have to address one more issue. The sealed cover in which Mr.R.Aghoramurthy, Chartered Accountant appointed by the Company Law Board, has submitted a report, has remained unopened so far. I kept up my word not to open the cover till I dictated the judgment upto this portion. Having dictated the judgment upto this portion, I now have 2 options before me. In view of the conclusions that I have reached on all questions of law, it may not even be necessary for me to open the cover and look into its contents. Therefore one option before me is to leave the cover unopened. But there is also a possibility, however remote it might be, that the investigative auditor has recorded some findings in favour of the appellants. This can be found out only if the cover is opened. Therefore, the second option before me is to open the cover and look into its contents and reject even the main Company petition as devoid of merits, if the report contains any material in favour of the appellants.

119. Out of the above 2 options, I prefer the second one, since it may tilt the balance in favour of the appellants, against whom I have answered all questions of law raised in the appeal. Therefore, in order not to deprive the appellants of such a benefit, let me now open the sealed cover in which Mr.R.Aghoramurthy, Chartered Accountant appointed by the Company Law Board, has submitted a report.

120. I found inside the sealed cover, a letter dated 9.6.2009 sent by the Chartered Accountant addressed to the Registrar-General of this Court, enclosing the copy of his Interim Investigative Audit Report. It is seen from the report that the Chartered Accountant sent letters to the parties on 19th and 24th March 2009, calling upon them to furnish copies of their submissions. The Company's staff, its present Directors and the Receiver appear to have submitted the records and information called

for by the Chartered Accountant. Based upon the records and the information so furnished, the Chartered Accountant has reached certain conclusions which can be summarised as follows:-

(i) The sale of the Petrol Bunk property has put the company to a loss of Rs.2.40 crores.

(ii) The payment of Rs.35.20 lakhs (including TDS) to the first appellant and his wife towards compensation for the period from October 2003 to May 2006, on the ground that possession of the Petrol Bunk property could not be handed over, is a clear case of siphoning of the company's funds.

(iii) The lease rent of Rs.50,000/- per month fixed in respect of the kalyana mandapam was too low and especially in the absence of an escalation clause in the Lease Agreement, the company would be a perpetual loser and the first appellant Mr.K.Muthusamy's son would be the gainer.

(iv) The extent of land leased out as part of the kalyana mandapam, is 8,400 sq. ft. But the area available for kalyana mandapam should only be 6,453 sq. ft., after deducting the extent of 6,347 sq. ft., on which Petrol Bunk is located, out of the total extent of 12,800 sq. ft., allotted by the Housing Board. Therefore, the difference of 1,947 sq. ft., (8,400 sq. ft. _x0016_ 6,453 sq. ft.) represents an encroachment.

(v) The rent paid by RPG Cellular Company of Rs.20,000/- per month legitimately belongs to the company and the total amount received by the Lessee of the kalyana mandapam, from RPG Cellular Company, for the period from April 2004 to June 2006, works out to Rs.7,37,974/-.

(vi) The claim made by M.Kalyanasundaram, the Lessee of the kalyana mandapam, in his letter dated 4.9.2006 to the Receiver, that he was receiving the rent from RPG Cellular towards settlement of the amount of Rs.11,95,914/- due to him from the company, is only a cover up operation. There is a calculated move to divert the rental income due to the company for the personal benefit of the Lessee M.Kalyanasundaram (who is the son of the first appellant herein).

(vii) M/s.Kanthimathi Films and Investments, which is a Proprietory concern of the wife of the first appellant, took an advance of Rs.15 lakhs from the company for screening a film. Out of the distributor's share of the collections, a sum of Rs.12 lakhs was adjusted. A sum of Rs.1,50,000/- was paid under two cheques. The balance of Rs.1,50,000/- is yet to be recovered. The deficit of Rs.21,400/- recoverable from Kanthimathi Films, is also still remaining unrecovered.

(viii) No Special Resolution authorising payment of monthly remuneration to two Directors viz., S.Venkatachalam and P.Durai, was produced before the Auditor, leading to an inference that it was unauthorised. No Resolution authorising payment of remuneration to Managing Director K.Muthusamy (first appellant herein) was produced and the provisions of Section 302 (2) and (7) of the Act, requiring intimation to the shareholders to be given within 3 weeks of appointment, were not complied with.

(ix) The company's cash book for the period from 30.4.2004 to 31.3.2005 shows heavy amounts of cash on hand being carried over, though there were also bank overdraft borrowings during the same period with Karur Vysya Bank. If cash had been deposited in Bank on a day-to-day basis, there would have been no necessity to pay interest to the Bank on the overdraft borrowings. This paradox leads to an inference that in reality, there was no cash balance, but it was siphoned of.

(x) The cash on hand reached the peak of Rs.37,62,259.95 on 28.2.2005 and it came down to Rs.9,57,969.30 as on 31.3.2005. Between these two dates, there were some major payments by way of repayment of shop rental advances. But acknowledgements from the payees are not available.

(xi) The total expenditure for the year ending 31.3.2005 came to Rs.214.33 lakhs. Therefore, the monthly average works out to just less than Rs.18 lakhs. Hence the peak cash on hand balance, which was more than twice the normal expenditure, casts a shadow of doubt on the authenticity of the books of accounts.

(xii) On a single day viz., 15.4.2004, the bank book shows a receipt of Rs.20,029/- from RPG Cellular and the cash book shows a receipt of Rs.25,194/- from the same company. While the former is after deducting tax, the latter is without deducting TDS. Since a company like RPG Cellular could not have made two payments, one by way of cash and another by way of cheque on the same day, the only inference that could be drawn is that the cash entry was introduced later to avoid showing a nil figure in the profit and loss account for the year 2004-2005.

(xiii) The amount of Rs.45.10 lakhs mentioned by the Receiver in his report as the rental advance received from the shop tenants, is not correct. In the balance sheet as on 31.3.2004, a sum of Rs.30.85 lakhs is shown as rental advance and hence there is no short accounting of rental advance. However, the repayment of shop rental advance to the extent of Rs.26.11 lakhs during the period February and March 2005 defies any logic since at least 6 of those tenants continue to be tenants. There are also no acknowledgements from the parties, for having received refund of advance. Therefore, the sums purported to have been refunded, may only be book entries to reduce the non-existent cash as shown in the cash book.

(xiv) The balance sheets as on 31.3.2006 and 31.3.2007 disclose that a sum of Rs.59,00,040/- and Rs.70,60,040/- were respectively the loans and advances paid to Directors and their relatives. Four of them had issued letters denying the availing of any loan. One of them is dead. There are no Board Resolutions authorising the grant of loans. Therefore, Section 292 (1)(e) stands contravened.

(xv) The statutory auditor has stated in his report that no interest was charged on the advances granted to the Directors and their relatives. But the company paid interest on the loans taken from Directors, their relatives and others. Therefore, diversion of funds to the extent of Rs.70 lakhs in the form of interest free loans and advances, at a time when the company is facing liquidity crunch, is an act of grave financial impropriety.

(xvi) After the Receiver took over the management, he could increase the share of the company to 40% of the collections, from 35%, indicating that the previous management had not accounted for the income fully. However, the allegation that the first appellant was getting 45% to 50% and was accounting only for 35%, was not verifiable.

(xvii) A tenant by name A.S.Nazeer, who was shown as paying only a monthly rent of Rs.18,000/-, instantaneously agreed to pay a monthly rent of Rs.1 lakh upon the Receiver assuming charge. It was increased to Rs.1,50,000/- per month with effect from October 2007. This development suggests that the previous management did not fully account for the rental income in the books of the company.

(xviii) There is substance in the allegation that the unsecured loans said to have been taken by the company, were inflated in the books of accounts in favour of L.Chinnammal and her daughters (the branch of S.Narayana Pillai) and the bank statements expose the truth. Moreover, most of the receipt entries for the loans are "cash receipts", while the repayments are all by cheques.

(xix) Though there is no car in the name of the company, the salaries of the driver of the Managing Director and the driver of one shareholder, were paid by the company. The salary of the watchman of the kalyana mandapam, was also paid even after it was leased out. The total personal expenditure of individuals, paid out of company's funds worked out to Rs.1,50,000/-. These payments were stopped only by the Receiver.

(xx) The expenses towards coffee, workers' welfare, meals and travelling and conveyance, gradually increased from Rs.13.65 lakhs in 2000-2001 to Rs.22.67 lakhs in 2004-2005. It deceased to Rs.17.04 lakhs in 2005-2006, Rs.5.34 lakhs in 2006-2007 and Rs.4.65 lakhs in 2007-2008. The reduction of the expenses on these counts, after the Receiver took over charge, indicates that the expenses were inflated.

121. Thus the findings recorded in the Investigative Audit Report also do not favour the appellants in many aspects, except on one issue namely, the alleged collection of Rs.45.10 lakhs from the shop tenants. Therefore, I find no merits in the appeal. Hence it is dismissed. There will be no order as to costs.