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

Dehigaspe Patabendige Nishantha
Nanayakkara,
No. 34/1,
First Lane,
Egodawatta Road,
Boralesgamuwa.
Petitioner

SC APPEAL NO: SC/CHC/APPEAL/26/2003
CHC CASE NO: HC/CIVIL/01/2000(2)

Vs.

1. Ceylon MKN Eco Power (Pvt) Ltd.,
   No. 202, Moratuwa Road,
   Piliyandala.
2. Yukinori Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
3. Norika Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
   Respondents

AND NOW BETWEEN

Dehigaspe Patabendige Nishantha
Nanayakkara,
No. 34/1,

First Lane,
Egodawatta Road,
Boralesgamuwa.
Petitioner-Appellant

Vs.

1. Ceylon MKN Eco Power (Pvt) Ltd.,
   No. 202, Moratuwa Road,
   Piliyandala.
2. Yukinori Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
3. Norika Kyuma,
   No. 11A, Queen's Terrace,
   Colombo 03.
   Respondent-Respondents

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice Kumuduni Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Geoffrey Alagaratnam, P.C., with Anura Ranawaka and Lasantha Garusinghe for the Petitioner-Appellant.
Laknath Seneviratne for the Respondent-Respondents.

Argued on: 14.07.2021

Written submissions:
by the Petitioner-Appellant on 13.06.2011 and 12.08.2021.
by the Respondent-Respondents on 05.05.2011 and 15.09.2021.

Decided on: 28.02.2024

Samayawardhena, J.

Background

The petitioner-appellant filed this application in the Commercial High Court under sections 210 (oppression) and 211 (mismanagement) of the repealed Companies Act, No. 17 of 1982, (which are analogous respectively to sections 224 and 225 of the new Companies Act, No. 7 of 2007) on the basis that the affairs of the 1st respondent company are being conducted in a manner oppressive to the petitioner as a minority shareholder and prejudicial to the interests of the company. The petitioner sought the following reliefs in the prayer to the petition before the Commercial High Court:

(a) *An order regulating the conduct of the affairs of the 1st respondent company in future in such a manner as the Court may decide as to protect the 1st respondent company and its minority shareholders including the petitioner.*
(b) *An order directing the 2nd and 3rd respondents not to remove the petitioner from the office of director of the 1st respondent company.*
(c) *An order directing the petitioner be permitted to carry out the functions of the Chief Executive Officer of the 1st respondent company.*
(d) *An order directing that the petitioner be a joint signatory to all Bank Accounts of the 1st respondent company.*
(e) *An order directing the 2nd and 3rd respondents not to do any act to diminish or suppress the petitioner's shareholding in the 1st respondent company.*

Upon completion of the pleadings, the parties agreed that the main inquiry/substantive application could be disposed of on written

submissions. After both parties filed written submissions, the Commercial High Court by order dated 07.05.2003 dismissed the application of the petitioner with costs on the basis that it is not the conduct of the 2nd and 3rd respondents but "*the conduct of the petitioner [that] is oppressive and detrimental to the 1st respondent company*." Being dissatisfied with the order, the petitioner filed this appeal. The gravamen of the argument of learned President's Counsel for the petitioner before this Court is that the petitioner must succeed in this appeal on oppression and mismanagement particularly in view of the shareholders agreement marked X11.

The 1st respondent company was incorporated under the Companies Act on 20.03.1998 to carry on the business of generating hydro power to be supplied to the national grid and related services (X1). The petitioner, a Sri Lankan national with a PhD in electrical engineering, holds a 20% share in the 1st respondent company, while the 2nd respondent, a Japanese national and the investor, holds 80% of the share capital in the same company. Both were directors at the time of the incorporation of the company. As seen from the minutes of the first board meeting marked X26(a) held on the date of incorporation, the 3rd respondent who is a daughter of the 2nd respondent was appointed a director with the agreement of the petitioner. They started their mini hydro power project at Wijeriya in Kolonne.

Petitioner's allegations

Let me now consider the allegations of the petitioner against the 2nd respondent major shareholder in seeking the said reliefs under oppression and mismanagement.

The petitioner in paragraph 7 of the petition says that the 2nd respondent abused his powers as the major shareholder in that he

rejected a proposed investor (Dr. Rajakaruna); arbitrarily increased the capacity of the project from 500 kW to 750 kW despite an inadequate volume of water; and developed infrastructure facilities causing additional cost overrun. But according to letter X8 written by Dr. Rajakaruna to the petitioner, neither Dr. Rajakaruna nor the petitioner intended to invest any money in the 1st respondent company and instead expected to offer their services/expertise to the company. Furthermore, the documents C1-C3 show that the petitioner approved and actively participated in the decision to increase the capacity of the project from 500 kW to 750 kW. The petitioner's claims lack impact and are unconvincing.

The petitioner says in paragraph 10:

> *Around May 1998, the 3rd respondent who had come to Sri Lanka was made a director of the 1st respondent company by the 2nd respondent. By this time, since the 1st respondent company was facing many problems caused by the 2nd respondent's misuse of power and arbitrary decisions, including the said cost overrun, the petitioner insisted that he should be given certain rights including 50% of profits of the company.*

According to the petitioner, it is against this backdrop that the shareholders' agreement X11 was drawn up in June 1998 and signed after amendments on 29.10.1998.

The 1st respondent company was incorporated in March 1998. According to the petitioner, around May 1998 "*the 1st respondent company was facing many problems*". In the formative stage of any company, this may not be unusual. If the company was facing many problems, is it proper and sensible for the petitioner as a responsible shareholder and director to have demanded further rights including

50% of the profits of the company especially when he held only 20% of the issued share capital? In my judgment, it is not.

I will deal with the shareholders' agreement separately later on.

The petitioner in paragraph 11 of the petition says that in October 1999, the 2nd respondent obtained Rs. 1 million from the company to change his residence to a more luxurious and prestigious place. By producing the lease agreements marked P1 and P2, the respondents show that this was done because the deposit, advance and monthly rentals payable were cheaper for the new residence. Monthly rentals have been paid by the 2nd respondent personally and not by the company.

In paragraph 13 the petitioner speaks of loan facilities obtained for the project with his assistance. Obtaining loans is not mismanagement of the company and there is no allegation that the company was unable to repay such loans. The 1st respondent company was incorporated in March 1998 and the petitioner admits that the Kolonne mini hydro power project was commissioned in February 1999 and the Ceylon Electricity Board commenced purchasing electricity from that month onwards. The project was not a failure but a success.

Paragraph 14 of the petition is revealing. I take the view that the disclosures contained therein is crucial in the determination of this case. The petitioner says he incorporated two companies. One is Hydro Power International (Pvt) Ltd incorporated on 09.06.1999 for the purpose of engaging in mini hydro power projects to supply hydro power to the national grid. This is the same purpose for which the 1st respondent company was incorporated and therefore it is clearly a rival company creating a situation of potential conflict of interest between the petitioner and the 1st respondent company. The shareholders of this

new company are the petitioner and his wife. According to the respondents, it is the formation of the new company that triggered the actual dispute between the petitioner and the respondents. I have no difficulty in accepting this assertion of the respondents, although there would have been differences of opinion between the petitioner and 2nd respondent in managing the affairs of the company before this new development.

In *Re Five Minute Car Wash Service Ltd.* [1966] 1 WLR 745 at 751 Buckley J. stated:

> *The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed.*

Transgression of fiduciary duty

A company, a fictional entity created by law, is governed by its directors. They have been considered as trustees, partners, agents etc. for the company. Regardless of the categorisation that may apply to directors within a company, the fundamental principle remains unchanged: they owe a fiduciary duty to the company as a whole. Directors must act with good faith and unwavering loyalty, prioritising the best interests of the company over their personal interests. They should never allow their duties to the company to be compromised by conflicts of interest, nor should they engage in competition with the company. (*vide Gower's Principles of Modern Company Law,* 10th Edition

(2016), pp. 462-562; *Charlesworth's Company Law,* 17th Edition (2005), pp. 297-321)

These common law obligations of directors have now been largely replaced by statutory provisions. Our Companies Act of 2007 makes detailed provisions on the duties and responsibilities of directors. (*vide* sections 187-220)

The conflict of interest that arose out of the formation of the new company Hydro Power International (Pvt) Ltd by the petitioner is practically proven when the petitioner joined hands with another company by the name of Natural Power (Pvt) Ltd in setting up a hydro power project at Kabaragala in Nuwara Eliya. The petitioner complains that the 2nd and 3rd respondents approached the directors of Natural Power (Pvt) Ltd "behind his back" to ask them to deal with the 1st respondent company directly, but Natural Power (Pvt) Ltd entrusted their project to be handled by Hydro Power International (Pvt) Ltd. The conduct of the petitioner is reprehensible. There was no reason for the respondents to have approached Natural Power (Pvt) Ltd stealthily. As seen from the document marked F, Natural Power (Pvt) Ltd earlier entrusted the 1st respondent company with setting up a mini hydro power project at Kabaragala on a turnkey basis and informed the same to the Board of Investment of Sri Lanka. As seen from G1-G3, the Board of Investment of Sri Lanka in turn granted approval for the same. However, the document marked H goes to prove that the petitioner thereafter obtained approval for the same project in his personal name. Does this not create a serious conflict between the petitioner's personal interests and the interests of the 1st respondent company of which he is a director? It does, and this conflict is manifestly detrimental to the well-being of the 1st respondent company. The Commercial High Court cannot be found fault with when it stated "*it is the petitioner who had*

breached his fiduciary duties he owes to the 1st respondent company in order to obtain personal benefits."

In relation to the Kabaragala project, by X15(a) dated 25.11.1999, the petitioner had this to say to the 3rd respondent:

> *I have completely given up the idea of doing Kabaragala project by MKN [the 1st respondent company] and informed my decision to NP [Natural Power (Pvt) Ltd] since I should look after the interests of NP being the technical director of that company. Even if you didn't bother to tell me, I was informed by NP that directors of NP were met by you all and wanted to do the project by you all without me. After having judged all aspects, they have decided not to give the project to MKN, and will be handled by "Hydro Power International" [the rival company the petitioner incorporated with his wife]. Since I have big doubts on the success of partnership with you for subsequent projects, I don't want to have any link with you for my future projects.*

By this letter the petitioner makes it clear that he would maintain a business relationship with the 1st respondent company only for the mini hydro power project at Wijeriya in Kolonne. In that context, can he be allowed to continue as a director of the 1st respondent company? In that context, is it unreasonable if the majority shareholder, holding 80% of the shareholding and seemingly the exclusive financial investor, believes that allowing the petitioner to continue as a director would serve no purpose other than to potentially undermine the company's prospects? I am unable to accept the submission of learned President's Counsel for the petitioner that "*allegations of conflict of interest were wrong where the appellant had disclosed his interest in the other company and the 1st respondent company had only one approved project and no further mandate from BOI as revealed through boards minutes*." If

this submission is correct, for instance, the allegations levelled against the 2nd respondent by the petitioner in X15(a) in relation to dealings with Natural Power (Pvt) Ltd are meaningless. What is the purpose of the petitioner stating in X15(a) that he does not want to work with the 1st respondent company on future projects?

The petitioner states that after Natural Power (Pvt) Ltd rejected the offer of the 2nd respondent and accepted that of the petitioner, the 2nd and 3rd respondents orchestrated a strategy to suppress the rights of the petitioner as a shareholder and director of the 1st respondent company and attempted to remove him from the board of directors. He narrates several episodes in the petition in this regard. These primarily include (a) the respondents breaking into the petitioner's office room in the company premises at night in his absence and sealing it after removing documents and equipment; (b) attempting to remove him from the office of director; and (c) appointing extra security guards to the project premises without board approval.

Regarding the allegation of breaking into and sealing the petitioner's office room, the respondents' explanation is that the 2nd respondent and members of his family went to the company office at night and took charge of the confidential documents and placed them in the directors' room and conference room for safe custody; and on the following day the petitioner broke open the sealed doors and, in the melee, even assaulted the 2nd respondent. Criminal proceedings were instituted against the petitioner and a settlement was reached in Court regarding only the documents in that all documents of the 1st respondent company were delivered to the 2nd and 3rd respondents with copies to the petitioner. The position of the respondents is that the removal of the confidential documents was necessitated because of the dealing of the petitioner with his new company.

In *Re Five Minute Car Wash Service Ltd. (supra)* at 751 Buckley J. stated:

> *First, the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under section 210.*

The attempt to remove the petitioner as a director of the company and the breakdown of the relationship between him and the other directors are not decisive to decide the question of "oppression". Even if he were removed from the office of director and chief executive officer, such removal *ipso facto* does not qualify the petitioner to successfully make an application under "oppression" because it has *prima facie* nothing to do with his shareholding in the company. The reliefs sought in paragraphs (b)-(d) in the prayer to the petition cannot be granted under the rubric of "oppression" unless the petitioner can affirmatively show how such changes adversely affect him as a shareholder of the company. The petitioner has failed to satisfy the Commercial High Court in this regard. Sweeping statements and mere conjectures, in lieu of substantiated evidence, fall short of the requisite standard.

Oppression

Section 224(1) of the Companies Act of 2007 reads as follows:

> *Subject to the provisions of section 226, any shareholder or shareholders of a company who has a complaint against the company that the affairs of such company are being conducted in a*

> *manner oppressive to any shareholder or shareholders (including the shareholder or shareholders with such complaint) may make an application to court, for an order under the provisions of this section.*

In order to succeed in an application under oppression, the petitioner must establish that the affairs of the company are being conducted in a manner oppressive to the petitioner in his capacity as a shareholder, not as a director or chief executive officer or in any other capacity.

In *Re Lundie Brothers Ltd* [1965] 2 All ER 692 at 699, Plowman J., in an application filed under section 210 of the UK Companies Act of 1948 which allowed a shareholder to come before Court when the affairs of the company were being conducted in a manner oppressive to him opined:

> *[The shareholder] has to establish some element of lack of probity or fair dealing to him in his capacity as a shareholder in the company. In my judgment he has wholly failed to do that. His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.*

In *Re J.E. Cade & Son Ltd* [1992] BCLC 213 the petition was struck out where the Court found that the petitioner's true motive in bringing the action was not to obtain relief *qua* member of the company operating a farm, but to obtain possession of the agricultural land in his capacity as landlord.

Due to the infinite variability of circumstances in which oppression may arise, it is inherently intricate to provide a precise legal definition to the term "oppression". The determination of whether oppression exists necessitates a case-by-case evaluation of the unique facts and circumstances. In the House of Lords case of *Scottish Co-operative Wholesale Society Limited v. Meyer* [1958] 3 All ER 66 at 71, Lord Simonds described the meaning of the term "oppression" in this context as the majority exercising authority over the minority in a manner that is "*burdensome, harsh and wrongful*". This definition was adopted in *Re H.R. Harmer Ltd* [1958] 3 All ER 689 and in many other cases.

Lord Keith in *Scottish Co-operative Wholesale Society Limited (supra)* stated at 86:

> *Oppression under s. 210 may take various forms. It suggests, to my mind, as I said in Elder v. Elder & Watson (1952 SC 49), a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.*

The oppression and mismanagement shall relate to the "affairs of the company". The term "affairs of the company" found in relevant sections on oppression and mismanagement, in our jurisdiction, in the UK and India, extends to a wider spectrum of company-related activities and decisions, encompassing various aspects of corporate governance, management, and conduct.

However, a shareholder who seeks relief against oppression can only claim what he is legally entitled to and not what his whims and fancies demand. But I must add that legal rights are not limited to strict legal rights embodied only in the articles of association of the company. It may encompass legal rights grounded in broader equitable considerations, such as legitimate expectations of a shareholder—a

concept traditionally rooted in fairness as evaluated by an objective standard. Additionally, these rights may emanate from statutory provisions (such as section 49(2) of the Companies Act of 2007), contractual agreements (such as shareholder agreements), equity interests in the company, and the governance structures that define the company's management framework and decision-making processes. Moreover, fiduciary duties and responsibilities owed by directors may also give rise to additional legal rights and obligations beyond the confines of the articles of association. However, the bottom line is that both the claim of the shareholder and the granting of that relief by the company must have a legal foundation.

Lord Hoffmann in the House of Lords case of *O'Neill v. Phillips* [1999] 2 All ER 961 at 966-967 opined:

> *In the case of section 459 [of the UK Companies Act of 1985], the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.*

In *Re Elgindata Ltd* [1991] BCLC 959 at 985 Warner J. referring to the cases of *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 667 and *Re a company (No 005685 of 1988), ex p Schwarz (No 2)* [1989] BCLC 427 stated:

> *In general members of a company have no legitimate expectations going beyond the legal rights conferred on them by the constitution of the company, that is to say its memorandum and articles of association. Nonetheless, legitimate expectations superimposed on a member's legal rights may arise from agreements or understandings between the members. Where, however, the acquisition of shares in a company is one of the results of a complex set of formal written agreements it is a question of construction of those agreements whether any such superimposed legitimate expectations can arise.*

K. Kanag-Isvaran and Dilshani Wijayawardana in Company Law (2014), p.518 state:

> *When a shareholder complains of oppression on the part of the company, he must show that he has been constrained to submit to a conduct, which lacks probity, is unfair to him and which causes prejudice to his legal and proprietary rights as a shareholder. The acts complained of must deny to the complaining shareholder or shareholders their rights, or their legitimate expectations as shareholders. The rights and legitimate expectations of shareholders must be those rights and expectations the company can and should honour on a legal basis, and the shareholders can demand as of right, and not every wish and fancy of a shareholder.*

The term "oppression" generally does not include conduct that is merely inefficient, negligent or careless, although such conduct can fall under "mismanagement" in the event such conduct is persistent and the consequences serious, thereby prejudicially affecting the interests of the company. In *Re Five Minute Car Wash Service Ltd (supra)* at 752 Buckley J. held that allegations that the chairman and managing director of a company had been unwise, inefficient and careless in the performance of his duties could not without more amount to allegations of oppressive conduct for the purposes of section 210 of the UK Companies Act of 1948. However no hard and fast rule can be laid down. In *Scottish Co-operative Wholesale Society Limited (supra) at 88,* Lord Denning considered inaction as a species of oppression:

> *It is said that these three directors were, at most, only guilty of inaction—of doing nothing to protect the textile company. But the affairs of a company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something—just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it.*

Under our law, it may difficult to establish oppression by referring to one isolated incident of past conduct; it has to be a course of conduct. The oppressive conduct shall be of a recurring nature at the time of filing the application, as section 224(1) of the Companies Act of 2007 provides "*the affairs of such company <u>are being conducted</u> in a manner oppressive to any shareholder*". Similar wording can be found in section 225(b) under "mismanagement". However, these terms should not be interpreted overly restrictively. If the effect of a wrongful single act in the past (such as the wrongful issuance of shares, diverting company funds for personal use) continues and results in the persistent

oppression of the minority and mismanagement of the company, this will satisfy the requirement. Section 225(1)(b) refers to the future when it states "*it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company*."

Relevance of UK decisions

Before I move on to mismanagement, a word of caution is required when English authorities are considered by Sri Lankan Courts under "oppression" and "mismanagement" as the statutory provisions are not similar particularly after 1980.

I do not mean to make a close comparative analysis but thought it fit to refer to some conspicuous differences as learned President's Counsel for the petitioner drawing attention to section 3 of the Civil Law Ordinance, No. 5 of 1852, invited the Court to look into English decisions in understanding his main argument on "oppression" and "mismanagement" vis-à-vis the shareholders' agreement, which I will address later.

In the first place we have clear, separate provisions for "mismanagement" (section 211 of the Companies Act of 1982 and section 225 of the Companies Act of 2007). However, there is no counterpart in the UK Companies Act.

There was a provision for "oppression" under section 210 of the UK Companies Act of 1948, in terms of which any member of a company who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members (including himself) could make an application to the Court by petition for an order under that section.

But by section 75 of the UK Companies Act of 1980, the word "oppression" was replaced by "unfair prejudice":

> *Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

This was repeated in section 459 of the UK Companies Act of 1985, which was later slightly amended by the UK Companies Act of 1989 with the substitution of "unfairly prejudicial to the interests of its members generally or of some part of its members" for "unfairly prejudicial to the interests of some part of the members":

> *Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

Section 994 of the UK Companies Act of 2006 which represents the current law reiterates the same.

It may be noted that "unfair prejudice" introduced by the UK Companies Act of 1980 and carried forward up to now must be given a broader meaning than "oppression". (*Palmer's Company Law,* 24th Edition (1987), Vol 1, p.989) Hence cases decided under "unfair prejudice" by UK Courts cannot be directly applicable to the

determination of "oppression" in our jurisdiction although they serve as useful guides for interpreting our provisions appropriately.

It may also be relevant to note that even under "mismanagement" (under section 225 of the Companies Act of 2007), only the word "prejudice" is used, not "unfair prejudice". "Unfairness" and "prejudice" are different concepts. This is highlighted in *Gower's Principles of Modern Company Law*, 10th Edition (2016), pp. 672-673:

> *In a number of cases the courts have stressed that the section itself requires prejudice to the minority which is unfair, and not just prejudice per se. Sometimes what was done to the petitioner was unfair, but it caused him or her no prejudice, for example, because no loss was inflicted: in these cases s.994 [of the UK Companies Act of 2006] is not open.*

Section 994 of the UK Companies Act of 2006 makes express provisions to establish "unfair prejudice" not only for the present acts but also for past and future acts when it says "*are being or have been conducted*" and "*any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial*".

Mismanagement

Section 225(1) of the Companies Act of 2007 reads as follows:

> *Subject to the provisions of section 226, any shareholder or shareholders 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 change (not being a change brought about by or in the interest of any creditors, including debenture holders or*

> *any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in its board of directors or of its agent or secretary or in the constitution or control of the firm or body corporate acting as its agent or secretary or in the ownership of the shares of the company or in any other manner whatsoever, and that by reason of such change it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company,*
>
> *may make an application to court for an order under the provisions of this section.*

In order to succeed in an application on "mismanagement" under section 225 of the Companies Act of 2007 (211 of the Companies Act of 1982), the petitioner must establish that the affairs of the company are being conducted in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company which makes it likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company.

Material changes such as the removal of a director or the company secretary or auditors may initially seem significant. However, if these actions are carried out in good faith and in accordance with the company's articles of association for the overall betterment of the company, they may not provide sufficient grounds for a minority shareholder to successfully pursue an application under the claim of mismanagement. It is essential to recognise that not every material change automatically and invariably harms the interests of the company. For example, if such changes are undertaken to enhance corporate governance, streamline operations, or address genuine

concerns, they may ultimately benefit the company and its shareholders as a whole.

In the case of *Re Blue Arrow PLC* [1987] BCLC 585, the Court refused to intervene under "unfairly prejudicial conduct" to cancel a special resolution altering the articles of the company so as to make the president of the company or the chairman of the board of directors removable by board resolution, whereas previously the same was only possible by a resolution passed at a general meeting.

A decision by the board of directors to change the business or to continue carrying on the business despite trading losses or to sell the business to an outsider will not *per se* warrant the Court to give relief to a minority shareholder if those business decisions were made in good faith. (*vide Re Saul D Harrison PLC* [1994] 2 BCC 475, *Re Posgate and Denby (Agencies) Ltd* [1987] BCLC 8)

Under mismanagement, the petitioner must make the application in good faith in furtherance of the best interests of the company as a shareholder and not in the best interests of himself as an investor.

The test to be adopted in deciding whether or not the affairs of a company are being conducted in a manner oppressive to a shareholder (oppression) or in a manner prejudicial to the company (mismanagement) is objective as opposed to subjective. (*Palmer's Company Law*, op. cit., paragraph 66-06, *Halsbury's Laws of England*, Vol.14, (2009) 5th edition, pp 991-993 (paragraph 468)

In *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290-291, Nourse J. stated that "*it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test…is whether a reasonable*

bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests."

In reference to section 459(1) of the UK Companies Act of 1985 in the case of *Re Sam Weller & Sons Ltd* [1990] Ch 682 at 690, Peter Gibson J. stated:

> *To my mind, the wording of the section imports an objective test. One simply looks to see whether the manner in which the affairs of the company have been conducted can be described as "unfairly prejudicial to the interests of some part of the members." That, as [counsel for the petitioner] submitted, requires an objective assessment of the quality of the conduct. Thus, conduct which is "unfairly prejudicial" to the petitioner's interests, even if not intended to be so, may nevertheless come within the section.*

The lawful removal of directors in terms of the articles of association, protection of company property including business files, recruitment of additional security personal, attracting new businesses, and (as submitted during the argument) non-payment of dividends etc., which the petitioner in the instant case relies on to establish his case, cannot, on the facts and circumstances of this case, be regarded as oppressive to the petitioner as a shareholder or mismanagement of the company.

In *Re Lundie Brothers Ltd (supra)* at 699, Plowman J. stated:

> *There is also a complaint—or what I take to be a complaint—in the petition that he has received no dividend on his shares in the company. The company in fact has never paid any dividends. Its policy has been substantially to divide its profits between directors and not to pay any dividend on its shares. But no case is either pleaded or has been established for concluding that the company's failure to pay dividends was oppressive to the shareholders of the*

company and, indeed, there may well have been sound commercial reasons for not declaring any dividend.

In the Indian case of *Jaladhar Chakraborty v. Power Tools and Appliances Co* (1992) 2 CALLT 64 HC it was held that omission to declare dividends does not constitute an act of oppression or mismanagement.

The articles of association of the 1st respondent company marked X1(b) provides for the conduct of the affairs of the company including the removal of directors, rights to dividends etc., and therefore both the petitioner and 2nd respondent are lawfully entitled to invoke these provisions.

The need to exercise the jurisdiction of Court with extreme caution

The essence of democracy is majority rule. The general rule is that disputes among shareholders shall be resolved within the scope of the articles of association of the company, which is the constitution of the company. This is done by majority vote of the shareholders at a general meeting or by majority vote of the board of directors. According to section 13 of the Companies Act of 2007, the articles of association is expected to provide for the objects of the company, the rights and obligations of shareholders of the company, and the management and administration of the company.

The Court is unwilling, and indeed lacks jurisdiction, to reevaluate genuine business decisions made by the board of directors or majority shareholders after careful deliberation encompassing a broad spectrum of practical factors. It is not within the purview of the Court to substitute these legitimate business judgments with the judgments of the Court, confined as they are to the strict interpretation of the law and the limited facts presented during the legal proceedings.

Unless the Court is fully convinced that majority power has been abused and used *mala fide* for collateral purposes and not in the best interests of the company thereby suppressing the legitimate rights of the minority camp, the Court need not unnecessarily interfere with matters of commercial judgment or policy or the internal administration of the company so long as they are *intra vires* the company. If the Court still decides to intervene, there shall be compelling, cogent reasons for doing so.

In the Privy Council case of *Burland v. Earle* [1902] AC 83 at 93, Lord Davey was emphatic in confirming this non-interventionist attitude of judges:

> *It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.*

The Court shall bear in mind the relevant observation made in *Fisher v. Cadman* [2006] 1 BCLC 499 at 530:

> *[T]he mismanagement relied upon for the purposes of a claim under section 459 [of the UK Companies Act of 1985] must be serious, and that the Court will be astute not to 'second guess' legitimate management decisions taken upon reasonable grounds at the time, albeit as events transpired, they may not have been the best decisions in the interests of the Company.*

Kanag-Isvaran and Wijayawardana, op. cit., p. 520 state:

> *Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served, are concerned with a wide range of practical considerations, and when*

> *their judgment, is exercised in good faith and not for an irrelevant purpose, the courts of law will not assume the position of a kind of supervisory board over such decision. It is not unfair for directors in good faith to advance the objects of the company, or to embark upon new business opportunities even to the prejudice of a shareholder or a group of shareholders, where such advancement is in the best interests of the company. Prima facie, it is for the directors, and not for the court, to decide whether the furthering of a corporate interest which is inimical to a shareholder or shareholders should prevail over those interests, or whether some balance should be struck between them.*

However, this should never be taken to mean that there is a general prohibition on Court intervention in the internal affairs of a company. The Court must not always construe the imprecise concepts of "oppression" and "mismanagement" narrowly and technically and render the statutory provisions on oppression and mismanagement nugatory. In appropriate cases, the Court may, nay shall, exercise its statutory duty to protect minority shareholders from oppression by the majority, and to prevent mismanagement that jeopardices the company's best interests. The necessity for intervention depends on the facts and circumstances peculiar to each case.

Warner J. in *Re Elgindata Ltd* [1991] BCLC 959 at 993-994 opined:

> *I do not doubt that in an appropriate case it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But I share Peter Gibson J's view [in Re Sam Weller & Sons Ltd [1990] BCLC 80 at 89] that the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. Two considerations seem to*

> *me to be relevant. First, there will be cases where there is disagreement between petitioners and respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company's business is commercially sound. …In my view, it is not for the court to resolve such disagreements on a petition under s. 459. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company's affairs taking a different view from theirs on such matters. Secondly, as was persuasively argued by [counsel for the respondents], a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that that management may prove not to be of the highest quality. Short of a breach by a director of his duty of skill and care (and no such breach on the part of [majority shareholders] was alleged) there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor. It occurred to me during the argument that one example of a case where the court might nonetheless find that there was unfair prejudice to minority shareholders would be one where the majority shareholders, for reasons of their own, persisted in retaining in charge of the management of the company's business a member of their family who was demonstrably incompetent.*

In *Re Elgindata Ltd,* R and his wife being minority shareholders of the company commenced proceedings under section 459 of the UK Companies Act 1985 alleging that P being the majority shareholder had conducted the affairs of the company in a way that was unfairly prejudicial to their interests. The allegations of unfair prejudice were

broadly that (i) R was not consulted with respect to policy decisions on which he had a right to be consulted, (ii) P managed the affairs of the company in a manner that was incompetent, and (iii) P misused the assets of the company for his own personal and family benefit. The Court held that the affairs of the company have been conducted in a manner unfairly prejudicial to the interests of the petitioners. In the course of the reasoning it was *inter alia* observed that P had improperly used the company's assets for the benefit of himself, his family and his friends; and although this only had a limited impact on the value of the shares of R and his wife nevertheless it constituted unfairly prejudicial conduct since it would be unfair to leave R and his wife locked in the company because of P's propensity for using the company's assets for his personal benefit.

At page 1004 it was emphasised that "*one way, but not the only way, in which a member of a company may bring himself within s. 459 is by showing that the value of his shares in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those in control of the company which has been unfair to him.*"

In *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 404-405, Arden J. observed:

> *With respect to alleged mismanagement, the court does not interfere in questions of commercial judgment, such as would arise here if (for example) it were alleged that the companies should invest in commercial properties rather than residential properties. However, in cases where what is shown is mismanagement, rather than a difference of opinion on the desirability of particular commercial decisions, and the mismanagement is sufficiently*

serious to justify the intervention by the court, a remedy is available under s. 459.

In *Re Macro (Ipswich)* Ltd, proceedings were instituted *inter alia* under section 459 of the UK Companies Act of 1985 on minority oppression by the majority shareholder. It was held:

The question of whether any action was or would be unfairly prejudicial had to be judged on an objective basis. The questions which the court had to answer were (a) was the conduct of which complaint was made prejudicial to the members' interests, and (b) if the answer to the first question was in the positive was it unfairly so? Where conduct was unfairly prejudicial to the financial interests of the company then it would also be unfairly prejudicial to the interests of its members. In assessing the fairness of the conduct, the court had to perform a balancing act in weighing the various interests of different groups within the company. The court did not interfere in questions of commercial management but where the mismanagement was sufficiently significant and serious so as to cause loss to the company then it could constitute the basis for finding unfair prejudice. On the facts, the petitioners had identified sufficient acts of serious mismanagement to show that the affairs of the companies had been conducted in a manner which was unfairly prejudicial to their interests. Also, it was unfairly prejudicial for the petitioning shareholders to remain in the companies which were controlled by T [the majority shareholder] and on the boards of which there was no independent director. The court would order T to purchase the shares of the petitioners, the purchase price to be based on principles of valuation laid down by the court.

Re London School of Electronics Ltd [1986] Ch 211 is a case where the petitioner filed action seeking relief under section 75 of the Companies Act 1980. In this case the company, London School of Electronics Ltd (LSE) ran courses in electronics. The petitioner was a director and 25% shareholder of the LSE. The remaining shares were held by the respondent company, City Tutorial College Ltd (CTC). CTC employed the petitioner, a director and 25% shareholder, as a teacher. Later on, relationships broke down and CTC passed a resolution removing the petitioner as a director of LSE. Then the most of LSE's students were transferred to CTC. The petitioner set up a rival institution in the same centre as CTC and took 12 LSE students with him. Then the petitioner sought a purchase order for his 25% shares in LSE. He claimed that the conduct of the respondent had been unfairly prejudicial to his interests. The Court granted the petitioner's order for purchasing his 25% shares in LSE. Nourse J. held at 223:

> *In my judgment it was CTC's decision to appropriate the B.Sc students to itself which was the effective cause of the breakdown in the relationship of mutual confidence between the quasi-partners. Furthermore, that was clearly conduct on the part of CTC which was both unfair and prejudicial to the interests of the petitioner as a member of the company.*

The Court did not consider the petitioner's removal of some students to his institution would render the prejudicial conduct no longer unfair since it was CTC which had unfairly brought about the petitioner's departure from the company.

In *Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, the petitioner had been in *de facto* control of the company as chairman although he owned only 25% of the shares. His own company loaned £200,000 to the company as working capital. He complained under section 459 of the

UK Companies Act of 1985 that he had been removed as a director. It was held that the company was to be treated as a quasi-partnership and, as long as the loan was outstanding, he had a legitimate expectation of being involved in the management of the company and his removal as director was "unfairly prejudicial" to him.

Notwithstanding wide powers have been conferred on the Court to regulate the affairs of the company by way of final orders, interim orders, restraining orders, by sections 224, 225, 228, 233, 521 of the Companies Act of 2007, which empower the Court to make such orders "as it thinks fit" "upon such terms and conditions as appear to it to be just and equitable" akin to the powers of the Labour Tribunal, the Court must be extremely cautious and jealous in exercising these powers. The Court has neither the knowledge nor authority to dictate terms to the board of directors on how to manage the company. The orders which could be made "as it thinks fit" shall be confined to "remedying the matters complained of".

The petitioner cannot couch his reliefs in broad terms. The main relief of the petitioner in paragraph (a) of the prayer to the petition is too wide:

> *An order regulating the conduct of the affairs of the 1st respondent company in future in such a manner as the Court may decide as to protect the 1st respondent company and its minority shareholders including the petitioner.*

The reliefs sought under oppression and mismanagement must be specific so that *inter alia* the opposing party can assist the Court by alerting in advance the consequences that would follow in the management of the company in the event such reliefs are granted. (*Re*

Antigen Laboratories Ltd [1951] 1 All ER 110; *Ghosh & Dr. Chandratre's Company Law*, 13th Edition (2007), Vol 3, pp.4878-4879)

Relief under oppression and mismanagement is discretionary

The remedy provided by the Companies Act for shareholders to seek Court intervention in cases of oppression and mismanagement is both equitable and discretionary. This remedy is rooted in principles of equity and justice, even though it is now based on statutory provisions. According to sections 224 and 225, "the court may make such orders as it thinks fit" on "just and equitable" considerations.

Pennington's Company Law, 7th Edition (1995), p. 901 states:

> *A petition for relief from oppression under the original statutory provision would be dismissed if it was not presented in good faith solely in order to obtain such relief, and because of the equitable and therefore discretionary character of the Court's jurisdiction under both the original [section 210 of the UK Companies Act 1948] and the present provision [section 459 of the UK Companies Act 1985 and section 994 of the UK Companies Act 2006], the requirement of good faith on the part of the petitioner undoubtedly continues.*

The Court will have to give regard to wider equitable considerations including the conduct of the petitioner in deciding the matter. In that context, creating a conflict by seeking to purchase a competing company (*Grace v. Biagioli* [2006] 2 BCLC 70), manifestly improper conduct (*Waldron v. Waldron* [2019] EWHC 115 (Ch)), acquiescence in the improper management of the company without protest (*Re RA Noble and Sons Clothing Ltd (supra)*, delay in initiating proceedings (*Re Jermyn St Turkish Baths Ltd* [1971] 3 All ER 184) etc. are relevant factors.

The jurisdiction of the Court shall not be invoked for collateral purposes. In *Re Bellador Silk Ltd [1965] 1 All ER 667 at 672,* Plowman J. dismissed the application stating:

> *A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose [to get repayment of a loan owed by the company to the petitioner's group of companies] is, in my judgment, an abuse of the process of the court.*

On the facts and circumstances of the instant case, I do not think the High Court exercised its discretion arbitrarily in dismissing the application of the petitioner. In particular, the petitioner's forming up a new competing company together with his spouse militates against him in seeking discretionary relief.

Shareholders' agreement and the Duomatic principle

Learned President's Counsel for the petitioner does not seem to be contesting the fundamental principles of company law outlined above. Nevertheless, he strenuously submits that the shareholders' agreement X11 has the potential to amend or supersede the articles of the company, relying on "the Duomatic principle" elucidated in *Re Duomatic Ltd* [1969] 1 All ER 161, further elaborated upon in *Cane v. Jones* [1981] 1 All ER 533, and consistently applied in recent cases, such as *EIC Services Ltd v. Phipps* [2003] EWHC 1507 (Ch). This constitutes the pivotal argument presented by learned President's Counsel for the petitioner.

The Duomatic principle recognises that unanimous consent or acquiescence among the relevant shareholders can serve as a valid substitute for formal approval at a general meeting, provided that all parties are informed and act in a manner consistent with the proposed

action. Such informal yet informed consent holds binding force on the parties involved. This principle serves the interests of equity and efficiency in closely-held companies or situations where adherence to formal procedures may be impractical.

In *Re Duomatic Ltd (supra)* at 168 Buckley J. formulated the principle in the following manner:

> *[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.*

In *EIC Services Ltd v. Phipps* [2003] EWHC 1507 at paragraph 122, Neuberger J. lucidly spelled out the nature of the Duomatic principle in the following terms:

> *Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether*

members of the group give their consent in different ways at different times, does not matter.

This illustrates that the Duomatic principle is not bound by formalities. As noted by Neuberger J., approval can take various forms, including express or implied consent, given in advance or after the event, or through different means at different times. It is not obligatory for assent to be in written form as long as it is conveyed through other means. Similarly, when a shareholder wishes to withdraw his assent, the same principle should apply, and the revocation of assent does not require formalities as long as it is clearly manifested.

Learned President's Counsel for the petitioner admits that the Companies Act of 1982 which was the applicable law at the time of signing X11 did not contain any express provision on the effect of shareholders' agreements on the articles of the company. However he contends that this lacuna was filled by section 31(a) of the new Companies Act of 2007 and, as the 1st respondent company was re-registered under the new Companies Act, the Court can make use of that section to grant relief to the petitioner.

The impugned final order of the Commercial High Court was delivered in 2003. The new Companies Act was enacted in 2007. Hence consideration of the new Companies Act in this final appeal filed against the said order does not arise. Nevertheless, I will consider this argument since it is an important question of law.

Section 31(1) of the new Companies Act of 2007 reads:

Where all the shareholders of a private company agree in writing to any action which has been taken, or is to be taken by the company—

(a) the taking of that action is deemed to be validly authorised by the company, notwithstanding any provision in the articles of the company to the contrary; and

(b) the provisions contained in the list of sections of this Act specified in the Second Schedule hereto, shall not apply to and in relation to that action.

In accordance with section 31(1)(b), shareholders of a private company cannot unilaterally decide on any action outside the scope of the company's articles. However, it is essential to note that there are certain limitations to this authority. Shareholders are restricted from making decisions on matters that are specifically listed under the second schedule to the Act.

Be that as it may, in terms of section 530(1)(a) of the Companies Act of 2007, all agreements made under the repealed Companies Act of 1982 will not continue to be in force under the new Companies Act of 2007 but will continue only the agreements which were "in force on the appointed date" of the new Act. It reads as follows:

> *Without prejudice to the provisions contained in sections 5 and 10 of the Interpretation Ordinance – nothing in the repeal of any former written law relating to companies shall affect any order, rule, regulation, scale of fees, appointment, conveyance, mortgage, deed or agreement made, resolution passed, direction given, proceeding taken, instrument issued or thing done under any former written law relating to companies, but any such order, rule, regulation, scale of fees, appointment, conveyance, mortgage, deed or agreement, resolution, direction, proceeding, instrument or thing shall, <u>if in force on the appointed date, continue to be in force</u>, and so far as it could have been made, passed, given, taken, issued or*

> *done under this Act, shall have effect as if made, passed, given, taken, issued, or done under the provisions of this Act.*

Was the agreement X11 in force when the new Companies Act of 2007 became law? In my judgment, it was not. The petitioner knew this when he filed the application in the Commercial High Court where he said in paragraph 17 of the petition:

> *The petitioner states that in any event, in terms of the shareholders' agreement marked X11 the 2nd and 3rd respondents cannot take control of the 1st respondent company or its finances or oust the petitioner from its board of directors or the post of Chief Executive Officer without first referring the disputes to arbitration.*
>
> *However in X18(e) the said respondents have denied they are bound by X11 and therefore the petitioner verily believes that the said respondents would not agree to proceed to arbitration.*

The petitioner acknowledges that the 2nd respondent denies X11 and he (the petitioner) acquiesces to this denial. If the petitioner considered X11 a binding agreement, he could not have in the first place filed this application in the Commercial High Court without referring the dispute to arbitration. The petitioner cannot approbate and reprobate, blow hot and cold.

The position of the petitioner in his first written submissions that "*The 2nd and 3rd respondents however attempt to distance themselves from X11 stating that they were compelled to sign same. Whatever may be the positions of the parties, but the X11 remains a binding and valid agreement in law and moreover signing of it was admitted by the respondents*" is untenable.

A shareholders' agreement entered into outside the articles of association is binding on the parties so long as the parties agree to it. The parties to a shareholders' agreement are at liberty to withdraw from it. *Kanag-Isvaran and Wijayawardana, op. cit.,* p.90 state:

> *Another new provision that has been introduced under the Act of 2007 enables private companies to validate any action that has been taken, or is to be taken, by the company, where all its shareholders, by unanimous agreement in writing, agree to such an act, notwithstanding that it is contrary to the articles. (Section 31(1)(a) of the Act) The purpose behind introducing this concept of unanimous agreement of shareholders is to allow a private company to undertake certain actions otherwise than in accordance with the formalities prescribed in the articles in the company, if all its shareholders concur in writing to carry out that act. Such written agreement may be entered into for a particular use of a power, or to approve the exercise of a power generally, or an ongoing basis. Though the Act is silent as to the consequences of the withdrawal of the consent given by a shareholder, it can be affirmatively presumed that a shareholder is entitled to withdraw his consent after giving same, in which event section 31 would have no application.*

This appeal is for all practical purposes predicated on the shareholders' agreement X11. Learned President's Counsel begins Part A of the further written submissions "*the appellant relies on the X11 shareholders agreement to establish the oppressive conduct and mismanagement by the 2nd and 3rd respondents-respondents*" and ends Part A "*the appellant's grievance of oppression and mismanagement arose from the respondents' deliberate violation of X11 in conducting affairs of the company*". In other words, on the facts of this case, if there

is no valid shareholders' agreement, there is no oppression and mismanagement. X11 is unenforceable in law.

Resignation from the board and the petitioner's new claim

Learned President's Counsel for the petitioner in the further written submissions states that although the respondents' move to oust the petitioner was unsuccessful in view of this application "*the appellant subsequently had to resign from board in 2003 as he was unwilling to share the liability for the respondent's unilateral acts based on majority which was contrary to X11*." According to the document filed with the written submissions, the petitioner resigned from the office of director on 20.03.2003 even before the Commercial High Court delivered its final order. For reasons best known to him, the petitioner did not inform this to the Commercial High Court.

Learned President's Counsel suggests that the most viable solution seems to be the 2nd respondent purchasing the petitioner's shares at a fair value through a Court-supervised process, thereby enabling the petitioner to exit from the 1st respondent company. If this was indeed the petitioner's intention, he could have brought it to the attention of the Commercial High Court. Even though he resigned from the position of director while the action was pending, he continued to seek relief against the 2nd and 3rd respondents to prevent his removal from the directorship.

The petitioner shall understand that this is a final appeal filed against the final order of the Commercial High Court and not a revision application. In this appeal, the Court will consider whether the order of the Commercial High Court is right or wrong. The petitioner cannot seek different reliefs on appeal.

Additional submissions

At the argument, it was contended on behalf of the petitioner that the learned High Court Judge was in error when he stated in the impugned order that the petitioner did not file a counter affidavit refuting the allegations contained in the statement of objections which amounts to the allegations remaining unchallenged. It was submitted that the counter affidavit of the petitioner is found at page 328 of the brief. This submission is not correct. That is not the counter affidavit filed against the statement of objections to the substantive application but against the application filed by the respondents to vacate the interim orders issued against them *ex parte*. The respondents filed a statement of objections against the substantive reliefs (page 787 of the brief) and a separate application praying for vacation of the *ex parte* interim orders (page 983 of the brief).

Another submission made on behalf of the petitioner was that the 3rd respondent who filed the affidavit in support of the averments in the statement of objections did not have personal knowledge to affirm to the facts contained therein. In the aforesaid counter affidavit tendered for a different purpose, the petitioner says "*Therefore the 3rd respondent had no personal knowledge whatsoever of many statements in her affidavit in respect of the period prior to March 1998*." As I have already stated, the 1st respondent company was incorporated on 20.03.1998 and the 3rd respondent who is a daughter of the 2nd respondent was made a director of the company on the same day. What holds significance in this application is the events that occurred after the company's incorporation. Therefore, even if the 3rd respondent lacks personal knowledge regarding matters preceding the incorporation, it does not impact the respondents' case.

Conclusion

On the facts and circumstances of this case, the Commercial High Court was correct to have held that no cause of action accrued to the petitioner to sue the respondents under "oppression" and "mismanagement". The shareholders' agreement X11, heavily relied upon by the petitioner, is unenforceable in law.

I see no reason to interfere with the order of the Commercial High Court dated 07.05.2003. The appeal is dismissed with costs.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court