Madras High Court
Aidqua Holdings (Mauritius) Inc vs Tamil Nadu Water Investment ... on 31 January, 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31-1-2014

CORAM

THE HON'BLE MR. JUSTICE V.RAMASUBRAMANIAN

Company Appeal No.7 of 2012

AIDQUA Holdings (Mauritius) Inc.,
having its Principal Office at
6th Floor Cerne House,
Chaussee, Port Louis Mauritius. .. Appellant

vs.

1.Tamil Nadu Water Investment Company Ltd.,
Represented by its Director,
Having its Registered Office at Anurag 15,
Murrays Gate Road,
Alwarpet,
Chennai-600 018.

2.Tirupur Infrastructure Development Company Ltd.,
Represented by its Chairman and Managing Director,
Having its Registered Office at No.62,
Appachi Nagar, Main Road,
Tirupur-641 607.

3.Infrastructure Leasing and Financial Services Ltd.,
Represented by its Director, Having its Registered
Office at The IL & FS Financial Centre,
Plot No.22, G Block, Bandra Kurla Complex,
Bandra (East), Mumbai-400 051.

4.New Tirupur Area Development Corporation Ltd.,
Having its Registered Office at 66,
Appachi Main Road, Kongu Nagar,
Tirupur.

5.The Government of the State of Tamil Nadu,
Acting through Secretary, Municipal
Administration and Water Supply Department

Secretariat Building, Fort St. George,
Chennai-600 009.

6.Industrial Development Bank of India,
Represented by its Director, Having its Office
at IDBI Tower, WTC Complex, Cuffe Parade,
Mumbai-400 065, Having its Chennai
Office at No.115, Anna Salai,
Saidapet, Chennai-600 015.

7. Mr. Faizal N. Syed .. Respondents

This appeal is preferred under Section 10-F of the Companies Act, 1956 against an inter
For Appellant : Mr. Sudipto Sarkar, Senior Counsel
for M/s. Ramasubramaniam Associates.

For Respondents 1 - 3 : Mr. Fredun Devitre, Senior Counsel
for Mr. R. Parthasarathy,
assisted by Mr. Vivek Menon.

For Respondent-4 : Mr. S. N. Mookherjee, Senior Counsel
for Mr. P. Giridharan.

For Respondent-5 : Mr. T. K. Seshadri, Senior Counsel
for Mr. M. Venugopal, Addl. Govt. Pleader(CS).

For Respondent-6 : Mr. R. Murari, Senior Counsel
for Mr. Udayakar Rangarajan.

For Respondent-7 : Mr. M. P. S. Rao for
Mr. R. Sankaranarayanan.

J U D G M E N T

An interim order passed by the Company Law Board on a miscellaneous application filed by the company in question, pending disposal of a main company petition under Sections 397 and 398 of the Companies Act, 1956, is under challenge in the above appeal under Section 10-F of the Act.

2. I have heard Mr.Sudipto Sarkar, learned Senior Counsel appearing for the appellant, Mr.Fredun Devitre, learned Senior Counsel appearing for respondents 1 to 3, Mr.S.N.Mookherjee, learned Senior Counsel appearing for the fourth respondent, Mr.T.K.Seshadri, learned Senior Counsel appearing for the Government of Tamil Nadu, which is the fifth respondent herein, Mr.R.Murari, learned Senior Counsel appearing for the sixth respondent-IDBI and Mr.M.P.S.Rao, learned counsel appearing for the seventh respondent.

3. The respondents 1 to 3 herein who are respectively (i) Tamil Nadu Water Investment Company Ltd., (ii) Tirupur Infrastructure Development Company Ltd., and (iii) Infrastructure Leasing and Financial Services Ltd., all of whom are either mere shareholders or shareholders as well as creditors, joined together and filed a petition in C.P.No.18 of 2007 on the file of the Additional Principal Bench of the Company Law Board. The petition was filed on allegations of oppression and mismanagement under Sections 397, 398, 402, 403 & 406. In the company petition, as it was

originally filed, there were only 3 respondents viz., (i) AIDQUA Holdings (Mauritius) Inc., who is the appellant herein (ii) Mr. Faizal N.Syed, who is the 7th respondent herein and (iii) New Tirupur Area Development Corporation Limited, who is the 4th respondent herein. Subsequently, the Industrial Development Bank of India and the State of Tamil Nadu represented by Secretary to Government, Municipal Administration and Water Supply Department, were also impleaded in the main company petition.

4. The reliefs sought by the respondents 1 to 3 herein, who were the petitioners in the main Company Petition No. 18 of 2007, were as follows:-

"a. That this Hon'ble Board be pleased to declare that the requirement of an affirmative vote to render valid any resolution conferred by the Articles of Association of the company on the first respondent including that in Articles 49, 50, 193, 195, 197, 198, 217, 218 and 219 of the Articles of Association is bad in law, illegal, null and void and not binding on and/or enforceable against the company and other shareholders;

b. That this Hon'ble Board be pleased to strike down Article Nos. 49, 50, 193, 195, 197, 198, 217, 218 and 219 as violative of the provisions of the Act and against public policy;

c. That this Hon'ble Board be pleased to appoint one or more persons as AIDQUA nominee director in place of the second respondent, Mr.Faizal N.Syed, to ensure that the affairs of the Board of Directors are carried out in a proper manner;

d. That this Hon'ble Board be pleased to pass an order of interim injunction against the second respondent Mr.Faizal N.Syed restraining him from acting as a director of the company and/or exercising Affirmative Vote pursuant to the Articles of Association of the company;

e. That the rights and/or powers and/or privileges conferred by or under the Articles of Association of the company on AIDQUA including by or under the Articles 49, 50, 191, 193, 195, 197, 198, 217, 218 and 219 and the corresponding obligations on the company and/or its other shareholders thereunder be suspended pending disposal of this petition;

f. That this Hon'ble Tribunal be pleased to pass an order and injunction restraining the respondents from exercising the right of Affirmative Vote in all matters affecting the performance of the Concession Agreement;

g. That this Hon'ble Tribunal be pleased to appoint Mr.Sameer Vyas as Managing Director of the company;

h. That pending the hearing and final disposal of the present petition, interim and ad-interim reliefs in terms of prayer clauses (a) to (g) be granted."

5. During the pendency of the above main company petition, several miscellaneous applications were taken out by various parties, the details of which, are not very relevant for the purpose of

deciding this appeal. But two miscellaneous applications, one of which has given rise to the present appeal and another which preceded the miscellaneous application which has become the subject matter of this appeal, are to be noted for the completion of the preliminary narration of facts.

6. In one miscellaneous application Comp.A.No.15 of 2011, filed by the appellant herein, they sought an order prohibiting the company in question from considering a Corporate Debt Restructuring Scheme, unless and until a special audit and investigation is carried out in terms of the prayer made by them in yet another miscellaneous application pending from 2010 onwards. By an order dated 21.7.2011, the Company Law Board disposed of the said application Comp.A.No.15 of 2011, directing the Board of Directors of the company, to first consider the said Scheme and to take a decision in-house and thereafter come back to the Company Law Board if there were any difficulties. It was also made clear by the Company Law Board that the final decision taken by the Board of Directors on the CDR Scheme should be placed before the Company Law Board Bench before implementation.

7. In accordance with the order so passed by the Company Law Board, the CDR Scheme was fine-tuned by the Empowered Group for CDR, with the Lead institution of the Consortium viz., IDBI in a meeting held on 29.11.2011. The Scheme was forwarded to the members of the Board of Directors of the company on 2.12.2011 and a meeting of the Board was convened on 5.12.2011. Apart from the Chairman of the company, 8 Directors including the seventh respondent herein, who is a nominee Director of the appellant, were present at the Board meeting. By exercising his veto rights, the seventh respondent ensured that the resolution to approve the CDR Scheme was defeated, despite all the remaining 8 members of the Board favouring the resolution.

8. Therefore, the company, viz., New Tirupur Area Development Corporation Limited, which was the third respondent in the main company petition and which is the 4th respondent herein, filed a miscellaneous application in Comp.A.No.47 of 2011 on 9.12.2011, praying inter alia (i) for impleading the IDBI and the Government of Tamil Nadu as respondents 6 and 7 to the main company petition and (ii) for permission to adopt and implement the CDR Scheme dated 2.12.2011 irrespective of the rights of the individual shareholders and stakeholders. This application was filed on 9.12.2011 by the company.

9. At or about the same time, the appellant also filed a fresh company petition in C.P.No.101 of 2011 under Sections 397 and 398, claiming that the CDR Scheme proposed on 2.12.2011 was oppressive in nature and that it could not be implemented. Since the averments contained in this petition virtually met and countered all the averments contained in C.A.No.47 of 2011 in C.P.No. 18 of 2007, the the Company Law Board passed an order treating C.P.No.101 of 2011 filed by the appellant herein as its effective counter to Comp.A.No.47 of 2011.

10. On 14.2.2012, the Company Law Board directed the impleadment of IDBI and the State of Tamil Nadu as respondents 6 and 7 to the main company petition in C.P.No.18 of 2007.

11. Thereafter, the Company Law Board proceeded to pass an order on 6.3.2012, disposing of the miscellaneous application Comp.A.No.47 of 2011, (i) permitting the company to implement the CDR Scheme dated 2.12.2011 and (ii) making it clear that the implementation of the Scheme shall not

affect the special rights enjoyed by the appellant under the Articles of Association of the company. The Company Law Board also made it clear that the Company shall not have the power to amend the Articles of Association, affecting the special rights of the appellant, without the permission of the Board.

12. Aggrieved by the above order, permitting the company to implement the CDR Scheme and contending that such implementation has the natural result of complete annihilation of their special rights, the appellant has come up with the above appeal under Section 10-F of the Companies Act, 1956.

13. On 12.4.2012, the above appeal appears to have come up for orders as to admission along with a miscellaneous petition for interim stay of the order of the Company Law Board. On the said date, the respondents also appeared through counsel and opposed the grant of any interim order. Therefore, this Court simply adjourned the appeal for a detailed hearing. While doing so, the petition for stay was closed, on the basis that the main appeal itself would soon be taken up for disposal.

14. But, summer vacation intervened and the appellant appealed to the Supreme Court. The Supreme Court requested this court to hear the main appeal on a day to day basis from 4.6.2012 onwards and to decide it at the earliest point of time. But unfortunately, the appeal could not be disposed of, as desired by the parties.

15. Therefore, when a notice convening an Annual General Meeting on 30.9.2013 was issued by the Company, fresh miscellaneous petitions in M.P.Nos.1 and 2 of 2013 were taken out by the appellant for stalling the same. Those applications were dismissed by me by an order dated 24.9.2013, with a direction to list the appeal for hearing on a day-to-day basis to the extent possible, from 21.10.2013. Accordingly, the appeal was heard.

16. The order of the Company Law Board is challenged on any number of grounds as a legal brain of fertile imagination could do. But the questions of law that are formulated in the course of arguments for my consideration are as follows:-

(i) When a petition under Sections 397 and 398 can be filed only by shareholders and not even by creditors, can a miscellaneous application in such a proceeding be filed by the company itself?

(ii) Whether the expression "any party to the proceeding" appearing in Section 403 would include the company?

(iii) Whether the interim relief granted by the Company Law Board can go beyond the scope of the main relief?

(iv) Whether an interim relief which would have the effect of a final order could be passed by the Company Law Board?

(v) Whether retrospective creation and allotment of shares is permissible, especially when shares are a property and the existence of the property is a pre-condition for the creation of an interest in such property?

(vi) Whether the threat of financial insolvency can be a ground in a proceeding under Sections 397 and 398?

(vii) Whether under the guise of passing an order under Section 402 or 403, it is open to the Company Law Board to re-write a contract between the shareholders?

(viii) Whether the Company Law Board can authorise the parties to do something in violation of the prescriptions contained in the statute or in the shareholders agreement?

(ix) Whether the Company Law Board was right in approving the CDR Scheme, by way of an interim order that had the effect of reducing the percentage of holding of one shareholder even while increasing the percentage of shareholding of another?

(x) Whether the failure of the Government to enact a law as envisaged in the CDR Scheme, would vitiate the CDR Scheme or not?

17. Before proceeding to consider the questions of law arising for consideration, it may be necessary, for a better understanding of the issues involved, first to fix these issues in the historical setting in which they have arisen and next to explode the myth, if any, around what has become a matter of serious dispute viz., the CDR Scheme. Therefore, let me (1) first give the historical background and (2) then provide the broad features of the CDR Scheme, so that the journey into the questions of law become smooth.

HISTORICAL BACKGROUND:

18. (a) Tirupur, which gained popularity in the annals of the freedom movement by producing Kumaran, later became one of the largest cotton knitwear export centres post independence. The exporters of Tirupur formed themselves into an association and floated a society by name Tirupur Exporters Association. In order to provide necessary infrastructure to enable the industry at Tiruppur to attain its full potential, the Government of Tamil Nadu formulated a plan known as Tirupur Area Development Plan through its wholly owned corporation by name Tamil Nadu Corporation for Industrial Infrastructure Development Limited (referred to as TACID).

(b) The said plan envisaged several schemes including treatment and supply of potable water and treatment and disposal of sewage in Tirupur Municipality.

(c) With a view to leverage its own resources, the Government of Tamilnadu permitted TACID to partner with other players. Therefore, 3 entities namely, (1) TACID, (2) Tirupur Exporters Association (which is a society registered under the Societies Registration Act) and (3) Infrastructure Leasing and Financial Services Limited, hereinafter referred to as IL & FS for the sake

of brevity, came together and entered into a Memorandum of Understanding on 25.8.1994.

(d) In pursuance of the Memorandum of Understanding reached on 25.8.1994, a public limited company, namely New Tirupur Area Development Corporation Limited, which is the 4th respondent herein, was floated and incorporated on 24.2.1995 with initial equity participation from TACID, Tirupur Exporters Association and IL & FS.

(e) With a view to raise funds for the aforesaid project, IL & FS floated a competitive bidding process in the United States, for funds from the US Market. It appears that IL & FS received eight bids, the lowest being from Bear Stearns Co.Inc. (which actually went belly up in the 2008 sub-prime mortgage crisis in the U.S.). It appears that the lowest bid indicated a tenure of 30 years with a moratorium of 10 years and repayment in 40 equal semi annual instalments.

(f) Therefore, the Board of Directors of New Tirupur Area Development Corporation Limited (hereinafter referred to as NTADCL), in a meeting held on 13.2.1997, resolved to approve the term sheet containing the terms of U.S.AID borrowing, of a maximum of Rs.900 Million for Tirupur Area Development Project. The amount was directed to be kept in an escrow account by IL & FS on behalf of NTADCL.

(g) After the approval by the Board of Directors for USAID Borrowing, IL & FS also started looking for equity participation. Upon coming to know of a company by name AIDEC Management Company Pte.Ltd., incorporated in Singapore, IL & FS wrote a letter to their representative on 1.12.1999 asking them if they would be interested in the project.

(h) Thereafter, a public limited company by name Tamil Nadu Water Investment Company Limited, (hereinafter referred to as TWICL) was incorporated on 27.1.2000, as a joint venture special purpose vehicle, between IL& FS and the Government of Tamilnadu. At the time of incorporation, the authorised share capital of this special purpose vehicle was Rs.5 Crores and the paid up capital was just Rs.90/-. The participation of IL & FS in this company was to be 52% and the participation of the Government of Tamilnadu was to be 48%.

(i) In the meantime, a Concession Agreement was entered into, as a tripartite agreement between (i) the State of Tamilnadu; (ii) Tirupur Municipality; and (iii) NTADCL on 11.2.2000. Under the Concession Agreement, the Government of Tamilnadu and Tirupur Municipality agreed to provide, on an integrated basis, the water treatment and supply facilities and sewage treatment facilities, including the right to draw water from the river Cauvery for a specified period. The obligation on the part of NTADCL under the Concession Agreement was to provide, on strictly commercial principles on an integrated basis, a water treatment facility for the purpose of supply of potable water and also to provide sewage treatment facility. The Government of Tamilnadu and Tirupur Municipality also conferred the right upon NTADCL to abstract raw water from the river Cauvery upto a maximum of 250 MLD. Out of the said quantity, NTADCL was to allocate (1) upto a maximum of 48.70 MLD of raw water for domestic and non domestic purposes within Tirupur Municipality, (2) upto a maximum of 165 MLD for industrial units outside the municipal area and (3) upto a maximum of 36.30 MLD of raw water for domestic purposes to wayside panchayat unions.

(j) In the meantime, the Singapore company namely AIDEC Management Company Pte. Ltd., floated a special purpose vehicle by name AIDQUA Holdings (Mauritius) Inc., which is the appellant herein, agreeing and undertaking to invest a sum of Rs.90 Crores in NTADCL, in the form of equity. Similarly, the Life Insurance Corporation of India, the General Insurance Corporation of India, New India Assurance Company Limited, National Insurance Company Limited, Oriental Insurance Company Limited and United India Insurance Company Limited also agreed to invest in the equity shares of NTADCL. Hence, a Shareholders' Agreement was entered into at Mumbai on 12.4.2001 between these parties. It is relevant note that on the date of execution of the Shareholders' Agreement, the authorised share capital of NTADCL was Rs.600 Crores divided into 60 Crores shares of Rs.10/- each. Out of them, 40 Crores were equity shares and 20 Crores were unclassified shares. The paid up share capital, as on the date of the Shareholders' Agreement namely 12.4.2001 was only Rs.15,040/- divided into 1504 shares of Rs.10/- each. These 1504 shares were actually held by a few individuals, some of whom perhaps represented the members of the Tirupur Exporters Association and one or two representing IL & FS.

(k) Schedule-3 of the Shareholders' Agreement contemplated that the total cost of the project undertaken by NTADCL was to be Rs.1,050 Crores, out of which, Rs.615 Crores was to be in the form of debt, Rs.368.5 Crores in the form of equity and Rs.66.5 Crores in the form of subordinate debt.

(l) The total equity of the company was to be divided among the participants in the following manner :

(i) TWICL - 10,50,00,000 shares of Rs.10/- each totalling to Rs.105 Crores;

(ii) AIDQUA Holdings (Mauritius) Inc. - 9,00,00,000 shares of Rs.10/- each totalling to Rs.90 Crores;

(iii) LIC of India - 2,00,00,000 shares of Rs.10/- each totalling to Rs.20 Crores;

(iv) General Insurance Corporation Limited - 37,50,000 shares of Rs.10/- each totalling to Rs.3.75 Crores;

(v) New India Assurance Company Limited - 37,50,000 shares of Rs.10/- each totalling to Rs.3.75 Crores;

(vi) United India Assurance Company Limited - 30,00,000 shares of Rs.10/- each totalling to Rs.3 Crores;

(vii) National Insurance Company Limited - 22,50,000 shares of Rs.10/- each totalling to Rs.2.25 Crores;

(viii) Oriental Insurance Company Limited - 22,50,000 shares of Rs.10/- each totalling to Rs.2.25 Crores; and

(ix) Special investors and others - 13,85,00,000 shares of Rs.10/- each totalling to Rs.138.50 Crores.

All of them totalled to 36,85,00,000/- shares of Rs.10/- each totalling to Rs.368.50 Crores, which was actually the equity component of the total cost of the project, as indicated in Schedule-3 to the Shareholders' Agreement.

(m) The Shareholders' Agreement also contained, in Schedule-4, the list of lenders and the amount they were supposed to lend. For the purpose of easy appreciation, the same is presented as follows :

SNo Bank/Institution Amount Rs in Crores IDBI SIDBI LIC Central Bank of India IL&FS Indian Overseas Bank State Bank of India General Insurance Corporation 3.75 National Insurance Company Limited 2.25 New India Assurance Company Limited 3.75 Oriental Insurance Company Limited 2.25 United India Assurance Company Limited State Bank of Hyderabad State Bank of Patiala Bank of India Bank of Baroda Punjab National Bank Total

(n) The Shareholders' Agreement contained certain special features, the most important of which are as follows :

(i) that in the Board of Directors of NTADCL, TWICL would be entitled to nominate six directors, so long as its share holding is maintained at 26%;

(ii) that AIDQUA Holdings (Mauritius) Inc. would have a right to appoint and have one director so long as it holds at least 5% of the equity share capital;

(iii) that certain matters, listed in Clause 10.6.2 of the Shareholders' Agreement would be treated as "General Reserved Matters" and certain other matters listed in Clause 10.6.3 will be treated as "AIDQUA Reserved Matters";

(iv) that any matter, which comes within the purview of General Reserved Matters, could be taken to have been approved by the Board only if one nominee director of each shareholder consented to the same; and

(v) that any matter coming within the purview of AIDQUA Reserved Matters will be taken to have been approved by the Board only if at least one nominee director of AIDQUA consented to the same.

(o) Interestingly, though NTADCL was incorporated on 24.2.1995 and TWICL was incorporated much later on 27.1.2000, the Shareholders' Agreement dated 12.4.2001 considered TWICL as a promoter of NTADCL.

(p) Consequent upon the Shareholders' Agreement containing special features, the Articles of Association of NTADCL were amended suitably, to incorporate the special features of the Concession Agreement as well as the Shareholders' Agreement. In other words, provisions were made in the Articles of Association, so as to recognise the special rights conferred upon TWICL, AIDQUA and various lenders and also to recognise AIDQUA Reserved Matters and General

Reserved Matters.

(q) Subsequently, an agreement known as Common Loan Agreement was entered into between NTADCL on the one hand, the Industrial Development Bank of India as the Lead Institution on the other hand, various financial institutions and banks described as senior lenders and a few banks described as participants. This loan agreement was entered into on 22.3.2002, for the purpose of making available to NTADCL, the required finance, for the design, construction, testing, commissioning and implementation of the project. Under the said agreement, NTADCL was described as the borrower, IDBI was described as the Lead Institution, the financial institutions and banks named in Part A of Schedule-II were described as senior lenders and the banks named in Part B of Schedule II were described as participants.

(r) Each of the senior lenders and the participants, whose names were included respectively in Part A or Part B of Schedule-II to the Common Loan Agreement, gave a commitment to finance the project to the extent indicated therein. It may be relevant to note these commitments at this stage. The commitments of senior lenders were :

SNo Bank/Institution Amount Rs in Crores IDBI IL&FS SIDBI Central Bank of India Bank of Baroda State Bank of India State Bank of Hyderabad State Bank of Patiala Indian Overseas Bank Punjab National Bank Bank of India LIC of India GIC of India 3.75 National Insurance Company Limited 2.25 New India Assurance Company Limited 3.75 Oriental Insurance Company Limited 2.25 United India Assurance Company Limited

(s) The commitments of participants, to provide "Risk Participation Assistance" included in Part B of Schedule-II, are as follows :

SNo Bank/Institution Amount Rs in Crores Central Bank of India Indian Overseas Bank State Bank of India State Bank of Hyderabad State Bank of Patiala Bank of India Bank of Baroda Punjab National Bank

(t) An amendment was made to the Common Loan Agreement on 11.11.2003, on account of the State Bank of Hyderabad, which was a senior lender, reducing its commitment to Rs.10 Crores from Rs.20 Crores and also on account of the fact that there occurred a shortfall of total commitments on the part of the senior lenders under the Common Loan Agreement from Rs.613.80 Crores to Rs.550 Crores (the shortfall itself worked out to Rs.63.80 Crores). The shortfall was made up by NTADCL by obtaining sanctions from the Oriental Bank of Commerce and the Canara Bank, each of whom respectively contributed Rs.25 Crores and Rs.48.80 Crores.

(u) A second amendment to the Common Loan Agreement was entered into on 31.8.2004. This second amendment was necessitated in terms of Section 15.3.3 of the Common Loan Agreement, after sanction of the loans by the Oriental Bank of Commerce and the Canara Bank. One of the important amendments made under the second amendment to the Common Loan Agreement was the insertion of Section 6.30 into the Common Loan Agreement. By this section, a provision was made as to how to resolve the conflict between the Shareholders' Agreement and the Common Loan

Agreement, in case a conflict ever arose. In simple terms, this clause stated that if an event of default ever occurred under the Common Loan Agreement, any provision of the Shareholders' Agreement that was in conflict with the Common Loan Agreement would cease to exist.

(v) Interestingly, the second amendment dated 31.8.2004 to the Common Loan Agreement dated 22.3.2002 contained in Schedule-C, the details of (i) the revised project cost; (ii) the revised means of financing; (iii) the final tally of participation in equity; and (iv) senior debt and sub-ordinate debt.

(w) The amended project cost was indicated in Schedule-C to the agreement dated 31.8.2004, as Rs.1,023 Crores. This was to comprise of Rs.322.70 Crores in the form of equity; Rs.86.50 Crores in the form of subordinate debt; and Rs.613.80 Crores in the form of senior debt.

(x) The equity participation by each one of the stakeholders is indicated in Schedule-C as follows :

SNo Name of the Party Amount Rs in Crores Promoter AIDEC Tirupur Exporters Association LIC of India General Insurance Corporation of India 3.75 National Insurance Company 2.25 New India Assurance Company 3.75 Oriental Insurance Company 2.25 United India Insurance Company 2.25 WSA Engineers Private Limited Mahindra Infrastructure Developers Limited Mahindra Holdings and Finance Limited Mahindra Construction Co. Ltd.

7.5 Others 37.7 Total 322.70 (y) The debts classified as senior debts, listed out in Part 1 of Schedule A, which totalled to Rs.613.80 Crores are as follows :

SNo Bank/Institution Amount Rs in Crores IDBI IL&FS SIDBI Central Bank of India Bank of Baroda State Bank of India State Bank of Hyderabad State Bank of Patiala Indian Overseas Bank Punjab National Bank Bank of India LIC of India GIC of India 3.75 National Insurance Company Limited 2.25 New India Assurance Company Limited 3.75 Oriental Insurance Company Limited 2.25 United India Assurance Company Limited Oriental Bank of Commerce Canara Bank 48.80 (z) It appears that during the interregnum between the date of the Common Loan Agreement namely 22.3.2002 and the first amendment dated 11.11.2003, IL & FS effected a transfer of Rs.93,96,15,000/- being the disbursement of equity debt and USAID loan, after making deductions towards (i) costs; (ii) project management fee; (iii) upfront fee; and (iv) out of pocket expenses. Though the amount that was actually transferred on 29.5.2002 was Rs.93,96,15,000/-, the gross disbursements were taken to be Rs.140 Crores comprising of Rs.35 Crores towards equity, Rs.15 Crores towards subordinate debt and Rs.90 Crores towards senior debt. Out of the gross disbursement of Rs.140 Crores, IL & FS deducted a total amount of Rs.41,23,85,000/- whose break up was (i) project management fee of Rs.9.60 Crores; (ii) costs of Rs.15,14,50,000/- for USAID loan ; (iii) upfront fee of Rs.66,50,000/-; (iv) merchant banking fees of Rs.10,04,35,000/-; and (v) out of pocket expenses of Rs.5,78,50,000/-.

(aa) The above deductions made by IL & FS appear to have created ripples in the Board, with the nominee director of AIDQUA Holdings (Mauritius) Inc. raising objections. The objection of AIDQUA (appellant herein) was that when the amount of Rs.140 crores has not even come to NTADCL, IL & FS were not justified in deducting a huge amount of Rs. 41,23,85,000/-.

(ab) In the meantime, the work on the project of setting up the plant appears to have commenced in November 2002 and eventually, water started flowing (or trickling down) to the common users, both industrial and domestic, in May 2005. What flowed thereafter appears to be only litigation.

(ac) By the time the operations commenced, the burden of servicing the debts mounted to such an extent that the company and its lenders had to seek a programme of restructuring of the debts. Therefore, a package known as Corporate Debt Restructuring, referred to as CDR, dated 5.3.2007 was formulated, the special features of which are as follows :

"i. Restructuring shall be from 1.11.2006;

ii. Reduction of interest rate and charging of an uniform rate of 11%;

iii. Out of the rate 11% charged, 9% shall be paid immediately and balance 2% deferred. The deferred interest will be accumulated and repaid over a period of 36 months starting from 1.04.2010;

iv. The principal portion of the term loan shall be repaid in 132 instalments beginning from 1.04.2011;

v. The Banks can reset the interest rate every 3 years;

vi. TWICL as the promoter had to provide an undertaking to the senior lenders in the form of a cash deficit support;

vii. Lending institutions will have the right of recompense for the interest rate reductions given."

(ad) However, this CDR package (first in order of succession) was opposed by AIDQUA Holdings (Mauritius) Inc., as well as by the LIC of India. Since the CDR package was one of the items, which were included in the list of "General Reserved Matters" and also since their opposition to the package definitely signalled the failure of the scheme, a company petition was filed in C.P.No.18 of 2007 on the file of the Additional Principal Bench of the Company Law Board, under Sections 397 and 398 of the Act. This company petition C.P.No.18 of 2007 was filed jointly by (i) Tamil Nadu Water Investment Company Limited; (ii) Tirupur Infrastructure Development Company Limited; and (iii) IL & FS, who are the respondents 1 to 3 herein. In the said petition, they impleaded as respondents, (i) AIDQUA Holdings (Mauritius) Inc.; (ii) Faizal N.Syed, the nominee director of AIDQUA; and (iii) NTADCL. The reliefs sought by the petitioners in the said company petition C.P.No.18 of 2007 were (i) to declare Articles 49, 50, 193, 195, 197, 198, 217, 218 and 219 of the Articles of Association of NTADCL, which confirmed special powers of vetoing resolution, upon AIDQUA Holdings (Mauritius) Inc., as null and void; (ii) to appoint someone else in the place of Mr.Faizal N.Syed as the nominee director of AIDQUA; (iii) to injunct Mr.Faizal N.Syed from acting as the director of the company; and (iv) to appoint a person by name Mr.Sameer Vyas as the Managing Director of NTADCL.

(ae) Pending disposal of the main company petition C.P.No.18 of 2007, the petitioners therein also prayed for interim orders for restraining Mr.Faizal N.Syed from exercising his affirmative voting rights and to suspend the operation of the Articles challenged in the main petition.

(af) Since the above CDR, which we shall refer as CDR-I, met with obstacles, a second debt restructuring proposal was prepared in April 2009. But, the same was also objected to by AIDQUA.

(ag) At that time, the main petitioners in C.P.No.18 of 2007 claimed to have become aware of the sale of the shares of AIDEC Management Company Pte.Ltd., Singapore, to a third party, which, according to the petitioners in the main company petition, amounted to a transfer of shares of AIDQUA, in NTADCL to a third party in violation of the provisions of the Articles of Association. Moreover, the second CDR was also opposed by AIDQUA. Therefore, the petitioners in the main company petition C.P.No. 18 of 2007 filed two miscellaneous applications in Comp.A.Nos.33 and 34 of 2009. The prayer in Comp.A.No.33 of 2009 was for permission to amend the main company petition, so as to include the details of the transfer allegedly effected by AIDQUA. The prayer sought in Comp.A.No.34 of 2009 was for a direction to NTADCL to adopt the second CDR as approved by IDBI with suitable modifications.

(ah) In the second miscellaneous application, namely Comp.A.No. 34 of 2009, the Company Law Board passed an order on 31.7.2009 directing the Board of Directors of NTADCL to convene a meeting of the Board on 21.8.2009 to consider CDR-2 as approved by IDBI and to take a decision appropriately. The first application Comp.A.No.33 of 2009 was closed on the basis of the statement made by AIDQUA that no transfer of shares of AIDEC Management Company Pte.Ltd., Singapore, had taken place. The Company Law Board also directed Comp.A.No.34 of 2009 to be called for hearing on 28.10.2009 for further hearing, after the Board Meeting.

(ai) In accordance with the said directions of the Company Law Board, a meeting of the Board of Directors of NTADCL was held on 21.8.2009. In the said meeting, AIDQUA represented by Mr.Faizal N.Syed and LIC of India represented by one Mr.R.V.Rao did not give their concurrence for the second CDR.

(aj) Thereafter, AIDQUA took out a miscellaneous application Comp.A.No.32 of 2010 before the Company Law Board in the pending C.P.No.18 of 2007, praying for the conduct of a special audit to ascertain, verify and validate the payment of a sum of Rs.15.14 Crores from the coffers of NTADCL to IL & FS. But, even before the said application could come up for hearing, the Board of Directors resolved to appoint one M/s.Janakiraman & Co., Chartered Accountants for the purpose of conducting a special audit. Therefore, by an order dated 14.9.2010, the Company Law Board simply adjourned the application for conduct of special audit to 1.12.2010. In the meantime, the special audit was completed and a report was submitted by M/s.R.Janakiraman & Co. on 11.10.2010.

(ak) The special audit report was taken up for consideration by the Board of Directors of NTADCL on 10.12.2010. But, no decision was taken, on the premise that the Company Law Board was seized of the issue in an application pending before it.

(al) Thereafter, the Lead Institution namely IDBI convened a lenders' meeting on 6.4.2011 to review the performance of NTADCL. As an outcome of the said meeting, the IDBI wrote a letter on 17.5.2011 informing all the lenders that NTADCL was irregular in servicing the debt obligation and that since they failed to comply with many of the covenants of the Common Loan Agreement, the lenders would be constrained to downgrade the account and initiate further actions for recovery including the invocation of guarantee provided by TWICL.

(am) In view of the threat held out by IDBI in their letter dated 17.5.2011, the Board of Directors of NTADCL decided to consider another debt restructuring proposal in a meeting held on 17.6.2011. Immediately, a miscellaneous application was moved in Comp.A.No.15 of 2011 by AIDQUA praying for restraining the Board of Directors from considering and implementing any CDR package, until their miscellaneous application Comp.A.No.32 of 2010 filed for the conduct of special audit was finally disposed of. However, the said application was closed by the Company Law Board by an order dated 21.7.2011 on the short ground that the Board of Directors of NTADCL had merely initiated the CDR process, but not adopted the same and that therefore, it was premature to decide the validity of the same. However, the Company Law Board clarified that the finalised CDR, if approved by the Board of Directors, shall be placed before the Company Law Board before its implementation.

(an) Therefore, another meeting of the Board of Directors was convened on 9.9.2011. But, the very validity of the meeting was questioned by Mr.Faizal N.Syed, nominee director of AIDQUA on the ground that there was no Managing Director for the company. However, the meeting was held and it appears that the matter again went back to the Company Law Board. By an order dated 10.10.2011, the Company Law Board appointed one Ms.Hema Srinivasan as an Observer to attend the next meeting scheduled for 14.10.2011. The Observer attended the meeting and filed a report before the Company Law Board on 17.10.2011.

(ao) In the meantime, the Lead Institution namely IDBI convened a joint meeting of the lenders on 14.11.2011 and considered another debt restructuring proposal. The Empowered Group for CDR approved the debt restructuring scheme in its meeting held on 29.11.2011 subject to the condition that the scheme was approved within 45 days. Therefore, on the basis of the approval granted by the CDR-Empowered Group, IDBI wrote a letter dated 2.12.2011 to NTADCL. Immediately, NTADCL forwarded the copies of the proposal and convened a meeting of the Board of Directors to consider the same on 5.12.2011.

(ap) In the meeting of the Board of Directors so held on 5.12.2011, Mr.Faizal N.Syed, nominee director of AIDQUA exercised his right of affirmative vote and defeated the resolution proposing to accept the revised CDR.

(aq) Immediately, the company namely NTADCL, which was the third respondent in the main company petition C.P.No.18 of 2007, took out a miscellaneous application in Comp.A.No.47 of 2011, praying inter alia (i) for impleading IDBI and Government of Tamilnadu as respondents 6 and 7 to the application; and (ii) to permit the company to adopt and implement the CDR scheme dated 2.12.2011, de hors the rights of the shareholders and other stakeholders.

(ar) AIDQUA also filed a petition in C.P.No.101 of 2011 under Sections 397 and 398, by way of an independent main petition complaining that the CDR was nothing but a measure of oppression.

(as) On 14.2.2012, the Company Law Board passed an order (i) impleading IDBI and the Government of Tamilnadu as party respondents to the miscellaneous application; and (ii) directing AIDQUA to submit any alternative proposal within a week.

(at) It appears that AIDQUA submitted an alternative proposal. Thereafter, the Company Law Board passed an order on 6.3.2012, in Comp.A.47 of 2011 permitting NTADCL to implement the CDR scheme dated 2.12.2011. But at the same time, the Company Law Board directed that the special rights conferred upon AIDQUA should not be interfered with and that the Articles of Association shall not be altered in such a manner as to defeat the rights of AIDQUA without the permission of the Company Law Board. It is against the said order of the Company Law Board that AIDQUA has come up with the above company appeal under Section 10-F of the Companies Act, 1956.

19. In the historical setting that I have provided in the previous paragraphs, let me now have a look at the features of the CDR scheme, which has now become a matter of serious controversy.

FEATURES OF THE DEBT RESTERUCTURING SCHEME

20. Under the restructuring scheme -

(i) Interest will be charged at 9.5% per annum (overall return) payable monthly for the senior debt. The senior lenders would fund interest payment upto June 2012, but the same would be repaid along with the term loan;

(ii) The senior lenders would give a moratorium of 18 months for the repayment of the principal. In other words, the repayment would start from the first quarter of the financial year 2014 and would be completed by financial year 2026. The accrued interest on the entire outstanding subordinate debt of Rs.86.50 Crores raised from IL & FS and the entire amount of Rs.65 Crores raised from the Government of Tamilnadu and IL & FS towards Debt Servicing Reserve Fund (DSRF) would be waived completely by the respective lenders;

(iii) The senior lenders would convert overall 15% of the debt into equity, to improve the debt servicing capability of the company. In actual terms on ground, this would work out to a conversion of 30% of the debt due to IL & FS and 8.61% of debt due to other lenders, the debt converted into equity.

(iv) The interim debt raised from TWICL and the Government of Tamilnadu mainly for debt servicing purpose would be converted into equity or quasi equity instruments.

(v) The entire subordinate debt would get converted into equity;

(vi) The DSRF debt would also get converted into equity;

(vii) The Government of Tamilnadu would bring in a sum of Rs.114 Crores in a phased manner mainly for debt servicing/reduction in outstanding senior debt. Out of this, Rs.55 Crores is expected to be brought in during the time of restructuring, Rs.35 Crores is to be brought in during the financial year 2013 and Rs.24 Crores during the financial year 2014;

(viii) The Government of Tamilnadu would ensure additional water off-take towards domestic use to the extent of 100 MLD or more under a two part tariff, namely Rs.15/- per KL as fixed charge and Rs.6/- per KL as variable charge with the variable charge increasing at the rate of 6% annually. The major maintenance requirement estimated at around Rs.120 Crores over five years starting from financial year 2017 is to be met out of additional promoters' contribution;

(ix) All contingent liabilities/other liabilities, including the outstanding creditors, would be met out of additional promoters' contribution;

(x) The Government of Tamilnadu would notify prohibition of usage of ground water for industrial purposes as envisaged in the Concession Agreement;

(xi) The total sacrifices of the senior lenders by way of conversion of debt into equity, NPV losses on account of reduction in interest rates, conversion of debt into equity would work out to around Rs.210 Crores. The promoters/Government of Tamilnadu have already brought in, interim debt of Rs.48 Crores towards debt servicing and expected to bring in Rs.67 Crores during the current financial year and another Rs.59 Crores over next two years. The total amount of fresh funds to be brought in by the promoters would thus aggregate to Rs.174 Crores;

(xii) The Senior Lenders would have the right of recompense for all the waivers/ sacrifices, as per the CDR guidelines;

(xiii) The total contribution of promoters/Government of Tamil Nadu, on the implementation of the scheme is expected to be more than the waivers and sacrifices of the Senior Lenders; and

(xiv) The interest on the senior debt for nine months from the cut off date namely from 1.10.2011 upto 30.6.2012 is proposed to be funded by way of Funded Interest Term Loan-II (FITL-II) by the Bank of India, Bank of Baroda, Canara Bank, Central Bank of India, GIC, IL & FS, etc., to the total extent of Rs.35.97 Crores.

21. Annexure II to the CDR contained special terms and conditions, some of which are as follows :

(i) the company shall not incur any capital expenditure except as is permitted in terms of the CDR package;

(ii) CDR Lenders will have the absolute discretion of resetting the interest rate for the term loan and FITL every two years;

(ii) CDR Lenders shall have a right to convert the defaulted interest and principal instalment, either wholly or partly into equity at par, in the event of default;

(iii) in case of delay in repayment of principal instalment or payment of interest, charges or other monies due on the facility, default/penal interest rate shall be at 2% over and above the revised document rate;

(iv) the Lenders will have the right to reverse the waivers/sacrifices, if there is default on any of the obligations to CDR Lenders or if there is violation of any of the undertakings, etc.; and

(v) The company/Government of Tamil Nadu/Tirupur Municipality/Investors should make necessary changes in the Concession Agreement, Shareholders' Agreement and Memorandum of Articles.

22. Interestingly, the CDR package, contained in Annexure III, certain assumptions, on the basis of which, the financial projections were made. These projections included the probable industrial off-take for the years 2012-2019 with a pricing of Rs.15/- per KL with 6% escalation and the off-take for domestic use from Tirupur Municipality and wayside villages. Annexure III-A contained a projected profitability statement. Annexure III-B contained a projected cash flow statement. Annexure III-C contained a projected balance sheet.

23. Having seen the historical background and also having taken note of the broad features of the CDR scheme, let me now take into account the various petitions and applications that were filed both before and after the impugned order of the Company Law Board dated 6.3.2012. This is necessary in view of certain developments that had taken place subsequent to the impugned order of the Company Law Board dated 6.3.2012. Therefore, let me now first take note of the company petitions and miscellaneous applications now pending before the Company Law Board. This will comprise of two parts namely those that were filed before 6.3.2012 and those that were filed after 6.3.2012.

Petitions and applications filed before 6.3.2012 :

S. No Petition/ Appln. No. Petitioner/ Applicant Respondent Relief Prayed C.P.No.18 of 2007

(i) TWICL

(ii) TIDCL

(iii) IL&FS

(i) AIDQUA

(ii) Faizal N. Syed

(iii) NTADCL

(i) declaration of Articles 49, 50, 193, 195, 197, 198, 217, 218 and 219 of the Articles of Association as null and void,

(ii) restrain Mr.Faizal N. Syed from acting as nominee director of AIDQUA and and to appoint one or more persons in his place; and

(iii) negate the special rights conferred on AIDQUA by virtue of the above mentioned articles.

2. Comp.A.

Nos.33, 34 & 45/2009

(i) TWICL

(ii) TIDCL

(iii) IL&FS

(i) AIDQUA

(ii) Faizal N. Syed

(iii) NTADCL

(i) Comp.A.33/2009 : for permission to amend the main company petition, so as to include the details of the transfer allegedly effected by AIDQUA;

(ii) Comp.A.34 of 2009 : for a direction to NTADCL to adopt the second CDR as approved by IDBI with suitable modifications;

(iii) Comp.A.No.45 of 2009 :

.....

Comp.A.

Nos.22 and 25 of 2010

(i) TWICL

(ii) TIDCL

(iii) IL&FS Permission to hold Board Meetings (allowed and disposed of).

Comp.A.

No.32/ AIDQUA to conduct special audit and investigation (Pending) Comp.A.

No.47/ NTADCL extension of time for convening the AGM (allowed and disposed of)

6. Comp.A.

No.1/ NTADCL extension of AGM (allowed and disposed of)

7. Comp.A.

No.14/ NTADCL extension of AGM (allowed and disposed of)

8. Comp.A.

No.15/ AIDQUA Not to consider the proposed debt restructuring till Comp. A. No. 32 of 2010 is disposed of (Closed holding that the final decision regarding debt restructuring process will be placed before the Bench before implementation

9. Comp.A.

No.18/ AIDQUA

(i) Not to create any legally binding arrangement nor undertake any such binding obligations nor undertake steps towards adoption of the CDR until the same meets approval with the Board of Directors as per the Articles of Association;

(ii) pursue sponsor obligations;

(iii) direct IL& FS to reimburse the company an amount of Rs.104.45 Crores; and

(iv) appoint a neutral observer.

10. Comp.A.

No.22/ NTADCL extension of time for holding of AGM (Pending)

11. Comp.A.

No.24/ AIDQUA Access to records and information from NTADCL (Disposed of)

12. Comp.A.

No.25/ AIDQUA

(i) set aside the Board meeting held on 9.9.2011;

(ii) direct the company to circulate agenda proposed by the first respondent as separate agenda items to all members;

(iii) interim injunction during pendency of Comp.A.No.25 of 2011 directing the company not to act in furtherance of resolutions dated 9.9.2011 (Pending)

13. Comp.A.

No.38/ AIDQUA Access to records (Pending)

14. Comp.A.

No.43/ AIDQUA

i) interim direction as prayed for in Comp.A. No.25/2011

ii) interim direction to the company to provide information as requested for;

iii) direction to the company to include in the agenda items proposed by Mr.Faizal N.Syed for meetings in the audit committee and Board meeting;

iv) direction setting aside the co-option of nominee of IL&FS as being contrary and inconsistent with the Articles of Association; and

v) appoint a neutral observer. (Pending)

15. Comp.A.No.

47/2011 NTADCL

i) TWICL

ii) TIDCL

iii) IL&FS

iv) AIDQUA

v) Faizal N.Syed

vi) IDBI and

v) Govt. of Tamil Nadu

(i) for impleading the IDBI and the Government of Tamil Nadu as respondents 6 and 7 to the main company petition; (allowed on 14.2.2012) and

(ii) for permission to adopt and implement the CDR Scheme dated 2.12.2011 irrespective of the rights of the individual shareholders and stakeholders (ordered on 6.3.2012, against which the present appeal has been filed.) Comp.A.No. 48/2011 AIDQUA

i) amendment to Comp.A.No.43/2011;

ii) set aside reconstitution of audit committee (Pending)

17. Comp.A.

No.83/ AIDQUA to set aside the Board meeting held on 21.3.2011 (dismissed. Company Appeal No.5 of 2011 on the file of this Court pending)

18. Comp.A.

No.160/

(i) TWICL

(ii) TIDCL

(iii) IL&FS Seeking amendment in the main CP (Orders reserved in November 2011)

19. Comp.A.

No.161/ AIDQUA Seeking to refer Comp.A.Nos.33 and 45 to arbitration (Orders reserved in November 2011)

20. Comp.A.

No.456/ 2011 on the file of the Principal Bench, New Delhi AIDQUA Injunction restraining the NTADCL from holding the Board Meeting on 9.9.2011 (Dismissed)

21. CP.No.101 of 2011 AIDQUA

i) NTADCL

ii) TWICL

iii) IL& FS & 35 other respondents

i) declare and hold that the CDR proposal dated 2.12.2011 is oppressive to the petitioner and against the interest of the company and consequently restrain the respondents from implementing the same;

ii) restrain the respondents jointly and severally from conducting the affairs of the company in a manner, which is inconsistent with the Concession Agreement, Shareholders Agreement and legitimate expectation of the petitioner;

iii) direct the respondents particularly respondent NO.38, which is Government of Tamil Nadu to notify appropriate law in terms of Section 2.8 of the Concession Agreement;

iv) direct respondents 2, 3 and 38, namely TWICL, IL& FS and Government of Tamil Nadu to fulfill their obligations towards the company under the Concession Agreement and Shareholders Agreement relating to sourcing of funds, compliant with the said Concession Agreement and Shareholders Agreement;

v) direct the respondents to administer, manage the business on commercial principles as per the Concession Agreement;

vi) direct the respondents to nominate a full time MD and to alter charges for sanitation facilities and also to increase prices of water;

vii) restrain the Lenders from taking any actions against the interests of the company, which would jeopardise vis-a-vis its Concession Agreement, Shareholders Agreement and Articles of Association;

viii) set aside the resolutions (pertaining to accounts, reconstitution of audit committee, CDR, calling of the AGM of the company and anything in contravention of reserved matters under Articles 196 and 197 of AoA) at the Board meetings dated 9.9.2011, 14.10.2011 and 5.12.2011;

ix) set aside meeting of the audit committee dated 18.11.2011, direct a forensic audit to ascertain true financial position of the company and direct IL&FS to return funds, which have been wrongly paid by the company and direct the Lenders to invoke the guarantee by TWICL dated 2.7.2008 for debt servicing requirements;

x) direct TWICL, IL&FS and Government of Tamil Nadu to replenish the DSRF of the company as per the Common Loan Agreement.

Petitions and applications filed after 6.3.2012:

S. No Petition/Appln. No. Petitioner/ Applicant Respondent Relief Prayed

1. Comp.A.No.17 of 2012 in CP.No.18 of 2007 AIDQUA NTADCL

i) to appoint neutral and independent observer for the board meeting scheduled to be held on 25.6.2012;

ii) to direct the company to include the items proposed by AIDQUA's nominee director vide their letter dated 5.6.2012 on the agenda of business for the said meeting and circulate the same to all the directors (D/o on 21.6.2012. 1st prayer rejected. 2nd prayer granted) Comp.A.No.18 of 2012 in CP. No. 18 of 2007 NTADCL

i) TWICL

ii) TIDCL

iii) IL&FS

iv) AIDQUA V) Faizal N.Syed to confirm the appointment of M/s.Suri & Company as statutory auditors of NTADCL for the year ended 31.3.2011 and grant extension of time till 31.12.2012 to the company for convening the AGM for the year ended 31.3.2011. (D/o on 12.10.2012) Comp.A.No.144 of 2012 in CP.No.101 of 2011 AIDQUA

i) Restrain NTADCL from implementing the terms of the CDR Cell's LOA and the MRA until the same has been approved by the Board of Directors as per the Articles of Association of NTADCL;

ii) Restrain NTADCL from allotting any shares to lenders, Government of Tamil Nadu or any other entity without first complying with the provisions of the Articles of Association and the Companies Act;

iii) Restrain the alleged debts advanced by IL&FS from being included in the debt restructuring until adjudication of Comp.A.No. 32 of 2010 in C.P.No.18 of 2007;

iv) Restrain the Company Secretary or any other employee of the company to sign or execute omnibus resolutions as proposed in the draft circular resolution of 25.7.2012;

v) Restrain the alleged debts of TWICL from being included in debt restructuring until such debts have been approved as debts of the company by the Board of Directors in accordance with the Artices of Association of the company; and

vi) Render a default judgment in favour of the applicant/petitioner and against respondents in C.P. No.101 of 2011.(Counter filed. No interim orders of injunction or stay. Pending) Comp.A.No.187 of 2012 in CP.No.101 of 2011 AIDQUA Amendment to C.P.No.101 of 2011 (Pending) Comp.A.No.188 of 2012 in CP.No.101 of 2011 AIDQUA

i) Restore status quo ante as existing before impugned allotment of shares on 1.10.2011, 28.10.2011, 26.11.2011 and 20.3.2012.

ii) Set aside allotment of shares;

iii) Restrain the company from allotting further shares to any third party without holding a General Meeting;

iv) Restrain the company from convening the General Meeting until final decision in this company petition or restrain the allottees from exercising any right at the General Meeting;

v) Restrain the company from implementing the terms of the Master Restructuring Agreement until the same is approved in accordance with the Articles of Association (counter filed. No interim orders of injunction or stay. Pending).

Comp.A.No.2 of 2013 in CP.No. 101 of 2011 AIDQUA

i) Restore status quo ante as existing before impugned allotment of shares on 1.10.2011, 28.10.2011, 26.11.2011, 20.3.2012 and 22.3.2013;

ii) Set aside the allotment of shares.(counter filed. No interim orders of injunction or stay. Pending).

24. Just as I have taken note of the various petitions, both miscellaneous and main, that were filed before and after 6.3.2012, it is important for me also to take note of the developments that had taken place on and off the Court after 6.3.2012.

DEVELOPMENTS AFTER 6.3.2012 :

25. Immediately after the order of the Company Law Board dated 6.3.2012 sanctioning the CDR scheme, the appellant came up with the above appeal. The above appeal was actually filed on 14.3.2012. It came up for orders as to admission, along with an application for interim stay in Comp.A.No.1 of 2012, on 12.4.2012. It appears that the respondents were ready to take notice even on the said date. Thereafter, in the main appeal, this Court passed the following order :

"Heard arguments of the appellant. For arguments of the respondents, the matter is adjourned to 17.4.2012."

In the miscellaneous application for stay, this Court passed the following order :

"All the parties have agreed for taking up the appeal itself for disposal. Hence, this petition seeking for stay of operation of the impugned order of the Company Law Board is closed subject to the result of the appeal."

26. But, by 30.4.2012, the hearing of the appeal was not completed and this Court was closed for summer recess. Therefore, the appellant appears to have taken up the matter to the Supreme Court by way of a special leave petition. On 11.5.2012, the Supreme Court passed an order directing the Company Court to hear the main appeal from 4.6.2012 onwards and to dispose it of at the earliest. The Supreme Court also observed that if it was not possible to complete the hearing of the appeal, it was open to the appellant to revive the application for stay.

27. It appears that as per the directions of the Supreme Court, the appeal was taken up for hearing in June-July 2012. But, for reasons which I do not wish to record, neither the appeal was disposed of nor the appellant enabled to revive the application for stay.

28. But, in the meantime, the Government of Tamil Nadu appears to have passed an order in G.O.Ms.No.25, Municipal Administration and Water Supply Department dated 16.3.2012 sanctioning a sum of Rs.150 Crores for investing in NTADCL, as part of the CDR scheme. Out of the said amount, a sum of Rs.36 Crores had already been provided as a 'Ways and Means Advance' towards DSRF (Debt service rehabilitation fund).

29. In August 2012, the appellant filed an application in Comp.A.No.144 of 2012 before the Company Law Board, to restrain NTADCL from allotting any share to the lenders. But, on 14.9.2012, NTADCL proceeded with the allotment of shares and filed returns of allotment, in the form of four Form-2s. Under one form, an allotment was made with effect from 1.10.2011. Under another form, the allotment was made with effect from 28.10.2011. Under a third form, the allotment of shares was made with effect from 26.11.2011 and under the fourth Form-2, the last allotment was made with effect from 20.3.2012.

30. Thereafter, this fact was informed by NTADCL to the Company Law Board in a counter affidavit filed on 5.10.2012 to Comp.A.No.144 of 2012. The appellant therefore claims that the CDR scheme was implemented and shares allotted to the creditors in September 2012, with retrospective effect from various dates commencing from 1.10.2011 and that this fact itself came to light only on 5.10.2012 when a counter affidavit was filed before the Company Law Board in a miscellaneous application. In other words, the claim of the appellant is that the order dated 6.3.2012 of the Company Law Board was kept on hold till September 2012, but implemented thereafter with retrospective effect to outwit the appeal. Keeping in mind all the above, let me now move on to the grounds on which the impugned order of the Company Law Board is assailed.

GROUNDS OF APPEAL AND QUESTIONS OF LAW:

31. The order of the Company Law Board is assailed by the appellant on the following grounds :

(i) A petition under Sections 397 and 398 cannot be filed either by the creditors or by the company itself, but can be filed only by the shareholders. If the company is not entitled to file a petition under Sections 397 and 398, it is not competent even to file a miscellaneous application. Therefore, the Company Law Board was in error in entertaining a miscellaneous application for relief by the company;

(ii) Section 403 of the Companies Act, which enables "any party to the proceeding" to move an application for interim relief, would not enable the company to take out an application. The expression "any party to the proceeding" would not include within itself the company;

(iii) The interim relief granted by the Company Law Board is beyond the scope of the main petition itself. An interim order passed by any forum can only be incidental to the main relief and cannot go beyond the scope of the main relief;

(iv) No interim order can be passed by a Tribunal, which would have the effect of a final order. The relief now granted by the Company Law Board is in the nature of a final order and hence, it could not have been passed by way of interim relief;

(v) The interim relief granted by the Company Law Board on 6-3-2012 is for the implementation of a CDR scheme with retrospective effect from 1.10.2011. Under the scheme, shares are to be allotted with retrospective effect from 1.10.2011. This would mean an increase in the share capital of the company with retrospective effect. But under the Transfer of Property Act or under the Sale of Goods Act, no asset can be created with retrospective effect. The existence of a property is a precondition for the creation of an interest in the property;

(vi) The impugned order of the Company Law Board has been passed purportedly with the object of avoiding financial insolvency of the company. But, the threat of financial insolvency can never be a ground in proceedings under Sections 397 and 398. The expression "just and equitable" appearing in Section 397(2)(b) has nothing to do with financial insolvency and hence, in a proceeding under Sections 397 and 398, financial insolvency is an irrelevant consideration;

(vii) Under the guise of passing an order either under Section 402 or under Section 403, the Company Law Board is not competent to re-write a contract. The appellant was lured to invest a sum of Rs.90 Crores in the company, at the instigation of IL & FS and a Shareholders' Agreement dated 12.4.2001 was entered into. The Shareholders' Agreement conferred certain special rights upon the appellant. The Company Law Board, by the impugned order, has obliterated those special rights, by reducing the shareholding of the appellant from 27.89% to 14.35%. This has the effect of re-writing the Shareholders' Agreement itself;

(viii) By the impugned order, the Company Law Board has permitted the company and the shareholders to do something in violation of the prescriptions contained in the Articles of Association and also to violate the provisions of the Companies Act, 1956. No Court or Tribunal is entitled to pass an order permitting one of the parties to do something in violation of the law of the land.

(ix) The CDR Scheme approved by the Company Law Board is completely unviable, unless the Government increased the offtake of water as well as its price. The appellant itself submitted alternative proposals for the revival of the company and the improvement of the debt equity ratio, but the Company Law Board did not consider it in the right perspective. The Scheme approved by the Company Law Board would result in the reduction of the percentage of holding of the appellant,

even while resulting in the increase in the percentage of holding of IL&FS.

(x) The Company Law Board ought to have seen that the Government of Tamil Nadu failed to enact a law regulating the abstraction and use of ground water for non-domestic purposes in the service area of the company. Therefore, the CDR cannot really take off.

These grounds have already been formulated by me, in paragraph-16 above, as questions of law arising for consideration in this appeal under section 10-F of the Act. Therefore, I shall now deal with them one after another.

QUESTIONS 1 & 2 (Whether company can file an application and whether company is a "party" within the meaning of section 403):

32. The first question of law raised by the appellant is that the Company Law Board was in error in allowing a miscellaneous application filed by the company itself. In a petition under Sections 397 and 398, neither the creditors nor the company can seek relief before the Company Law Board and hence, the Company Law Board committed a grave error in entertaining an application from the company itself.

33. As an offshoot of the above contention, the next ground of attack of the appellant is that the expression "any party to the proceeding" appearing in Section 403, would not encompass within itself the company. Therefore, the first question of law that I should address myself to is as to whether the company can make an application, whether interim or final in a proceeding under Sections 397 and 398 or not.

34. If we have a careful look at the scheme of the Companies Act, 1956, it could be seen that the Act is divided into 13 Parts, to which about 15 Schedules are also attached. Every Part is divided into various Chapters. Part VI of the Act deals with "Management and Administration" and the same is divided into 8 Chapters. The first Chapter contains General Provisions from Section 146 to Section 251. Chapter II deals with Directors from Section 252 to Section 323. Chapter III deals with Managing Agents, Chapter IV deals with Secretaries and Chapter V deals with compromises, arrangements and reconstructions.

35. Chapter VI of the Act starting from Section 397 and going upto Section 409 deals with "Prevention of Oppression and Mismanagement".

36. Section 397 enables "any member of a company" to approach the Tribunal, if he has a grievance that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any one or more members. Section 398 enables any member of the company to apply to the Company Law Board, if he has a grievance that the affairs of the company are conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company. But, the precondition for invoking Sections 397 and 398 is that "such members have a right so to apply, by virtue of Section 399."

37. Section 399 conditions the right of members to apply under Section 397 or 398, by prescribing (i) that not less than 100 members or not less than 1/10th of the total number of members, should join together to apply, if the company has a share capital; (ii) that not less than 1/5th of the total number of members should join together, if the company does not have a share capital; and (iii) that any member or members authorised by the Central Government may also apply, if the Central Government authorises them to do so irrespective of the fact that there is no required strength namely 100 members or 1/10th of the total number of members or 1/5th of the total number of members.

38. Section 401 entitles even the Central Government to apply for an order under Section 397 or 398. Therefore, it is clear that the jurisdiction of the Company Law Board can be invoked for redressal under Section 397 or 398, only by the members or by the Central Government and not by anyone else. Hence, the contention of the learned Senior Counsel for the appellant is correct to the limited extent that a person, who is not a member of the company, cannot invoke the jurisdiction of the Company Law Board under Section 397 or 398.

39. But unfortunately for the appellant, the Scheme of Chapter VI contains a restriction only in so far as the persons, who are entitled to apply are concerned. It is needless to point out that there are always two or more parties to every litigation. While the Code of Civil Procedure describes the party, who initiates proceedings as "the party suing" and the party against whom the proceeding is laid as "the party sued", Chapter VI of the Companies Act speaks only about persons, who are entitled to apply. In other words, it speaks about the party suing and not the party or parties sued. Therefore, none of the restrictions found in Sections 397, 398, 399 and 401 would apply, in so far as the respondents before the Company Law Board are concerned. Even creditors and third parties can be made respondents in a proceeding before the Company Law Board under Sections 397 and 398. This is confirmed by the various powers conferred upon the Company Law Board under Section 402. If we have a careful look at Section 402, it is seen (i) that under Clause (b), the Company Law Board can direct the purchase of shares and interests of any members of the company either by other members or by the company itself; (ii) that under Clause (e), the Company Law Board can set aside, terminate or modify any agreement between the company on the one hand and any person other than a Director, Managing Director or Manager on the other hand, after due notice to "the party concerned"; and (iii) that under Clause (f), the Company Law Board can set aside the transfer, delivery of goods, payment, execution or other act relating to the property made or done by or against the company, by invoking the deeming fiction of fraudulent preference.

40. To put it in simple terms, the powers conferred upon the Company Law Board include a power (i) to direct the company itself to do certain things; and (ii) to annul the effect of a contract entered into by a third party with the company. Therefore, it is clear that a company or a third party can be a respondent before the Company Law Board, as otherwise no direction can be issued by the Company Law Board to the company or to such third party to comply with its directions.

41. Once it is clear that by virtue of Clauses (b), (e) and (f) of Section 402, the company can be a respondent before the Company Law Board and that a direction can be issued to the company, it follows as a corollary that the company itself can become aggrieved by any direction given under the

said provision. Say for instance, an ex parte direction is issued to the company under Clause (b) or Clause (e) or Clause (f), would it be right then to contend that the company is not a party aggrieved and that the company cannot file an application under Section 403, to set aside such ex parte order?

42. Section 403 uses the expression "any party to the proceeding". This expression should be construed to mean and include within its ambit (i) any member or Central Government, who applies under Section 397 or 398; and (ii) any person, who is impleaded as a respondent before the Company Law Board, either as a third party agreement holder or as a third party transferee or as a member constituting the majority or as a member alleged to be guilty of oppression and mismanagement. In Sections 397 and 398, the Act uses only the expression "member or members of the company". But, in Sections 402 and 403, the statute uses the expressions "party concerned" and "party to the proceeding". Therefore, any person including the company, which is made as a respondent and against which, a direction can always be issued by the Company Law Board, would automatically come within the definition of the expression "party to the proceeding" under Section 403.

43. Relying upon the decision of the Chancery Division in Re a company, ex parte Johnson [1992 BCLC 701], it was contended by Mr. Sudipto Sarkar, learned Senior Counsel for the appellant that a company is only a nominal party to the proceedings of this nature and that these proceedings are, in substance, only between two sets of shareholders, one constituting minority and another, majority.

44. Mr.Sarkar is right to a limited extent. As pointed out in Re a company, the view that the company is a nominal party to such proceedings, appear to have held the field from 1872, based upon the exposition in Pickering Vs. Stephenson [1872 LR 14 Eq. 322]. But, the long line of decisions from Foss Vs. Harbottle [1843 (2) Hare 461, 67 ER 189], on which reliance was placed by Harman,J, primarily dealt with the question whether the company's money could be used to resist a petition complaining of misfeasance against Directors. But, while making a reference to the principle enunciated by Hoffmann,J in Re Crossmore Electrical and Civil Engineering Ltd. [1989 BCLC 137], Harman,J pointed out in Re a company that where a company is a necessary respondent, the company may be affected by the petition in two particular ways. The first is that it may have to give discovery of documents on what is sometimes a petition simply seeking a buy-out by one section of the members, of the other section of the members. The second is that the company itself might be ordered to buy back the shares, which are in issue. Therefore, Harman,J pointed out that an order of the said nature plainly involves the company's interest and requires its representation for two reasons namely (a) the interests of creditors may be affected; and (b) the interests of members as a whole may be affected, in that the company should have sufficient monies to carry on its business.

45. Thus, Harman,J recognised in Re a company, that the company has no business whatever to be involved in the S.459 petition, "apart from those two interests elaborated above." This is why I have pointed out in para 39 above that under Section 402(b), the Company Law Board can even order the buy out of shares of one set of members by the company itself and that therefore, if such an order is passed contrary to the wishes of the company or contrary to the interests of the company, it cannot be said that the company is not a "party aggrieved". '

46. In other words, a company may be a nominal party to a proceeding under Sections 397 and 398, subject however to the exceptions carved out by Harman,J in Re a company. Therefore, it cannot be held as a matter of general principle of universal application that a company can never be an applicant even under Section 403.

47. As a matter of fact, the application filed by NTADCL in Comp.A.No.47 of 2011, cannot be seen in isolation. The appellant itself filed a miscellaneous application to prohibit NTADCL from considering any CDR Scheme in Comp.A.No.15 of 2011. That application was closed by the Company Law Board by an order dated 21.7.2011, with a direction to place the CDR before the Board of Directors and then to come back to the Company Law Board. Therefore, in all fairness, the appellant itself should have gone back to the Company Law Board with another miscellaneous application. But the appellant filed a fresh main petition in C.P.No.101 of 2011. The order now passed by the Company Law Board on 6.3.2012 in Comp.A.No.47 of 2011 could have been passed very well by the Company Law Board in the application filed by the appellant itself. If the Company Law Board had done this, the appellant would not have had an opportunity to raise this objection at all.

48. In other words, the Company Law Board had two petitions before it. One was a petition filed by the appellant itself and another was a miscellaneous application filed by the company NTADCL. If the order impugned in this appeal had been passed either in the petition filed by the appellant or in common on both petitions, the objection with regard to the maintainability of Comp.A.No.47 of 2011 at the instance of NTADCL would not have arisen. Therefore, what is important for me to test is only the correctness of the contents, rather than the label with which the contents are packed.

49. Fortunately, it is not the contention of the appellant that the act of the company in filing the miscellaneous application Comp.A.No.47 of 2011 was ultra vires the Articles of Association. The entitlement of the company to approach a court of law, is not one of the "General Reserved Matters" or "AIDQUA Reserved Matters". If it had been so, the appellant could have vetoed the resolution of the Board to approach the court. Therefore, the right of the company to approach the Company Law Board is not assailed on the ground that it is one of the General Reserved or AIDQUA Reserved Matters, but is assailed on the larger ground that the company could not have filed a miscellaneous application at all in a proceeding under Section 397 or 398. But, the Scheme of Sections 397, 398, 399, 402 and 403 does not support such a contention.

50. Therefore, I hold on the first and second questions of law that though a company could not apply under Section 397 or 398, it can always suffer an order under Sections 397 and 398 and consequently, it is capable of making a miscellaneous application under Section 403. To that extent, the company will come within the definition of the expression "party" under section 403.

QUESTIONS 3 & 4 (SCOPE OF INTERIM RELIEF):

51. The next ground of attack is that the interim relief granted by the Company Law Board is beyond the scope of the main petition itself and the same has the effect of a final order. Therefore, in precise terms, the question of law that arises for consideration is as to whether the Tribunal is competent to grant an interim relief, which would have the effect of closing the rights of one of the parties once

and for all. 52. Relying on the decision of a Division Bench of this Court in K.P.M. Aboobucker Vs.K.Kunhamoo and Others [AIR 1958 Madras 287], Mr.Sudipto Sarkar, learned Senior Counsel appearing for the appellant contended that a court has no jurisdiction to grant, by way of interim relief, what could never be granted in the main suit itself. He also relied upon the decision of the Supreme Court in Cotton Corporation of India Limited Vs. United Industrial Bank Limited & Others [1983 (4) SCC 625] in support of his contention that an interim relief can be granted only in aid of and as ancillary to the main relief.

53. On the fundamental proposition that a court cannot grant an interim relief beyond the scope of the final relief sought by the parties and that the interim relief so granted could only be ancillary to or incidental to the main relief, there can be no quarrel. In K.P.M.Aboobucker, an injunction restraining the sale of a property was sought pending a suit for partition. But, the property was sought to be sold in execution of a decree passed in another suit. Therefore, the Division Bench of this Court held (i) that a court has no jurisdiction to grant, by way of interim relief, what could never be granted in the main suit itself; and (ii) that the court would not also grant an interim relief, which would lapse on the termination of the suit, but would leave the parties in the same position, in which, they were before the institution of the suit.

54. In Cotton Corporation, the Supreme Court was concerned with a case where the usance bills issued by a company, which purchased cotton and which bills were accepted by a bank, were sought to be disowned by the bank. The bank instituted a suit to declare that the co-acceptance of the bills by the Chief Branch Manager of the bank was null and void. Pending suit, the bank also sought an interim injunction restraining the Cotton Corporation from initiating the winding up proceedings. Injunction was refused by a learned Judge, but granted by the Division Bench. The Cotton Corporation went on appeal before the Supreme Court. Relying on the decision of the Constitution Bench in State of Orissa Vs. Madan Gopal Rungta {AIR 1952 SC 12}, the Court held that the interim relief can be granted only in aid of and ancillary to the main relief. But, when the final relief is barred by law, in the form of Section 41(b) of the Specific Relief Act, 1963, no interim relief of the same nature could be granted.

55. In answer to the above contentions of Mr. Sudipto Sarkar, learned Senior Counsel appearing for the appellant, Mr. Fredun Devitre contended that the scope of Sections 402 and 403 are too wide to enable the Court to pass any interim order. In support of the said contention, the learned counsel relied upon the decisions of this Court in Aruna Theatres and Enterprises P. Ltd. and others Vs. S. Balasubramanian [2008 (141) Company Cases 820 (Mad.)] and of the Supreme Court in (i) Wander Limited Vs. Antox India P. Ltd. [1990 (Supp.) SCC 727]; and (ii) Deoraj Vs. State of Maharashtra & Others [2004 (4) SCC 697].

56. Mr.T.K.Seshadri, learned Senior Counsel appearing for the Government of Tamil Nadu brought to my notice one decision of the Calcutta High Court in Re : New Standard Coal Co.Pvt.Ltd. [69 CWN 18] and a judgment of this Court in Palanisamy and another Vs. Milka Nutrients P. Ltd. and Others [2008 (144) Company Cases 619 (Mad.)], in response to the contentions of the learned Senior Counsel for the appellant.

57. In Aruna Theatres and Enterprises, relied upon by Mr. Devitre, a learned Judge of this Court held that in the given circumstances, the Court can always pass interim relief in the nature of final relief, provided the situation warrants.

58. But, Mr. Sudipto Sarkar, learned Senior Counsel attempted to draw a distinction by pointing out that in that case, this Court found that the Company Law Board merely gave effect to the decision of the majority and that the findings of the Company Law Board were based on valid materials and evidence on record. He also pointed out that despite upholding the order of the Company Law Board, this Court also gave further directions not to take policy decision nor to alienate or transfer or encumber the assets without the consent of the Company Law Board. Therefore, the learned Senior Counsel for the appellant submitted that the aforesaid decision is not of any assistance to the respondents.

59. Wander Limited is relied upon by the learned Senior Counsel for the respondents 1 to 3, to drive home the point that an Appellate Court would not normally interfere with the exercise of discretion by the Trial Court, while considering an application for interim relief. I do not think that anyone, either at the bar or at the bench, has any quarrel with this proposition, which is well settled for too long.

60. In Deoraj, relied upon by the learned Senior Counsel for the respondents 1 to 3, the Supreme Court observed that "situations emerge where the granting of an interim relief would tantamount to granting the final relief itself and that the withholding of an interim relief in some cases would tantamount to dismissal of the main petition itself." A test was laid by the Supreme Court in the said decision, as to the types of cases, in which, such an interim relief could be granted. After pointing out that such cases would be very rare and exceptional, the Supreme Court said "the Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing and at the end, the Court would not be able to vindicate the cause of justice."

61. But, Deoraj is sought to be distinguished by the learned Senior Counsel for the appellant on the ground that what was under challenge in that case was the election of a person as Chairman of a co-operative society. His tenure itself was for a period of one year. Therefore, the Supreme Court over-turned the decision of the Bombay High Court and granted an interim relief. Therefore, the learned Senior Counsel for the appellant contended that the case on hand cannot be compared to the one in Deoraj.

62. In Re New Standard Coal Co. Pvt. Ltd., relied upon by Mr.T.K.Seshadri, learned Senior Counsel for the Government of Tamil Nadu, a learned Judge of the Calcutta High Court observed that the power of the court to make interim orders in applications under Sections 397 and 398 are wide and ample.

63. But, again this judgement is sought to be distinguished by the learned Senior Counsel for the appellant on the ground that it was a case where an order was passed by consent of all parties directing the Special Officer to accept the offer of one person. The Special Officer was directed to

enter into an agreement. All these things happened by consent of parties. Therefore, the learned Senior Counsel for the appellant contended that the said decision is of no assistance to the respondents.

64. In Palanisamy, relied upon by the learned Senior Counsel for the Government of Tamil Nadu, a learned Judge of this Court held that during the pendency of a company petition under Sections 397 and 398, the Company Law Board has wide powers under Section 403 to regulate the conduct of the company's affairs. In the same judgment, it was also pointed out that such an interim order passed by the Company Law Board, cannot be interfered with by this Court.

65. Again, the above decision is sought to be distinguished by the learned Senior Counsel for the appellant on the ground that it was a case where the Company Law Board permitted the Managing Director to operate the bank accounts, in accordance with Clause 41 of the Articles of Association. In other words, it is his contention that the said decision arose out of a direction issued by the Company Law Board to do something intra vires.

66. I have carefully considered the rival contentions, the decisions relied upon by both parties and also the distinguishing features of each one of those decisions. The melancholy of law is that every principle of law is developed on the basis of facts and hence, every decision can be easily distinguished. Therefore, ultimately, every decision has to be tested on the facts, upon which, they turned on. Hence, let me now take a look at the facts, which compelled the Company Law Board to pass the order that it did.

67. On facts, what I have to test is (i) whether the interim relief granted by the Company Law Board arises out of and incidental or ancillary to the main relief sought; and (ii) whether the interim relief granted is actually the final relief or something short of the same.

68. To test both the above conditions, I must first take a look at the prayers made in the main company petition and the reliefs sought in the miscellaneous application. The reliefs sought in C.P.No.18 of 2007 are as follows :

"a. That this Hon'ble Board be pleased to declare that the requirement of an affirmative vote to render any valid resolution conferred by the Articles of Association of the company on the first respondent including that in Articles 49, 50, 193, 195, 197, 198, 217, 218 and 219 of the Articles of Association is bad in law, illegal, null and void and not binding on and/or enforceable against the company and other shareholders;

b. That this Hon'ble Board be pleased to strike down Article Nos. 49, 50, 193, 195, 197, 198, 217, 218 and 219 as violative of the provisions of the Act and against public policy;

c. That this Hon'ble Board be pleased to appoint or more persons as AIDQUA nominee director in place of the second respondent, Mr.Faizal N.Syed, to ensure that the affairs of the Board of Directors are carried out in a proper manner;

d. That this Hon'ble Board be pleased to pass an order of interim injunction against the second respondent Mr.Faizal N.Syed restraining him from acting as a director of the company and/or exercising Affirmative Vote pursuant to the Articles of Association of the company;

e. That the rights and/or powers and/or privileges conferred by or under the Articles of Association of the company on AIDQUA including by or under the Articles 49, 50, 191, 193, 195, 197, 198, 217, 218 and 219 and the corresponding obligations on the company and/or its other shareholders thereunder be suspended pending disposal of this petition;

f. That this Hon'ble Tribunal be pleased to an order and injunction restraining the respondents from exercising the right of Affirmative Vote in all matters affecting the performance of the Concession Agreement;

g. That this Hon'ble Tribunal be pleased to appoint Mr.Sameer Vyas as Managing Director of the company;

h. That pending the hearing and final disposal of the present petition, interim and ad-interim reliefs in terms of prayer clauses (a) to (g) be granted."

The reliefs sought in Comp.A.No.47 of 2011 are as follows :

(i) for impleading the IDBI and the Government of Tamil Nadu as respondents 6 and 7 to the main company petition; and

(ii) for permission to adopt and implement the CDR Scheme dated 2.12.2011 irrespective of the rights of the individual shareholders and stakeholders.

69. The reliefs sought in the main company petition predominantly revolve around the veto power, termed as "affirmative vote" conferred upon the appellant herein, in respect of matters, which are listed as "General Reserved Matters" and the matters that are listed as "AIDQUA Reserved Matters". The petitioners in the main company petition, who are the respondents 1 to 3 herein actually want the annihilation of those special rights conferred upon the appellant and its nominee director (7th respondent herein), by the Shareholders' Agreement dated 17.4.2001, which are mutatis mutandis incorporated into the Articles of Association of the company.

70. There are two possible scenarios as the outcome of the main company petition. One is the success of the petitioners in the main company petition, resulting in the total destruction of the special rights conferred upon the appellant. The other is the dismissal of the main company petition. It is true that as between these two extremes, the Company Law Board can also come up with another remedy to the malady. But, let me test the validity of the interim order, in the light of the two extreme scenarios that could evolve.

71. In the event of the main company petition being allowed as prayed for, the appellant would lose the special rights and the resolution of the Board of Directors dated 5.12.2011 approving the CDR

scheme would automatically come into effect. In such an event, the interim order now granted by the Company Law Board will be taken only to have been incidental or ancillary to the reliefs sought in the main petition. It can be recalled that by the interim order, the Company Law Board permitted the CDR scheme to be implemented, subject to the special rights conferred upon the appellant by the Shareholders' Agreement and the Articles. In event of the main company petition being allowed as prayed for, the interim order would merge with the final order except that the conditions incorporated in the interim order would go. In the event of the main company petition being dismissed, what would happen to the events that take place pursuant to the interim order, is the vital question around which the answer to this question of law revolves.

72. In the event of the main company petition being dismissed, the interim order passed by the Company Law Board would automatically go. Therefore, all that had happened pursuant to the interim order granted by the Company Law Board, should also go. If something that was done in pursuance of the interim order of the Company Law Board, is incapable of being reversed or if something done in pursuance of the interim order would continue to stick on to the parties even after dismissal of the main company petition, then, the grant of such an interim relief will have to be viewed with lot of circumspection, doubt and careful analysis.

73. In other words, the only test to my mind, to be applied in such cases, is to find out, if the implementation of the interim orders passed by a Court or Tribunal would result in a situation that cannot be rolled back or not. If the position of the parties, pursuant to the implementation of an interim order would get altered to the extent that they are irreversible or that the restitution of the parties to their original position becomes impossible, then such an interim order cannot be passed. The Court should simply keep in mind the philosophy behind Section 144 before passing an interim order, provided the interim relief arises out of or is incidental or ancillary to the main relief.

74. The question as to whether an interim relief arises out of or is incidental or ancillary to the main relief, can be tested safely on the premise as to what would happen, if the party seeking the interim relief succeeds in the main petition. The other question as to whether the interim relief would put the parties or the subject matter in an irreversible position or not, has to be tested on the premise as to what would happen, if the party seeking the relief fails in the main petition. Though it may not be an appropriate example for the present case, I would consider the grant of an interim relief by a Family Court for continued cohabitation pending divorce proceedings as a glaring example of something where the parties could be put to an irreversible position.

75. If tested on the above principles, it will be clear that the interim relief sought by the company actually arose out of the main relief. It was certainly incidental and ancillary to the main relief sought. The main relief was for the cancellation of the special rights conferred upon the appellant, the exercise of which, resulted in the CDR scheme being vetoed out. Therefore, the interim relief to go ahead with the CDR scheme ignoring the special rights of the appellant, certainly arose out of the main relief. As a matter of fact, it was the appellant, which first filed a miscellaneous application in Comp.A.No.15 of 2011 for an injunction to restrain the company from considering any CDR scheme till Comp.A.No.32 of 2010 is disposed of. The said application was closed by the Company Law Board with a direction to the company to have the scheme considered by the Board of Directors.

Accordingly, the Board of Directors met on 5.12.2011 and the appellant vetoed the resolution. Thereafter, the appellant themselves came up with a petition in C.P.No.101 of 2011 seeking a declaration that the CDR scheme cannot be implemented. There was no necessity for the appellant to file C.P.No.101 of 2011 in the light of the special rights conferred upon them by the Articles of Association and in the light of the recognition of the existence of such special rights by the respondents, which led them to file C.P.No.18 of 2007. If the dismissal of C.P.No.101 of 2011 would have had no effect at all, they could not have filed it. Let me look at another scenario. If, despite the veto exercised by the appellant, the company had gone ahead with the CDR scheme, it would have left only the appellant to seek interim stay of implementation of the CDR scheme. Perhaps, anticipating such a scenario, the appellant filed C.P.No.101 of 2011. If the company had allowed this to happen, the appellant could have been on the other side of the table to justify the prayer for interim relief to put on hold the CDR scheme. Therefore, I have no doubt in my mind that the interim relief actually arose out of and was incidental and ancillary to the main relief.

76. Now, let me take up the question as to whether the position is irreversible or not, in the event of the main company petition being dismissed.

77. The main features of the CDR scheme are (i) that a part of the debt gets converted into equity; (ii) that the Government is bringing in funds to the extent of more than Rs.100 Crores; and (iii) that the Government is also promising committed water off-take.

78. In so far as the conversion of debt into equity is concerned, the steps involved, to my mind, would be as follows :

(i) making of entries in the books of accounts of the lenders;

(ii) making of entries in the books of accounts of NTADCL;

(iii) making of entries in the register of members of NTADCL;

(iv) issue of share certificates to the lenders to the extent of conversion of debt into equity; and

(v) filing of appropriate returns both by the lenders and by NTADCL with competent authorities.

79. Since all the above steps, except perhaps issue of fresh share certificates, are required to be done only through entries in books of accounts, it is always possible to reverse those entries in the books and registers. This can happen on both sides. While the issue of share certificates would result in fresh entries in the register of members of NTADCL, the reversal of entries would only mean reduction of capital. The share certificates, even if issued to the lenders, can always be directed to be surrendered to the company, in the event of the appellant succeeding in the main company petition. It would then be only a question of reversal of the other entries and the reduction of share capital. Therefore, the conversion of debt into equity carried out in pursuance of the interim orders of the Company Law Board involves various steps, that are capable of being reversed.

80. The Government's offer to pump in more than Rs.100 Crores is also a step at least in theory, that is capable of being reversed. But, the only hitch here is that NTADCL is not in a position to even service its debts. Therefore, NTADCL will not be able to repay to the Government the amount of more than Rs.100 Crores pumped in by the Government under the CDR.

81. However, the silver lining is that the amount of Rs.36 Crores already paid by the Government towards DSRF and the amount of Rs.114 Crores to be brought in by the Government in a phased manner, is proposed to be utilised for payment out to the lenders, to prevent the account of NTADCL from becoming a Non Performing Asset. Therefore, in the event of the main company petition being dismissed, the Company Law Board or even this Court can direct those lenders, to refund to the Government, the amount of Rs.150 Crores. In other words, restitution of status quo ante as on 2.12.2011 even in respect of the Government of Tamil Nadu is possible, in the event of the main company petition being thrown out.

82. Therefore, it is clear that the interim relief now granted by the Company Law Board is something that is capable of being reversed, in the event of the appellant's success in the main company petition. If that is so, I do not see as to why the Company Law Board could not have passed such an order.

83. Once it is found that all the actions carried out in pursuance of the interim order passed by the Company Law Board are capable of being reversed, in the event of the appellant succeeding before the Company Law Board, then there is no point in contending that the Company Law Board granted the relief which did not arise out of or incidental or ancillary to the main relief. I have indicated earlier that the scope of the main petition before the Company Law Board was to test whether the right to an affirmative vote in favour of the appellant has to be deleted or not. It is this affirmative vote that resulted in the CDR scheme being rejected by the Board in its meeting held on 5.12.2011. This is why the company came up with Comp.A.No.47 of 2011. Hence, the interim relief sought by NTADCL, cannot be stated to be beyond the scope of the main company petition. It cannot also be stated to be in the nature of a final order. Therefore, the third and fourth questions of law are answered accordingly.

QUESTION No.5 (retrospective creation of assets in the form of shares and their allotment):

84. The next ground of attack to the impugned order of the Company Law Board is that the CDR Scheme placed before the Board of Directors on 5.12.2011 and now approved by the order of the Company Law Board dated 6.3.2012, is intended to take effect retrospectively from 1.10.2011. In pursuance of the interim order passed by the Company Law Board, the company now claims that shares have, in fact, been allotted to the lenders. The company has admittedly filed necessary returns with the Registrar of Companies on 14.9.2012, allotting shares to the lenders with effect from 1.10.2011. Therefore, the contention of the learned Senior Counsel for the appellant is that such allotment of shares is contrary to the provisions of the Transfer of Property Act and the Sale of Goods Act. In other words, the contention of the learned Senior Counsel for the appellant is that shares constitute an asset for anyone. An asset cannot be created with retrospective effect, from a date prior to the asset actually coming into existence. Therefore, the contention of the learned

Senior Counsel for the appellant is that inasmuch as the creation of an asset has been sanctioned by the Company Law Board by its impugned order, with effect from a date anterior to the date of the very coming into existence of the asset, the order goes contrary to the well accepted and fundamental principle that governs the provisions of the Sale of Goods Act and the Transfer of Property Act. The above contention of the appellant is sought to be repelled by Mr.S.N.Mookherjee, learned Senior Counsel for the company, by relying upon the decision of a Court of Appeals in Re Cumana Limited {1986 BCLC 430}. In the said decision, a date chosen for the valuation of shares, by the Judge was in question before the Court of Appeals. The Court of Appeals referred to the wide discretion conferred upon the Judge, under Section 75(4)(d) of the Companies Act, 1980 and held that the Judge had wide discretion to choose a date, as the value of the shares went down between the date of the petition and the date of the judgment.

85. But, relying upon another decision of the Court of Appeals in Profinance Trust SA vs. Gladstone {2001 EWCA Civ 1031}, where the decision in Re Cumana Limited, was considered by the subsequent Court of Appeal, Mr.Sudipto Sarkar, learned Senior Counsel for the appellant contended that the law did not remain static in the last 15 years. He also contended that the date chosen by a party or a Court for valuation of shares, has nothing to do with the question as to whether shares could be created and allotted with retrospective effect or not. Even in Marshall Sons & Co. (India) Ltd vs. Income Tax Officer {1997 (2) SCC 302}, the question that arose for consideration was as to whether a Scheme of Amalgamation brought forth by a holding and subsidiary company, was actually a Scheme devised to evade taxes legitimately payable by the transferor or not. The Scheme of Amalgamation had been sanctioned by the Company Court, with effect from a particular date. This led to the transferor making some savings in the form of income tax. Therefore, the Department contended that it was a device designed to evade taxes. But the said contention was overruled. But, I do not think that cases of Amalgamation, have any comparison with a case of the nature that we have on hand. In the case of Amalgamation, two companies come together. There is always a time gap between the date of resolution and the date of sanctioning of the Scheme. Till the certified copies of the orders of the Court are filed with the Registrar of Companies, the Scheme of Amalgamation does not come into effect. Therefore, I do not think that a parallel should be drawn from cases of Amalgamation, to test whether what was done in this case is right or wrong.

86. Mr.Sudipto Sarkar, learned Senior Counsel for the appellant is right in contending that the choice of a date for the valuation of the shares, is completely different from the date of creation of the shares itself. While choosing a date for valuation of the shares, the parties or the Court proceed on the basis that the property is already in existence. But the price alone is determined with reference to an earlier date. In the case on hand, the asset viz., the shares themselves were created with retrospective effect, which happens to be the primary objection of the appellant.

87. But, unfortunately for the appellant, the said contention overlooks a very important aspect. It is no doubt true that shares in a company constitute an asset for a person who holds them. But in so far as the company is concerned, the share capital is always shown as a liability. The creation of an asset in the form of shares in favour of the lenders, cannot be looked at in isolation. In so far as the lenders are concerned, they already had an asset in the form of something that is recoverable from NTADCL. That asset which the lenders had, got converted by the impugned order into another form

of asset. In so far as the NTADCL is concerned, one form of liability in the form of the loans and advances repayable to the lenders got converted into another form of liability viz., share capital.

88. In other words, there was no creation of a new asset with effect from a date prior to the date of the asset coming into existence. For the lenders, one form of asset was converted with retrospective effect into another form of asset. For NTADCL, one form of liability was converted into another form with retrospective effect. Therefore, the contention that the CDR Scheme goes against the fundamental principles of Transfer of Property Act and the Sale of Goods Act, may not be correct.

89. Section 5 of the Transfer of Property Act defines the expression "transfer of property, to mean an act by which a living person conveys property in present or in future to one or more other living persons or to himself and one or more other living persons. Living person includes a company. Section 6 of the Act states that property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force. Section 6 contains a list of properties that cannot be transferred. The conversion of one form of property into another form or the conversion of one form of liability into another form, is not prohibited by the Transfer of Property Act. Therefore, on the fifth question of law, my answer would be that the conversion of debt into equity with retrospective effect, does not amount to the creation of an interest in a property which was not in existence. It is just a conversion of one form of liability into another form, in so far as the Company is concerned.

QUESTION No.6 (threat of financial insolvency not a ground under sections 397/398):

90. The next contention of Mr.Sudipto Sarkar, learned Senior Counsel for the appellant is that the Company Law Board has allowed the application of the company sanctioning a CDR Scheme, only on the ground that the survival of the company depended entirely upon the sanctioning of the Scheme. In other words, the Company Law Board was carried away by the fact that the company has been unable to service its debts. The lenders convinced the Company Law Board that if the CDR Scheme was not sanctioned, the account of the company will become a Non-Performing Asset and that the company was on the verge of financial insolvency. This, according to the learned Senior Counsel for the appellant, is not one of the factors which form relevant consideration for deciding a petition under Sections 397 and 398.

91. Drawing my attention to the distinction between the import of the expression "just and equitable" appearing in Section 397(2)(b) and the import of the very same expression appearing in Section 433(f) of the Companies Act, the learned Senior Counsel for the appellant contended that while the former dealt with conditions other than financial insolvency, the latter confined its area of operation only to financial insolvency. In other words, his contention is that if the company had become financially insolvent, it may be a good ground for winding up under the "just and equitable" provision contained in Section 433(f). But the same expression "just and equitable" appearing in Section 397(2)(b), has no application to financial insolvency. The expression appearing in Section 397(2)(b) relates only to situations where it had become impossible to carry on the affairs of the company due to a constant fight between two groups of shareholders. Therefore, the learned Senior Counsel for the appellant contended that the order impugned in the above appeal, would not fall

within the parameters of Section 402(g) which empowers the Company Law Board to pass an order providing for any matter, which in its opinion, is just and equitable.

92. The learned Senior Counsel for the appellant also contended that to invoke Section 397, a person should establish oppression and that to invoke Section 398, a person should establish mismanagement. These expressions "oppression" and "mismanagement", should be given only their ordinary dictionary meaning and that they cannot be given such a meaning as to include financial insolvency. In support of the said contention, the learned Senior Counsel relied upon a passage from the decision of the House of Lords in Scottish Cooperative Wholesale Society Ltd vs Meyer {1958 Weekly Law Report 404}. In the said passage, the House of Lords opined that the words of Section 210 (U.K. Companies Act, 1948), do suggest that the Legislator had in mind some remedy whereby the company, instead of being wound up, will continue to operate. However, the House of Lords indicated that it would be wrong to infer therefrom that the remedy under Section 210 is limited to cases where the company is still in active business. If a remedy is available when the oppression is so moderate that it would only inflict wounds on the company while leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice - destroying the value of his own shares with those of everyone else - the injured shareholders have, a remedy under Section 210.

93. In response to the above contentions of Mr.Sudipto Sarkar, it is contended by Mr.T.K.Seshadri, placing reliance upon Hind Overseas P. Ltd vs. Raghunath Prasad Jhunjhunwalla {1976 (46) Comp.Cases 90}, that although the Indian Companies Act is modelled on the English Companies Act, the Indian Law was developing on its own lines. Therefore, the Supreme Court pointed out that where the words used in both the Acts (Indian and English) are identical, the English decisions may throw good light and reasons may be persuasive.

94. The above contention of Mr.T.K.Seshadri, learned Senior Counsel for the Government of Tamil Nadu, is sought to be repelled by Mr.Sudipto Sarkar, learned Senior Counsel for the appellant by placing reliance upon the extensive usage of English precedents by the Supreme Court in various subsequent decisions including the one in Needle Industries (India) Ltd vs. Needle Industries Newey (India) Ltd {1981 (3) SCC 333}, where the Supreme Court relied upon the very decision of the House of Lords in Scottish Co-operative Wholesale Society Limited. Drawing my attention to paragraph 48 of the said report, the learned Senior Counsel for the appellant contended that even if a company is prosperous and was making substantial profits, there was no obstacle to its being wound up, if it is just and equitable to do so in terms of Sections 397 and 398.

95. I have carefully considered the rival submissions. While for winding up a company in terms of Section 433(e) and (f), financial insolvency may be a sine qua non, it is not necessarily so under Sections 397 and 398 read with Section 402. Even a profit making company, whose net-worth is extremely sound, can be ordered to be wound up, if it is impossible to carry on the affairs of the company.

96. But it does not mean that the impugned order of the Company Law Board was passed only with a view to prevent financial insolvency. Two groups of shareholders were before the Company Law

Board in this litigation. Rightly or wrongly, the company itself was also made a party. The lis between the groups of shareholders commenced in the year 2007. While it took 11 years for NTADCL to commence its operations (it was incorporated in 1994 and operations commenced in 2005), it just took only 2 years for the shareholders to indulge in a long drawn litigation, from the date of commencement of operations. The company was left with two options. One was to allow the shareholders to fight for some more time before there was nothing left for them to fight about. The other option was to seek infusion of some blood in the form of finances, so that the shareholders can keep alive their fight for some more time. It is just that the company chose the second option and the Company Law Board blessed the same with its order dated 6.3.2012. Therefore, I do not think that the impugned order was passed, with a view to prevent financial insolvency of the company. While it is one way of looking at it, there is also another way of looking at it viz., that the Company Law Board preserved, by the impugned order, the subject matter of controversy alive. Therefore, I hold on the sixth question that the impugned order cannot be looked at as one solely intended to prevent financial insolvency. It was intended to preserve the company in tact and keep it running, so that the dispute between the parties could be resolved, at a later stage.

QUESTION No.7 (re-writing of a contract):

97. The next question raised by the appellant is as to whether the Company Law Board, in exercise of the power conferred either under Section 402 or under Section 403, was competent to re-write a contract viz., the terms and conditions of the Shareholders Agreement. Under the Shareholders Agreement dated 12.4.2001, the appellant agreed to bring in equity in a sum of Rs.90 crores, at the instance of IL&FS. The Shareholders Agreement conferred certain special rights upon the appellant. It is only in exercise of the special rights of an affirmative vote that the appellant, through its nominee Director, defeated the resolution for the adoption of a CDR Scheme. The right so exercised by the appellant is sought to be defeated by the order of the Company Law Board. Therefore, it is contended by the appellant that by the order impugned, the Company Law Board has annulled the effect of a right conferred under a contract. By doing so, the Company Law Board, according to the appellant, has re-written a contract. The CDR Scheme also reduced the percentage of shareholding of the appellant from 27.89 to 14.35. This, according to the appellant, virtually tantamount to the Shareholders Agreement being re-written by the Company Law Board and that the same is not permissible in law.

98. In support of the above contention, Mr.Sudipto Sarkar, learned Senior Counsel for the appellant, relied upon two decisions, viz., the decision of the House of Lords in O Neill vs. Phillips {(1991) 1 W.L.R. 1092} and the decision of the Supreme Court in Shin Satellite Public Co. Ltd vs. Jain Studios Ltd {2006 (2) SCC 628}.

99. In O'Neill, the House of Lords considered the principle of interpretation to be applied, while construing the express terms of a contract. While doing so, the House of Lords pointed out that before venturing to interpret the terms of a contract, a Court is bound to cross check whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. If the interpretation would conflict with the promises which the parties appear to have exchanged, the Court is not entitled to adopt such interpretation.

100. In Shin Satellite, a learned Judge of the Supreme Court was concerned with an application under Section 11(6) of the Arbitration and Conciliation Act, seeking the appointment of an Arbitrator. The application was resisted on the ground that the arbitration agreement was not legal and valid. While overruling the objections and allowing the application for appointment of an Arbitrator, the Supreme Court indicated that in terms of Section 7 of the Act, the arbitration clause is severable and that if the blue pencil rule could be applied and the valid clause can be severed, the Court would adopt such an interpretation. But even while holding so, the Supreme Court cautioned that the Court should not re-write a contract, in the nature of novation.

101. In response to the above contentions, it is submitted by Mr.T.K.Seshadri, learned Senior Counsel for the Government that once the various terms and conditions contained in the shareholders agreement, got transported into the Articles of Association of the company, it is not open to the appellant to rely upon the Shareholders Agreement. In so far as the Articles of Association are concerned, the power of the Company Law Board even to direct the amendment or alteration of the Articles of Association, is well recognised in terms of Section 404(1). The learned Senior Counsel, relied upon the decision of the Delhi High Court in Pearson Education Inc. vs. Prentice Hall India (P) Ltd. {2005 (84) DRJ 455} to contend that the Articles of Association can be amended by an order of the Company Law Board. He also relied upon the decision in Dineker Rai D. Desai vs. R.P.Bhasin {1986 (60) Comp.Cases 14}, where a Division Bench of the Delhi High Court even amended the election rules while dealing with amended petitions under Sections 397 and 398.

102. Mr.S.N.Mookherjee, learned Senior Counsel for the company relied upon the decision of the Supreme Court in Bennet Coleman and Co. vs. Union of India {1977 (47) Comp. Cases 92}, where the Supreme Court distinguished the powers of the Central Government under Section 408 and the powers of the Company Law Board under Section 402 and held that the powers of the Company Law Board are much wider.

103. I have carefully considered the submissions made on both sides. In order to find an answer to the contention of the appellant, all that is required is just to take a look at the Scheme of Chapter VI of Part VI of the Act. While Section 397 deals with an application for relief in cases of oppression, Section 398 deals with an application for relief in cases of mismanagement. The right to apply is clearly delineated in Section 399. Section 400 speaks about the issue of notice to the Central Government and Section 401 recognises the right of the Central Government itself to apply under Section 397 or 398. Having clearly indicated the grounds on which applications could be filed and the method of filing applications, in Sections 397 to 401, the Act speaks about the powers of the Company Law Board in Section 402. Section 402 begins with the expression "without prejudice to the generality of the powers of the Company Law Board under Section 397 or 398". In other words, the powers listed in Section 402 are not exhaustive. They are only indicative of the wide jurisdiction of the Company Law Board. That it is so, is made clear in Section 404. Section 404(1) prohibits the company from making any alteration in the Memorandum and Articles, without the leave of the Company Law Board, whenever an order passed under Section 397 or 398, directs an alteration to be made in the Memorandum and Articles of the company. Nowhere in Section 397 or 398 or 402, is there any specific provision for an order directing the alteration of the Memorandum and Articles of Association of the company. Without there being an express provision in Sections 397 or 398 or 402

or even 403, Section 404 (1) speaks about the consequences of an order passed under Section 397 or 398 for an alteration in the Memorandum and Articles of a company. Therefore, what is contained in Section 404(1) is the recognition of a power for the Company Law Board to alter the Memorandum and Articles of a company, though such a power is not spelt out in express terms in any of the preceding Sections. Rather than conferring a power in express terms, Section 404(1) prohibits the company from doing anything contrary to an order of such a nature, to which a recognition is granted by Section 404(1).

104. It is needless to point out that the Articles of Association of a company, constitute a contract inter se between the shareholders. Section 36 of the Companies Act, makes the Memorandum and Articles, binding on the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member. This is why the Supreme Court pointed out in Claude-Lila Parulekar vs. Sakal Papers (P) Ltd {2005 (11) SCC 73} that the Articles of Association constitute a contract between the shareholders and the company, apart from constituting a contract between the shareholders inter se. In other words, it is nothing but a larger and wider version of the Shareholders Agreement. While the shareholders agreement is one to which there were only few parties, the Articles of Association of a company becomes an agreement, to any person who was not only a shareholder at the time when the Articles came into existence, but also includes those who become shareholders subsequently. Therefore, if such a contract in the form of Articles of Association, can be modified or altered by the Company Law Board under Section 397 or 398, I do not see any reason as to why the Shareholders Agreement cannot be altered or modified by the Company Law Board. Hence, my answer to the seventh question of law is that once a shareholders agreement had taken the shape of articles of association, it becomes amenable to alteration or modification, under orders of the Company Law Board, in view of the provisions of Section 402, 403 and 404.

QUESTION No.8 (impuged order to do something in violation of statute and Articles):

105. The next question raised by the appellant is as to whether the Company Law Board is entitled to pass an order permitting the company to do something in violation of the Articles of Association and also in violation of the provisions of the Companies Act, 1956.

106. It is the contention of the appellant that under Article 193, all decisions to be taken by the Board shall be duly and validly taken by the resolution adopted by an affirmative vote of a majority of Directors present at the meeting. The proviso to Article 193, states that in respect of a general reserved matter, no resolution shall be effective and valid, unless it has been adopted by the affirmative vote of at least one nominee Director of each shareholder. Similarly, in the case of AIDQUA reserved matter, no resolution will be effective and valid unless it has been adopted by the affirmative vote of the nominee Director of AIDQUA. Therefore, the resolution to approve the CDR scheme, taken at the meeting of the Board held on 5.12.2011, is invalid and ineffective in view of Article 193. Moreover, it is the further contention of the appellant that under Article 96, the share capital of the company can be increased only by an ordinary resolution passed in a general meeting. If a decision is taken to increase the capital by the creation of new shares, the company is obliged to send a written offer to each shareholder under Article 98 and the shareholder should be given 15

days time from the date of the written offer, to take a decision. This procedure ought to have been followed, since the CDR scheme actually involves the issue of new shares and the increase of the share capital.

107. Moreover, as and when a company makes any allotment of shares, it is required to file with the Registrar, a return of allotments, as per Section 75(1) within 30 days. In this case, the allotment of shares has taken place on 1.10.2011. The returns were filed only on 14.9.2012. The order of the Company Law Board itself was passed only on 6.3.2012. The Company Law Board was aware of the fact that the allotment was to take effect from 1.10.2011. Therefore, it was obvious that Section 75(1) could not have been complied with and that the same is also a punishable offence. Despite this, the Company Law Board permitted the CDR Scheme, thereby allowing a statutory violation.

108. In any case, Section 81(1) of the Act stipulates that whenever it is proposed to increase the subscribed sharecapital of the company, by allotment of further shares, then such further shares should be offered to the persons who are the holders of the equity shares of the company in proportion, as nearly as circumstances admit to the capital paid up on those shares at that date. If the procedure prescribed under sub-section (1) of Section 81 is not to be followed, then the case should fall under sub-section (1-A).

109. Relying upon the decision of a Division Bench of the Calcutta High Court in Maharani Lalita Rajya Lakshmi M.P. vs. Indian Motor Co. (Hazaribagh) Ltd {AIR 1962 Cal. 127}, Mr.Sudipto Sarkar, learned Senior Counsel for the appellant submitted that the Directors cannot be allowed or directed to do something which the law does not permit them to do or which might be objectionable in law.

110. Mr.Sudipto Sarkar, learned Senior Counsel for the appellant also relied upon the decision of the Supreme Court in Claude-Lila Parulekar vs. Sakal Papers (P) Ltd {2005 (11) SCC 73}, where the Supreme Court pointed out that the Articles constitute a source of power of the Directors, who can, as a result, exercise only those powers conferred by the Articles in accordance therewith. Any action referrable to the Articles and contrary thereto would be ultra vires. It was also held in the same decision that the allotment of shares in violation of the prescription contained in the Articles, is invalid.

111. In response to the above contentions, Mr.S.N.Mookherjee, learned Senior Counsel appearing for NTADCL, contended that all the restrictions placed in the various provisions of the Companies Act, are subject to the powers of the Company Law Board under Sections 397 and 398 read with Section 402. In support of the said contention, the learned Senior Counsel relied upon the decision of a Division Bench of this Court in Shoe Specialities Pvt. Ltd vs. Standard Distelleries and Breweries {1997 (90) Comp. Cases 89}, where the Division Bench of this Court rejected the contention that the power exercised under Section 398 read with Section 402 should be read as subject to the other provisions of the Act. He also relied upon the decision of the Supreme Court in Cosmo Steels Pvt. Ltd vs. Jairam Das Gupta {1978 (1) SCC 215}, where the Supreme Court pointed out that when an order is passed under Section 402, directing the company to purchase its own shares, leading to reduction of share capital, there was no necessity to follow the procedure prescribed by Sections 100 to 104. In yet another decision passed by the Delhi High Court in Sanjay Gambhir vs. D.D.

Industries {2013 (177) Comp. Cases 99}, relied upon by Mr. S.N.Mookherjee, learned Senior Counsel for the company, the Delhi High Court held that while passing orders under Section 403, the Company Law Board is not obliged to follow the mandatory requirements under Sections 169 and 186. In other words, the Court held that the power is not subject to the other provisions of the statute.

112. In Bennet Coleman & Co. vs. Union of India {1977 (47) Comp. Cases 92}, the Court pointed out that while there are restrictions on the exercise of power by the Central Government under Section 408, there are no such limitations, with regard to the power exercised by the Company Law Board under Section 402. Similarly in Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick {1980 (50) Comp. Cases 771}, a Calcutta High Court held that the Court had the power to make an order which might be contrary to the Articles of Association, provided it satisfies the parameters of Sections 397 and 398.

113. I have carefully considered the rival submissions.

114. Before taking up the other contentions, it is easy to dispose of the objections based upon Section 81. Section 81(3)(b)(ii) makes it clear that nothing in Section 81 would apply to the increase of the subscribed capital of a public company caused by the exercise of an option attached to the debentures issued or loans raised by a company to subscribe for the shares in the company. Therefore, I do not think that Section 81(1) would go to the rescue of the appellant.

115. Coming to the contention that the order of the Company Law Board approving the Scheme, would result in the violation of the Articles of Association of the company, I should point out that the appellant is primarily aggrieved by the rights conferred under Articles 193 and 196 having been destroyed by the impugned order. But the very main company petition of the respondents 1 to 3 is to destroy those Articles. As an incidental relief to the main company petition, NTADCL sought the approval of the CDR Scheme, which was vetoed down by the appellant in the meeting of the Board of Directors. When the very grievance of the main petitioners before the Company Law Board was the unworkability of certain Articles of Association and when the Company Law Board has chosen to pass an order which really put on hold those Articles in respect of one particular Scheme, the question of violation of those Articles would not arise. In other words, the contention merely begs the question. If the Company Law Board had been articulate in its order, it would have simply granted an interim suspension of Articles 193 and 196 in so far as the CDR Scheme is concerned. In such an event, the question of violation of the Articles would not have arisen. Therefore, the impugned order of the Company Law Board has to be understood as one which kept in suspense, certain Articles of Association, for the purpose of enabling the company to implement the CDR Scheme and to prolong its life span at least for some more time.

116. If viewed from the above angle, it will be clear that the impugned order is not violative of any Articles of the company, except that it struck at the very root of some Articles of Association, which had become a contentious issue between the parties. In such circumstances, it may not even be necessary for me to consider whether or not the Company Law Board has powers to pass an order, in violation of the provisions of the Articles of Association or the provisions of the Companies Act, at

all. The eighth question is answered accordingly.

QUESTION No.9 (reduction of percentage of holding of one shareholder and increase of percentage of another):

117. The next question of law raised by the appellant is that the CDR Scheme approved by the Company Law Board is completely unviable and that the appellant itself submitted alternative proposals for the survival of the company and the improvement of the debt equity ratio, but the Company Law Board did not consider it in the right perspective. The Scheme approved by the Company Law Board, would result in the reduction of the percentage of holding of the appellant, even while resulting in the increase in the percentage of holding of IL&FS.

118. But in response, it is contended by the respondents that the CDR Scheme approved by the Company Law Board, was considered by Experts in the field of finance and the Empowered Group constituted in accordance with the guidelines issued by the Reserve Bank of India. Therefore, it is their contention that as an adjudicatory body, which does not have the expertise in the field of finance, the Company Law Board could not have considered the alternative Scheme submitted by the appellant, when they were not supported by any expert opinion. In other words, the contention of the respondents is that what was proposed by the appellant as an alternative Scheme, was neither acceptable to the lender nor supported by any expert opinion, while the Scheme approved by the Company Law Board had the approval of experts and the consent of all the lenders.

119. It is true that the CDR Scheme now approved by the Company Law Board, was considered by the Empowered Group and approved on 24.11.2011. The Empowered Group comprised of Executive Director level representatives of IDBI, ICICI Bank Ltd., and State Bank of India as standing members, in addition to the Executive Director level representatives of Financial Institutions and Banks who have an exposure to the concerned company. Originally, the Reserve Bank of India had issued Master Circular No.DBOD.BP.BC.12/21.04.048/2007-2008 dated 2.7.2007. It was modified by a fresh Master Circular bearing DBOD No.BP.BC.20/21.04.048/2008-09 dated 1.7.2008. It must be mentioned here that the Master Circular was actually issued for the purpose of laying down "Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances", based upon the recommendations made by the Committee on the Financial System. Paragraph 4.2.16 of the Master Circular indicates that a CDR System was originally evolved, on the basis of the institutional mechanism available in countries like U.K., Thailand and Korea. The Master Circular contemplated a 3 Tier structure for CDR System viz., (i) CDR Standing Forum and its Core Group; (ii) CDR Empowered Group; and (iii) CDR Cell. The CDR Empowered Group, as stated earlier, is to comprise of standing members as well as the representatives of the Banks which have exposure to the company. Therefore, neither the Company Law Board nor this Court has the expertise to throw the Scheme out of the window, on the basis of an alternative Scheme proposed, not by a lender but by a shareholder. All the lenders without exception, accepted the proposal approved by the Empowered Group. As against a Scheme accepted by all lenders and approved by an Empowered Group constituted by the Reserve Bank of India, the applicant had a proposal which did not have the acceptance of the lenders and which did not go through a process of consideration by an Expert Group. Therefore, the Company Law Board was right in not considering the alternative

Scheme.

120. The next limb of the present question is as to whether the CDR Scheme which results in the reduction of the percentage of holding of the appellant, even while resulting in the increase in the percentage of shareholding of IL&FS could have been approved by the Company Law Board at all.

121. In response to this contention, it is argued by the respondents that while balancing the interest of equity shareholders as between themselves and the shareholders and the creditors, the interest of the company, should be of paramount consideration. According to the respondents, the impugned order of the Company Law Board has been passed in the best interest of the company NTADCL and that therefore, the reduction or increase in the percentage of holding of the shareholders, cannot tilt the balance. In other words, the contention of the respondents is that if it is in the best interest of the company, the fact that one shareholder might suffer a loss, cannot be an impediment.

122. However, repelling the above contention of the respondents, it is argued by Mr.Sudipto Sarkar, learned Senior Counsel for the appellant, on the strength of the decision of the Delhi High Court in Pearson Education Inc. vs. Prentice Hall India (P) Ltd. {2005 (84) DRJ 455} that under the garb of "interest of the company", the company cannot be allowed to take what is not legitimately due to it.

123. However, relying upon the decisions in (i) Syed Mahomed Ali vs. R.Sundaramoorthy {1971 L.W. (26) 595}; (ii) Scottish Co-operative Wholesale Society Ltd vs. Meyer {1958 WLR 404}; (iii) Sangramsinh P.Gaekwad vs. Shantadevi P. Gaekwad {2005 (123) Comp. Cases 566}; and (iv) M.S.D.C.Radharamanan vs. M.S.D.Chandrasekara Raja {2008 (6) SCC 750}, it is contended by Mr.S.N.Mookherjee, learned Senior Counsel for NTADCL that the Company Law Board is bound to keep the interests of the company as of paramount importance.

124. In Syed Mahomed Ali, a Division Bench of this Court held that the proceedings under Sections 397 and 398 should not be considered as a mere dispute between individuals and that any order passed under Section 402, should be to facilitate the working rather than the destruction of the company. This Court went to the extent of expressing displeasure in that case that the parties to the case viewed the matter as a mere game for getting into power rather than serving the interests of the company.

125. Scottish Co-operative, is relied upon by the learned Senior Counsel for NTADCL to drive home the point that the nominee Directors should actually put their duty to NTADCL above their duty to the company that nominated them. In Scottish, the Directors nominated by the Co-operative Society, to be on the Board of a Textile Company, faced a situation where there was a conflict of interest between the Co-operative Society that nominated them and the Textile Company. The interests of the Textile Company demanded that the Board of Directors obtained the best possible price for any new issue of shares. But the interests of the Co-operative Society demanded that the shares were procured at the lowest price. While commenting upon their conduct, the House of Lords observed that "by subordinating the interests of the Textile Company to those of the Co-operative Society, they conducted the affairs of the Textile Company in a manner oppressive to the other shareholders.

126. In Sangramsinh, the Supreme Court observed in para 189 of the Report that the interests of the company vis-a-vis the shareholders must be upper most in the mind of the Court while granting a relief under Sections 397 and 398. Similarly, in M.S.D.C.Radharamanan, the Supreme Court pointed out in para 22 that in matters of this nature, the function of the Company Law Board should first be to see as to how the interests of the company vis-a-vis its shareholders can be safeguarded.

127. I have carefully considered the submissions of Mr.S.N.Mookherjee, learned Senior Counsel for NTADCL and the ratio laid down in the decisions relied upon by him. As a matter of fact, the learned Senior Counsel for the appellant has no quarrel with the principles laid down in the aforesaid decisions to the effect that the interests of the company are of paramount importance, in matters of this nature. But the grievance of the appellant is that even while jeopardising the interests of the appellant-company, the CDR Scheme was contrary to the interests of NTADCL itself. According to Mr.Sudipto Sarkar, learned Senior Counsel for the appellant, the CDR Scheme is primarily intended to subserve the interests of the lenders and that the company NTADCL does not stand to benefit at all. The debt equity ratio, as originally propounded at the time of incorporation of the company, will completely blow out of proportions, if the CDR Scheme is implemented. Therefore, it is his contention that it is not in the interests of the company to have this CDR Scheme implemented.

128. But unfortunately for the appellant, this Court is ill-equipped to find out if the CDR Scheme is in the interests of the company or not. All the lenders and all the shareholders (except the appellant herein) have supported the CDR Scheme. The Government of Tamil Nadu itself have supported the Scheme. The Scheme was approved by the CDR Empowered Group, constituted in terms of the Master Circular issued by the Reserve Bank of India. Therefore, it is not possible for me to check whether the Scheme is beneficial to NTADCL or not. Hence, question No.9 has also to be answered against the appellant.

QUESTION No. 10 (Failure of Government to enact a law):

129. The last question that is raised by the appellant for my consideration is as to whether the CDR Scheme is workable at all in the absence of a law enacted by the State of Tamil Nadu for regulating the abstraction and use of ground water for non-domestic purposes.

130. As we have seen in the second part of this order, the CDR Scheme contains a clause to the effect that the Government of Tamil Nadu would notify the prohibition of usage of ground water for industrial purposes, as envisaged in the Concession Agreement and that the Government would also ensure additional offtake of water for domestic use to the extent of 100 MLD under two part tariff viz., Rs.15 per KL as fixed charge and Rs.6 per KL as variable charge, with the variable charge increasing at the rate of 6% annually.

131. Admittedly, no law has been enacted so far. On the contrary, the enactment that was in force earlier viz., Tamil Nadu Ground Water (Development and Management) Act, 2003, has actually been repealed recently. In the course of hearing of the above appeal, this fact has been admitted by the learned counsel on all sides. However, a careful look at what had happened to the fate of the legislation, would throw more light on the present contention.

132. The State of Tamil Nadu passed an Act known as the Tamil Nadu Ground Water (Development and Management) Act, 2003. In so far as the Metropolitan City of Chennai is concerned, there was already a law known as Chennai Metropolitan Area Ground Water (Regulation) Act, 1987. The preamble to Tamil Nadu Act 3 of 2003 states that the object of the Act was to protect ground water resources to provide safeguards against hazards of over-exploitation and to ensure its planned development and proper management. This Act was originally introduced in the form of an ordinance on 17.1.2003. Within a few weeks, the Assembly passed the Bill. But the Farmers' Associations protested. Therefore, Rules were not issued and the Act was not notified. In the year 2006, a Cabinet Sub Committee was constituted to go into the law. The Sub Committee appears to have made certain proposals. But it was put in cold storage. Consequently, the Policy Note of the Public Works Department did not make a reference to the status of implementation of this law from the year 2008 onwards. But it appears that in a public interest litigation, this Court directed the State Government not to allow any person to draw and sell ground water until the 2003 Act was notified. On September 14, 2013, the 2003 Act has been repealed.

133. Therefore, it is the contention of the appellant that the Company Law Board ought to have taken note of the unworkability of the CDR Scheme, in the absence of a legislation issued by the State of Tamil Nadu. Though none of the respondents including the Government of Tamil Nadu could dispute the fact that the State of Tamil Nadu has not come up with such a law so far, the respondents contend that the approval of the Government of Tamil Nadu to the CDR scheme, is only towards fulfilling its obligations to the people of the Town of Tiruppur and its neighbouring villages. Therefore, they contend that it is in public interest that NTADCL is kept alive to enable the Government of Tamil Nadu to fulfill its obligations to provide water (not to show water) to its citizens.

134. This contention, revolving around the element of public interest, in my opinion requires greater consideration. The main reason that it requires greater consideration is that this contention raises more issues than that are sought to be addressed either by the appellant or by the respondents. Therefore, I shall consider this question of public interest a little deeper than all other questions of law which I have considered earlier.

135. I am conscious of the fact that I am not dealing with a writ petition or a public interest litigation. I am dealing only with an appeal under section 10-F of the Companies Act, 1956. But even within the four corners of Section 10-F of the Companies Act, I can see whether the Company Law Board tested the CDR Scheme, atleast within the realm of the law of contracts, with reference to public interest. Till Amendment Act 53 of 1963, Sections 397 and 398 did not contain any reference to public interest. But by Amendment Act 53 of 1963, the words "in a manner prejudicial to public interest" were inserted into these provisions. Therefore, at least this Court is obliged to test whether the acts complained of, are contrary to public interest or not. I am alive to the fact that the "public interest" contemplated in the Act, is primarily with reference to the shareholders and other stakeholders of a company. But I think time has come, especially in cases of this nature, where natural resources such as water are sought to be entrusted to the private sector, to enlarge the scope of public interest referred to in Sections 397 & 398.

136. There can be quarrel about the fact that supply of water to the people, is an obligation of the State. In Subhash Kumar v. State of Bihar, AIR 1991 SC 420 the Supreme court held: The right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life . Again in State of Karnataka v. State of Andhra Pradesh, (2000) 9 SCC 572 it was held: There is no dispute that under the Constitutional scheme in our country right to water is a right to life and thus a fundamental right

137. Even internationally, the obligation of the States, especially welfare States, to supply water to its citizens, is well recognised. The General Comment (No. 15) on the right to water adopted by the United Nations Committee on Economic, Social and Cultural Rights in 2002 reads: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses . The Convention on Elimination of Discrimination Against Women, 1979, in Article 14(2)(h) explicitly mentions about provision of water and sanitation to women. The Convention on the Rights of the Child, 1989 under Article 24 (2) (c) mentions right to safe drinking water of a child from a non-polluted source. Similarly, the United Nations General Assembly Resolution 64/292, 2010 reads: "The General Assembly recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights . The United Nations Human Rights Council Resolution on Human Rights and Access to Safe Drinking Water and Sanitation, 2010 states: The right to water and sanitation is derived from the right to an adequate standard of living, which is contained in several international human rights treaties.

138. But unfortunately, many Nation-States appear to have started withdrawing themselves, all over the world, from the fulfilment of this obligation. "Law, Environment and Development Journal" (known as LEAD), published jointly by School of Law, School of Oriental and African Studies - University of London and the International Environment Law Research Centre (Volume 3/2, 2007), contains some interesting information about "Privatisation of water". Tracing the history of privatisation of water, the Journal indicates that in the city of New York of the 18th century, potable water was sold by business people known as "Tea Water Men". After a major epidemic of yellow fever broke out in 1795, there was a public outcry. Manhattan Company was established to deliver water and it turned out that the said company was most corrupt, incompetent and the experiment proved to be most disastrous on water privatisation. It appears that London had a similar story. The Journal concludes that after decades of experimentation with PSP in water supply, there is an emerging trend of failures and re-negotiations. While arguments in favour of State ownership rest on market failure assumptions, arguments in favour of PSP rest on the failure of the State machinery.

139. It is stated in LEAD that there are divergent views throughout the world, on this burning issue, which could not be doused by water. While countries like Sweden have banned water companies from making profit, Netherlands and Uruguay have barred privatisation. In countries like Belgium, Finland, France, Germany, Greece, Italy and Spain, there is an amalgam of PSP (Private Sector Participation). In Austria, Denmark and Sweden, the policy is to encourage PSP with no profit motive. In England and Wales, there is full privatisation, but with strong Regulation.

140. Even the World Bank appears to have realised this, as reflected by the fact that the World Bank started discussions on privatisation through a concept of decentralisation. A background paper for World Development Report (WDR) 1983, which was followed by annual reports encouraged water privatisation. In the 1993 Water Resources Management Report, the World Bank called on to improve water efficiency through price mechanism and privatisation. Though the United Nations, through its Dublin Conference, evolved four guiding principles, one of which is to recognise water to have an economic value and to be recognised as a economic good, the International Instruments promoted by the United Nations speak a different story. This is due to the fact that both World Bank and the United Nations have recognised that it is extremely difficult to operate a water service profitably and at the same time, provide affordable services to consumers.

141. The Environmental Law Reseach Society at New Delhi, which published a draft paper titled "A Primer on Water Law and Policy in India", in January 2012, indicates that an effective devolution of power to the democratically elected local bodies by taking umbrage under the 73rd and 74th Constitutional amendments, may provide a solution. The draft paper quotes the successful devolution that took place in the city of Porto Alegre, Brazil. But the fact remains that even as per the reports of the World Bank, it is not possible to operate a water service profitably.

142. Coming to the Indian scenario, it is seen that The National Water Policy 2012 conceded the demand for privatization of water supply and suggested that water could be priced to fully recover the cost of operation and administration of water resources projects. Therefore, operators in the private sector jumped into the fray, to fill up the gap between resources and the unwillingness of the Government.

143. But none of the Nation-States appear to have drawn a lesson from what had happened in Bolivia and in the neighbourhood of Johannesburg, South Africa, where the policy of privatisation of water supply was tested in recent times, under the aegis of the World Bank. After water supply was privatised in Johannesburg, South Africa, people became unable to pay their water bills. Therefore, the private water supply agencies stopped the supply of water, forcing the residents to drink water from polluted rivers. This led to an outbreak of cholera claiming hundreds of lives and thousands of people getting hospitalised.

144. In Bolivia, the International Monetary Fund approved a loan of 138 million dollars to help the country control inflation and to bolster economic growth. In compliance with IMF-drafted "structural reforms" for the nation, Bolivia agreed to sell off "all remaining public enterprises," including national oil refineries and Cochabamba's local water agency, SEMAPA.

145. In September 1999, after closed-door negotiations, the Bolivian government signed a $2.5 billion contract to hand over Cochabamba's municipal water system to Aguas Del Tunari, a multinational consortium of private investors, including Bechtel, Edison, and Abengoa. Aguas Del Tunari was the sole bidder for the privatization of Cochabamba's water system.

146. On October 11, 1999 Aguas Del Tunari officially announced that it had been awarded 40-year concession rights to provide water and sanitation services to the residents of Cochabamba. The

consortium also announced that it will generate electrical energy and irrigation water for the region's agricultural sector. The major shareholder of Aguas Del Tunari, Bechtel subsidiary International Water Ltd., claimed that water delivery coverage and sewage connection will increase by at least 93 percent by the fifth year of private water management in Cochabamba.

147. In compliance with the obligation to IMF, the Bolivian parliament passed a Drinking Water and Sanitation Law, known as "Law 2029", which allowed for the privatization of drinking water and sewage disposal services. In effect, the law required residents to pay full cost for water services in Cochabamba.

148. In November 1999, Cochabamba s citizens began to protest the privatization of their water system and up to 200 percent increases in water rates initiated by Aguas Del Tunari. In April 2000, Aguas Del Tunari was thrown out of Bolivia and replaced by a public company, due to huge public outcry.

149. In November of 2002, Aguas Del Tunari lodged a claim for a minimum compensation of $50 million against the Bolivian government, in the International Centre for Settlement of Investment Disputes (ICSID), a mechanism of the World Bank. It was the very same institution that forced Cochabamba to privatize its water system as a condition for a loan package in 1997.The $50 million claim was not only for the recovery of investments, which are estimated at less than a million dollars, but also for estimated loss of future profits due to the annulment of the contract with Cochabamba. The process and content of the case against Bolivia in ICSID was kept secret. Under ICSID rules, neither the people of Cochabamba nor the press had the right of access to the proceedings.

150. In August 2003, more than 300 organizations from 43 countries, including Bolivia, sent an International Citizens Petition demanding that the case be transparent and open to citizen participation. ICSID rejected the petition. The case garnered international attention and activists in Bolivia, the U.S., and around the world engaged in campaigns to pressure the companies to drop the case, and to bring international attention to the World Bank and its actions.

151. On October 21, 2005 ICSID issued a preliminary ruling that it had jurisdiction in the case of Aguas Del Tunari vs. Bolivia, and would proceed with the hearing of the case. Defending the case before ICSID cost the Bolivian government $1 million in legal fees over three years.

152. On January 19th 2006, Aguas Del Tunari s main shareholders Bechtel and Abengoa agreed to drop their case in ICSID for a token payment of 2 bolivianos (0.30 USD). Sources directly involved in the settlement negotiations cited continued international citizen pressure as the reason for the companies' decision to drop the case.

153. It is an irony of fate that Bechtel, which was a member of Aguas Del Tunari, the multinational consortium of private investors, that was driven out of Bolivia, appears to be part of the consortium that was selected by IL & FS, even in this case, for funding the project of NTADCL. I do not know if anyone is aware of this fact and anyone is aware of what happened in Bolivia. Therefore, the 10th

question of law raised by the appellant, based on the foundation of public interest, cannot be considered without reference to what happened in Johannesburg and Bolivia.

154. As stated earlier, the Government of Tamilnadu, after being a party to the CDR Scheme which obliges it to enact a law, has undone the effect of the CDR scheme, by repealing even the existing law. But perhaps due to lack of coordination between different departments, the Government of Tamil Nadu has argued before me, in support of the CDR Scheme, without realising that even the law that was in existence has been scrapped.

155. Moreover, there are larger issues involved in this case. The right of individuals to draw water from the river bed, at least for domestic use and the right of individuals to draw groundwater from their own private properties, can be regulated, if at all, only through legislation. The power to legislate, cannot be compelled to be exercised in a particular manner, by contractual obligations. A creditor or even a foreign investor, cannot specifically enforce the terms of a contract that obliges a government to legislate in a particular manner. The Sovereign functions of the State and the Legislative power of the elected bodies, cannot be surrendered to the dictates of creditors or investors and cannot be brought within the realm of a contract, especially in a parliamentary system of democarcy.

156. While contracts are entered into by the Executive, laws are enacted by the elected representatives. The Executive cannot decide what law the Legislature has to enact and how the power to make laws has to be exercised. Article 162 of the Constitution makes the Executive power of a State extend to the matters with respect to which the Legislature of the State has power to make laws. But, the proviso to Article 162 makes it clear that in any matter with respect to which the Legislature of a State or Parliament have power to make laws, the Executive power of the State shall be subject to and limited by the Executive power expressly conferred by the Constitution or by any law. Therefore "what is to be decided through the collective wisdom of the Legislature on the floor of the Assembly cannot be dictated by decisions taken at the meeting of the Board of Directors of a company, even if it be a Government Company, within the meaning of Section 2(45) of the Companies Act, 2013". The question whether NTADCL has today become a Government company, within the meaning of the above provision, is to be seen.

157. Therefore, the correctness of the order of the Company Law Board approving the CDR Scheme, is not beyond a pale of doubt. This is especially so when the most fundamental pre-requisite namely that of the Government enacting a law has not so far been fulfilled. I do not know if at all the Legislature can be compelled to make a law. Therefore, the Company Law Board ought to have directed the Government to come up either with a law if it was possible or to inform the Board if it was not possible, before investing further amount. To this extent, the order of the Company Law Board appears to be contrary to public interest, which is now enshrined in Sections 397 and 398.

158. As I stated earlier, I am conscious of the fact that I am not dealing with a writ petition under Article 226 of the Constitution. But even within the four corners of Section 10-F of the Companies Act, I find that the CDR Scheme which is also in the nature of a contract, contains certain conditions that infringe upon the legislative power of the State and the sovereign functions of the State.

Therefore, I doubt whether the Company Law Board is competent to enforce the contract and make the State Government a fait accompli.

159. But unfortunately, during the pendency of the appeal, much water appears to have flown (in the figurative sense), by the allotment of shares and the State Government pumping in more money. The Government has pumped in money, unfortunately, only to service the debt with a pre-condition that the money will not even be used to improve the infrastructure. Investing more money just for the purpose of servicing a debt, is neither a prudent business decision nor in the interest of the public. The result of the approval of the CDR Scheme is (i) that the debt due to the creditors got converted into equity to some extent and (ii) that the Government agreed to bring in Rs.150 crores, only for the purpose of servicing the debt, without being able to improve either the capacity of the company or to improve the marketability of water through legislation. Therefore, it is clear that the money brought in by the Government is required only to go down the drain, as waste water, if no law is enacted. No Court, including the Company Law Board, can compel the Government to enact a law, by way of specific performance of the obligations under the CDR Scheme. This crucial aspect has been lost sight of by the Company Law Board and hence the order of the Company Law Board calls for interference. But today, I can only make a limited interference, in view of the fact that several things have happened during the pendency of the appeal.

160. Therefore, the Company Appeal is disposed of, directing the respondents, particularly the Government of Tamil Nadu, not to proceed any further towards the full and final implementation of the CDR Scheme, unless and until the State of Tamil Nadu takes a policy decision to pass or not to pass a law, in a manner prescribed by the Constitution. In other words, the Government of Tamil Nadu shall not make any further investment, towards the implementation of the CDR Scheme, till a decision on the question of enacting a law is taken. Till then, the status-quo as on date shall be continued subject to the other conditions imposed by the Company Law Board, for retention of the affirmative voting rights and the preservation of the Articles of Association. There will be no order as to costs.

31-1-2014

Index : Yes.
Internet : Yes.

Svn/RS/kpl

V.RAMASUBRAMANIAN,J

Svn/RS/kpl

Judgment in
Company Appeal No.7 of 2012

31-1-2014