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*Before*

**THE HONOURABLE COMPANY LAW BOARD**

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**Under Section 397/398 of The Companies Act,1956**

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**CORIANDER & LETTUCE .....PETITIONERS**

**v.**

**ABPL & CBI.....RESPONDENTS**

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**LIST OF ABBREVIATIONS**

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&	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

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- *Syedabad Tea Company Ltd. v. Samarendra Nath Ghattak* (1995) 83 CompCas 504.
- *T.V. Raju Naidu v. Tiruppur Karur Transport Pvt. Ltd.*, (2010) 153 CompCas 12 (CLB).
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## **STATEMENT OF JURISDICTION**

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**THE PETITIONERS HAVE FILED THE CASE BEFORE THE HON'BLE COMPANY LAW BOARD, IN THE MATTER OF CORIANDER & LETTUCE v. ABPL & CBI, UNDER SECTION 397/398<sup>1</sup> 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 RESPONDENTS RESERVE THE RIGHT TO CHALLENGE THE JURISDICTION.**

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

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**<sup>1</sup> 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.



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## **STATEMENT OF FACTS**

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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.

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**ISSUES RAISED**

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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 SECURITY DEPOSITS BY ABPL VIOLATES THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.**
6. **WHETHER CORIANDER AND LETTUCE HAVE COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.**

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## **SUMMARY OF ARGUMENTS**

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### **1. THE COMPANY LAW BOARD (CLB) DOES NOT HAVE THE JURISDICTION TO HEAR THE APPLICATION UNDER SECTION 397/398 OF THE COMPANIES ACT, 1956.**

By virtue of the mandatory nature of section 8 of The Arbitration and Conciliation Act, 1996, once the ingredients of this section are satisfied, then even the matters covered under Section 397 & 398 shall have to be referred to arbitration. Compliance with section 399 is a condition precedent for maintaining a petition u/s 397/398 which requires holding of one-tenth of the issued share capital of the company by the petitioners. When the relief sought both in the company petition and the civil suit were substantially the same, in order to avoid conflict of decisions the proceedings before the CLB were stayed till the disposal of the civil suit.

### **2. THE ACTS OF AMAZE BURGERS PRIVATE LIMITED (ABPL) DO NOT AMOUNT TO MISMANAGEMENT AND SUPPRESSION OF MINORITY INTEREST.**

With respect of alleged mismanagement, the court does not interfere in the question of commercial judgement. The decision of CBI to replace the existing ingredients and to rebrand globally is a commercial decision and hence it will not attract mismanagement. The termination of the petitioners' employment was on the ground of huge insubordination and dishonesty. The termination being for a cause does not amount to illegal removal and hence no case for oppression and mismanagement can be made.

### **3. THE ACT OF ABPL SELLING BURGERS BY ITSELF OR THROUGH ITS FRANCHISEES DOES NOT AMOUNT TO SINGLE BRAND RETAILING.**

In a franchising arrangement, the franchisor usually does not make any contribution to the business in terms of equity. The franchisor's contribution is in terms of grant of rights for the use of their intellectual property and business method. The equity is contributed by the Indian franchisee and the economic interest of the franchisor is limited to the franchisee fees that he receives from the franchisee. Furthermore, franchising primarily involves sale of goods and services through Indian franchisees, which at one level is more akin to sale of goods to distributors in India who could sell from their own retail outlets. Merely because under franchising, the franchisor usually exercises a higher degree of control over the franchisee's business operations, it cannot be equated with FDI.

**4. THE FRANCHISE AGREEMENT BETWEEN ABPL AND FRANCHISEES IS NOT IN VIOLATION OF SECTION 3, THE COMPETITION ACT, 2002.**

Under the franchise agreements ABPL requires the franchisees not to sell outside a particular territory. In case of genuine agency agreement, territorial restriction would not be a restrictive trade practice. By virtue of the control exercised by ABPL over its franchisee, the franchise agreement is an agency agreement. 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 condition is imposed as a restriction for legitimate business reasons and not for anti-competitive purposes.

**5. ACCEPTANCE OF SECURITY DEPOSITS BY ABPL DOES NOT VIOLATE THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.**

As per the franchisee agreement that existed between ABPL and the franchisees, a sum of Rs. 20,00,000 was taken by ABPL from the franchisees as a security deposit to indemnify itself in case of a default. The allegation by Coriander and Lettuce, that the acceptance of deposits by ABPL is violative of the provisions of the Companies Act, NBFC regulations and SEBI CIS regulations, does not hold ground because the deposit in question is a security deposit and not a public deposit as alleged. The definition of public deposits clearly elucidates that security deposit is not a public deposit. Hence, as ABPL only accepted security deposits, there is no violation of the said regulations.

**6. CORIANDER AND LETTUCE HAVE COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.**

The Petitioners have engaged in fraudulent activities, misappropriation of funds, 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 a minimal 20% which suggests manifest fraudulent activities and criminal breach of trust on the part of the directors. Also, the Company under their aegis had received notices from the Excise Department.

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## ARGUMENTS ADVANCED

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### **1. THE COMPANY LAW BOARD (CLB) DOES NOT HAVE JURISDICTION TO HEAR THE APPLICATION UNDER SECTION 397/398 OF THE COMPANIES ACT, 1956.**

The ESOP Agreement as well as the employment agreement contains arbitration clauses.

*1.1 The CLB has no jurisdiction in view of the arbitration clause contained in the employment agreement and ESOP agreement.*

Being a judicial body, the CLB is bound, in terms of Section 8 of Arbitration Act, to refer the parties to arbitration if the allegation arose out of the terms of an agreement containing an arbitration agreement as defined in section 7 of the Act, notwithstanding the provision of section 9.<sup>2</sup> It is an established principle that when the matter before the CLB is covered by an arbitration agreement, then the same has to be referred to arbitration. Matters covered in a proceeding u/s 397/398 are not outside the purview of the provisions of section 8 of the Arbitration Act, if the requirements of that section are satisfied.<sup>3</sup> By virtue of mandatory nature of section 8, once the ingredients of the section are satisfied, then even the matters covered under section 397, 398 shall have to be referred to arbitration.<sup>4</sup>

Where the arbitration agreement existed between the parties and the grievance was directly flowing from the agreement and the subject matter of the same, the CLB directed the reference to arbitration.<sup>5</sup> Relief was claimed in a petition on the basis of an agreement which contained an arbitration clause. The CLB found that relief could be granted only in accordance with the agreement. The matter was accordingly referred to the arbitration.<sup>6</sup>

*1.2 The petitioners have no locus standi to file the present petition.*

The requirements of Section 399(1) are statutory and not directory in nature.<sup>7</sup> A breach of the said requirement cannot be waived by the CLB.<sup>8</sup> The requirement of shareholding up to the prescribed percentage is mandatory. It must be shown with the help of documentary evidence.<sup>9</sup> The Applicant must hold the requisite number of shares at the time of filing the

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<sup>2</sup> 20<sup>th</sup> Century Finance Corporation Ltd. v. RFB Latex Ltd., (1999) 34 CLA 267.

<sup>3</sup> Pinaki Das Gupta v. Maadhyam Advertising Pvt. Ltd., (2002) 49 CLA 9.

<sup>4</sup> Vijay kumar Chopra v. Hind Samachar Ltd., (2001) 2 CLC 867.

<sup>5</sup> E Logistics Pvt. Ltd. v. Financial Technologies India Ltd., (2007) 139 CompCas 311.

<sup>6</sup> Spray Engg. Devices Ltd. v. Shree Saibaba Sugars Ltd., (2008) 145 CompCas 166.

<sup>7</sup> Prem Seth v. National Industrial Corporation Ltd., (1996) 20 CLA 341.

<sup>8</sup> Syed Musharraf Mehdi v. Frontline Soft Ltd., (2007) 135 CompCas 280 (CLB).

<sup>9</sup> Vijay Mehta v. Arlington Spinning and Weaving Mills Ltd., (2010) 154 CompCas 456 (CLB).

petition. Where this is not so, the petition would be dismissed even if his shareholding increased subsequently.<sup>10</sup> If the petitioners are no longer the shareholders of the company then they do not have the qualification to proceed with the main proceeding.<sup>11</sup>

### *1.3 Pending Civil Court Proceedings.*

In a petition for relief under section 397, it was found that the acts alleged were already the subject matter of civil proceedings. The CLB refused to pass any order on the petition.<sup>12</sup> If any other remedy has been pursued by the petitioner, then the extraordinary & summary jurisdiction of the CLB u/s 397/398 cannot be invoked.<sup>13</sup> Where there was the complaint about non issue of bonus shares. The dispute as to petitioner's title to the shares was pending before the court. It was held that the CLB could not adjudicate such disputed question of facts. The petition, therefore, was not maintainable.<sup>14</sup> The relief sought both in the company petition and the civil suit were substantially the same. The parties to the suit before the court were all parties before the CLB. The cause of action both in the suit and the company petition were found to be the same. It was held that since the civil proceeding before the court were prior in time to the filing of petition, to avoid conflict of decisions, the proceedings before the CLB were stayed till disposal of the civil suit on the file of the court.<sup>15</sup>

## **2. THE ACTS OF AMAZE BURGERS PRIVATE LIMITED (ABPL) DO NOT AMOUNT TO MISMANAGEMENT AND SUPPRESSION OF MINORITY INTEREST.**

### *2.1 Commercial decisions do not amount to oppression and mismanagement.*

With respect to alleged mismanagement, the court does not interfere in question of commercial judgment.<sup>16</sup> Reduction in profits or incurring of losses may create a suspicion but it is not the same thing as a proof of financial mismanagement or even a presumption of it.<sup>17</sup>

### *2.2 The termination of the director was not illegal.*

The change in the control/management of the company and the appointment of new directors as a result thereof cannot be questioned under this section and the court will not interfere with the affairs of the company in case where the act complained of is not *ultra vires* the company.

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<sup>10</sup> Mahendra Singh Rathore v. Rajput Hotel and Resorts Pvt. Ltd., (1998) CompLJ 160.

<sup>11</sup> Syedabad Tea Company Ltd. v. Samarendra Nath Ghattak (1995) 83 CompCas 504.

<sup>12</sup> Sandeep Gupta v. Indian Hardware Industries Ltd., (2008) 142 CompCas 552.

<sup>13</sup> P.S Nanavati v. Jaipur Metals Ltd., (1990) 69 CompCas 769 (Raj).

<sup>14</sup> Indowind Energy Ltd. v. ICICI, (2010) 96 CLA 1 (CLB).

<sup>15</sup> Harikumar Rajah v. Sovereign dairy Industries Ltd., (2001) 2 CLC 1162.

<sup>16</sup> Re Macro (Ipswich) Ltd., (1994) 2 BCLC 354.

<sup>17</sup> Jagjit Singh Chawla v. Tirath Ram Ahuja Ltd., (2002) 2 CompLJ 72.

The section is only concerned with the acts prejudicial to the interest of the company, whether caused by conduct lawful/unlawful.<sup>18</sup> Removal of existing directors and appointment of new directors cannot be challenged in a petition under section 398.<sup>19</sup> It is only when the new directors misconduct the affairs of the company that it may be said that they have been working to the prejudice of the company.<sup>20</sup>

The petitioners, Coriander and Lettuce, were terminated for a cause and the said termination was not at will. Termination for cause refers to the expiration of a contract when one side failed to act up to the terms of the contract, and the other side is ending the relationship as a result. Termination for cause can result from work not being done or being done incorrectly. Insubordination is a kind of misconduct whereby the employee refuses to recognize and submit to the authority of the employer, and refuses to comply with the employer's clear instructions, policies and procedures. In *Daniels v. Canadian Gift & Tableware Assn.*,<sup>21</sup> the employee, refused to comply with her supervisor's instructions and challenged her supervisor's authority. The court said that the employer had just cause to dismiss the employee without notice. The employee had behaved as though she had the authority to make the decisions she did, even though she had no such authority. Despite several warnings that this kind of conduct would not be tolerated in the workplace, the employee continued her campaign of insubordination. Just cause to terminate her employment was validated.

### **3. THE ACT OF ABPL SELLING BURGERS BY ITSELF OR THROUGH ITS FRANCHISEES DOES NOT AMOUNT 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.<sup>22</sup> FDI in single-brand retail has been clearly defined by government circular, which says single brand retail generally refers to the selling of goods under a single brand name.<sup>23</sup> In a franchising arrangement, the franchisor usually does not make any contribution to the business in terms of equity. The franchisors contribution is in terms of grant of rights for the use of their intellectual property and business method. The equity is contributed by the Indian franchisee and the economic

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<sup>18</sup> Thakur Paper Mills Ltd., In Re, 1975 TaxLR 1656 (Pat).

<sup>19</sup> T. V. Raju Naidu v. Tiruppur Karur Transport Pvt. Ltd., (2010) 153 CompCas 12 (CLB).

<sup>20</sup> Rai Saheb Vishwamitra v. Amar Nath Mehrotra, (1986) 59 CompCas 854 (All).

<sup>21</sup> 2003 CanLII 25192.

<sup>22</sup> [http://dipp.gov.in/English/Policies/FDI\\_Circular\\_02\\_2011.pdf](http://dipp.gov.in/English/Policies/FDI_Circular_02_2011.pdf) (last visited on 11.10.2014).

<sup>23</sup> 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.



interest of the franchisor is limited to the franchisee fees that he receives from the franchisee. Furthermore, franchising primarily involves sale of goods and services through Indian franchisees, which at one level is more akin to sale of goods to distributors in India who could sell from their own retail outlets. Merely because under franchising, the franchisor usually exercises a higher degree of control over the franchisee's business operations, it cannot be equated with FDI.

#### **4. THE FRANCHISE AGREEMENT BETWEEN ABPL AND FRANCHISEES IS NOT IN VIOLATION OF SECTION 3, THE COMPETITION ACT, 2002.**

Agreement between enterprises at different level of production chain are vertical agreements. Vertical agreements are subject to 'rule of reason' unlike the case in horizontal agreements<sup>24</sup> where AAEC is presumed. If such an agreement causes or is likely to cause an appreciable adverse effect<sup>25</sup> 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.<sup>26</sup> The rule of reason in examining the legality of restraints on trade was explained by the US Supreme Court in *Board of Trade of City of Chicago v. US*,<sup>27</sup> as "Any restraint is of essence, until it merely regulates and promotes competition. To determine this question, the Court must ordinarily consider the facts peculiar to the business to which restraint is applied, its condition before and after the restraint was imposed, the nature of restraint and its actual or probable effect."<sup>28</sup>

Under the franchise agreements ABPL requires the franchisees not to sell outside a particular territory. In case of a genuine agency agreement, territorial restriction would not be a restrictive trade practice.<sup>29</sup> In agency contracts, the actual business consists in dealings between principal and customers, and the work of the agent is only to bring about that business.<sup>30</sup> The relation of agency has to be distinguished from that of an independent contractor. An independent contractor is one who undertakes to do some work for another, or to produce a certain result<sup>31</sup> but is not subject to control and directions of the employer as to

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<sup>24</sup> Section 3(3), Competition Act, 2002.

<sup>25</sup> *Global Automobiles Ltd. v. Pooja Expo India Private Ltd.*, (33 of 2011) decided on 3rd July 2012, ¶ 12.4.

<sup>26</sup> *FICCI Multiplex Association of India v United Producers/Distributors Forum and Ors.*, (1 of 2009) decided on 25<sup>th</sup> May 2011, ¶ 23.6.

<sup>27</sup> (1918) 246 US 231.

<sup>28</sup> *National Society of Professional Engineers v. United States*, 435 US 679.

<sup>29</sup> *Northland Rubber Mills Ltd.*, RTP Enquiry No. 1227/1987, Order dated 17-03-1989.

<sup>30</sup> *CIT v. Raj Bahadur Jairam Valji*, (1959) 35 ITR 148, 163 (SC).

<sup>31</sup> *Samson v. Ailchison*, (1912) AC 844.

the means or process by which he is to achieve the result.<sup>32</sup> But an agent has to act according to the principal's instructions, whether given at the outset or from time to time.<sup>33</sup> Since franchisees is directly executing the order<sup>34</sup> in the process of sale of burgers which is provided by ABPL in detailed instruction booklet,<sup>35</sup> this agreement is in form of agency and not independent contract.

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 case there is competition in the market any upstream party would want to ensure a safe shelf for its product or a particular kind of service. Exclusive supply agreement requires the downstream party to ensure him, of that market or service, in return of some benefits.

In *re Mohan Meakins Ltd. & Ors.*,<sup>36</sup> the commission held that reasonable restrictions on the franchise holders to protect the quality of the products will be in public interest and are justified. There is an element of risk of mix-up<sup>37</sup> or contamination<sup>38</sup> in the utilisation of the same plant for bottling products similar to those of Mohan Meakin. In *re India Cements Ltd.*,<sup>39</sup> the standard form of agreement entered into with its stockists, *inter alia*, prohibited sale of, and dealing in, of any cement, whether foreign or Indian, other than the cement marketed by the company, i.e. India Cements Ltd. the commission held that having regard to the nature of commodity, i.e. cement, which can easily be mixed up or passed off for another brand of cement, the restriction imposed was reasonable.

A clause contained in a newspaper merger agreement forbidding the seller to engage in, work for, operate, or to be connected in any way with any business or other activity, directly or indirectly competitive with the business of surviving firm was held not to be anti-competitive and reasonable.<sup>40</sup> Hence, this condition is imposed as a restriction for legitimate business reasons and not for anti-competitive purposes.

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<sup>32</sup> *Quarman v. Burnett*, (1840) 151 ER 509.

<sup>33</sup> *Union of India v. Motilal Kamalia*, AIR 1962 Pat. 184.

<sup>34</sup> *Re, Veeraj Brushes*, RTP Enquiry No. 1200/1987, Order dated 22-02-1989.

<sup>35</sup> Para 4.5 of Fact Sheet.

<sup>36</sup> RTP Enquiry No. 65/1984, Order dated 11-04-1986.

<sup>37</sup> *Re Bangalore Soft Drinks Private Ltd.*, RTP Enquiry No. 189/88, Order dated 4-09-1989.

<sup>38</sup> *Re Mc Dowell & Co. Ltd.*, RTP Enquiry No. 105/1984, Order dated 17-09-1986.

<sup>39</sup> RTP Enquiry no. 48/1985, Order dated 8-04-1986.

<sup>40</sup> *Morgan v. Jacobs*, Miss., Sup. Ct. 1967.

## 5. ACCEPTANCE OF SECURITY DEPOSITS BY ABPL DOES NOT VIOLATE THE PROVISIONS OF COMPANIES ACT, NBFC REGULATIONS AND SEBI CIS REGULATIONS.

Non-violation of NBFC Regulation: The term 'deposit'<sup>41</sup> includes and shall be deemed always to have: included any receipt of money by way of deposit or loan or in any other form but does not include: amount received in ordinary course of business by way of security deposit, dealership deposit, earnest money, advance against orders for goods, properties or services; Paragraph 2(1)(xii) of the Non-Banking Financial Companies Acceptance of Public Deposits ( Reserve Bank) Directions, 1998 defines a ' public deposit' as a 'deposit' as defined under Section 45 I(bb) of the RBI Act, 1934 and further has a added list of exclusions.

In the present case the said deposit of Rs.20,00,000 is not a public deposit as it is a security deposit and by virtue of section 45 I(bb) of the RBI Act, 1934. A security deposit is no deposit at all.

Non-violation of SEBI-CIS Regulation: 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;*
- (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. Under the facts of the present case, the ABPL will not be covered under the CIS scheme as it is accepting security deposits from the franchisees for the purpose of indemnification.*

Non-Violation of Companies Act, 1956: The Explanation to Section 58A, Companies Act, 1956, provides that for the purposes of this section “deposit” means any deposit of money

<sup>41</sup> Section 45I(bb) of the RBI Act, 1934.

with, and includes any amount borrowed by, a company but shall not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. In exercise of the powers conferred by section 58A, read with section 642 of the Companies Act, 1956(1 of 1956), the Central Government, in consultation with the Reserve Bank of India, has framed the Companies (Acceptance of Deposits) Rules, 1975. Section 2(b)(vi) of the said Rules provides that deposit does not include any amount by way of security.

**6. CORIANDER AND LETTUCE HAVE COMMITTED THE OFFENCES AS ALLEGED BEFORE THE EOW.**

The petitioners have engaged in fraudulent activities and criminal breach of trust by misappropriating funds as the gross profit of ABPL rose at an alarming rate of 250% but the net revenue only rose by minimal 20%. They have also engaged in criminal conspiracy with some of the franchisees as they used to make payments to the franchisees, for the purposes of purchase of shop, stock, to pay employee dues etc. which they were not supposed to.

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**PRAYER**

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

- 1. The petition under Section 397/398 of The Companies Act, 1956, is not maintainable and hence be quashed and set aside.*
- 2. The petitioners have no rights under the ESOP scheme and consequently no shareholding to approach the CLB according to Section 399, the Companies Act, 1956.*
- 3. The removal of the petitioners is legal.*

*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 Respondents shall duty bound forever pray.*

Sd. /-

(Counsel for the Respondents)