IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal from the Commercial High Court of Colombo.

Aitken Spence & Company Limited,
No. 305, Vauxhall Street,
Colombo 2.

Petitioner

SC CHC APPEAL 08/2005

Commercial High Court
Case No. 02/2003(2)

Vs

1. The **Garment Services Group Ltd**.,
   Swan House, 52-53 Poland Street,
   London WIV 3DF.
2. **Dennis Day Limited**,
   Swan House, 52-53 Poland Street,
   London WIV 3DF.
3. **Aitken Spence Garments Ltd.,**No.305,VauxhallStreet,Colombo2.
4. J.M.S. Brito, Cinnamon Garden Residencies,No. 67, Ward Place,
   Colombo 07.
5. R.E.V. CasieChetty,No. 50, Rosmead Place, Colombo 7.
6. E.P.A. Cooray, No. 95/15, Kalyani Mawatha, Wattala.
7. K.D.A.Lawrence, No. 41/1, Old Nawala Road, Nawala.
8. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, GalleRoad, Colombo 3.

9. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF.
10. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala, Kandy.
11. M. **Gabay**, No. 7, Sukhastan Gardens, Colombo 7.

Respondents

AND NOW

1. D D Garments Limited (formerly known as '**The Garment Services Group Ltd.**') , Swan House, 52-53 Poland Street, London WIV 3DF.
2. **Dennis Day Limited**,
   Swan House, 52-53 Poland Street,
   London WIV 3DF.
3. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, Galle Road, Colombo 3.
4. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF.
5. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala,
Kadawatha.

Respondent Appellants

Vs

1. **Aitken Spence & Company Ltd.,**
   No. 305,Vauxhall Street,
   Colombo 2.

Petitioner Respondent

2. **Aitken Spence Garments Limited, No. 305, Vauxhall Street, Colombo 2.**
3. J.M.S.Brito, Cinnamon Grand Residencies, No.67, Ward Place, Colombo 7.
4. R.V.E. Casie Chetty, No. 50, Rosmead Place, Colombo 7.
5. E.P.A.Cooray, No. 95/15, Kalyani Mawatha, Wattala.
6. K.D.A. Lawrence, No. 41/1, Old Nawala Road, Nawala.
7. M. **Gabay,** No. 7, Sukhastan Gardens, Colombo 7.

Respondent Respondents

BEFORE : S. EVA WANASUNDERA PCJ,
L. T. B. DEHIDENIYA J. &
MURDU FERNANDO PCJ.

COUNSEL : Aruna de Silva with SakshinHaren for the 1st to 5th Respondent Appellants.
V.K. Choksy with L.D.S.D. Disanayake and S.Gomez for Petitioner Respondent.

ARGUED ON : 18.05.2018.

DECIDED ON : 05.07.2018.

S. EVA WANASUNDERA PCJ.

The Petition of the Respondent Appellants dated 06.04.2005 has placed the following grounds of Appeal when they appealed to this Court from the Order

made by the High Court Judge of the Commercial High Court of Colombo dated 07.02.2005. They read as follows:-

1. The learned High Court Judge has failed to consider the preliminary objections raised in the Statement of Objections of the Respondent Appellants.
2. The said Order is contrary to law and against the material placed before Court.
3. The learned High Court Judge has erred in law in holding that the failure to attend the Board Meetings of the 2nd Respondent Respondent by the nominee Directors of the 1st Respondent Appellant is unjustifiable and unwarranted and amounts to acts of Oppression and Mismanagement within the meaning of Sections 210 and 211 of the Companies Act No. 17 of 1982.
4. The learned High Court Judge has erred in law in holding that the Respondent Appellants should be presumed to have intended the 2nd Respondent Respondent to face all the difficulties/obstacles in the management of the 2nd Respondent Respondent by refusing to attend the Board Meetings of the 2nd Respondent Respondent.
5. The learned High Court Judge has failed to consider the matters set out in the Statement of Objections and the Affidavit tendered on behalf of the Respondent Appellants.
6. The learned High Court Judge has failed to consider that the Petitioner Respondent holds 50% of the shares in the 2nd Respondent Respondent and was at the time of institution of these proceedings and at all times material to this Application and thereafter was in control of the management of the 2nd Respondent Respondent having wrongfully and unlawfully taken over the control of the 2nd Respondent Respondent and therefore not entitled to seek relief under Sections 210 /211 and 213 of the Companies Act.

The facts in summary with regard to the Appeal before this Court is as follows:
The company named Aitken Spence and Company Limited filed an action before the Commercial High Court of Colombo on the 1st of April , 2003 against 11 Respondents, out of which the 1st, 2nd and the 3rd Respondents were companies. The 1st Respondent Company was named as The Garment Services Group Limited (which will be hereinafter referred to as GSGL). The 2nd Respondent company was

named as Denis Day Limited (which well be hereinafter referred to as DDL). Both these companies were incorporated in the United Kingdom and are companies of limited liability. DDL is a wholly owned subsidiary of GSGL. The 3rd Respondent is named as the Aitken Spence (Garments) Limited [which will be hereinafter referred to as **ASGL**] and it is a company of limited liability incorporated in Sri Lanka. It is a wholly owned **subsidiary** of **the Aitken Spence & Company Limited** who was the Petitioner before the Commercial High Court of Colombo.

ASGL forms the subject matter of this Appeal. The issued share capital of this company was 1,997,500 ordinary shares of Rs. 10 each and 3,000,000 preference shares of Rs. 10 each. Pursuant to a **Joint Venture Agreement** (P8) entered into by the Aitken Spence & Company Ltd. with the GSGL, DDL and ASGL, (the 1st, 2nd and 3rd Respondents before the High Court), the**Aitken Spence & Co. Ltd**.,(the Petitioner before the High Court) **sold 50% of these shares of ASGL** and transferred the same to the **GSGL**. The business of ASGL was 'manufacture and export of garments'.

The said Joint Venture Agreement provided that the 3rd Respondent before the High Court, ASGL should have a Board of Directors consisting of 9 Directors. Three are nominated by Aitken Spence & Co. Ltd., the Petitioner in the High Court and three others are nominated by the 1st Respondent, GSGL. The **total of these 6 Directors are named as Voting Directors**. The other 3 Directors are jointly nominated by both the Petitioner and the 1st Respondent and they are designated as **Executive Directors**. The quorum for a meeting of the Board of Directors who shall meet at least once in three months in Sri Lanka should be two Directors nominated by Aitken Spence & Co. Ltd and two Directors nominated by the GSGL. The Board shall appoint one of the Executive Directors as the Chief Executive Officer and he shall be responsible to the Board and the day to day business of ASGL.The 3rd Respondent, shall be managed by the CEO. In the event of any **conflict** between the provisions of the JV Agreement and the Articles of Association of ASGL, the said **ASGL shall amend the Articles** to reflect the terms and conditions of the JV Agreement.

Thus, the 4th and 5th Respondents before the High Court were Voting Directors appointed by the Petitioner, Aitken Spence & Co. Ltd. and the 8th, 9th and 10th Respondents were the Voting Directors appointed by the 1st Respondent, GSGL. On 28.02.2003, the 6th Respondent , Mr. E.P.A. Cooray who was the Chairman of

the Board and a Voting Director nominated by the Petitioner, Aitken Spence& Company Ltd., resigned from the Board. On 26.03.2003, Mr. K.D.A. Lawrence was appointed as the Chairman. He was a Voting Director appointed by the Petitioner.

The 11th Respondent, Mr. Gabay was appointed as the CEO of ASGL and after his appointment, the ASGL made losses continuously and by 31.03.2000 the loss amounted to Rs. 84,810,445/- in the year 2000. An internal audit of the accounts of AGSL revealed that Gabay was functioning in a large scale fraud and financial irregularities which caused massive losses to the AGSL. The Chairman informed the 8th Respondent, D.S.Rose about the situation and suggested that the CEO, Gabay be removed. Rose did not agree. The Chairman of AGSL suspended the services of Gabay as CEO. The Chairman wanted to continue with the employment of 760 employees and to save the business of AGSL and in that interest he complained of the fraud by the CEO to the Criminal Investigations Department and the Police. The**GSGL did not agree with the Chairman of AGSL in these decisions.** However in consultation with the Petitioner Aitken Spence & Company Ltd. , Gabay was given a show cause letter on 20.06.2002 . Charges were sent to him. He did not respond. A domestic inquiry was held. He failed to be present. The inquiry was held ex parte. He was found guilty and his services were terminated. Gabay filed an application for relief before the Labour Tribunal under case number LT 1/ 29 / 2003.

It is from that time onwards that **problems** had started **between** the four companies to the JV Agreement, namely, the Petitioner **Aitken Spence & Co. Ltd., and the 3rd Respondent AGSL** ***on one side*** and the **1st Respondent GSGL and the 2nd Respondent DDL** ***on the other side.***

From 16.05.2002 onwards, the 8th, 9th and 10th Respondents who are the Voting Directors of AGSL nominated by the GSGL consistently failed to attend any meetings of the Board of Directors of AGSL. They refused to sign any Circular Board Resolutions either. The meetings of the Board of Directors of AGSL could not be held for the lack of quorum. Yet, after the removal of the CEO, each month from April, 2002 the AGSL had been recovering from the position of losses in a better way. AGSL has Bank liabilities of an amount of Rs. 215.8 million rupees, Bank interests and charges of an amount of Rs. 1.2 million each month, employment emoluments and overheads etc. to be looked after. Therefore there existed an imperative need for the Board of Directors to meet. The liabilities to

the Bank are secured by guarantees given by the Petitioner Aitken Spence & Co. Ltd. and the 2nd Respondent DDL.

The Petitioner before the High Court , Aitken Spence & Company Ltd. complains about the continuing refusal of the Voting Directors nominated by the 1st Respondent Company, GSGL to attend the meetings of the Board of Directors of the 3rd Respondent AGSL . Furthermore by not signing the Circular Resolutions, the 8th, 9th and 10th Respondents have willfully rendered it impossible for AGSL to function according to procedures to be followed by a company. The AGSL had to fulfill its mandatory statutory obligations under the statutes such as the Companies Act and the Inland Revenue Act. Such mandatory statutory obligations include finalizing, authenticating and tendering to the Registrar of Companies and to the Inland Revenue Department, the Annual Accounts. The Aitken Spence & Company Ltd. alleges that the 8th , 9th and 10th Respondents abetted by the 1st, 2nd and 11th Respondents were endeavouringto bring the affairs of the AGSL, the 3rd Respondent to a halt and to destroy the AGSL to the detriment of the Petitioner, Aitken Spence & Company Ltd. and the 760 employees of AGSL and also alleges that they have been doing so ever since the large scale frauds and irregularities committed by Gabay, the CEO of AGSL came to light.

The Petitioner stated that their conduct were **Oppressive** to the Petitioner and **Prejudicial to the interests** of the 3rd Respondent, **AGSL.**The reliefs sought from the Commercial High Court was made under **Sections 210 and 211 of the Companies Act No. 17 of 1982.**

Sec. 210 reads as follows:-

(1) Any member or members of a company……………having complaint that the affairs of a company are being conducted in a manner **oppressive** to any member or members………..may make an application to the District Court of the district in which the registered office of the company is situate for an order under the provisions of this section, where such member or members …………have under the provisions of Sec. 214 a right to make such an application.

(2) Where, on any application made under the provisions of subsection (1) , the court is of opinion that the affairs of a company are being conducted in a manner oppressive to any member…….the **court may, with a view to remedying the matters complained of, make such order as it thinks fit.**

Sec. 211 reads as follows:-

(1) Any member or members of a company having a complaint -

(a) that the affairs of the company are being conducted in a manner **prejudicial to the interests** of the company ; or

(b) that a material………

May make an application to the District Court of the district in which the registered office of the company is situate for an order under the provisions of this section, where such member has……..under the provisions of Section 214 a right to make such an application.

(2) Where , on any application made under the provisions of subsection (1), the court is of the opinion that the affairs of the company are being conducted as referred to in subsection (1) or that………., **the court may , with a view to remedying or preventing the matters complained of or apprehended, make such order as it thinks fit.**

The prayer to the Petition filed before the Commercial High Court by the Petitioner, Aitken Spence & Company Ltd. dated 01.04.2003 reads as follows:-

" WHEREFORE the Petitioner prays that the Court be pleased to issue **a Decree Nisi**

in the first instance and thereafter **a Decree Absolute** :-

(a) Declaring that the 1st, 2nd, 8th, 9th, 10th, and 11thRespondents have conducted the affairs of the 3rd Respondent in a manner that is:-

(i) **Oppressive** to the Petitioner; and

(ii) **Prejudicial to the interests** of the 3rd Respondent; and,

(b) Directing :-

(i) That the quorum for a meeting of the Board of Directors of the 3rd Respondent shall be any two Voting Directors;

(ii) That Article 93 of the Articles of Association of the 3rd Respondent be amended to read:-

" The quorum for a meeting of the Board of Directors shall be any two Voting Directors of the Company. Where a board meeting cannot be held due to the lack of the requisite quorum, the Chairman of the Meeting or in his absence the Voting Directors present at the Meeting shall re-fix that Meeting to be held fourteen days from the date on which that Meeting could not be held. The quorum

necessary for such re-fixed meeting shall be as above. Due notice shall be given of such re-fixed meeting." ; and,

(iii) That the 8th, 9th, 10th and 11th Respondents be removed from the Board of Directors of the 3rd Respondent; and,

(iv) That the aforesaid Joint Venture Agreement be modified by the deletion therefrom clause 18 thereof.

(c) Award costs; and,

(d) Such other and further relief as to this Court shall seem meet to the Petitioner.

The Petitioner before the Commercial High Court was a shareholder of the 3rd Respondent Company. The Petitioner Company, Aitken Spence & Co. Ltd. made the aforementioned **Application** on the 01.04.2003 under **Sections 210 and 211** and also made another Application on the same day under **Section 213** of the Companies Act No. 17 of 1982.

Section 213 reads as follows:-

(1) **Pending** the making by it of a final order under the provisions of **Section 210 or Section 211**, the Court may, on the application of a party to the proceedings , **make an interim order** including a restraining order which **it thinks fit** for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to **be just and equitable**.

The then Commercial High Court judge had heard the counsel for the Petitioner in support of both the Applications on 04.04.2003 and after giving consideration to the submissions had issued order nisi, in terms of Section 377(a) of the Civil Procedure Code, in respect of prayers (a) and (b) of the Petition seeking relief under Sections 210 and 211 of the Companies Act. However, the interim relief sought by the second Application which was filed was not granted under Sec. 213 and the judge had stated that it would be considered after hearing the Respondents. Later on , the Court had made an interim order that a meeting of the Board of Directors be held before the end of April,2003 with notice to all the directors for the limited purpose of considering the annual audited accounts of the 3rd Respondent AGSL and to carry out its statutory obligations and taking any decision in that regard and the quorum for that meeting of the board of directors of the 3rd Respondent to be any two voting directors.

However, after hearing both parties, the Commercial High Court judge made order on 28.05.2003 , **as prayedfor in paragraph (a)** to the second Application made under **Section 213** dated 01.04.2003 which reads as " to make **an interim order** directing that the quorum for a meeting of the Board of Directors of the 3rd Respondent shall be any two Voting Directors **until the final determination** of the Petitioner's aforesaid application for relief under **Sections 210 and 211** of the Companies Act."

The Judge of the Commercial High Court, at the end of the submissions made by the parties in support of the Application and the objections filed by the parties opposing the Application as well as submissions made with regard to the objections, **made the final order on 7th February, 2005**. The penultimate paragraph of the order reads as follows:-

" For the foregoing reasons, I hold that the decree nisi issued in terms of the prayer **(a) (i) and (ii) should be made absolute**. I further hold that the decree nisi entered in terms of prayer **(b) (i) and (ii) be made absolute**. I also hold that the decree nisi issued in terms of prayer **(b) (iv)** too should be made absolute**."**
Thereafter the Judge made the further order that the decree nisi issued in termsof prayer**(b) (iii) to be dissolved/discharged**. At the end, the Judge also granted the costs of action to the Petitioner from the contesting Respondents.

From the aforementioned Order of the Commercial High Court dated 07.02.2005, the **GSGL, DDL, and the 8th, 9th& 10th Respondents** before the High Court have **appealed** as Appellants, to the Supreme Court, on the grounds set out by me at the very commencement of this Judgment. The Petitioner **Respondent** is the **Aitken Spence & Company Ltd.** and there are **other Respondents including ASGL**and six other persons who are named as Respondent Respondents.

The Appellants pray that the "**Order** making the decree nisi issued in terms of prayers (a) (i), (b)(i), (ii) and (iv) absolute", be **set aside** and/or vacated and to **dismiss the Application** of the Petitioner Respondent made under **Sections 210 and 211 of** the Companies Act No. 17 of 1982.

It should be stressed and understood that the Order made by the Commercial High Court was done **after an analysis of the factual material** before Court. Therefore the said Order is based on the facts before Court. Since the procedure in such applications are by way of summary procedure, the facts are laid down by way of Affidavits placed before court. The Affidavits filed on behalf of the Petitioner Respondent, Aitken Spence & Company Ltd. had submitted that AGSL had ever since it was formed in 1981, made profits every year upto 1995. AGSL had for the first time made losses in 1996 and 1997. After Gabay became the CEO of AGSL the losses had escalated rapidly to Rs. 19,442,073/- in 1998, Rs. 23,422,551/- in 1999, Rs. 84,810,445/- in 2000, Rs. 13,188,152 /- in 2001 and Rs. 21,824,270/- in 2002.

Then, the results of an Internal Audit of AGSL was done by the Internal Auditor and he had reported in reports P23 to P26 that Gabay was guilty of large scale fraud and irregularities which had caused the losses to AGSL. The said documents P23 to P26 were read by me at pages 741 to 753 in Volume II of the Brief before this Court. The contents of the internal audit reports P25 and P26 specifically prove that the CEO had acted in quite a wrongful manner prejudicial to the interest of the ASGL and losses caused to the company are irremediable. The procedures taken in handling the business of ASGL in the manner it was done by the CEO is beyond any reason and quite detrimental to the company. It amounts to fraud against the company, committed by the CEO. The Chairman had informed the Police, the Criminal Investigations Department and the mother company Aitken Spence & Company Ltd. about the state of affairs no sooner than the internal audit reports had reached him. Gabay, the CEO was taken out of his duties and later on his services were terminated.

Gabay went before the Labour Tribunal complaining that his services were terminated by AGSL unreasonably unlawfully and unjustifiably. He prayed for **compensation** but **not reinstatement**. On 25.02.2011 the said Application was dismissed by the Labour Tribunal after a inquiry held inter partes. Gabay appealed from that order to the High Court. The argument/hearing of the said Appeal by the High Court was scheduled for 21.02.2012.

The 1st and 2nd Respondents were the London based companies, GSGL and DDL. After the Joint Venture Agreement was signed by all the four companies, the Articles of Association was amended providing that the quorum for a board

meeting was four Voting Directors of whom two each had been nominated by the GSGL and the Aitken Spence & Company Ltd. After Gabay was suspended none of the Voting Directors of AGSL who had been nominated by GSGL to the Board of Directors of AGSL attended any Board Meeting of AGSL, despite having been informed of the dates for the meetings. They totally refused to sign the Circular Resolutions as well. It was also informed by GSGL in writing that their nominee Directors will not participate in any board meeting by letters addressed to AGSL on 19.06.2002 (P 40) and 17.02.2003 (P52). Due to the said boycott of board meetings and refusal to sign the circular resolutions, the AGSL could not move on in business at all.

The Aitken Spence & Co. Ltd. who owns 50% of the shares of AGSL filed an Application under Sec. 213 of the Companies Act No. 17 of 1982 praying for an interim relief Order directing that the quorum for a meeting of the Board of Directors of AGSL be made **as any two Voting Directors** until the final determination of the Application made under Sec. 210 and 211 of the Act. Court granted the said relief on 28th May, 2003.

'Gabay and the Appellants in this Appeal before the Supreme Court' made an Application to the Supreme Court, for leave to appeal from the Order of the High Court granting the interim relief as aforesaid.**Leave to Appeal was refused** by the Supreme Court and the Application made by the Appellants was **dismissed.**

This Court as at present has to consider the ground on which the Appellants are challenging the impugned Order of the Commercial High Court dated 07.02.2005. The first submission was that the High Court Judge had failed to consider the preliminary objections raised by the Appellants. **The first preliminary objection** was that the High Court had **no jurisdiction** to hear the matter before the High Court because the Petitioner Respondent, Aitken Spence & Co. Ltd. had failed to abide by Clause 19 in the Joint Venture Agreement dated 20.12.1996 marked as P8 and the provisions of Section 5 of the Arbitration Act No. 11 of 1995. The position taken up was that the Petitioner Respondent was bound to refer the matter for arbitration before making an application under Sections 213,210 and 211 of the Companies Act to Court.

The Appellants had taken up that position in the High Court on 05.05.2003 at the time the High Court was considering the Application under Section 213. After

hearing the parties, the then High Court Judge had gone into the matter at length and made a long order of 11 pages quoting judgments from Courts of India and comparing the similar provisions in the Indian Companies Act etc. and had delivered the same in open court on 28.05.2003. The Appellants being aggrieved by the said Order had then appealed to the Supreme Court and as I have mentioned earlier, the Supreme Court had refused leave to appeal and dismissed their Application on 08.07.2003. A certified copy of the Supreme Court order is at page 158 in Volume I of the brief before this Court. Therefore it cannot be stated that the learned Commercial High Court Judge who heard the matter under Sections 210 and 211 have failed to consider the preliminary objection on jurisdiction. The same court cannot and shall not consider the same preliminary objection twice in the very same case. It is totally a wrong submission brought forward by the Appellants before this Court at the hearing of this Appeal.

The **second preliminary objection** was that the Petitioner Respondent , the Aitken Spence & Co. Ltd. cannot have and maintain the Application before the High Court in **as much as it holds 50% of the shares** of the 3rd Respondent, the AGSL and was at the time of the Application as well as at the time of filing the Appeal**, in control of the management of the 3rd Respondent.**The AGSL the 3rd Respondent is a company which exports garments after manufacturing the same in Sri Lanka and has been approved by the BOI in the country. Just because 50% of the shares are owned by the Aitken Spence & Co. Ltd. , that does not mean that the said company is in control. It is Aitken Spence & Co. Ltd. who transferred 50% of the shares owned by the said company to the 1st Appellant before this court, namely GASL and thereafter only the parties entered into the Joint Venture Agreement.

Even though it is alleged by the Appellants, that ,at the time of institution of the proceedings, the Petitioner Respondent **was actually not in control of the AGSL** because the other 50% of the shares were with the 1st Appellant and the Voting Directors nominated by GASL did not either attend the Board Meetings or sign the circular resolutions thus making it impossible for AGSL to function as a manufacturing and exporting garment company. If the Petitioner Respondent was in control there was no reason to enter into litigation against the Appellants. Just because the CEO Gabay was suspended from service by the Petitioner Respondent at a time the 1st Appellant was not in agreement of the same as indicated verbally, it cannot be heard to say that the Petitioner Respondent was

already in control of the AGSL and therefore should not have come before court. That argument does not hold water. The High Court when considering the factual situation has come to the conclusion that the **Petitioner Respondent had the status to come before court due to the current situation which prevailed at that time, in the interests of the AGSL** which had to be saved from falling down in business and also in the interests of the employees of AGSL.

The High Court Judge had identified that it is the termination of the 11th Respondent before the High Court, who was Gabay the CEO was the root of the dispute and had given rise to a conflict of opinion which appeared on the face of it had adversely affected the smooth functioning of the 3rd Respondent company AGSL. The High Court Judge had reasoned out that due to this conflict, the 1st Respondent GASL had made it impossible for the Board of Directors of AGSL to meet and take decisions by making sure that there was no quorum for any meeting acting in a manner oppressive to the interests of the Company with a decision of their nominee Voting Directors not attending the meetings. It is obvious that when there is no quorum, the Board of Directors cannot make the decisions to make the company run forward and then the progress of the company would come to a halt.

The Companies Act had provisions to make applications from court seeking relief in such an instance. According to the pleadings before court, the High Court Judge states that it was quite clear that after the expulsion of the 11th Respondent, the nominee Directors of the 1st Respondent had admittedly refrained from attending any of the board meetings and refused to sign the circular resolutions as well. I find that the learned High Court Judge has analyzed each and every aspect of all matters before making the order.

The Appellants argued that the **CEO is accountable** for the day to day running of the business of the AGSL according to the Joint Venture Agreement and by having removed him, the Petitioner Respondent had taken control of the Company. I am of the opinion that the High Court Judge was correct when he concluded that the Company is run by the Board of Directors and the **CEO is responsible and accountable to the Board of Directors** according to the JVA and the Articles of Association. When it was revealed by the Audit Reports that the CEO was engaged in fraud in running the day to day business of the company , the first thing to be done to save the company was obviously to suspend him which was done even

though it was done without having had a board meeting prior to the same. The evidence before this Court demonstrate that when it was found out that Gabay was involved in fraud meddling with the property of the company such as quotas received by AGSL being sold to other companies etc. which is amply obvious from the Audit Reports P23 to P26, the removal/ suspension of the CEO Gabay had to be done immediately but when the Directors nominated by Aitken Spence & Company orally discussed the matter with the Directors nominated by GSGL and DDL, they had shown their displeasure towards the suggestion of removing Gabay and that is why the Aitken Spence & Company had suspended him since Gabay's actions had been compelling the removal if the company AGSL was to be saved from incurring more and more losses. It looks like what was done had to be done immediately and that is why Gabay was removed from service. Just by doing that the Petitioner did not get the control of the company as argued by the Appellants now.

The action by the Appellants consequently has been analyzed by the High Court Judge quite well in this way at page 15 of his Judgement which is impugned:
" As regards the protest staged by the 1st Respondent and its nominee Directors, it must be observed that as it has been put forward in the forefront of their defence, if the Petitioner was in control of the management of the Company at the time the conflict of opinion arose or the misunderstanding cropped up, **without deciding to keep away from the board meetings, they could have complained against the Petitioner and its nominee Directors to Court** either in the manner Petitioner has invoked the jurisdiction of this Court or in some other way as advised. The fact that the nominee Directors of the 1st Respondent have chosen **not to complain the matter to Court and to sabotage the meetings of the Board of Directors** of the 3rd Respondent, appears to be **too drastic a decision taken against the interests and welfare of the incorporated body, namely the 3rd Respondent Aitken Spence Garments Co. Ltd."**
I totally agree with the analysis of the High Court Judge in that regard. It is due to the actions of sabotage of the meetings and signing the circular resolutions that undoubtedly rendered the management and control of AGSL impracticable and impossible.

The Appellants argued that having invested Rs. 35 million in the AGSL and having entered into the Joint Venture Agreement, it should have been understood by the learned High Court Judge that the Appellants never intended AGSL to face any

difficulties or obstacles and that the presumption drawn by the High Court was wrong. The only way to find the intention is to analyze the facts. I find that the High Court Judge has come to the conclusion that the Appellants intended the down fall of AGSL and to bring the company to a halt by not attending the meetings and refusing to sign the circular resolutions.

Then again the Appellants argued that the learned High Court Judge has conceded and admitted the fact that the reasons why the Appellants refrained from attending the Board Meetings was justifiable quoting from page 10 of the Order thus:
“ Be that as it may, admittedly the fact of the matter is that the 11th Respondent has been discontinued from service, as the Executive Director of Aitken Spence Garment Co. Ltd. without any decision being taken by the Board of Directors the Petitioner has not given any plausible explanation as to what prevented it from discussing the conduct of the 11th Defendant at a Board Meeting of the Directors of the Aitken Spence Garment Co. Ltd. prior to any such drastic action being taken against the 11th Respondent which unfortunately has led to an unbendable misunderstanding between both groups of nominee Directors.
In passing it must be mentioned that the situation would have continued to be quite cordial and pleasant between the parties had the Petitioner extended the basic courtesy to discuss the pros and cons of its decision relating to the 11th Respondent’s conduct, at a board meeting of Directors of the 3rd Respondent.”

I find that by stating as such by the High Court Judge shows that he had looked at all sides of the problem as it then was. Such a statement being included among the other matters which were analyzed from the beginning to the end of the judgment explaining how the Judge saw it, does not necessarily mean that the Judge should have held with the Appellants. That is the very reason that in his Judgment the learned **Judge had not made the decree nisi entered in terms of prayer (b) (iii) absolute but dissolved the same.** Prior to arriving at that part of his decision, the learned Judge has explained thus: “ Taking into consideration the fact that the Petitioner has not consulted the Board of Directors, prior to its having taken the decision to expel the 11th Respondent and the protest made by the nominee directors of the 1st Respondent and also being mindful of the commitments of the 1st Respondent towards the Joint Venture Agreement, it is my opinion that the **equitable consideration does not favour** the decree nisi

issued in terms of prayer (b) (iii) being made absolute. Hence the decree nisi issued in terms of prayer (b) (iii) is hereby dissolved / discharged."

I find that the learned High Court Judge has well analyzed the facts and how it affects the 3rd Respondent company AGSL which is the primary duty of the Court when the Petitioner before his Court had invoked Sections 210, 211 and 213 of the Companies Act which was effective at all times pertinent to the problem before the Court. He has looked at the situation from the point of view of the 1st and 2nd Respondents as well as from the point of view of the Petitioner with regard to the AGSL, the company which is the subject matter of the case and arrived at the conclusions on a balance of probabilities with equitable consideration.

Therefore I answer the questions arising out of the grounds of Appeal enumerated at the inception of this judgment in favour of the Respondents and against the Appellants. I dismiss the Appeal and affirm the Judgement of the learned Judge of the Commercial High Court dated 07.02.22005.

Appeal is hereby dismissed. However I make no order regarding costs.

Judge of the Supreme Court

L.T.B. Dehideniya J
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ
I agree.

Judge of the Supreme Court