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

In the matter of an appeal in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996

SC/CHC/APPEAL NO: 34/2002
High Court No: HC (Civil) 12/2001(2)

Dr. Renatus Diederich Gebhard Wilhelm Koehn,
Rothwiesenweg 8, 53229 Bonn, Germany and
presently of No. 197, Rajapihilla Mawatha, Kandy

PETITIONER

-Vs-

1. Dynavision Broadcasting Company (Pvt) Ltd.,
   No 451A, Kandy Road, Kelaniya.

2. Indulakshin Wickremasinghe Senanayake,
   No 1, 33rd Lane, Bagatalle Road, Colombo 03.

3. Premalal Wickremasinghe Senanayake,
   No 31/20, Bathiya Mawatha, Kalubowila,
   Dehiwala.

4. I.W.S Holdings (Pvt) Ltd,
   451A, Kandy Road, Kelaniya.

5. Dynacom Engineering (Pvt) Ltd,
   451A, Kandy Road, Kelaniya.

6. Board of Investment of Sri Lanka,
   West Tower, World Trade Centre,
   Echelon Square, Colombo 01.

7. Controller of Exchange,
   Central Bank of Sri Lanka,
   61, Janadhipathi Mawatha, Colombo 01.

8. The Registrar of Companies,
"Samagam Medura",
No 400, D.R. Wijewardena Mawatha, Colombo 10.

9. Controller of Immigration and Emigration,
Department of Immigration and Emigration,
Tower Building, Station Road, Colombo 04.

10. Jacey and Company,
22 3/1 & 3/2, Sir Baron Jayatilake Mawatha, Colombo 01.

11. Indrakumara Varoja Alwis Goonetilleke,
Partner, Goonetilleke & Co
No 38, 3rd Floor, Galle Face Court 2,
Colombo 03.

12. Millawalage Weeratunge Wickramarachchi,
Partner, Goonetilleke & Co
No 38, 3rd Floor, Galle Face Court 2, Colombo 03.

13. The. Hon. Attorney General,
Attorney General's Department, Colombo 12.

RESPONDENTS

And now between

2. Indulakshin Wickremasinghe Senanayake,
No 1, 33rd Lane, Bagatalle Road, Colombo 03.

3. Premalal Wickremasinghe Senanayake,
No 31/20, Bathiya Mawatha, Kalubowila,
Dehiwala.

4. I.W.S Holdings (Pvt) Ltd,
451A, Kandy Road, Kelaniya.

5. Dynacom Engineering (Pvt) Ltd,
451A, Kandy Road, Kelaniya.

2ND – 5TH RESPONDENTS – APPELLANTS

-Vs-

Dr. Renatus Diederich Gebhard Wilhelm Koehn,
Rothwiesenweg 8, 53229 Bonn, Germany and
presently of No. 197, Rajapihilla Mawatha, Kandy

PETITIONER – RESPONDENT

Phillip Nikolaus Koehn,
Kiiser-Karl-Ring 38A, 53111 Bonn, Germany and
presently of No. 197, Rajapihilla Mawatha, Kandy

SUBSTITUTED – PETITIONER – RESPONDENT

1. Dynavision Broadcasting Company (Pvt) Ltd.,
No 451A, Kandy Road, Kelaniya.

6. Board of Investment of Sri Lanka,
West Tower, World Trade Centre,
Echelon Square, Colombo 01.

7. Controller of Exchange,
Central Bank of Sri Lanka,
61, Janadhipathi Mawatha, Colombo 01.

8. The Registrar of Companies,
"Samagam Medura",
No. 400, D.R. Wijewardena Mawatha, Colombo 10.

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Partner, Goonetilleke & Co
No 38, 3rd Floor, Galle Face Court 2, Colombo 03.

13. Hon. Attorney General,
Attorney General's Department, Colombo 12.

1ST AND 6TH – 13TH RESPONDENTS – RESPONDENTS

Before: **E.A.G.R. Amarasekera, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Rajeev Amarasuriya with Ruvindu Bandara and Yohani Yoharajah for the 2nd – 5th Respondents – Appellants

Uditha Egalahewa, PC with Amaranath Fernando for the Substituted Petitioner – Respondent

Rajitha Perera, Deputy Solicitor General for the 7th and 13th Respondents – Respondents

Argued on: 25th July 2022, 20th February 2023 and 12th September 2023

Written Submissions: Tendered on behalf of the 2nd – 5th Respondents – Appellants on 7th May 2003, 1st July 2004, 20th June 2006, 5th March 2022 and 3rd January 2024

Tendered on behalf of the Substituted Petitioner – Respondent on 1st July 2003, 28th July 2004 and 26th April 2012

Decided on: 9th May 2025

Obeyesekere, J

The dispute that I am called upon to adjudicate in this appeal has arisen between two parties who, at the start of their business relationship and when times were good between them, agreed to set up a private company and invest their hard earned money in such company, allocate shares among themselves and carry on business together but where, either due to the greed or otherwise of one or more of the parties, the relationship turned sour over a period of time, resulting in action being filed alleging that the rights of one person as a shareholder have been oppressed by the other. I must state that this is not an uncommon phenomenon in private companies and leaves the affected shareholder/s concerned in a precarious position, as he or she is locked in and finds it difficult or almost impossible to realise his or her investment.

Evolution of the provisions relating to oppression

It is perhaps for this reason that legislation relating to companies contain provisions to deal with the oppression of shareholders and mismanagement of the affairs of companies. An extremely useful discussion of the historical evolution of the legislative provisions relating to oppression and mismanagement are found in **Company Law** by Kanaganayagam Kanag-Isvaran and Dilshani Wijayawardana [2014]. While I shall not quote chapter and verse, the following discussion is based thereon.

The statutory remedy available in the United Kingdom at the turn of the 20th century for oppressive conduct, whether or not it involved a particular wrongful act, was to wind up the company. However, concerns that winding up of the company may not be the best solution especially where such company is solvent saw the introduction of Section 210 of the Companies Act of 1948 in the United Kingdom, which provided an alternative to winding up.

Ceylon, as we were then known, followed suit by the introduction of Sections 153A and 153B to the Companies Ordinance of 1938 through the Companies (Amendment) Act, No. 15 of 1964. These provisions provided *inter alia* for the prevention of oppression and mismanagement as an alternative to winding up. Largely based on the Indian Companies Act, 1956, the new provisions provided "*a boon to minority shareholders for it enabled them to maintain checks and balances on the abuse of power by majority shareholders,*

with a right to bring an action against them with a view to remedying same." [Company Law; supra; page 511]. The Ordinance of 1938 was repealed by the Companies Act, No. 17 of 1982, and the provisions of the latter relating to oppression and mismanagement are found in Sections 210 and 211.

These sections were not framed as an alternative to winding up, as in 1964, but instead:

> "*gave Court general powers to act when an application was made that the affairs of the company were being conducted in a manner oppressive to any member or members, or where the affairs of the company were being conducted in a manner prejudicial to the interests of the company, or that a material change had taken place and that by reason of such change it was likely that the affairs of the company may have been conducted in a manner prejudicial to the interests of the company.*";
>
> "*addressed the problem of the rights of a shareholder being denied or disregarded or overridden by the majority shareholders, hence the term 'oppression', and the empowerment of the court to remedy the matters complained of by appropriate orders, so that the oppression complained of was removed and the rights of the shareholder restored or upheld.*" [Company Law; supra; page 513].

While I shall be considering in this appeal Sections 210 and 211 of the Companies Act of 1982, I must state that the provisions of the Act of 1982 have been replaced by Sections 224-232 of the Companies Act, No. 7 of 2007. The provisions in the Act of 2007 are substantially based on the provisions of the Act of 1982.

What is oppression?

In responding to the question as to what is 'oppression', Samayawardhena, J has stated in **Dehigaspe Patabendige Nishantha v Ceylon MKN Eco Power (Pvt) Limited and others** [SC Appeal No. SC/CHC/Appeal No. 26/2003; SC minutes of 28th February 2024] that:

> "*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.""

In **Company Law** [supra; page 518], the authors have stated that:

"*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*." [emphasis added]

This position was emphasised in **Dehigaspe Patabendige Nishantha v Ceylon MKN Eco Power (Pvt) Limited and others** [supra] where Samayawardhena, J. stated as follows:

"*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*." [emphasis added]

I shall now proceed to consider the facts of this appeal bearing the above in mind.

Action under the Companies Act

By way of a petition filed in terms of Sections 210 and 211 of the Act of 1982 in the High Court of the Western Province holden in Colombo exercising commercial jurisdiction [the Commercial High Court/the High Court], the Petitioner – Respondent [**the Petitioner**], Dr. Renatus Diederich Gebhard Wilhelm Koehn alleged that the affairs of the 1st Respondent company, Dynavision Broadcasting Company (Pvt) Limited, are being conducted by the 2nd Respondent, Indulakshin Wickremasinghe Senanayake and the 3rd Respondent, Premalal Wickremasinghe Senanayake in a manner oppressive to the Petitioner's rights as a shareholder in the 1st Respondent company and that the affairs of the 1st Respondent are being conducted by the 2nd and 3rd Respondents in a manner prejudicial to the interests of the 1st Respondent.

The 1st – 5th Respondents – Appellants [the 1st, 2nd, 3rd, 4th or 5th Respondents or collectively the **Respondents**] thereafter filed their Objections relating to the matters pleaded in the said petition. The High Court, having considered the matters contained in the pleadings and documents filed by the parties delivered its judgment on 24th October 2002 granting the Petitioner the relief that had been prayed for. Aggrieved, the Respondents invoked the appellate jurisdiction of this Court under and in terms of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

There is one matter that I wish to advert to at this stage. The averments contained in the Objections of the 1st – 5th Respondents were supported only by an affidavit of Asoka De Z Gunasekera, a director of the 4th Respondent. The Petitioner claimed that this affidavit must be rejected as the 4th Respondent was neither a director nor a shareholder of the 1st Respondent and hence did not have any personal knowledge of the matters pleaded in the objections. Although the High Court has agreed with that position, it had done so only after considering the positions of both parties on the merits. While there is merit in the conclusion reached by the High Court, I shall not venture to consider the competence of Asoka De Z Gunasekera to affirm to the matters stated in the Objections filed on behalf of the 1st – 5th Respondents but would instead decide this matter on the material tendered by all parties to the High Court.

Background facts

The Petitioner, who passed away while this appeal was pending and was substituted by his son, was a German national. He was employed at Detecon, a company registered and based in Germany. The 2nd Respondent was the agent of Detecon in Sri Lanka. The Petitioner had visited Sri Lanka for the first time in 1993. He had returned to Sri Lanka in 1994 as the Project Manager of Detecon which by then had been retained to provide expert technological services in the expansion of the telephone network in Sri Lanka.

The Petitioner states that during this period, he developed a friendship with the 2nd Respondent who it is claimed had encouraged the Petitioner to invest in a project in Sri Lanka that was being promoted by the 2nd Respondent. The Petitioner claims that he thus became the foreign collaborator and investor in establishing the 1st Respondent, which was incorporated as a private company on 23rd August 1994.

It is admitted that the 2nd Respondent, on behalf of the 1st Respondent and the 4th Respondent, I.W.S. Holdings (Pvt) Limited, made an application to the 6th Respondent, the Board of Investment of Sri Lanka on 12th August 1994 to establish a television transmission and distribution service in Sri Lanka [**the Project**]. The 6th Respondent had accordingly granted approval for the Project by its letter dated 7th March 1995 [**A4**], subject to the conditions contained therein, which *inter alia* contained the following:

(a) A limited liability company, that being the 1st Respondent, shall be incorporated to implement the Project;

(b) The Petitioner, being the foreign equity collaborator shall invest a minimum sum of USD 150,000 as equity capital for the project;

(c) The local collaborator shall obtain the prior approval of the Controller of Exchange for the issue of shares in the proposed company to the Petitioner;

(d) The equity shares held by the Petitioner would be 6% of the paid up capital of the proposed company;

(e) The local collaborator shall enter into a joint venture agreement with the foreign collaborator setting out the basis for the collaboration;

(f) The Memorandum and Articles of Association of the proposed company shall be approved by the 6th Respondent;

(g) The local collaborator shall ensure that shares in the proposed company are issued soon after its incorporation and that the 6th Respondent is informed of those appointed to the Board of Directors.

Investment by the Petitioner in the 1st Respondent

The 1st Respondent was incorporated as a private company on 23rd August 1994 [**A6**]. According to the Form 48 tendered at the time of incorporation [**A7a**], the directors of the company were the 2nd Respondent and the 3rd Respondent. The 2nd and 3rd Respondents had continued to be directors of the 1st Respondent in 1996 [**A7b**], in 1997[**A7c**] and during the time the transactions that are the subject matter of this appeal were carried out. According to the Memorandum of Association of the 1st Respondent [**A5**], the authorised share capital of the 1st Respondent was Rs. Ten million divided into One million shares of Rs. Ten each, with the right to increase or reduce the share capital. A5 provided further that the 2nd and 3rd Respondents had subscribed to one share each in the 1st Respondent. Thus, at the time of incorporation of the 1st Respondent, only 2 shares had been issued. 999,998 shares in the 1st Respondent remained unallotted, with the claim of the Petitioner being that the entire 999,998 shares must be allotted to him since he provided the entirety of the capital of the 1st Respondent and was the only equity investor.

The Petitioner states that although he was only required to invest USD 150,000, at the request of the 2nd Respondent, the Petitioner had invested a further sum of USD 100,000. It is admitted that the Petitioner and the 4th Respondent entered into a Memorandum of Understanding on 26th October 1995 [**A14**], with the 2nd and 3rd Respondents signing A14 on behalf of the 4th Respondent to reflect such further investment.

A14 provided *inter alia* as follows:

(a) The Petitioner has invested USD 150,000 in the 1st Respondent in March 1995;

(b) The Petitioner shall invest a further sum of USD 100,000 in the 1st Respondent on or before 31st October 1995 subject to the authorised capital of the 1st Respondent being increased to Rs. 50 million before 31st October 1995;

(c) "*Thereafter, 30% of the shares in the 1st Respondent will be allocated to the Collaborator. However, the percentage of the shares will change on a pro-rata basis if the capital is increased*";

(d) The Petitioner shall be a member of the Board of Directors and shall serve as a consultant to the 1st Respondent for which the Petitioner shall be paid a monthly fee of Rs. 100,000.

<u>Has the Petitioner been deprived of his rights as a shareholder?</u>

It is admitted by the Respondents that the Petitioner had invested the aforementioned sum of USD 250,000 in the 1st Respondent. The Petitioner claims that this investment was made as consideration for the purchase of shares in the 1st Respondent. Although payment was made in 1994 and 1995, the authorised share capital of the 1st Respondent was not increased to Rs. 50 million nor were shares in the 1st Respondent company allotted to the Petitioner until 26th March 2001. Furthermore, the Petitioner was not appointed as a director of the 1st Respondent, with it being admitted that the 1st Respondent functioned at all times with only the 2nd and 3rd Respondents as its directors.

As proof of the oppressive conduct of the 2nd and 3rd Respondents towards him, the Petitioner claims that the 2nd and 3rd Respondents:

(a) failed to appoint the Petitioner as a director of the 1st Respondent;

(b) prevented the Petitioner from participating in the affairs of the 1st Respondent;

(c) did not allot to the Petitioner shares in the 1st Respondent company in a timely manner;

(d) deprived the Petitioner of his rights as a shareholder; and

(e) had acted in concert and colluded to manage the affairs of the 1st Respondent.

The Petitioner claims that these actions are in contravention of the understanding set out in A14 and are oppressive of his rights as a shareholder of the 1st Respondent.

Allotment of shares in the 1st Respondent

The Petitioner states that the authorised share capital of the 1st Respondent [i.e. Rs. Ten million] and the number of shares issued at the time of incorporation of the 1st Respondent [i.e. the two subscriber shares issued to the 2nd and 3rd Respondents] remained the same even as at 26th March 2001. The latter is reflected in the Companies Form No. 7 tendered to the Registrar of Companies on 17th May 2001 [**A11**] under the signature of the 2nd Respondent.

A further declaration had been made on Companies Form No.7 and submitted to the Registrar of Companies on 17th May 2001 [**A3**], under the signature of the 2nd Respondent. A3 confirms that 1,262,930 shares in the 1st Respondent had been allotted to the Petitioner and that as at 29th March 2001, the Petitioner holds the said number of shares. The Petitioner however states that with the authorised share capital of the 1st Respondent being only Rs. Ten million and with only 999,998 shares left to be allotted, only 999,998 shares stands lawfully allotted to the Petitioner and that the balance shares [1,262,930 – 999,998 = 262,932] have not been lawfully allotted. However, as the Petitioner has already paid for the said 262,932 shares by way of the capital input of USD 250,000, the Petitioner states that the said sum had been accounted as a loan by the Petitioner to the 1st Respondent.

Together with the above allotment of shares to the Petitioner, the 2nd and 3rd Respondent had purported to issue a total of 20,737,068 shares, of which 6,714,466 had been allotted to the 2nd Respondent, with a further 4,501,496 and 9,521,106 shares allotted to the 4th Respondent and 5th Respondent, Dynacom Engineering (Pvt) Limited, respectively. The

Petitioner claims that the 4th and 5th Respondents are owned and/or controlled by the 2nd and 3rd Respondents. The Companies Form No. 7 [**A13a**] and No. 8 [**A13b**] in respect of the above allotment of shares to the 2nd, 4th and 5th Respondents had been tendered to the Registrar of Companies on 23rd May 2001, which is six days after the submission of A3.

The Petitioner states that although the above shares had been allotted to the 2nd, 4th and 5th Respondents, no payment has been made by the said Respondents for the said shares. Instead, A13a states that '*shares issued in view of balance outstanding in the company accounts for purposes of settlement*', and A13b states that, '*shares issued for the settlement of credit balances in the company's account.*' Differently put, it was the position of the Respondents that the 2nd, 4th and 5th Respondents have provided services to the 1st Respondent and the allotment of shares was in lieu of payment for such services. The claim of the Respondents that they have provided services to the 1st Respondent and that payment is due for such services has been challenged by the Petitioner who claims that the fact that payment is due for such services is not reflected in the audited accounts of the 1st Respondent. This is a matter that I shall refer to later in this judgment.

Furthermore, the Petitioner has pointed out that although the value of the shares so allotted was Rs. 207,370,680, the value of the services provided by the 2nd, 4th and 5th Respondents was only Rs. 30,276,119. Thus, even if the position of the 2nd, 4th and 5th Respondents that they provided services to the 1st Respondent is accepted, and on a best case scenario for the Respondents, the fact is they have only paid Rs. 1.46 per share for a Ten rupee share, with the balance sums of money due and owing to the 1st Respondent. The Petitioner claims that the effect of the above exercise is that the Respondents have pushed the Petitioner from being a majority shareholder to that of a minority shareholder holding only 5.75% and gained control of the 1st Respondent.

It is the position of the Petitioner that with the authorised share capital of the 1st Respondent being only Rs. Ten million, and with the One million shares in the 1st Respondent already having been allotted as aforesaid to the Petitioner and the two subscribers, the 1st Respondent could not have issued a further 20,737,068 shares over and above its authorised share capital, without amending the Memorandum of Association of the 1st Respondent. The Petitioner had stated further that in August 2001 his Attorneys-at-Law had carried out a search at the office of the Registrar of Companies

of the documents relating to the 1st Respondent and that no resolution to increase the authorised share capital of the 1st Respondent had been submitted by that time.

The Petitioner claims that the issuance of the said 20,737,068 shares has diluted his shareholding of 99.98% in the 1st Respondent to 5.75% and that the intention of the Respondents has been to gain majority control of the 1st Respondent, without making any contribution of equity to the 1st Respondent. The Petitioner claims that the said actions of the Respondents are fraudulent and oppressive of his rights as a shareholder in the 1st Respondent. Thus, it is the legality of the above allotment of shares to the 2nd, 4th and 5th Respondents that formed the subject matter of the action in the High Court, with the Petitioner claiming the following relief:

01. A declaration that the authorised Share Capital of the company is Rs. Ten Million;

02. A declaration that the Petitioner is the lawful holder of 999,998 fully paid-up ordinary shares of Rs.Ten each;

03. A declaration that the allotment of 20,737,068 ordinary shares to the 2nd, 4th and 5th Respondents is null and void and of no force and avail in law;

04. A declaration that 2nd and 3rd Respondents are not fit and proper persons to function as directors of the 1st Respondent.

Objections filed by the Respondents

The position of the Respondents was that the Petitioner approached the 2nd Respondent to explore the possibility of securing a resident visa for the Petitioner to reside in Sri Lanka and that the 2nd Respondent had arranged for the Petitioner to be a collaborator in the 1st Respondent with the sole intention of enabling the Petitioner to reside in Sri Lanka. The Respondents have stated further that a monthly consultancy fee of Rs. 100,000 was paid to the Petitioner, it being the return on the monies contributed by the Petitioner. The Respondents thus claim that the monies that were brought in to Sri Lanka by the Petitioner were not brought in as an investment in the 1st Respondent.

Quite apart from the approval granted by the Board of Investment for the Petitioner to be the foreign collaborator and investor, I have already noted that the receipt of USD 250,000 and the fact that it was towards the equity capital of the 1st Respondent have been acknowledged by the Respondents – vide A14 signed by the 2nd Respondent. The fact that such monies were utilised as payment for the shares in the 1st Respondent and that shares were in fact allotted to the Petitioner is confirmed by A3, which too has been signed by the 2nd Respondent, and is reflected in the Financial Statement and the Report of the Auditors [**A15a**] as part of the Share Application Account. The subsequent allotment of shares in the 1st Respondent to the Petitioner negates the argument of the Respondents that the 2nd Respondent was only helping the Petitioner to obtain a resident visa to operate a hotel in Kandy, and that the Petitioner was not entitled to any shares in the 1st Respondent. Thus, the position taken up by the Respondents that the Petitioner was not entitled to shares in the 1st Respondent is not tenable.

I must perhaps at this stage reiterate the position of the Petitioner that even as at August 2001, the records in respect of the 1st Respondent maintained at the office of the Registrar of Companies did not reflect any increase in its authorised share capital. I reiterate this for the reason that the position of the Respondents is that the allotment of shares to the 2nd, 4th and 5th Respondents was carried out only after the authorised share capital of the 1st Respondent was increased by the Board of Directors of the 1st Respondent and subsequently at an extraordinary general meeting in accordance with its Memorandum and Articles.

The Respondents had produced with its Objections the following three decisions taken by the 1st Respondent, the cumulative effect of which the Respondents claim are to increase the authorised share capital of the 1st Respondent and to thereafter allot shares to the 2nd, 4th and 5th Respondents:

(1) The first decision [**R3**] is that of the Board of Directors of the 1st Respondent taken on 7th March 2001 to increase the authorised share capital of the 1st Respondent from Rs. 10 million to Rs. 500 million.

(2) The second decision [**R4**] too is that of the Board of Directors of the 1st Respondent, taken on 26th March 2001 to allot shares in the 1st Respondent to the Petitioner, as

well as to the 2nd, 4th and 5th Respondents in the quantities in which I have already referred to. The Board of Directors have also resolved to increase the authorised share capital from Rs. 10 million to Rs. 500 million in order to give effect to the foregoing allotment of shares.

(3) The third decision [**R5**], taken on 27th March 2001 at an extraordinary general meeting of the 1st Respondent, is also to increase the authorised share capital from Rs. 10 million to Rs. 500 million.

I am of the view that the legality of R3, R4 and R5 must be considered sequentially. However, the decisions reflected in each of the documents need not be combined, even though each document, taken individually and/or cumulatively, is evidence of the oppressive conduct that the Respondents sought to engage in through each of the decisions contained in R3, R4 and R5.

The learned President's Counsel for the Petitioner submitted that:

(a) The increase in the authorised share capital of the 1st Respondent reflected in each of the above three decisions – vide R3, R4 and R5 – have not been carried out in accordance with the provisions of the Companies Act and the Memorandum and Articles of the 1st Respondent and is therefore invalid;

(b) The allotment of shares to the 2nd, 4th and 5th Respondents as per R4 could only be carried out consequent to an increase in the authorised share capital, as the authorised share capital that stood as at 26th March 2001 was only Rs. Ten million. Hence, the Petitioner's position is that such allotment of shares too are of no force in law;

(c) As a result of these actions, the Petitioners' rights as the majority shareholder have been diluted and that the 2nd and 3rd Respondents have gained control of the 1st Respondent and is conducting its affairs in a manner that is oppressive to the Petitioner and prejudicial to the interests of the 1st Respondent.

The High Court declared that the increase in the authorised share capital of the 1st Respondent and the allocation of shares to the 2nd, 4th and 5th Respondents are bad in law and granted the Petitioner the relief prayed for. It is the legality of these actions of the Respondents that are the subject matter of this appeal.

In considering the complaint of the Petitioner and the legality of R3, R4 and R5, I shall first examine the provisions of the Act of 1982 relating to the increasing of the authorised share capital of a company and the allotment of shares, and thereafter consider the arguments of the learned Counsel for the Respondents in the light of the findings of the High Court.

The Memorandum and Articles of Association

In terms of Clause 5 of the Memorandum of Association of the 1st Respondent [**A5**], "*the authorised share capital of the Company is Rs. Ten Million divided into One Million shares of Rs. Ten each, with the right to increase or reduce the shares.*" The final page of A5 reflects the fact that the 2nd and 3rd Respondents have subscribed to one share each.

Section 62(1) of the Act reads as follows:

> "***A company limited by shares*** *or a company limited by guarantee* ***and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum as follows, that is to say, it may –***
>
> ***(a) increase its share capital by new shares of such amount as it thinks expedient;***
>
> *(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;*
>
> *(c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;*
>
> *(d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced*

share shall be the same as it was in the case of the share from which the reduced share is derived:

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled."

Section 62(2) provides further that, "*The powers conferred by the provisions of this section* ***shall be exercised by the company at a general meeting***."

Section 64 of the Act, which reads as follows, imposes a requirement to inform the Registrar of any increase in the share capital:

"*(1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital,* ***it shall with fifteen days from the date of passing of the resolution authorising the increase, give to the Registrar notice thereof and the Registrar shall record such increase*****.**

(2) The notice to be given under the provisions of sub section (1) shall include such particulars as may be prescribed with respect to the classes of shares affected and the conditions subject to which the new shares have been or are to be issued, and the company shall forward to the Registrar together with such notice ***a copy of the resolution authorising such increase****.*

(3) Where default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable to a default fine."

The argument of the Petitioner that the provisions of Section 64 have not been complied with in respect of the purported increase in the authorised share capital of the 1st Respondent has not been disputed by the Respondents.

Article 7 of the Articles of Association of the 1st Respondent provides that, "*the shares shall be under the control of the Directors who may issue and allot them only to such persons* ***as may be approved by the Board of Directors in writing***."

Article 13 of the Articles of Association provides further that:

> "*Until otherwise determined by a general meeting:*
>
> *(1) Two directors including the Chairman or his alternate shall form a quorum for a Directors meeting;*
>
> *(2) Two members present in person or by proxy shall form a quorum for a general meeting.*"

The cumulative effect of the above provisions can be summarised as follows:

(a) Any increase in the authorised share capital of the 1st Respondent shall be preceded by a resolution to amend the Memorandum of Association to reflect such an increase and such resolution shall be passed by its shareholders at a general meeting;

(b) The authorised share capital of a company cannot be increased by the Board of Directors;

(c) The Registrar must be informed within 15 days of any increase of the authorised share capital, and a copy of the resolution shall be served on the Registrar;

(d) The required quorum for a meeting of the Board of Directors shall be two including the Chairman;

(e) The Board of Directors shall have the power to allot shares to such persons as may be approved by them.

Meeting held on 7th March 2001 – R3

I have already stated that the share capital of the 1st Respondent at the time of its incorporation was Rs. Ten million consisting of One million shares of Rs. Ten each, with the Petitioner claiming that the entirety of the capital was contributed by him and that he is therefore entitled to 999,998 shares in the 1st Respondent. I must state that even though the claim of the Petitioner that he is entitled to 99.98% of the shares in the 1st Respondent is based on the premise that he is the sole equity contributor to the 1st Respondent, it was sought to be argued by the learned Counsel for the Respondents before us that such position, on the face of it, is contradicted by A14 which states that the Petitioner shall be entitled to be allotted only 30% of the shares upon the additional sum of USD 100,000 being invested.

I must state that this position has not been taken up by the Respondents in their Objections before the High Court nor have they sought to explain this provision in A14. I have carefully considered paragraph 1 of A14 in its entirety and what it provides for is the fixing of the shareholding of the Petitioner at 30% only after the authorised share capital is increased to Rs. 50 million. In other words, there is recognition that the Petitioner shall be entitled to 30% after additional capital is brought in and the authorised share capital is increased to Rs. 50 million, with a qualification that the percentage of the shares will change on a pro-rata basis if the capital is increased further. While this gives credence to the position of the Petitioner that he was entitled to 99.98% of the shares until then, the limitation of the Petitioner's shareholding to 30% was contingent upon the authorised share capital being increased, which however has not taken place. In these circumstances, I am not in agreement with the submission that A14 only provided the Petitioner the right to hold a maximum shareholding of 30% at any given time.

The Respondents have produced marked R3 the minutes of a meeting of the **Board of Directors of the 1st Respondent** held on 7th March 2001 in the office of the 2nd Respondent relating to the "Capitalisation of Dynavision Assets and Dr. Koehn's investment". According to R3, four persons were present at the meeting, including the 2nd Respondent in his capacity as Chairman of the 1st Respondent, Asoka De Z Gunasekera, a Group Director but who was not a director of the 1st Respondent, and two others. According to R3, it had been decided *inter alia* to:

(a) Increase the authorised share capital of the 1st Respondent to Rs. 500 million;

(b) Increase the paid up capital to Rs. 210 million inclusive of the contribution of the Petitioner;

(c) Transfer the balance of the creditors account and issue shares in favour of the 2nd and 4th Respondents;

(d) Arrange for the issuance of shares to Dr. Koehn upto 5%.

The learned President's Counsel for the Petitioner submitted that R3 is only the minutes of the Board of Directors of the 1st Respondent, and not the minutes of a general meeting of the shareholders of the 1st Respondent. Quite apart from the fact that the required quorum of two directors was not present at the said meeting, it is not within the power of the Board of Directors to increase the authorised share capital of the 1st Respondent. Thus, in the absence of a resolution placed before the shareholders to amend Clause 5 of the Memorandum of Association and such resolution being passed by the shareholders, any increase in the authorised share capital of the 1st Respondent reflected in R3 is *ultra vires* the Memorandum of the 1st Respondent. Probably for this reason, the 1st Respondent has not acted in terms of Section 64 of the Act and informed the Registrar of any increase in the authorised share capital of the 1st Respondent nor has a copy of the said resolution been filed with the Registrar. Any decision to allot shares taken consequential to such decision also suffer the same fate.

With the decision taken at the said meeting of 7th March 2001 being invalid, it was the position of the learned President's Counsel for the Petitioner that the status quo that prevailed as at 7th March 2001 continued, with the authorised share capital of the 1st Respondent being Rs. Ten million and the 2nd and 3rd Respondents holding one share each.

The High Court has considered the above matters and accepted the position of the Petitioner that (a) the authorised share capital can only be increased at a general meeting of the 1st Respondent and that the purported increase of the authorised share capital of the 1st Respondent by the 2nd and 3rd Respondents is *ultra vires* the Memorandum of the

1st Respondent, and (b) the board meeting held on 7th March 2001 is not a valid meeting and all decisions taken at the said meeting are invalid.

The simple argument that the Respondents was thus required to meet in this Court was whether R3 is a decision of the shareholders of the 1st Respondent taken at a general meeting. It is admitted in the written submissions tendered on behalf of the Respondents on 3rd January 2024 that in order to increase the authorised share capital, a board resolution is not sufficient and that such a decision must be taken at a general meeting of the company. To my mind, the matter ends there and the decision taken on 7th March 2001 is indeed invalid. The High Court was therefore correct on this matter.

R3 gives context to the overall manipulation that the Respondents were about to engage in.

Meeting held on 26th March 2001 – R4

The Respondents produced marked R4 the minutes of the meeting of the **Board of Directors** of the 1st Respondent held on 26th March 2001, which are re-produced below:

> "*The Board considered the Company's monthly accounts for February 2001 and noted that a sum of Rs. 12,468,084.76 was payable to Dynacom Engineering Private Limited which they noted was in respect of rent, electricity and standby power expenses of the company during the last six years which had been paid by the said company. It was also noted that the said company had requested that they be allotted shares for a total consideration of Rs. 13,900,814.76 inclusive of a sum of Rs.1,432,730 lying to the credit of Dynacom Engineering Trunking Pvt Ltd which has now been merged with the company.*
>
> *The Board further noted the following credit balances of Dr Koehn, IWS Holdings and Mr I.W. Senanayake and authorised the Managing Director to transfer these balances to the call account after obtaining the necessary documentation from them.*

Dr. Koehn	*Rs. 12,620,300*
IWS Holdings	*Rs. 6,573,808*
Mr. I W Senanayake	*Rs. 9,805,532*
	Rs. 29,008,640

The Board resolved that in terms of Article 7 of the Articles of Association of the company Rs. 220 million divided into 22,000,000 shares of Rs. 10 each be issued as follows:

IWS Holdings -	*4,501,496*	
Mr. I W Senanayake -	*6,714,466*	
Dr. Koehn -	*1,262,930*	
Dynacom Engineering	*9,521,106*	
Mr. I W Senanayake		*1 Sub. Share*
Mr. P W Senanayake	*----------*	*1 Sub. Share*
	22,000,000	

of which 20,737,068 was to be partly paid shares of Rs.10 each and 1,262,932 fully paid shares of Rs. 10 each.

It was noted that Rs. 1.46 per share had been called up on the partly paid shares as follows:

IWS Holdings -	*6,572,184.16*
Mr. I W Senanayake -	*9,803,120.36*
Dynacom Engineering -	*13,900,814.76*
	30,276,119.28

and that the paid up capital of the company will be Rs. 42,905,439.28.

The Board further resolved *that to give effect to the foregoing that the authorised share capital of the company be increased from Rs. 10 million divided into 1 million shares of Rs. 10 each to Rs. 500 million by the creation of 49,000,000 shares of Rs. 10 each ranking equally and pari passu with the existing ordinary shares of Rs. 10 each with the right to increase or reduce.*"

While this is a matter that I shall refer to in detail later in this judgment, I must state that even though the Respondents had every opportunity of doing so, the Respondents did not file with their Objections:

(a) any documents to support its position in R4 that services have been provided to the 1st Respondent by the 2nd, 4th and 5th Respondents;

(b) the monthly accounts of the 1st Respondent for the month of February 2001 which formed the basis for the allotment in favour of the 2nd, 4th and 5th Respondents.

In my view, the failure to do so on the part of the Respondents was critical since shares were being allotted as consideration for such services. I must also observe that even though the partners of the audit and accountants' firm of the 1st Respondent too had been named as the 11th and 12th Respondents, they too chose not to tender any material in that regard.

R4 accordingly reflects the decision of the **Board of Directors** of the 1st Respondent to increase the authorised share capital of the 1st Respondent. I must perhaps state that there was no necessity to increase the authorised share capital once again if such an increase had already taken place on 7th March 2001 as reflected in R3. In any event, R4 too are minutes of a meeting of the Board of Directors and quite apart from the absence of a resolution to amend the Memorandum, the decision to increase the authorised share capital of the 1st Respondent has not been taken at a general meeting of the shareholders. Thus, the increase in the authorised share capital of the 1st Respondent that is said to have taken place on 26th March 2001 too is invalid and must suffer the same fate as R3.

That leaves the maximum number of shares of the 1st Respondent that could have been allotted as at 26th March 2001 at 999,998. The question is, have these shares been allotted validly and if so, to whom and in what quantities?

The learned President's Counsel for the Petitioner submitted that:

(a) According to the audited accounts of the 1st Respondent as at 31st March 1997 [**A15a**] and as at 31st March 1998 [**A15b**], which incidentally were the latest audited

accounts of the 1st Respondent that were available to the High Court, a sum of Rs.9,999,980.00 had been transferred to the Share Application Account of the 1st Respondent. The Petitioner states that this sum of money is part of the equity contribution made by the Petitioner.

(b) When the Board of the 1st Respondent issued 1,262,930 shares to the Petitioner on 26th March 2001, the aforesaid sum of money held in the 'Share Application Account' of the 1st Respondent had been utilised as payment for the said shares allotted to the Petitioner. It is claimed that the allotment of shares to the Petitioner is therefore in order.

(c) With 1,262,930 shares having been allotted to the Petitioner and with the number of shares as at that date being One million, the 1st Respondent had no other shares that were capable of being allotted and therefore the allotment of shares to the 2nd, 4th and 5th Respondents is null and void;

(d) In any event, the transfer to the call account of the sums of money said to have been owed to the 2nd and 4th Respondents was '*after obtaining the necessary documentation from them*'.

Thus, the submission on behalf of the Petitioner is that 999,998 shares can be allotted to the Petitioner since the consideration for the payment for such shares, that being the monies already invested by the Petitioner, had passed. Although there is merit in such submission, since the allotment of shares to the Petitioner and the 2nd, 4th and 5th Respondents have been carried out simultaneously, the above submission of the learned President's Counsel for the Petitioner still leaves open the question of whether the 2nd, 4th and 5th Respondents too are entitled to any shares in the 1st Respondent out of the said 999,998 shares on a pro rata basis and if so, in what quantities. This was in fact one of the submissions made by the learned Counsel for the Respondents who submitted that if there were only 999,998 shares available for allotment, the said shares must be allotted proportionate to the allotment that was sought to be effected by R4.

The learned President's Counsel for the Petitioner submitted that as pleaded in the petition, the answer to the above question can be found in A15a and A15b. According to A15a and A15b, the share capital as at 31st March 1996 was Rs. 5,815,000 while as at 31st March 1997 and 31st March 1998, it was Rs. Ten million. According to Note 1 to A15a and A15b, the number of the issued and fully paid share capital as at 31st March 1996 as well as at 31st March 1997 and 31st March 1998 was Rs. 20. However, Note 1 of A15a goes on to state that the monies available in the Share Application Account as at 31st March 1996 was Rs. 5,815,000 and had been contributed by the Petitioner while as at 31st March 1997 and 31st March 1998, it was Rs. Ten million, with such sum once again being the contribution of the Petitioner. Thus, as at 31st March 1998, the share capital of the 1st Respondent was only Rs. 20 and the balance Rs. 9,999,980 had been accounted for in the Share Application Account as monies paid by the Petitioner. With the audited accounts of the 1st Respondent confirming the availability of the monies invested by the Petitioner in the Share Application Account, there was no necessity to call for further documentation and hence, the said sum of money served as the consideration for the shares allotted to the Petitioner – vide R4.

On the contrary, the audited accounts upto 31st March 1998 do not reflect any contribution made by the 2nd and 3rd Respondents towards the capital of the 1st Respondent other than the two Ten Rupee subscriber shares nor does the audited accounts of the 1st Respondent reflect that the 2nd, 4th and 5th Respondents have provided services to the 1st Respondent for which payment was due. Therefore, the basis of allotment of shares to the 2nd, 4th and 5th Respondents is, on the face of R4, a nullity. I have already stated that the Respondents failed to present to the High Court even an iota of evidence to substantiate the basis in R4 for the allotment of shares to the 2nd, 4th and 5th Respondents, although it was well within their capacity to have done so. Thus, the condition in R4 '*to transfer these balances to the call account after obtaining the necessary documentation from them*' could not have been complied, with the result being that no shares could have been allotted to the 2nd , 4th and 5th Respondents on 26th March 2001.

The position of the Petitioner is reinforced by the Balance Sheet of the 1st Respondent which forms part of A15a. While the Long Term Loans to the 1st Respondent stood at Rs. 16,652,327.50 as at 31st March 1996, Note 3 to A15a attributes this sum of 16,652,327.50 as being a long term loan from the Petitioner. Together with the capital contribution of Rs.

Ten million from the Petitioner, all costs associated with the acquisition of assets and pre-operational expenses as at 31st March 1996 in a sum of Rs. 22,467,328 has been met with the funds of the Petitioner. The long term loans had increased to Rs. 25,325,775.30 by 31st March 1997, with Rs. 5 million from the National Development Bank and Rs. 3,673,447.80 from the 4th Respondent in addition to Rs. 16,652,327.50 contributed by the Petitioner. The total cost of the acquisition of assets and pre-operational expenses as at 31st March 1997 was Rs. 28,455,855 but A15a does not demonstrate the infusion of any capital by any of the 2nd – 4th Respondents. The position is no different even in A15b. Thus, the Respondents have not been able to establish the passing of consideration for the allotment of shares to the 2nd, 4th and 5th Respondents, even at Rs.1.46 per share. Thus, my view that even though issued simultaneously, the allotment of shares to the 2nd, 4th and 5th Respondents is invalid is reinforced by the Balance Sheet of the 1st Respondent.

The High Court traversed a slightly different path although it arrived at the same conclusion that no shares were validly allotted to the 2nd, 4th and 5th Respondents. The High Court observed that the shares allotted to the Petitioner had been registered with the Registrar of Companies on 17th May 2001 [A11] and that "*the 1st Respondent company had already officially registered shares to the maximum authorised share capital in terms of its Memorandum of Association.*" Thus, by the time A13a was submitted to the Registrar of Companies on 23rd May 2001, the maximum number of shares in the 1st Respondent had already been allotted and registered in the name of the Petitioner. Hence, the High Court concluded that the shares purported to have been allotted to the 2nd, 4th and 5th Respondents could not have been registered as the shares of the 1st Respondent was limited to 1 million shares.

It is in this factual background that the High Court held as follows:

> "*In these circumstances, I am inclined to agree with the submission made by the learned President's Counsel that without amending the Memorandum of Association of the 1st Respondent company the aforesaid allotment of shares to the 2nd, 4th and 5th Respondents is invalid in as much as the 1st Respondent company had already on 17th May 2001 officially registered to the maximum authorised shares according to its Memorandum of Association. Accordingly the said allotment of shares is invalid*

and the registration is ultra vires the memorandum of association of the 1st Respondent.

I am of the view that on the facts and circumstances of this case the 1st – 5th Respondents have acted ultra vires in allotting over 20 million of ordinary shares to the 2nd, 4th and 5th Respondents. Accordingly 4th and 5th Respondents have no right to claim any shares in the 1st Respondent company"

The learned Counsel for the Respondents sought to argue, in the alternative, that the entirety of the allotment of shares effected on 26th March 2001 was invalid with the result that the Petitioner too had not been allotted any shares. The basis for this submission was that the Board of Directors had decided in R4 that the credit balances set out therein must be transferred to the call account **after obtaining the necessary documentation from the Petitioner and the 2nd and 4th Respondents**, and that until then, no allotment of shares can take place. In other words, it was his position that no allotment of shares to the Petitioner or for that matter to the 2nd and 4th Respondents could have taken place on 26th March 2001 until and unless the necessary documentation had been tendered.

I must observe that the Objections filed before the High Court does not contain any material in support of this submission. Be that as it may, I have already stated that as far as the Petitioner was concerned, allotment of shares to the Petitioner could not have been conditional upon such documentation being obtained as the audited accounts already recognised such contribution of the Petitioner. Quite apart from the fact that the equity contribution of the Petitioner has been acknowledged by the 1st Respondent and that the audited accounts reflected the availability of the monies contributed by the Petitioner and therefore there being no need to obtain further documentation relating to the Petitioner, whether such documentation was given by the 2nd, 4th and 5th Respondents was a matter within the knowledge of the Respondents. I have already stated that the objections filed by the Respondents in the High Court was silent in this regard. Viewed from that light, no shares could have been allotted to the 2nd, 4th and 5th Respondents on 26th March 2001 at all, and hence on the Respondents own submission, the said allotment could not have been registered as it was sought to be done by A13a.

It was further submitted on behalf of the Respondents that even if the above condition of submitting supporting documents had been satisfied, the allotment of shares to all the allottees took place simultaneously and can take effect only subsequent to the increase of the authorised share capital which took place on 27th March 2001 – vide R5. Whether the increase of the authorised share capital on 27th March 2001 was valid is a matter that I shall consider later. Suffice to state at this point that with the High Court taking the view that the increase in the authorised share capital on 27th March 2001 was invalid, the position of the Respondents appear to be that the allotment of shares to the Petitioner too is invalid. I have already concluded, for reasons alluded to earlier, that the allotment of shares to the Petitioner on 26th March 2001 was valid and more importantly, that the validity of the shares allotted to the Petitioner is not dependant on the validity of R5. This submission of the Respondent does not therefore apply to the shares allotted to the Petitioner but would apply to the shares that were sought to be allotted to the 2nd, 4th and 5th Respondents.

The High Court had also proceeded on the basis that there already existed 999,998 shares and since the allotment of shares to the Petitioner was registered on 17th May 2001 ahead of the Respondents, that gave the Petitioner priority over the 2nd, 4th and 5th Respondents whose shares were submitted for registration only on 23rd May 2001. This was in spite of stamp duty on both allotments having been made on the same date [**R8**]. The need for me to consider if the said conclusion reached by the High Court is correct does not arise in view of the conclusion reached by me that the allotment of shares that took place on 26th March 2001 was limited to the Petitioner.

Meeting held on 27th March 2001 – R5

Thus, by 26th March 2001, the Petitioner was a shareholder of the 1st Respondent, and was entitled to notice of any general meeting of the shareholders.

The Respondents have produced with their Objections the minutes of the extraordinary general meeting of the shareholders of the 1st Respondent held on 27th March 2001, marked R5. Only the 2nd and 3rd Respondents were present at the said meeting. R5 reads as follows:

"*<u>Ordinary Resolution</u>*

The Chairman proposed the following ordinary resolution and was seconded by Mr. P W Senanayake:

'*That the authorised share capital of the company be increased from Rs. 10 million divided into 1 million shares of Rs. 10 each to Rs. 500 million divided into 50 million shares of Rs. 10 each by the creation of 49 million shares of Rs. 10 each ranking equally and pari passu with the existing ordinary shares of Rs. 10 each with the right to increase or reduce. The Shares in the original or any increased capital may be divided into several classes and there may be attached thereto respectively any preferential deferred or other special rights privileges conditions as to dividend capital voting or otherwise*'

On being put to the meeting the Resolution was duly carried."

The Respondents had also produced another document titled, 'Consent to short notice' [**R6**], signed by only the 2nd and 3rd Respondents, by which they had consented to the convening of the above extraordinary general meeting to pass the above resolution notwithstanding that the required number of days for giving notice has not been complied with.

Even though no resolution has been formally presented at the meeting held on 27th March 2001, the shareholders did approve some form of resolution to increase the authorised share capital of the 1st Respondent. However, as pointed out by the learned President's Counsel for the Petitioner, the Petitioner had become a shareholder by 26th March 2001, as evidenced by R4 and was entitled to have been served with a notice to be present at the extraordinary general meeting of the 1st Respondent. While the Petitioner pleads ignorance of this meeting, that no notice was served on the Petitioner is clearly evident from the fact that it is only the 2nd and 3rd Respondents who consented to dispensing with the minimum notice – vide R6.

Thus, the Petitioner, although holding 999,998 shares in the Respondent on 26th March 2001 did not have notice of a resolution, if approved, would have resulted in a dilution of his shareholding within the 1st Respondent. Quite apart from whether such a course of

action is contrary to A14, it is clear that the 2nd and 3rd Respondents had manipulated the affairs of the 1st Respondent to such an extent that it was able to convene and conduct general meetings without the Petitioner who at that point in time was the sole contributor of the equity capital in the 1st Respondent and was a shareholder thereof.

It is in the above circumstances that the learned President's Counsel for the Petitioner submitted that:

(a) Even if the resolution in R5 was valid, the Board of the 1st Respondent did not meet thereafter and allot shares in the 1st Respondent to the 2nd, 4th and 5th Respondents as required by Article 13 of the Articles of Association;

(b) The Registrar of Companies has not been given notice of the resolution, as required by Section 64 of the Act;

(c) The approval of the Board of Investment has not been obtained for the said increase, although that was a condition on which the Board of Investment had granted approval to the Project – vide A4;

(d) The authorised share capital of the 1st Respondent was never lawfully increased to allow the allotment of shares to the 2nd, 4th and 5th Respondents and therefore the 2nd, 4th and 5th Respondents are not entitled to any shares in the 1st Respondent;

(e) R3, R4, R5 and R6 are fabrications prepared for the purposes of this case.

The High Court has accepted the position of the Petitioner that the meeting held on 27th March 2001 "*is also invalid for the reason that no notice has been given of the said extraordinary general meeting of shareholders of the 1st Respondent to the Petitioner.*"

The position of the Respondents was that as at 26th March, 2001 the Petitioner had not been allotted shares in the 1st Respondent and was therefore not entitled to notice of the extraordinary general meeting that was held on 27th March 2001. For reasons which I have already referred to, I have concluded that the Petitioner was in fact allotted shares on 26th March 2001. The Petitioner was therefore entitled to notice of the extraordinary general meeting. I must also state that the argument of the Respondents that shares could be

allotted prior to increasing the authorised share capital and that once such an increase takes place, the allotment of shares could be given effect is to put the cart before the horse, and must therefore be rejected.

Oppression and Mismanagement

This brings me to the core issue in this appeal, that being whether the 2nd and 3rd Respondents are guilty of oppression as provided for in Section 210 of the Companies Act.

With regard to the overall conduct of the Respondents, the High Court has held as follows:

> "*The 2nd and 3rd respondents have acted in their own interests by allotting shares to themselves and to the 4th and 5th respondent companies owned by the 2nd respondent so as to enable them to take over complete control of the first respondent company in an illegal manner*
>
> *The conduct on the part of the 2nd and 3rd respondents of unlawfully issuing shares to themselves and the 4th and 5th respondents which are companies more or less fully owned by the 2nd and 3rd respondents is oppressive to the petitioner and is an attempt to materially change the ownership of the 1st respondent company*
>
> *By reason of this material change the affairs of the 1st respondent company would be conducted in a manner prejudicial to the said company and to the petitioner who is the only other shareholder… In my view all these acts of the 2nd to the 5th respondents amounted to oppression of the petitioner and also oppression in the conduct of the affairs of the company and the aforesaid conduct is detrimental to both the company and the petitioner*
>
> *It Is my considered view that the aforesaid increase of the share capital of the 1st respondent company and the manner and the allotment of shares was made surreptitiously and deliberately with the ulterior motive of diluting the petitioner's shareholding in the 1st respondent company and with the sole idea of defeating the rights of the petitioner. The 2nd to 5th respondents have allotted shares to themselves which had which had seriously affected the proprietary rights of the petitioner*"

To my mind, it is clear that the Respondents had no intention of allotting shares to the Petitioner although the Petitioner had invested USD 250,000 by 1995. It appears that the Respondents could no longer resist calls from the Petitioner that effect be given to the commercial deal struck between them way back in 1994 and 1995 and that, as suggested by the Petitioner, hurriedly prepared a series of documents, namely R3, R4 and R5 that would allot the Petitioner the minimum possible number of shares and allot to themselves shares in excess of 94%, having only paid Rs. 1.46 per share. In the process the Respondents committed a series of fundamental mistakes relating to the procedure that should have been followed and the Respondents now find themselves in a more precarious position than they should be in. I can only agree with the submission of the learned President's Counsel for the Petitioner that the actions of the Respondents have boomeranged on them in a manner in which it was least expected by the Respondents.

The manner in which the rights of the Petitioner as a shareholder was sought to be diluted is a clear case of oppression by the Respondents. Here was an investor who invested USD 250,000 in 1994 in return for a majority shareholding in the 1st Respondent and who is now being short changed by the Respondents. Had the Respondents been successful, the Petitioner would have lost his investment and been left with just 5.75% shares in the 1st Respondent.

Putting aside the legal niceties, should not the Respondents have given effect to their original bargain struck in 1994 and 1995 and allotted shares to the Petitioner commensurate with the investment that he had brought in to the 1st Respondent? As I noted at the outset, the 1st Respondent being a private company, its shareholders and collaborators must act in a sense of cooperation and honesty, respecting each other. The conduct complained of lacks probity, is unfair to the Petitioner and has caused prejudice to the legal and proprietary rights of the Petitioner as a shareholder. The acts complained of have denied to the Petitioner not only his rights as a shareholder but even his legitimate expectations as a shareholder.

I am therefore in agreement with the above conclusion reached by the High Court.

Provisions of the Exchange Control Act, No. 24 of 1953

There is one other matter that I must advert to before I conclude.

The learned Counsel for the Respondents submitted that in terms of the Exchange Control Act, a person who is resident outside Sri Lanka cannot hold shares in a company registered in Sri Lanka except with the permission of the Central Bank. While I shall discuss the said submission in detail later on, I must state at the outset that, (a) R3 – R5 does not reflect that this was the reason for the Respondents to have done what they did, and (b) this issue was not raised before the High Court.

The learned Counsel for the Respondents however submitted that this was a pure question of law and can therefore be raised for the first time in appeal. I am afraid I cannot agree. For reasons that I shall express, my view is that this issue does not satisfy the test laid down in **Dona Podi Nona Ranaweera Menike v Rohini Senanayake** [(1992) 2 Sri LR 180] and **Sirimewan Maha Mudalige Kalyani Sirimewan v Herath Mudiyanselage Gunarath Menike** [SC Appeal 47/2017; SC minutes of 10th May 2024] for determining if an issue is a pure question of law, and whether such issue could therefore be raised for the first time in appeal. Be that as it may, I shall consider the said submission as the learned Counsel for the Respondents placed much reliance on that submission.

There are three sections of the Exchange Control Act which were relied upon by the learned Counsel for the Respondents, they being Sections 10, 11 and 30. Section 10 *inter alia* prohibits any person who is **resident outside Sri Lanka** from being the transferee of any security which is registered or is to be registered in Sri Lanka **except with the permission of the Central Bank.** Section 11 prohibits any person from *inter alia* transferring any registered security to any person who is resident outside Sri Lanka **except with the permission of the Central Bank**. The learned Counsel for the Petitioner submitted further that in terms of Section 30(5), ' ***Except with the general or special permission of the bank*** *no person resident in Sri Lanka shall transfer any interest in any business in Sri Lanka or create any interest in any such business, to or in favour of a* ***citizen of a foreign state***.'

The learned Counsel for the Respondents drew our attention to the following paragraphs of the Notice issued under the Exchange Control Act in terms of Sections 10,11,15 and 30(5) of the said Act published in Gazette Extraordinary No. 721/4 dated 29th June 1992:

"*1. Permission - Permission is hereby granted for the purposes of Sections 10, 11, 15 and sub-section 5 of section 30 as applicable of the Exchange Control Act (Chapter 423 of the CLE), for the issue and transfer of shares in a company upto 100% of the issued capital of such company, to approved country funds, approved regional funds, corporate bodies incorporated outside Sri Lanka and* ***individuals resident outside Sri Lanka*** *(inclusive of Sri Lankans resident outside Sri Lanka) subject to the exclusions, limitations and conditions hereinafter set out.*

2. Exclusions – The permission hereby granted shall not apply in respect of shares of a company proposing to carry on or carrying on any of the following businesses:

(i) Money lending,
(ii) Pawn Broking,
(iii) Retail trade with a capital of less than one Million U.S. Dollars,
(iv) Providing personal services other than for the export or tourism sectors,
(v) Coastal fishing.

3. Limitations – (a) The permission hereby granted shall apply in respect of shares in a company carrying on or proposing to carry on any of the following businesses only upto 40% of the issued capital of such company, or ***if approval has been granted by the Greater Colombo Economic Commission*** *for a higher percentage of foreign investment in any company, only upto such higher percentage.*

(i) – (ix) …
(x) Mass communications;
(xi) – (xv) …"

It was the position of the learned Counsel for the Respondents that the 1st Respondent is a company that is engaged in mass communication and that a person who is *a citizen of a foreign state* is prohibited by law from owning anything more than 40% of the shares in a company such as the 1st Respondent.

There are two things that I must state.

The first is that at least as far as Sections 10 and 11 are concerned, the criterion for deciding whether any of the above provisions apply is the residence of the individual concerned. Sections 10 and 11 apply to persons who are resident outside Sri Lanka and the restrictions in the above mentioned Notice applies in respect of those who are resident outside Sri Lanka. In paragraphs 7 – 16 of the Objections filed before the High Court and particularly in paragraph 13 thereof, the Respondents have submitted that the Petitioner had a resident visa and was operating a guest house in Kandy. This fact has been reiterated in paragraph 22 of the written submissions tendered on 3rd January 2024.

According to the Direction given by the Minister of Finance under Section 37(1) of the Exchange Control Act and published in the Ceylon Government Gazette No. 15,007 of 21st April 1972, "*Citizens of foreign countries who are in Ceylon, except passengers in transit to other countries or visitors touring the country for pleasure or business"* are treated as 'resident in Ceylon' "*for the purpose of determining the residential status of persons under the Exchange Control Act".* Thus, I am satisfied that the Petitioner was a resident for the purposes of the Exchange Control Act and the restrictions in Sections 10 and 11 would not apply to the Petitioner.

The second is that the prohibition contained in the Exchange Control Act on the transfer of shares is not a blanket prohibition and such transfers can be carried out with the permission of the Central Bank. Whether such approval will be granted is a question of fact and I do not have before me all the facts to decide this question. This is the reason for the view expressed by me that the Respondents ought to have raised this issue before the High Court and that this is not a pure question of law that can be raised for the first time in appeal.

Furthermore, it was the submission of the learned President's Counsel for the Petitioner that the Controller of Exchange was a party to the action and had this issue been raised before the High Court, a satisfactory explanation could have been offered by the Controller of Exchange or by one or more of the other parties as to the legality of whether the Petitioner can hold 999,998. However, this was not to be due to the failure of the Respondents to raise this issue before the High Court.

Conclusion

I am in agreement with the view expressed by the High Court that the 2nd and 3rd Respondents (a) have acted in an oppressive manner with regard to the rights of the Petitioner as a shareholder in the 1st Respondent, and (b) are attempting to dilute the shareholding of the Petitioner in such a manner that would enable the Respondents to gain control of the 1st Respondent without investing any moneys in the 1st Respondent and in the process deny the Petitioner his rights and legitimate expectations as a shareholder.

I would therefore affirm the judgment of the High Court. This appeal is accordingly dismissed with costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT