REPORTABLE

IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY JURISDICTION

COMPANY APPEAL (SB) NO. 15/2006

DATE OF DECISION: 20th December, 2006

M/s Shonkh Technologies Limited ..... Appellant.

Through Mr. Ganesh, Sr. Advocate, Mr. Krishna Kumar & Ms. Lupaulu Gangmei, Advocates

VERSUS

Union of India and Others ..... Respondent.

Through Ms. Manisha Dhir & Ms. Shantha Narang, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be

allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported

in the Digest ? YES

SANJIV KHANNA, J :

1. M/s Shonkh Technologies Ltd. (hereinafter referred to as the appellant) in the present appeal under Section 10F of the Companies Act, 1956 (hereinafter referred to as Act) has impugned order dated 20.4.2006 passed by the Company Law Board in CP No.37/2003. By the impugned order, learned Company Law Board has allowed the petition under Section 237 (b) of the Act seeking investigation into the affairs of the appellant.
2. In the grounds of appeal as originally filed, no question of law was framed. Subsequently, an application for amendment was filed to incorporate specific questions of law. This application was allowed vide order dated 06.10.2006 and it was directed that the questions of law mentioned in the application will be treated as part of the main appeal. As many as 18 questions of law have been framed by the appellant.

3. The appellant had submitted that the impugned order was perverse, based on no findings/evidence and the conditions prerequisite to direct

investigation under Section 237 (b) of the Act are not satisfied in the present case. Reliance was placed upon the two judgments of the Supreme Court in M/s Barium Chemicals and Another versus Company Law Board and others (AIR 1967 SC 295) and Rohtas Industries Ltd. versus S.D. Aggarwal and Ors. (AIR 1969 SC 707).

4. Learned Additional Solicitor General appearing for Union of India in his brief argument submitted that an appeal under Section 10F of the Act is maintainable only on question of law and the findings and decision given by the Company Law Board were findings of fact. No question of law arises.

5. On the basis of submissions made, the following question of law is framed for being answered

Whether order dated 20.4.2006 passed by Company Law Board is perverse and whether conditions of section 237(b) of the Companies Act,1956 are satisfied in the present case?

6. The appellant was incorporated on 04.9.1998 as a Public Limited company. Certificate of commencement of business was obtained on 08.9.1998. The main objects of the appellant are to do business in the fields of electronics, electrical, technical, mechanical developing, marketing software system, solutions, designing etc.

7. By an agreement dated 15.7.2000, the appellant sold the entire business undertaking to another company M/s Shree Jee Yatayat

(India) Ltd. (hereinafter referred to as SYIL). Business undertaking of the appellant was valued at Rs.1,10,25,64,745/- in the business purchase agreement dated 15.7.2000 between the appellant and SYIL. This business purchase agreement also specifically records that as SYIL had agreed to purchase the undertaking "**net of all liabilities**" and the past arrears of taxes, charges, levies, outstanding dues and claims, free of all encumbrances. (see Annexure G to the appeal fled before this Court).

8. No amount was paid to the appellant for transfer of the entire business undertaking. SYIL did not pay any consideration for purchase of the business undertaking. On the other hand, the shareholders of the appellant were allotted 1,52,73,093/- of shares of Rs.10/- each in SYIL, as value received for transfer of the undertaking by the appellant. This allotment to the shareholders of the appellant in SYIL was made at a premium of Rs.60/- per share. In other words, the appellant transferred it's entire business undertaking minus all past liabilities to SYIL of value of Rs.1,10,25,64,754/-, with the shareholders of the appellant acquiring the shares of face value of Rs.15,27,30,930/- in SYIL (see Annexure-G of the appeal avernments made in para IX of the application filed before the Company Law Board and para 2 of the impugned order).

9. Thus, SYIL acquired a business undertaking which was valued at more than Rs.110 crores by allotting 1,52,73,093/- shares of Rs.10/- each to the shareholders of the appellant or for about Rupees 15.27 crores (approximately). The shareholders of the appellant, paid premium of Rs.60/- per share of SYIL. Even if we take this premium of Rs.60/- per share into consideration, there was shortfall of Rs. 3,28,37,141/- (Rs 110,25,64,745-value of the undertaking minus Rs. 106,97,27,604.05 – alleged value of the shares received).

10. Allotment of shares did not result in any monetary outflow or payment by SYIL. Paid up capital of SYIL increased.
11. The appellant was a private limited company but shares of SYIL were listed. In the report given by the Securities and Exchange Board of India (hereinafter referred to as SEBI) and as mentioned in para 2(a) of the order dated 20.04.2006, shares of SYIL were not traded between 13th May, 1999 to 9th August, 2000. On 13th May, 1999, they were last traded for Rs.2.15 per share. Prior to the said date in 1999, the shares were traded in the range of Rs.2/- to Rs.7/-. Therefore, on the date when business purchase agreement dated 15th July, 2000 was entered into, the last traded price of the share of SYIL of face value of Rs.10/- each was for Rs.2.15 i.e. the share was traded at discount of Rs.7.85 per share. Market value of each share of face value of Rs.10/- on 15th July, 2000 was only Rs.2.15/-. Shockingly, the shares of SYIL were alloted to the shareholders of the appellant at the premium of Rs.60/- per share, when actually the allotment should have been at a discount.
12. Securities and Exchange Board of India in it's report has also pointed out that preferential allotment to the shareholders of the appellant at the premium of Rs.60/- per share for each share of face value of Rs.10/-, was taken as the basis by the Bombay Stock Exchange to fix the base price for the shares of SYIL, after acquisition of the business undertaking of the appellant.
13. The report of the SEBI also shows that the scrip price of the SYIL jumped thereafter from Rs.75.55 on 9th August, 2000 to Rs.463.30 on 28th September, 2000.The trade was however on very low volumes. It attracted circuit filter level of 8% on each day i.e. rose by 8% from the previous closing on each trading day during the period 9th August, 2000 to 28th September, 2000. The price increased from Rs.75/- to Rs.463/-

in this short period of time. Thereafter, there was increase in volumes but the price started falling and reached Rs.210/- on 3rd November, 2000. Subsequently, the price moved between Rs.220/- to Rs.330/-. The relevant portion of the report of the SEBI is as under:-

> "As indicated in the earlier report, the period of investigation was divided into 2 stages based on price/volume movements. Stage 1 covered the period August 9, 2000 to September 28, 2000 (Sett. Nos. 20-27) when the price moved up very sharply (almost at circuit filter level i.e. at 8% higher than the closing price of the previous day). The price increased from Rs.70/- to Rs.445/- in a very short period of time. This price increase was on low volumes. Stage 2 covered the period September, 29, 2000 to March 2, 2001 when the fell from high of around Rs./440/- to Rs. 265/-. This stage was characterised by sharp increase in volumes.
>
> The shares of the company were not traded between 13th May, 1999 to 9th August, 2000. The last trade was at Rs.2.15 on 13th May, 1999. Prior to this date the scrip was trading in the range of Rs.2/- to Rs.7/-. For the new shares of the company (which were allotted on a preferential allotment basis to the shareholders of the unlisted company as consideration for purchase of the business undertaking), the BSE had fixed base price of Rs.70/-. This was derived from the price at which shares were allotted to shareholders or erstwhile Shonkh Technology Ltd.
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> The price of scrip went up from Rs.75.55 on August 9, 2000 to Rs.463.30 on September, 28, 2000 on very low volumes. After September 29, 2000 and upto December 8, 2000, there was an increase in volumes but the price started falling and reached Rs.210/- on 3rd November, 2000. Thereafter, the prices were moving in a narrow range of Rs.220/- to Rs.350/- accompanied with large volumes. The price volume data is as shown in Annexure A."

The yearly high-low of the prices is as given below:-

Year	High (Rs.)	Date	Low (Rs.)	Date
1999	6.4	10.05.1999	2.15	13.05.1999
2000	445.5	27.09.2000	75.55	09.08.2000
2001	315	13.02.2001	199.7	25.01.2001

14. The shares of SYIL prior to acquisition of business undertaking of the appellant and allotment of shares to the shareholders of the appellant, to the extent of 89.35% in volume terms, were held by the following shareholders:-

Sr. No.	Name of the Shareholder	No. of Shares	%
1.	Virendra Jain	9800	0.44%
2.	Virendra Jain (Jtly) Rina Jain	1200000	53.57%
3.	Laxmi Jain	250000	11.16%
4.	Sushma Jain	300000	13.39%
5.	Laxmi Jain (Jtly) Satyapal Jain	75450	3.37%
6.	Anand Jain (Jtly) Sushma Jain	141000	6.29%
7.	Ankit Jain (Jtly) Virendra Jain	25230	1.13%
	TOTAL	2001480	89.35%

15. It is, therefore, clear that prior to "acquisition of the business undertaking of the appellant", SYIL though a listed company was closely held and almost the entire shareholding was held by the said seven shareholders. These shareholders of SYIL substantially gained by acquiring the business undertaking of the Appellant valued at Rs.110 crores by allotting shares of SYIL having market value of Rs.2.15/- at a premium of Rs.60/- per share of face value of Rs.10/-. I may mention here that as per the balance sheet of SYIL for the period ending 31st March, 2000, the said company had brought forward losses of Rs.28,80,000/-.

16. It may be relevant to state here that in the due diligence report given by Amar Chand & Mangaldas & A. Shroff & Co. dated 10th October, 2000 in the case of SYIL, it has been recorded as under:-

> "SYIL does not presently have any employees and therefore does not have any registered code number under the Provident Fund or the Employees State Insurance legislations. The same may be required pursuant to the business transfer whereby the employees of STL will be transferred to SYIL.
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> SYIL did not apply for registration as an NBFC even when it was carrying out NBFC activities. It has not applied for any exemption either."

17. As per 'due diligence report' given by Amarchand Mangaldas Suresh S. Shroff and Co., Sales Tax Registration of SYIL had been cancelled. SYIL did not also have any certificate under the Shop and Establishment Act. The said company had not maintained complete and accurate corporate register in accordance with the relevant provisions pertaining to disclosure of interest of directors. Further SYIL had been carrying on activities as a non-banking financial company though it was not registered as a non-banking financial company with the Reserve Bank of India. These violations were serious.

18. It was repeatedly argued before me on behalf of the appellant that the avernments in the petition and the finding given by the Company Law Board that the appellant had suffered loss of Rs.104.77 Crores due to transfer of business to SYIL is unsubstantiated. It is not the figure but whether there was loss suffered that is material and relevant. It was argued that Company Law Board has failed to appreciate and understand that full value of the undertaking was paid by SYIL by allotment of shares to the shareholders of the appellant. It was submitted that it was not necessary for SYIL to pay sale consideration to the appellant and allotment of shares to the shareholders of the appellant was for valuable consideration. This argument over looks the facts and figures stated above. In paragraph VIII of the petition under

Section 237(b) it was alleged that the appellant had incurred loss of Rs.104.77 crores due to transfer of business to SYIL. The question is not whether shares were allotted to appellant or the shareholders of the appellant, but what was the corresponding market value of the shares allotted in lieu of transfer of undertaking by the appellant to SYIL. Admittedly, as per agreement for purchase dated 15th July, 1999, the total value of the undertaking was Rs.110.25 crores and for transfer of the said undertaking shares of face value of Rs.10/- each were allotted in SYIL at a premium of Rs.60/- per share but the market value of these shares as per last quoted price was Rs.2.15.

19. The above facts are startling by themselves and justify investigation under Section 237 (b) of the Act into the affairs of the appellant. The above facts are virtually un-rebutted and un-challenged. These facts are not new but are duly mentioned and recorded by the Ld. Company Law Board in its order while referring to the submissions of the parties and its findings. I have only collated them. I have gone into the factual aspects as the appellant has questioned the findings of the tribunal on the ground that the same are perverse and completely contrary to evidence on record. In view of the evidence and material discussed above, this portion of the question has to be answered against the appellant.

20. The second aspect of the question framed above relates to interpretation of section 237(b) of the Act and whether on the findings the provision has been rightly invoked.

21. Section 237(b) of the Act reads as under:-

> **(b)** may do so in its opinion or in the opinion of the Board there are circumstances suggesting-
>
> i. that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;
> ii. that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or
> iii. that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.

22. Section 237(b) of the Act can be invoked and is without prejudice to the powers of the Central Government under Section 235 of the Act. The said Section has three different

clauses. Conditions mentioned in any of the three clauses should be satisfied for directing investigation under section 237(b) of the Act. The first clause requires satisfaction of the Company Law Board that the business of the company is being conducted with the intent to defraud its creditors, shareholders or any other person. It also comes into operation when business of the company is being conducted for fraudulent or unlawful purpose or when a company is formed for the said purpose or when business is being conducted in a manner oppressive to its members. Secondly, the provision can be invoked when a person concerned with the formation or management of the affairs of the company is guilty of fraud, misfeasance or other misconduct towards the company or its members. The words “other misconduct” widens the scope of the said provision. Thus conduct, which is not strictly fraud and misfeasance but conduct which is dis-honourable, unprincipled and shameful is also covered by the said sub-clause. The third clause applies when all information in respect of the affairs of the company is not given to it's members.

23. For Section 237 (b) of the Act to be invoked there should be "circumstances suggesting" that the conditions mentioned in the three sub-clauses are satisfied. A final, definitive opinion, therefore, is not required at the stage of passing of an order under Section 237(b). The reason is apparent because investigation is still to be conducted. The provision is essentially of an exploratory character. What is to be decided at this stage is whether exploration/investigation is required and should be ordered. The words "circumstances suggesting" cannot be interpreted to mean conclusive proof. Otherwise, the provision will be rendered nugatory and completely toothless. Investigation is not required if facts are already established. At the same time, the legislature has been careful to use the words "defraud", "fraudulent", "unlawful purposes", "misfeasance"," other misconduct" "lack of information", etc. "Circumstances suggesting" must necessarily indicate fraud, misfeasance or like conduct or activities on the part of the company. The provision cannot be lightly invoked on mere suspicion. Supreme Court in the case of Rohtas Industries versus S.T. Aggarwal and others reported in (1969) 1 SCC 325 has held that the words

"circumstances suggesting" require inference of enumerated kind which should be demonstrable. It is not sufficient to merely assert that circumstances exist without specifying the material and evidence. The words "circumstances suggesting" do not support the construction that even existence of circumstances is a matter of subjective opinion. Referring to Shelat, J.'s opinion in the case of Barium Chemicals Ltd. and another versus Company Law Board reported in AIR 1967 SC 295, distinction was drawn between subjective process and formation of opinion and existence of circumstances on which the opinion is founded. The said judgment also explains the scope of judicial review in cases where discretionary administrative orders are under challenge. (Section 237(b) of the Act, after amendment, however requires a quasi judicial order to be passed by the Company Law Board and investigation can be ordered by the said Board, if the conditions specified in the three sub-clauses are satisfied.) In the said case, the Supreme Court came to the conclusion that the opinion formed was wholly irrational as there was no evidence with regard to the market price of

the shares of Albion Plywoods Ltd. on or about 6th May, 1960 though allegation had been made and accepted by the Central Government that the shares were sold for inadequate consideration on 6th May, 1960.This was the foundation of the administrative order passed by the Central Government. It was held that without material and evidence, Central Government had presumed fraud in the sale of the shares. Suspicion by itself, in these circumstances, it was held was not justification to precipitate action. However, the Supreme Court also noticed that in Barium Chemicals (supra), there was difference of opinion between A.K. Sarkar, C.J. and Madholkar, J. on the one side and Hidayatullah, J. and Shelat J. on the other side. In Barium Chemicals (supra), the Supreme Court, while dealing with the question whether the said provision falls foul of the fundamental right to carry on business under Article 19(1)(g) of the Constitution of India, held that investigation when ordered was bound to cause inconvenience and affect credit worthiness of a company but the provision was reasonable. It was held that the aforesaid provision cannot be regarded as an unreasonable restriction on right of a

party to carry on business. Reference in this regard was made to the judgement of the Supreme Court in the case of Raja Narayanlal Bansilal versus Maneck Phitoz Mistry (1961) 1 SCR 417 wherein it has been held as under:-

"**30.** ...A company is a creature of the statute. There can be no doubt that one of the objects of the Companies Act is to throw open to all citizens the privilege of carrying on business with limited liability. Inevitably the business of the company has to be carried on through human agency, and that sometimes gives rise to irregularities and malpractices in the management of the affairs of the company. If persons in charge of the management of companies abuse their position and make personal profit at the cost of the creditors, contributories and others interested in the company, that raises a problem which is very much different from the problem of ordinary misappropriation or breach of trust. The interest of the company is the interest of several persons who constitute the company, and thus persons in management of the affairs of such companies can be classed by themselves as distinct from other individual citizens. A citizen can and may protect his own interest, but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power vesting in the managers. If the relevant provisions of the Act dealing with enquiries and investigations of the affairs of the companies are considered from this point of view there would be no difficulty in holding that Article 14 is not violated either by Section 239 or Section 240 of the new Act."

24.The above observations made almost half a century ago are perhaps more relevant today. With opening up of the economy and deregulation, we have had cases where by employing ingenuous methods and tactics some dishonest persons have managed to intrude and evade safeguards in force. Common man is today making huge investments in the stock market and shares. His interest is paramount. Reasonable invasion, once grounds for investigation exit, into right to carry on business, to protect interest of common man is justified. There is no incongruous friction between the two. Success of liberalisation depends upon the regulatory and supervisory machinists weeding out the unscrupulous and the corrupt and not to protect them. What is required is not a fragile but a robust supervisory framework, which is just and fair.

25.The main pillar of free market economic system, is integrity and full, correct, true and open information. Without integrity and reliable information, free market economic system can lead to frauds, mismanagement and ultimately collapse. Integrity and information can be achieved through

internal self controls and independent verifiable financial information. However, system of external checks is recognized and accepted as imperative necessity. Progressive economic liberalization with increasing emphasis on trade facilitation has also led to some increase in misuse of the facilities/concessions. Scams and manipulations of share prices, and insider trading, on at-least two occasions has caused losses with general public and institutions taking the brunt. The complexion of economic fraud has changed dramatically. It has become complex and much more difficult to unravel and uncover. Investigation to un-cover frauds once grounds exits are required. In this climate, courts have to tread carefully and strike a fine balance between free market system and enforcement- a natural corollary to liberalization.

26.Other contentions raised by the appellant with reference to section 237(b) of the Act and the impugned order directing investigation may now be noticed. It was submitted by the appellant that separate proceedings were initiated under different enactments, the object and purpose being to

investigate into the affairs of the appellant. Reference was made to the report given by SEBI, investigation done by CBI and proceedings under Section 209A of the Act and it was submitted that investigation under 237(b) should not be permitted as there was duplicacy of proceedings and therefore harassment. This argument has to be rejected. Each authority has been conferred specific power under respective statutes. They examine and investigate with reference to the purpose and object of the enactment. The angle and facet of investigation under each enactment is separate. It cannot be said that the power of investigation under Section 237(b) of the Act is similar to the powers conferred on SEBI or CBI. In fact the argument raised is to some extent self-defeating. It accepts that material and evidence exists. Reference in this regard may be made to the decision of the Court of Appeal in the case of London United Investments Plc reported in 1991 All ER 849 wherein it has been held as under:-

"The power of Secretary of State to appoint inspectors to investigate the affairs of a company and to report is an important regulatory mechanism for ensuring probity in the management of company's affairs. That of

course is in the public interest. Since the Secretary of State's powers under section 432 (2) are exercisable where there are circumstances suggesting fraud, it is likely that in many cases where inspectors are appointed an investigation by the police or the Serious Fraud Office could also be appropriate. But the code under the 1985 Act is a separate code even though it may overlap the field of criminal investigation."

27.Merely filing of a complaint by SEBI for violation of the provisions of Securities Exchange Board of India does not in any manner curtail or bar investigation under Section 237(b) of the Act. Once the provisions of the said Section are satisfied, the fact that the SEBI has filed prosecution, is not a bar. The scope and ambit of SEBI's findings and filing of prosecution under the Securities Exchange Board of India Act are relevant but distinct in several aspects. Consequences that follow are different. A different offence, under a separate enactment cannot be condoned because proceedings have been initiated for violation of another enactment.

28.Another contention raised was that investigation has already been done and completed and therefore an order permitting investigation under section 237(b) of the Act

serves no purpose. This argument also has to be rejected. Some more facts and allegations made in the application may be looked into. The appellant had spent Rs.6.37 crores in the years 1999 and Rs.6.44 crores in the year 2000 towards consultation fee. Similarly, as per the balance sheet for the period ending 31st December, 1999 more than Rs.7.26 crores was allegedly spent on research and development activities. In the reply filed by the appellant before the Company Law Board, expenditure of more than Rs.7.26 crores, it was stated was normal and ordinary general business expenditure. It was further stated that the appellant company was dealing with software technology and developing software and, therefore, consultancy fee was required to be paid. The reply is devoid of material particulars and relevant details with regard to nature and type of software developed, price of software, the parties to whom software was sold etc. It is interesting in this regard to refer to some of the vouchers and bills, which have been enclosed by the appellant in support of the contention that it was genuinely developing and or selling software. Two invoices were raised allegedly by the appellant against Jai

Prakash Industries Limited dated 17th November, 1999 and 4th December, 1999 for Rs.5,15,50,000/- and Rs.5,35,00,000/-. The bills do not specifically state the type of software purchased and thereafter sold to Jai Prakash Industries Limited. It refers to some agreement dated 16th June, 1999 but the said agreement was/is not placed on record.

29.Similarly, there were alleged transactions between the appellant and Padmini Technologies Limited, a company managed and controlled by Mr. Vivek Nagpal who was also a director in the appellant company. It was alleged in the application that the appellant had advanced Rs.9.35 crores to Padmini Technologies Limited. This was disputed and denied by the appellant in the reply. It was stated that the company had entered into transaction with Padmini Technologies Limited for sale and purchase of computer software. Annexure A filed to the reply shows that as on 1st April, 2000 Rs.5,85,24,000/- was due and payable by Padmini Technologies Limited to the appellant. Between the period 20th May, 2000 to 22nd June, 2000, further sales of

Rs.3,50,05,000/- have been shown as per the details given below:-

Date	Particulars	Vch Typ.	Debit
20.5.2005	Software-Sales-CST Being sale of Construction management.	Sale	3,65,000.00
22.5.2000	Software-Sales-CST Being sale of Hospital Management System Software 4 nos. @325000/unit	Sale	13,00,000.00
23.5.2000	Software-Sales-CST Being sale of SBS Ver 6. 2K Credit Business Control System	Sale	37,00,000.00
24.5.2000	Software-Sales-CST Being sale of Intelligent Invoicing for Commerce 1 No. Software-Sales-CST Being Sale of Inventory Maintenance System Software 1 No.	Sale Sale	36,00,000.00 26,50,000.00
25.5.2000	Software-Sales-CST Being sale of SBS V er. 6. ST Pending 1 No.	Sale	37,00,000.00
26.5.2000	Software-Sales-CST Being sale of SBS Ver 6. 2K Automatic Loan	Sale	25,00,000.00
27.5.2000	Software-Sales-CST Being sale of Inventory Maintenance System Software 2 nos @ 2650000/unit	Sale	53,00,000.00

Date	Particulars	Vch Typ.	Debit
	Carried Over		2,31,15,000.00

Date	Particulars	Vch Typ.	Debit
	Brought Forward		**2,31,15,000.00**
3.6.2000	**Software-Sales-CST** **Being Sale of Intelligent Invoicing for Commerce**	**Sale**	**44,00,000.00**
7.6.2000	**Software-Sales-CST** **Being sale of Inventory Maintenance System.**	**Sale**	**26,50,000.00**
14.6.2000	**Software-Sales-CST** **Being sale of Inventory Maintenance System Software**	**Sale**	**26,50,000.00**
22.6.2000	**Software-Sales-CST** **Being sale of Construction Management System Software**	**Sale**	**21,90,000.00**
	Closing Balance		**3,50,05,000.00**

30.The nature and type of software, quantity supplied etc. are missing. It may be relevant to state here that there are allegations against Padmini Technologies Ltd. also, that it was manipulating and involved in the share market scam along with Ketan Parekh Group. It may be relevant to state here that Padmini Technologies Limited was also a

shareholder to the extent of 77,0 6,000 shares (or 17.72 % in value terms) in the appellant company.

31.Allegation was also made in the petition that Padmini Technologies Limited had incurred a huge loss on the sale of the shares of the appellant company. The appellant had denied this and relied upon Annexure F to the reply filed before the Company Law Board. Perusal of Annexure F shows that 27,06,000 shares held by Padmini Technologies Limited in the appellant were transferred to M/s Ankur Cultivators (P) Limited for consideration of Re.1/- only. These shares had been purchased by Padmini Technologies Limited for Rs.38,17,80,000/-. The shares allotted to Padmini Technologies Limited in SYIL, in the reply filed by the appellant before the Company Law Board, were described as bonus shares. The reply affidavit on behalf of the appellant has been filed by none other than Mr. Vivek Nagpal, who was also a controlling Director in Padmini Technologies Limited. It was further claimed that on sale of shares of SYIL, Padmini Technologies Limited had made net profit of Rs.25,88,728/- . The alleged profit is

calculated by taking sale price of SYIL between Rs.142.50 per share to Rs.19.79 per share. However, no details of the dates on which the alleged sales were made, to whom sales were made and whether the sale amount has been released, was mentioned and stated.

32.It was also alleged in the petition that the appellant had advanced Rs.7 crores to Adani Export Limited which in turn had advanced money to Ketan Parekh Group. The amount mentioned in the petition was not denied by the appellant but it was stated that the transaction was for supply and development of software but what was the nature and type of software, whether there was any agreement etc., were not furnished.

33.As on 31st March, 2000 the shareholding pattern of the appellant company was as under:

Srl. No.	***Particulars***	***No. of shares***	***Percentage of Holding***
1.	B.R.Badrinath	90,010	0.73
2.	M.S. Udayakumar	50,010	0.40
3.	S. Vinayak Sanjay Urs.	50,000	0.40
4.	Ankur Cultivators (P) Ltd.	5,910,000	49.12

Srl. No.	*Particulars*	*No. of shares*	*Percentage of Holding*
5.	Advance Hovercraft and Composites India Ltd.	2,400,000	19.14
6.	Unit Trust of India	1,126,023	9.21
7.	UTI-A/c. India Growth Fund	384,000	3.14
8.	Panther Fincap and Management Services Ltd.	700,000	5.81
9.	Classic Credit Ltd.	500,000	4.15
10.	Panther Investrade Ltd.	425,000	3.53
11.	Ashok Mittal	200,000	1.66
12.	Bhavin V. Parikh	100,000	0.83
13.	Sunidhi Consultancy Services Ltd.	100,000	0.83
14.	Niyoshi Trading And Investments (P) Limited	50,000	0.41

(ii) Others were holding less than 50,000 shares.

34.The authorized share capital of the appellant is Rs.20 crores. The issued share capital as on 15.7.2000 was Rs.15.27 crores. As per the application filed under Section 237 (b), the appellant company was controlled by companies and the person belonging to Ketan Parekh Group. The details of these companies and individuals are in the application filed by the UOI before the Company Law Board including Annexure-I.

35.Classic Credit Limited, Panther Fincap and Management Services Limited and Panther Investrade Limited as per the allegations made by

Union of India, belong to Ketan Parekh Group of companies. These companies were also selling clients of Broker -Credit Suisse First Boston India Securities Private Limited. The said broker along with some other brokers as per the SEBI report had created artificial market in certain scripts and assisted, abetted and indulged in market manipulations in entities connected with Ketan Parekh Group.

36.Learned counsel for the respondent during the course of arguments had relied upon the closure report submitted by Central Bureau of Investigation in case No. RC 7(E)/2003 in the case of the appellant and some other individuals. This FIR was registered on the basis of complaint made by Unit Trust of India Growth Fund. As per the closure report, allegation made by Unit Trust of India Growth Fund was that it was cheated. It was alleged that UTI Growth Fund had applied for allotment of shares in the appellant company through private placement by paying premium of Rs.120/- per share. It was alleged that the Equity Research Cell a Department of Unit Trust of India had not recommended subscription by private placement and as per the estimate, the moderate rate of each shares of the appellant was Rs.30/- to Rs.36/- per share. It was further alleged that till September, 1999, the appellant company had not launched any products of it's own but

substantial amount of more than Rs.16 Crores had been disbursed and paid. Central Bureau of Investigation, however, recommended closure as it was found that Unit Trust of India had been able to sell shares of SYIL for consideration of Rs.24.30 crores and, therefore, had not suffered loss. Thus, Central Bureau of Investigation felt that case for cheating under Section 420 IPC and 409 IPC read with Section 120B IPC was not made out. The report of the Central Bureau of Investigation dealt with a very limited aspect and was not at all concerned with the market manipulation, money laundering, conduct of the business and affairs of the appellant etc. The report by the Central Bureau of Investigation focussed itself only on the question whether the Unit Trust of India Growth Fund was able to recover the investment made. Once it was found that the investment had been recovered, Central Bureau of Investigation recommended closure of the case. The said report does not, support the case of the respondent and is not relevant for the issues and questions involved in the present case.

37.I may refer here to the agreement dated 11th August, 1999, which was entered into between Unit Trust of India (Fund manager for the India Growth Fund Unit Scheme) and the appellant. Unit Trust of India had agreed to invest Rs.14.95 crores in the appellant by applying for

allotment of 11,50,000 equity shares of face value of Rs.10/- on private placement basis for a premium of Rs.120/-. Unit Trust of India had also agreed to provide financial assistance for part financing for setting up of two divisions i.e. Software Development Division and Convergence Technology Division at total cost of Rs.57.32 crores. The said agreement specifically provides that unless Unit Trust of India agreed, the appellant would not undertake or permit any merger, consolidation, re-organistion, scheme of arrangement or compromise with its creditors, shareholders or effect any scheme of amalgamation or reconstruction. It was stipulated that the appellant shall not issue any equity or preference shares and change its capital structure, create any charge on assets or give guarantees without it's approval. Shares of the appellant were also required to be pledged by the promoters of the appellant.

38.A company is a separate and distinct entity in law. It is an artificial person. Shareholders are entitled to dividend but are not owners of the property owned by and belonging to the company. The shareholders cannot also claim right in consideration received by the company on sale of it's property. This has to be understood in light of the agreement between Unit Trust of India Growth Fund and the appellant company. SYIL was not a party to the said agreement. Therefore, transaction

between the appellant and SYIL to allot shares to the shareholders of the appellant and not allot any shares to the appellant on transfer of the business undertaking, appears to be unusual. As a result of the transfer of the undertaking minus all the liabilities, the appellant was merely reduced to a shell company with the understanding that application will be filed to get it's name struck from the office of Registrar of Companies. By allotting shares to the shareholders of the appellant in SYIL, the appellant got over the terms agreed upon with Unit Trust of India not to issue any equity or preference shares, change the capital structure etc., without its approval. At the same time, SYIL had the advantage of claiming that a Government of India institution viz. Unit Trust of India had made investment in SYIL.

39.Learned counsel for the respondent in order to justify the transactions for transfer of undertaking also relied upon documentary due diligence report of Amar Chand & Mangaldas & A. Shroff & Co. in the case of the appellant and SYIL. Interestingly, both the reports are dated 10th October, 2000 whereas the agreement to purchase the business undertaking had been entered on 15th July, 2000. The report specifically states that it is merely a report on requisite legal compliances with reference to questionnaire submitted by the said

companies. It is full of privileges and conditions. One of them being that it should not be disclosed to any third party or used by any third party without prior consent. These reports in no way support the contentions of the appellant. It also appears that the said solicitors were not informed that the transaction for transfer of business undertaking had already been completed as it is mentioned in the report relating to the appellant, that the said report is required for the purpose of transfer of the entire business undertaking as a going concern. If there is any earlier report it has not been brought on record.

40.There is a difference between transfer of an undertaking on payment of sale consideration and scheme of amalgamation/merger, which are sanctioned by a Court under Sections 391-394 of the Act. Before a scheme is sanctioned under Sections 391-394 of the Act, Regional Director/Central Government is required to examine and scrutinise the scheme. The Courts also have power to reject the scheme. This is not so when there is a private transaction or sale between two companies. No scrutiny or approval of the Court is required.

41. Accordingly, the question of law as formulated above is answered in favour of the respondent and against the appellant. The present Appeal is dismissed. The appellant will also pay costs which are assessed at

Rs.10,000/-. The costs will be deposited with the Official Liquidator within three weeks and will form part of the common pool fund.

(SANJIV KHANNA)

JUDGE

December 20, 2006

RN/VKR/P