
Before

THE HONOURABLE COMPANY LAW BOARD

Under Section 397/398 of The Companies Act, 1956

CORIANDER & LETTUCEPETITIONERS

v.

ABPL & CBIRESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	v
STATEMENT OF JURISDICTION.....	vii
STATEMENT OF FACTS.....	viii
ISSUES RAISED.....	x
SUMMARY OF ARGUMENTS.....	xi
ARGUMENTS ADVANCED.....	1
1. The Company Law Board (CLB) Has Jurisdiction To Hear The Application Under Section 397/398 Of The Companies Act, 1956.....	1
1.1 <i>The CLB has exclusive jurisdiction to hear cases of oppression and mismanagement.....</i>	<i>1</i>
1.2 <i>The petitioner has locus standi to approach the CLB.....</i>	<i>1</i>
2. The acts of Amaze Burgers Private Limited (ABPL) amount to Mismanagement and Suppression of Minority Interest.....	2
2.1 <i>Acts of new management of ABPL is against the interest of the company.....</i>	<i>2</i>
2.2 <i>Illegal termination of the petitioners amounted to Oppression and Mismanagement...2</i>	<i>2</i>
3. The Act of ABPL Selling Burgers by Itself or Through Its Franchisees Amounts to Single Brand Retailing.....	3
4. Whether the Franchise Agreement between ABPL and franchisees is in violation of Section 3 of the Competition Act, 2002.....	4
5. Whether acceptance of deposits from public by ABPL violates the provisions of Companies Act, NBFC Regulations and SEBI CIS Regulations.....	5
6. Whether the petitioners have committed the offences as alleged before the EOW.....	6
PRAYER.....	7

LIST OF ABBREVIATIONS

&	And
¶	Paragraph
ABPL	Amaze Burgers Private Limited
AIR	All India Reporter
Anr.	Another
Art.	Article
CBI	Crazy Burgers Inc
CEO	Chief Executive Officer
Co.	Company
Corpn.	Corporation
CLB	Company Law Board
CCI	Competition Commission of India
CIS	Collective Investment Scheme
Ed.	Edition
ESOP	Employee Stock Option Scheme
FDI	Foreign Direct Investment
Govt.	Government
Hon'ble	Honourable
i.e.	That is
Ltd.	Limited
M.D.	Managing Director
M.P.	Madhya Pradesh
Mar.	March
No.	Number
NBFC	Non-Banking Financial Corporation
Pvt.	Private
ROC	Registrar of Companies
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports

SCWR	Supreme Court Weekly Reporter
SEBI	Securities and Exchange Board of India
SIA	Secretariat for Industrial Assistance
U/S	Under section
U.P.	Uttar Pradesh
U.S.	United States of America
v.	Versus
Vol.	Volume
www	World Wide Web

INDEX OF AUTHORITIES

CASES REFERRED AND CITED:

- *Anil Gupta v. J.K Gupta*, (2002) 47 CLA 50.
- *Arun Kumar Mehta v. Ganesh Commercial Co. Ltd.*, (2006) 134 CompCas 500.
- *FICCI Multiplex Association of India v. United Producers/Distributors Forum and Ors.*, (1 of 2009) decided on 25th May 2011, ¶ 23.6.
- *Global Automobiles Ltd. v. Pooja Expo India Private Ltd.*, (33 of 2011) decided on 3rd July 2012, ¶ 12.4.
- *Manavendra Chitnis v. Leela Chitnis Studios Pvt. Ltd.*, (1985) 58 CompCas 113 (Bombay).
- *Manmohan Singh Kohli v. Venture India Properties Pvt. Ltd.*, (2005) 123 CompCas 198.
- *McDowell & Co. Ltd.*, RTP Enquiry No. 105/1984, Order dated 17-09-1986.
- *O.P Gupta v. Shiv General Finance Pvt. Ltd.* (1977) 47 CompCas 279 (DEL).
- *Re Himtubes Limited*, RTP Enquiry No. 20/1986, Order dated 2-5-1986.
- *Re Smith & Fawcett Ltd.*, (1942) Ch 304, at P. 306, per Greene MR.
- *Re Tide Water Oil Company (India) Ltd.*, RTP Enquiry No. 21/1987, Order dated 18-11-1987.
- *Re, Albert David*, (1964) 68 (WN 163,172).
- *Re, Altek Lammertz Needles Ltd.*, (2004) 56 SCL 156 (CLB).
- *Re, Kare (P.) Ltd.*, (1977) 47 CompCas 276 (Del).
- *Re, Mohan Meakins Limited & Others*, RTP Enquiry No. 65/1984 , Order dated 11-04-1986.
- *RRTA v. Spencer & Co. Ltd.*, RTP Enquiry No. 75/1975, Order dated 3-11-1977.
- *Sanjay Paliwal v. Paliwal Hotels Pvt. Ltd.*, (2008) 141 CompCas 270 (CLB).
- *Shri Dhananjay Pande v. Dr. Bais Surgical and Medical*, 2005 125 CompCas 626 CLB.
- *Sudershan Chopra v. CLB*, (2004) 52 SCL 429 (P&H).
- *Suresh Arora v. Grevlon Textile Mills Pvt. Ltd.*, (2008) 142 CompCas 963.

BOOKS REFERRED:

- Bhandari M.C., Guide to Company Law Procedures, (21st ed., 2009), Lexis Nexis Butterworths Wadhwa, Nagpur.

- Dugar S.M., Guide to Competition Law- Commentary on MRTP Act, Competition Act & Consumer Protection Act, (5th ed., 2010), Lexis Nexis Butterworths Wadhwa, Nagpur.
- Ghosh K.M. & Chandratre K.R., Company Law with Secretarial Practices, (13th ed., 2007), Bharat Law House, New Delhi.
- Majumdar A.K. & Kapoor G.K., Company Law & Practice, (17th ed., 2012), Taxmann.
- Ramaiya A., Guide to the Companies Act, (17th ed., 2010), Lexis Nexis Butterworths Wadhwa, Nagpur.
- Ramappa T., Competition Law in India, (2nd ed., 2011), Oxford University Press.
- Singh Avtar, Competition Law, 2012.
- Soni A., *Supreme Court on Service Laws*, (1st ed., 2009), Lexis Nexis Butterworths Wadhwa.

WEBSITES REFERRED:

- www.lexisnexus.com (last visited on 25th October, 2014).
- www.judis.nic.in (last visited on 26th October, 2014).
- www.manupatra.com (last visited on 26th October, 2014).
- www.sconline.com (last visited on 25th October, 2014).
- www.rbi.org.in (last visited on 28th October, 2014).
- www.cci.gov.in (last visited on 28th October, 2014).
- www.fipb.in (last visited on 28th October, 2014).
- www.dipp.nic.in (last visited on 29th October, 2014).
- www.sebi.gov.in (last visited on 29th October, 2014).

LEGAL DICTIONARIES:

- Aiyer P.R., *Advanced Law Lexicon*, (3rd ed., 2005).
- Garner B.A., *Black's Law Dictionary*, (9th ed., 2009).
- Greenberg Daniel, *Stroud's Judicial Dictionary of Words and Phrases*, (4th ed.), Sweet and Maxwell, Vol. 4.
- Mish F.C., *Merriam-Webster's Collegiate Dictionary*, (11th ed. 2003).
- *Oxford Advanced Learners Dictionary*, (7th ed., 2008).

STATEMENT OF JURISDICTION

THE PETITIONERS HAVE FILED THE CASE BEFORE THE HON'BLE COMPANY LAW BOARD, IN THE MATTER OF CORIANDER & LETTUCE v. ABPL & CBI, UNDER SECTION 397/398¹ OF THE COMPANIES ACT, 1956.

A MEETING WITH THE RBI, SEBI, ROC, CCI IS DUE AND STATEMENTS ARE TO BE RECORDED AT THE POLICE STATION TODAY.

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS.

¹ Sec 397 - Application to Company Law Board for relief in cases of oppression:

(1) Any member of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

Sec 398 - Application to Company Law Board for relief in cases of mismanagement.

(1) Any members of a company who complain

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

may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

STATEMENT OF FACTS

For the sake of brevity and convenience of the Hon'ble Court the facts of the present case are summarised as follows:

1. ABI was into the business of operating and managing franchises of fast food outlets through its appointed franchisees. ABI was one of the biggest companies in the world doing this business. ABI decided to expand to other countries in late 90's and by December 2007 it incorporated ABPL in India. The articles of association of ABPL were as per Table A of Schedule I of the Companies Act, 1956 and remained so.
2. Coriander and Lettuce were hired as the first employees of ABPL by ABI. In about May 2011, both Coriander and Lettuce were promoted as MD and CEO of ABPL. Along with the promotion, ABPL also came out with an ESOP policy under which Coriander was granted ESOPs worth 5.5% of the total paid up share capital of ABPL and Lettuce was granted ESOPs worth 4.6% of the total paid up share capital of ABPL. Business Model of ABPL contains following relevant conditions-
 - ABPL and franchisee share the sale proceeds, after deducting all direct costs, in the following ratio-
ABPL: 25%
Franchisee: 75%
 - As a security, ABPL accepts a deposit of Rs. 20,00,000 from each franchisee so that in case there is any default, the deposit shall be used to indemnify ABPL.
 - The franchise agreements were subject to arbitration to be held in Delhi and subject to jurisdiction of Delhi courts.
3. Coriander and Lettuce filed civil cases for illegal removal, breach of their respective employment contracts and ESOP policies, ESOP agreements and non payment of their salary, PF and ESI of an amount of Rs. 50,00,000. Amongst others, following were the main provisions of the ESOP agreement read with the ESOP policy-
 - The options will vest in the grantee after an expiry of 2 years from the date of the agreement (vesting date).
 - The grantee will pay market value of shares for issue of shares on vesting.
 - The shares will be issued on vesting date on receipt of payment from the grantees and an exercise notice.

- The exercise notice may be sent to the company by the grantee even after his employment provided that the employment was not terminated for cause by the company.
 - The ESOP agreement was subject to arbitration in Delhi and Delhi courts had jurisdiction over any disputes.
4. The contract with Coriander and Lettuce were terminated after CBI's takeover of ABI and thus they filed an application under sections 397/398 of the Companies Act, 1956 before the Company Law Board on 2.4.2014. Coriander and Lettuce have, on 15.4.2014, also filed three separate cases against CBI and ABPL as follows-
- Before Reserve Bank of India: Since ABPL is a wholly owned subsidiary of ABI and now CBI, and since it has foreign funding, it cannot carry on the business of selling burgers either by itself or through its franchisees since it amounts to single brand retailing and ABPL has not sought any approval of concerned authorities.
 - Before Competition Commission of India: Under the franchise agreements, ABPL requires the franchisees not to sell outside a particular territory, not to do competing businesses and not to sell any other products other than those which are permitted by ABPL. This is in violation of Section 3 of the Competition Act.
 - Before Reserve Bank of India, Registrar of Companies and SEBI: That ABPL is accepting deposits from public by making them their franchisees without complying with necessary laws with respect to acceptance of deposits from public as per Companies Act, NBFC regulations, SEBI CIS regulations and other applicable laws. Today is the date for hearing in CLB, meeting with RBI, SEBI, ROC and CCI and statements to be recorded at the police station.

ISSUES RAISED

The following questions are presented for adjudication in the instant matter:

- 1. WHETHER THE COMPANY LAW BOARD HAS JURISDICTION TO HEAR THE APPLICATION UNDER SECTION 397/398 OF THE COMPANIES ACT, 1956.**
- 2. WHETHER THE ACTS OF AMAZE BURGERS PRIVATE LIMITED (ABPL) AMOUNT TO MISMANAGEMENT AND SUPPRESSION OF MINORITY INTEREST.**
- 3. WHETHER THE ACT OF ABPL SELLING BURGERS BY ITSELF OR THROUGH ITS FRANCHISEES AMOUNTS TO SINGLE BRAND RETAILING.**
- 4. WHETHER THE FRANCHISE AGREEMENT BETWEEN ABPL AND FRANCHISEES IS IN VIOLATION OF SECTION 3, THE COMPETITION ACT, 2002.**
- 5. WHETHER ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ABPL VIOLATES THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.**
- 6. WHETHER THE PETITIONERS HAVE COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.**

SUMMARY OF ARGUMENTS

1. THE COMPANY LAW BOARD (CLB) HAS JURISDICTION TO HEAR THE APPLICATION UNDER SECTION 397/398 OF THE COMPANIES ACT, 1956.

The CLB's jurisdiction u/s 397/398 cannot stand fettered merely because there is an arbitration clause or an arbitration proceeding or an award. On the other hand, courts have gone to the length to hold that the matter which can form the subject matter of a petition u/s 397/398 cannot be the subject matter of arbitration, for an arbitrator can have no powers such as Section 402. The jurisdiction of CLB u/s 397/398 is a statutory jurisdiction which cannot be ousted by an arbitration clause. Section 397/398 provides in itself a complete code for redressal of any grievance in regard to oppression and mismanagement. A person, who is entitled to allotment of shares against his application money, can file a petition on equitable grounds. In the present case the petitioners Coriander and Lettuce have vested rights which entitle them to 10.1% of shareholding, in pursuance of which the CLB would have precedence over the arbitration clause.

2. THE ACTS OF AMAZE BURGERS PRIVATE LIMITED (ABPL) AMOUNT TO MISMANAGEMENT AND SUPPRESSION OF MINORITY INTEREST.

Directors of a company are under a fiduciary duty to act for the benefit of the company. The conduct of the parties against the interest of the company constitutes mismanagement of affairs. To satisfy the requirements of Section 398 it is enough to establish that there was a likelihood of the affairs of the company being conducted in a manner prejudicial to the interest of the company. As per the facts of the case Coriander and Lettuce opposed the complete conversion of ABI's franchisees to 'Craze Burgers' and the replacement of ABI's ingredients and recipes with the ingredients and recipes of CBI. Both Coriander and Lettuce had deep understanding of the Indian markets and they reasonably anticipated that neither the franchisees would agree to convert nor the consumers would appreciate it and the entire business in India would fail. This anticipation of failure was further supported by the reason that ABPL had adopted ABI's recipe to Indian tastes and that was the reason for its success. However, CBI was completely against changing its recipe. Removal of director without proper service of notice is illegal and may be held to be an oppressive act. In the said case, the notice was served to the office address of ABPL instead of service to the director.

3. THE ACT OF ABPL SELLING BURGERS BY ITSELF OR THROUGH ITS FRANCHISEES AMOUNTS TO SINGLE BRAND RETAILING.

FDI in single brand retailing is subject to the condition that the product is sold under a single brand internationally. The foreign company invests into the equity of the Indian company. As per the facts of the said case ABPL is selling burgers under the brand name of 'Amaze Burgers' and being the master franchise it has entered into franchise agreements with other franchisees to sell burgers under the same brand name. After the takeover of ABI by CBI, the new management of CBI proposed to change the ingredients and recipes of the burgers which constitutes an 'addition to the product' requiring fresh approvals from the concerned government authorities. Even though the mandate was to obtain fresh approvals ABPL failed to get the required approvals thereby in breach of RBI Regulations.

4. THE FRANCHISE AGREEMENT BETWEEN ABPL AND FRANCHISEES IS IN VIOLATION OF SECTION 3, THE COMPETITION ACT, 2002.

Under the franchise agreements ABPL requires the franchisees not to sell outside a particular territory. An agreement relating to allocation of area or market is in contravention of Section 3(4)(c) of the Competition Act, 2002. This agreement with the franchisees amounts to a vertical agreement which causes adverse effect on the market and is void. The territorial restriction results in inhibiting competition and imperfect competition detrimental to the objective of the Competition Act, 2002, i.e. to promote free and fair competition. The franchise agreement also provides that the franchisees cannot sell any other products other than those which are permitted by ABPL and not to do any competing business. This arrangement of exclusive supply is in violation of Section 3(4)(b).

5. ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ABPL VIOLATES THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.

The Companies Act provides, that a private company is prohibited from inviting or accepting deposits from persons other than its members, directors or their relatives. If a private company invites or accepts deposits from public, it will become a public company.

The NBFC regulations provide that a non-banking company with the primary aim to accept deposits should register itself and take authorization for the acceptance of public deposits. However, in fact as a matter of public policy, Reserve Bank has decided that only banks

should be allowed to accept public deposits and as such has since 1997 not issued any Certificate of Registration (CoR) for new NBFCs for acceptance of public deposits.

The scheme practised by ABPL falls under the Collective Investment Scheme under the garb of accepting security deposit from the franchisees which is violative of the SEBI CIS Regulations 1999.

6. CORIANDER AND LETTUCE HAVE NOT COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.

The Petitioners have not engaged in fraudulent activities, misappropriation of funds, and criminal breach of trust and conspiracy with some of the franchisee. When the petitioners were serving as the directors, ABPL's gross revenue grew at an alarming 250%, however, the net revenue grew at 20% because the difference includes impurities for contingencies and reserves. Hence there are no fraudulent activities or criminal breach of trust on the part of the directors. Also, the Company under their aegis became one of the most popular fast food joints in India. There was no acceptance of gratuitous payments from the franchisees or criminal conspiracy as the amount of Rs. 20,00,000 was security deposit for the purpose of indemnification.

ARGUMENTS ADVANCED

1. THE COMPANY LAW BOARD (CLB) HAS JURISDICTION TO HEAR THE APPLICATION UNDER SECTION 397/398 OF THE COMPANIES ACT, 1956.

Section 397/398 of the Companies Act, 1956 confers jurisdiction on the CLB to hear cases of oppression and mismanagement in the affairs of the company.

1.1 The CLB has exclusive jurisdiction to hear cases of oppression and mismanagement.

The CLB's jurisdiction u/s 397/398 cannot stand fettered merely because there is an arbitration clause or an arbitration proceeding or an award.² The scheme of Section 397, 398 and 402 appears to constitute a complete code in itself and orders envisaged u/s 402 cannot be given to party by an arbitrator.³

The statutory jurisdiction of the CLB could not be ousted by an arbitration clause.⁴ The statutory jurisdiction of the CLB and the right of appeal against its orders could not be ousted even by the consent of the parties.⁵ The provisions of section 397, 398 and 434 dealing with the jurisdiction to wind up a company or to regulate its management are exclusively the jurisdiction of the CLB and cannot be referred to arbitration.⁶

1.2 The petitioner has locus standi to approach the CLB.

Any member holding not less than one-tenth of the issued share capital of the company has the right to apply u/s 397/398.⁷ However, a person entitled to allotment of shares against his application money can file a petition. The CLB is a court of equity and hence the matter has to be considered on equitable grounds. Assuming that no shares were allotted to the petitioner, yet, he was declared to be a shareholder for the purposes of the petition as he was entitled to allotment of shares.⁸ Hence, the petitioners in the present case, are entitled under the ESOP agreement to 10.1% of shareholding which gives them the standing before this CLB.

² Manavendra Chitnis v. Leela Chitnis Studios Pvt. Ltd., (1985) 58 CompCas 113 (Bombay).

³ Sudershan Chopra v. CLB, (2004) 52 SCL 429 (P&H). *See also* Anil Gupta v. J.K Gupta, (2002) 47 CLA 50.

⁴ Altek Lammertz Needles Ltd., *Re*, (2004) 56 SCL 156 (CLB).

⁵ *Supra* note 3.

⁶ O.P Gupta v. Shiv General Finance Pvt. Ltd. (1977) 47 CompCas 279 (DEL); Kare (P.) Ltd., *Re*, (1977) 47 CompCas 276 (Del).

⁷ Section 399 (1), Companies Act, 1956

⁸ Shri Dhananjay Pande v. Dr. Bais Surgical and Medical, 2005 125 CompCas 626 CLB.

2. THE ACTS OF AMAZE BURGERS PRIVATE LIMITED (ABPL) AMOUNT TO MISMANAGEMENT AND SUPPRESSION OF MINORITY INTEREST.

The directors are under the fiduciary duty to act for the benefit of the company.⁹ They have a fiduciary relationship with the company.¹⁰ The duties arising from this relationship include the duty to exercise the power for the benefit of the company.¹¹

2.1 Acts of new management of ABPL is against the interest of the company.

To satisfy the requirement of Section 398(b), it is enough to establish that there was a likelihood of the affairs of the company being conducted in a manner prejudicial to the interest of the company.¹² The terms of the takeover provided that the ABI franchisees all over the world were supposed to be rebranded under the brand name of CBI i.e. 'Craze Burgers' and instead of ABI's ingredients and recipes, CBI's ingredients and recipes were to be used. The petitioners had deep understanding of the Indian markets, so they vehemently opposed complete conversion. They anticipated that neither the franchisees will agree to convert nor the consumers will appreciate and the entire business in India will fail.¹³

2.2 Illegal termination of the petitioners amounted to Oppression and Mismanagement.

A special notice has to be given to a director u/s 284 before removing him because an opportunity of hearing has to be provided to him at the general meeting.¹⁴ Removal of a member director without such a notice¹⁵ has been held to be an act of oppression and mismanagement.¹⁶ As per the facts of the present case, the notice to remove the petitioners was sent to the office address of the company. However, a copy of the said notice was not sent to the directors thereby denying their representation and opportunity to defend themselves and be heard.¹⁷ Hence, according to the aforesaid, the acts committed by ABPL amount to oppression and mismanagement.

⁹ Suresh Arora v. Grevlon Textile Mills Pvt. Ltd., (2008) 142 CompCas 963.

¹⁰ Re Smith & Fawcett Ltd., (1942) Ch 304, at P. 306, per Greene MR.

¹¹ Sachar Committee Reports, 2006, Para 5.14.

¹² In Re, Albert David, (1964) 68 (WN 163,172).

¹³ Para 5, 6 of the Fact Sheet.

¹⁴ Arun Kumar Mehta v. Ganesh Commercial Co. Ltd., (2006) 134 CompCas 500.

¹⁵ Sanjay Paliwal v. Paliwal Hotels Pvt. Ltd., (2008) 141 CompCas 270 (CLB).

¹⁶ Manmohan Singh Kohli v. Venture India Properties Pvt. Ltd., (2005) 123 CompCas 198.

¹⁷ Para 7 of the Fact Sheet.

3. THE ACT OF ABPL SELLING BURGERS BY ITSELF OR THROUGH ITS FRANCHISEES AMOUNTS TO SINGLE BRAND RETAILING.

FDI means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000.¹⁸ FDI in single-brand retail has been clearly defined by government circular,¹⁹ which says single brand retail generally refers to the selling of goods under a single brand name.

FDI in Single Brand product retail is subject to the following conditions²⁰-

- (a) Products to be sold should be of a 'Single Brand' only.
- (b) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
- (c) 'Single Brand' product-retail trading would cover only products which are branded during manufacturing.
- (d) The foreign investor should be the owner of the brand.
- (e) Applications seeking permission of the Government for FDI in retail trade of 'Single Brand' products would be made to the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion. The applications would specifically indicate the product/product categories which are proposed to be sold under a 'Single Brand'. Any addition to the product/product categories to be sold under 'Single Brand' would require a fresh approval of the Government.
- (f) Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered by the FIPB for Government approval.

ABPL is a wholly owned subsidiary of CBI, and since it has foreign funding, it cannot carry on the business of selling burgers either by itself or through its franchisees since it amounts to single brand retailing and ABPL has not sought any approval.²¹ In present case there was change in the recipe and ingredients of burgers, which is an addition to the product and thus ABPL is required to take fresh permission which has not been taken.

¹⁸ http://dipp.gov.in/English/Policies/FDI_Circular_02_2011.pdf (last visited on 11.10.2014)

¹⁹ Press Note No.1 (2012 Series), D/o IPP File No.: 5/12/2010-FC-1 dated: 10th January, 2012, Ministry of Commerce & Industry Department of Industrial Policy & Promotion, Government of India.

²⁰ http://rbidocs.rbi.org.in/rdocs/content/PDFs/PRES210912_4.pdf (last visited on 20.10.2014).

²¹ Para 18 of the Fact Sheet.

4. THE FRANCHISE AGREEMENT BETWEEN ABPL AND FRANCHISEES IS IN VIOLATION OF SECTION 3, THE COMPETITION ACT, 2002.

Agreement between enterprises at different level of production chain are vertical agreements. If such an agreement causes or is likely to cause an appreciable adverse effect²² on competition within India will make it anti-competitive and in contravention of Section 3(1) of the Act which has to be seen with reference to factors given under section 19(3) of the Competition Act, 2002.²³ Under the franchise agreements ABPL requires the franchisees not to sell outside a particular territory. The territorial restriction eliminates competition between dealers, *inter se* and its effects will be more noticeable in the border areas of the two territories where the customer will not have any choice between the two dealers although the customer might prefer to a dealer on the other side of the border of his territory for whatever reasons, whether quality of service or the terms of sale etc.²⁴

In *re McDowell & Co. Ltd.*,²⁵ territorial restriction imposed by it on its franchise-holders manufacturers/bottlers, to the effect that they were to confine their selling operations to area allotted to them and prohibited them from selling their products at any place outside the respective areas was held to be a restrictive trade practice.

Provision of an agreement stating: “We have pleasure in appointing you as one of our distributors for marketing our products in eastern region subject to following conditions...” was held to be anti-competitive.²⁶ Furthermore, the franchise agreement also provides that the franchisees cannot sell any other products other than those which are permitted by ABPL and not to do any competing business.

In *re, Mohan Meakins Limited & Others*,²⁷ the commission examined the reasonableness on the part of franchisors to protect the quality of product and to avoid the risk of mix up or contamination where the agreement completely prohibited the franchise holders to engage in competing business of bottling products. The commission found it unreasonable and held it to be anti-competitive. When dealers were required not to deal directly or indirectly in the sale of similar goods, the exclusive dealership was held restrictive and anti-competitive in

²² Global Automobiles Ltd, Pooja Expo India Private Ltd, (33 of 2011) decided on 3rd July 2012, ¶ 12.4.

²³ FICCI Multiplex Association of India v United Producers/Distributors Forum and Ors, (1 of 2009) decided on 25th May 2011, ¶ 23.6.

²⁴ RRTA v. Spencer & Co. Ltd., RTP Enquiry No. 75/1975, Order dated 3-11-1977.

²⁵ RTP Enquiry No. 105/1984, Order dated 17-09-1986.

²⁶ In *re* Tide Water Oil Company (India) Ltd., RTP Enquiry No. 21/1987, Order dated 18-11-1987.

²⁷ RTP Enquiry No. 65/1984, Order dated 11-04-1986.

nature.²⁸ Hence this franchise agreement is anti-competitive and violative of Section 3(4)(b)/(c).

5. ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ABPL VIOLATES THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.

Violation of Companies Act, 1956: The Companies (Amendment) Act, 2000²⁹ provides that a private company is prohibited from inviting or accepting deposits from persons other than its members, directors or their relatives. If a private company invites or accepts deposits from public, it will become a public company. ABPL, being a private company is accepting public deposits under the garb of security deposits and hence violating the provisions of The Companies Act, 1956.

Violation of NBFC Regulations: The NBFC regulations provide that a non-banking company with the primary aim to accept deposits should register itself and take authorization for the acceptance of public deposits. However, in fact as a matter of public policy, Reserve Bank has decided that only banks should be allowed to accept public deposits and as such has since 1997 not issued any Certificate of Registration (CoR) for new NBFCs for acceptance of public deposits.³⁰

Violation of SEBI CIS guidelines: Section 11AA, SEBI Act, 1992 provides: (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme; (2) Any scheme or arrangement made or offered by any company under which,

- (i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilized solely for the purposes of the scheme or arrangement;
- (ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable from such scheme or arrangement;
- (iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

²⁸ Himtubes Limited, RTP Enquiry No. 20/1986, Order dated 2-5-1986.

²⁹ Section 3(1)(iii), The Companies Act, 1956. (as amended by The Companies (Amendment) Act, 2000).

³⁰ <http://www.rbi.org.in/scripts/FAQView.aspx?Id=92> (last seen on 10th October, 2014).

(iv) the investors do not have day to day control over the management and operation of the scheme or arrangement. The SEBI CIS Regulations clearly exclude the deposits which are accepted by a company under section 58A, Companies Act, 1956.

The scheme practised by ABPL falls under the Collective Investment Scheme under the garb of accepting security deposit from the franchisees which is violative of the SEBI CIS Regulations 1999. In the matter of *Rose Valley Real Estate & Constructions Ltd.*, the entity invited contributions to invest in land and allotted land to investors. The investors were given an option to withdraw the delivery of land along with promise of returns. Hence, the company was conducting CIS activities in the garb of real estate operations. SEBI, therefore, passed an interim order dated January 03, 2011 directing the company not to collect any money from investors or to launch any scheme; not to dispose of any of the properties or delineate assets of the scheme; not to divert any fund raised from public at large kept in bank account and/or at the custody of the company. In the matter of *PACL Limited v. SEBI*, it was held that the transactions between PACL and its customers are not real estate transactions simpliciter, and they satisfy all the ingredients of a CIS as defined under Section 11AA of the SEBI Act. It is clear that the business run by the PACL is nothing but that of a CIS. Thus, PACL has violated Section 12(1)(B) of the SEBI Act read with Regulations 5, 68, 69 of the CIS Regulations, by not applying for registration with SEBI as a CIS and also launching new schemes/ plans, raising money under such schemes/ plans.

6. CORIANDER AND LETTUCE HAVE NOT COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.

The Petitioners have not engaged in fraudulent activities, misappropriation of funds, and criminal breach of trust and conspiracy with some of the franchisee. When the petitioners were serving as the directors, ABPL's gross revenue grew at an alarming 250%, however, the net revenue grew at 20% because the difference includes impurities for contingencies and reserves. Hence there are no fraudulent activities or criminal breach of trust on the part of the directors. Also, the Company under their aegis became one of the most popular fast food joints in India.

PRAYER

Wherefore, in the light of the facts presented, arguments advanced and authorities cited, the Petitioners humbly submit that the Hon'ble Company Law Board be pleased to adjudge and declare that:

- 1. ABPL has suppressed the minority interests, thereby causing oppression and mis-management to the petitioners under Section 397/398, The Companies Act, 1956.*
- 2. That a direction be made to ABPL to grant the ESOP shares to the petitioners in pursuance of the ESOP Agreement and Policy.*
- 3. That the removal of petitioners be declared as illegal and contrary to the provisions of Section 284, The Companies Act, 1956.*

And pass any other relief, that this Hon'ble Company Law Board may deem fit and proper in the interest of justice, equity and good conscience.

For this act of kindness, the Petitioners shall duty bound forever pray.

Sd. /-

(Counsel for the Petitioners)