Kamal Kumar Dutta & Anr vs Ruby General Hospital Ltd. & Ors on 11 August, 2006

Author: A.K. Mathur

Bench: H.K.Sema, A.K.Mathur

CASE NO.:
Appeal (civil) 3471 of 2006

PETITIONER:
Kamal Kumar Dutta & Anr.

RESPONDENT:
Ruby General Hospital Ltd. & Ors.

DATE OF JUDGMENT: 11/08/2006

BENCH:
H.K.SEMA & A.K.MATHUR

JUDGMENT:

J U D G M E N T [Arising out of S.L.P.(c) Nos.11017-11018 of 2005] A.K. MATHUR, J.

Leave granted.

These appeals are directed against the order dated 31.3.2005 passed by learned Company Judge, Calcutta High Court in APO No.746 of 1999 and APO No.759 of 1999 whereby learned Single Judge has disposed of the appeal and the cross-appeal arising out of the order dated 29.10.1999 passed by the Company Law Board (hereinafter to be referred to as CLB).

Brief facts which are necessary for disposal of these appeals are that an application under Sections 397 & 398 of the Companies Act, 1956 (hereinafter to be referred to as the Act) was filed by Dr.Kamal Kumar Dutta and Dr. Binod Prasad Sinha alleging various acts and oppression and mis-management in the affairs of the company before the CLB. Ruby General Hospital Limited, a company was incorporated in the year 1991 by two non-resident Indian Doctors i.e. Dr.Kamal Kumar Dutta and Dr.Binod Prasad Sinha along with Indian enterprenuor, Shri Sajal Kumar Dutta, who is the younger brother of Dr.Kamal Kumar Dutta. The Company took up the project to establish a Hospital-cum-Advance Diagnostic facility at Calcutta. The cost of the project was about Rs.11 crore out of which the share capital would be Rs.9 crore and Rs.8 crore out of the said share capital would be by way of NRI participation. Therefore, 88.88% of the project was NRI shares and the balance by resident Indians. In the year 1991, the Department of Industrial Development, Government of India, Secretariat of Industrial Approval, (for short SIA) approved the NRI investments in the said company.

Dr.Kamal Kumar Dutta was one of the first Directors of the said company and with Dr.Binod Prasad Sinha held 52.74 % of the equity shares in the said company. Apart from that Dr. Kumar Kumar Dutta contributed Rs.3 crore for the purpose of importing second-hand medical equipments and the shares towards the said investments, being the value of the equipments, should be allotted to Dr.Dutta. A loan was granted for a sum of Rs.4.6 crore by the Industrial Development Bank of India for the said project.

The Hospital was inaugurated by the Chief Minister of West Bengal on 25.4.1995. Dr.Kamal Kumar Dutta contributed Rs.4.26 crore out of which equipments worth Rs.3.5 crore were brought from USA and Rs.1.23 crore was contributed by Sajal Kumar Dutta. The grievance of Dr.Kamal Kumar Dutta was that he was denied shares of the company for the equipments brought by him by his younger brother Sajal Kumar Dutta. Though the Reserve Bank of India granted permission to allot shares in favour of Dr.Dutta on 22.3.1997 but the same was withdrawn on 20.5.1998 at the instance of the company. The company filed a writ petition challenging the said approval by the Reserve Bank of India before the High Court of Calcutta. The High Court directed to give personal hearing to the parties and the Reserve Bank of India once again granted approval for allotment of shares in favour of Dr.Kamal Kumar Dutta. The said approval was again challenged by the company by filing a writ petition before the High Court. Then again some directions were not properly followed and another writ petition was filed by the company. In compliance to the directions issued by the High Court, the Reserve Bank of India after hearing the parties passed an order granting permission to allot shares to Dr.Dutta against supply of second hand medical equipment as capital contribution. Subsequently, a writ petition was filed by the company in 2004 before the High Court of Calcutta and the same is said to be still pending.

In fact, this Ruby General Hospital Limited was established in memory of late wife of Dr.Kamal Kumar Dutta. Since Dr.Dutta and Dr.Binod Prasad Sinha were both NRIs, the company was being looked after by Sajal Kumar Dutta. No problem arose for some time till the hospital was in a struggling stage. But it appears that soon after the hospital started showing the sign of prosperity, the chord of discord grew between the brothers and attempt was made by the younger brother to oust the elder brother by denying him his shares for the medical equipment worth Rs.3.5 crore supplied by him from USA. Thus, ultimately the appellants filed a petition under Sections 397 & 398 of the Act before the CLB. The stand of the company was that Dr.Kamal Kumar Dutta and Dr.Binod Prasad Sinha who alleged to have had 88.88% shares in the company discontinued themselves as Directors and refusal of the company to allot shares to them worth the value of second hand equipments was justified. The CLB heard the parties at length and passed a detailed order giving certain directions which will be referred to hereinafter. Aggrieved against that direction issued by the CLB on 29.10.1999 both the parties approached the High Court of Calcutta. The appeal filed by Sajal Dutta and the cross-appeal filed by Dr.K.K.Dutta were clubbed together and taken together by learned Company Judge for disposal.

The main grievance of Dr.Dutta was denial of his shares for supply of medical equipments worth Rs.3.5 crore and consequential ousting from the chairman and directorship of the company which led to filing of a petition before the CLB in 1997.The appellants prayed before the CLB that necessary directions may be given to relieve the company from the mis-management of the respondents and to

relieve the oppressive, harsh and unreasonable conduct of the respondents on the appellants and other members of the company and to stop such acts or conducts of the respondents which are prejudicial to the interest of the shareholders of the company and the public at large; to direct the respondents to comply with the statutory provisions of the Act to serve the notice of the Board of Directors meetings of the company and the meetings of the shareholders of the company on the appellants and other shareholders; the appellants should be involved in the effective management of the affairs of the company; to remove the Managing Director (Sajal Dutta) from the company and to prohibit him from interfering with the effective management of the company; to quash the allotment and issue of the shares of the value of Rs.42,10,000/- allotted illegally and unlawfully by the respondents to corporate shareholders, to direct the respondents to restore the shares of the appellants which are shown as share application money by illegal and unlawful entries to direct the respondents for allotment of shares for the sum of Rs.3,05,53,290/- to the appellant No.1 being the value of the goods already supplied as the proposal has been duly approved by the Reserve Bank of India and to appoint an independent observer to attend the meetings of the Board of Directors and the meetings of the shareholders of the company. This was contested by the respondents by filing counter affidavit and the allegations were denied. It was alleged that all the notices of the meetings were given to the Board of Directors and the meetings were conducted whenever required according to law. It was alleged that in the meeting dated 19.4.1995 the appellant No.1 was present when the resolution was passed to raise the funds as he declined to give any fresh funds. This was denied by the appellant No.1 in the rejoinder filed before the CLB and it was pointed out that the minutes of the meeting dated 19.4.1995 were fabricated and manipulated to the advantage of the respondent for being appointed as Managing Director of the company so that he can succeed in his design of usurping the company. It was also alleged that the allotment of shares was bad. It was also pointed out that the resolution dated 19.4.1995 in which the appellant No.1 was alleged to be present, would indicate that the decision to convene the extraordinary general meeting and to pass a resolution under Section 81(1A) was considered and approved. But no details were furnished of such a decision. It was also alleged that the respondent No.2 using the old minutes to gain illegal and unlawful majority by hiding the contents of the resolution tried to justify his action. It was alleged that the answering respondent deliberately and knowingly did not annex the copies of such minutes of resolutions. It was specifically asserted that the respondents have withheld the copies of the resolutions passed on 12.3.1996, 17.2.1996, 19.4.1995, 9.2.1996 and 16.2.1996. In fact from the records it transpires that the main issue is with regard to the resolution passed on 19.4.1995, though according to Dr. Kamal Kumar Dutta, copies of the resolution were not supplied along with the counter affidavit. It was only the records were placed before the CLB during the course of proceedings. The main crux of the problem arose on account of the resolution passed by the Board of Directors on 19.4.1995. That resolution is crucial because in that resolution it was passed to raise funds and to issue and allot not exceeding 40 lacs equity share for Rs.10/- each at par to such persons or corporate bodies, banks, mutual funds or other financial institutions whether or not they are the existing shareholders of the company, and in such manner as may be decided by the Board. This resolution, according to the appellants, was totally fabricated though no such allegation was made before the CLB. But the core issue is whether this resolution was at all passed in that meeting or not because the whole trouble seems to have started from this and thereafter further resolutions have been passed in order to reduce the shareholding of the appellants and the whole design was to reduce the appellant No.1 to minority. In fact, the Reserve Bank of India has already granted

permission to allot share to the appellant No.1 for the equipments supplied by him to the extent of Rs.3.5 crore and that permission was challenged by one way or the other so that the permission is not granted and the share to the extent of Rs.3.5 crore is denied to the appellant Dr.Kamal Kumar Dutta and he looses the majority thereby the younger brother Sajal Dutta who has made total investment of Rs.1.3 crore will get majority and oust the appellant No.1 from the chairmanship and reduce him to nothing. This was the core issue. The CLB after considering the matter found various omissions and commissions in conduct of the Board meetings and in a detailed order discussed the whole issue. The CLB discussed the memorandum and articles of association of the company to which the appellants and Sajal Kumar Dutta are the signatories. This document is of 1991. It was resolved that the hospital was to be established with the participation of the appellants and that imported equipments worth Rs.420 lakhs would be purchased from the foreign exchange provided by the NRI doctor. The cost of the project was indicated as Rs.1100 lakhs with Rs.900 lakhs as the authorized capital out of which Rs.800 lakhs would be by NRI participation. Under the heading 'foreign investment- financial collaborator', the name of the appellant is mentioned. It was mentioned that the appellant was the principal promoter and the other promoter being the respondent No.2- a resident Indian. Under 'Means of Finance' it is mentioned that NRI investment would be Rs.800 lakhs comprising of Rs.400 lakhs as equity and Rs.400 lakhs as preference shares. It was mentioned that from various records of the company and approval given by the SIA, it is apparently clear that the appellant is the chief principal promoter of the company. In this connection CLB discussed the notices of the Board of Directors meetings because all the issues arose from the resolutions passed by the Board of Directors. The CLB recorded that the notices issued at the local address in India cannot be considered to meet with the provisions of Article 121(b) of the Memorandum and Articles of Association. It was also observed that the notices in respect of appellant No.2 the address shown was "P.O.Hirapur, District Dhanbad, Bihar" and in respect of most of the meetings, the time gap of alleged date of posting and the meeting did not exceed 3 days excluding the dates of posting and the dates of the meetings. In respect of the appellant No.1 the notices were addressed to a local address notwithstanding the fact that the company itself has attached various documents indicating that the appellant No.1 used to stay in some hotel or guest house during his visit to Calcutta. It was observed that adequate time was not given and notices were not sent at the correct address. The CLB observed that the action of the company to have posted notices for the meetings to the local addresses of the NRI directors lacked in probity and fair play as the appellants being not only the first directors of the company but also substantial holders of the shares, they should have been given notices to their address in the USA. Accordingly, the CLB held that notices for the Board meetings cannot be deemed to have been given to the appellants. Ultimately the CLB held as follows :

> " In view of our finding that no notices should be deemed to have been served on the petitioner directors for the Board Meetings, the decisions taken in these Board Meetings, granting that they had taken place, should be declared to be null and void, as the general proposition of law is that proceedings of Board meetings without notices With regard to the letter received by Dr.Dutta that the matter has been amicably settled, the CLB recorded as follows:

> "Even assuming that the petitioner had authorized this advocate to send that letter (which is disputed by the petitioner), the circumstances have been changed afterwards. Further additional shares were issued, the petitioner directors were declared to have vacated their offices and allotment of shares against the cost of imported equipments denied. In the changed circumstances, by which the petitioners have been completely ousted from the company, which was not the position when the letter from the advocate of the petitioner was written, we do not think that it would be right to bind the petitioner to the terms of the said letter."

Similarly, with regard to the second appellant, Dr.Binod Prasad Sinha, it was also held that no proper notices were given. Therefore, he cannot be deemed to have vacated the Office of Director. The notice for the AGM convened on 30.12.1996 was issued wherein re-election of this appellant was an item in the agenda, wherein it was stated " to appoint directors in place of Dr.Binod Sinha and Dr.S.K.Ghosal who retire by rotation and being eligible offer themselves for re-appointment. The resolution passed in that meeting was that Dr.Binod Sinha retired by rotation is not being reappointed because of lack of active interest and the CLB recorded that such resolution was very doubtful and whether such a resolution was at all passed. The CLB also pointed out certain impropriety in recording the minutes.

So far as the vacation of the office by the appellant No.1 is concerned, it is mentioned that the appellant No.1 vacated the office on 24.2.1997. For that purpose, the provisions of Section 283 (1) (g) were invoked. The CLB after going through the records observed that the convening of the Board meeting on 3.3.1997 at 11 A.M. is very doubtful. It was on 3.3.1997 a letter was issued indicating that the appellant No.1 has vacated his office. The CLB after appreciating the evidence observed that the resolution dated 3.3.1997 cannot be sustained.

So far as the allotment of shares was concerned, the CLB after assessing all the materials on record came to the conclusion that the allotment of shares was not completely bona fide and thus deserved to be set aside. Instead of setting aside the same, the CLB issued certain directions to which we would advert hereinafter.

The next question was with regard to the allotment of shares against the value of imported equipments. It was alleged on behalf of the respondents that this was not approved by the SIA nor the RBI covered the allotment of shares against the imported equipments and it was also pointed out that the company had no knowledge that those were second hand equipments. This aspect was also examined by the CLB at length but the CLB did not make any observation since the matter was pending before the Calcutta High Court.

After examining the evidence led by both the sides the CLB recorded that they were not in a position to convince themselves that all the equipments should have become non-functional. It appears that the whole controversy originated somewhere in March, 1997. Prior to that all the equipments were functioning properly. However, no finding was given because the matter was already pending before the Calcutta High Court. The CLB also adversely observed with regard to the Board meeting dated 7.2.1996 and far reaching decisions were taken by the company when the appellant No.1 was not

present in the said meeting and especially the respondent No.2 as Managing Director indirectly outstripping the appellant No.1 of all his powers. This meeting was held a week before the appellant No.1 was scheduled to arrive from USA on 14.2.1996. In fact, such a final decision was taken in the absence of the main promoter of the company and therefore, the CLB concluded that this reflects complete lack of probity on the part of the Directors in passing such a resolution.

So far as the meeting of 16.2.1996, the minutes were not properly recorded and it was pointed out by the IDBI nominee that draft minutes of the meeting dated 7.2.1996 placed before the meeting should correctly reflect the appointment of respondent No.2 as the Managing Director but such an important item was not included in the draft minutes and whether this item was at all discussed in the meeting dated 7.2.1996 becomes highly doubtful. It was also pointed out that the minutes of the meeting dated 16.2.1996 was signed by the respondent No.2 though it was presided over by the appellant No.1 and such minutes are required to be signed by the chairman as required under section 193 of the Act. Therefore, the recording of both the minutes cannot be accepted as correct one. Consequently, the CLB also adversely commented on another meeting dated 13.4.1996. It also held that after receipt of the letter dated 4.4.1996 from the IDBI that it cannot fund the second hand equipments and the Board decided not to import any second hand equipment for allotment of shares to the appellants, a resolution was passed despite the fact that the company had earlier applied to the Reserve Bank of India for allotment of shares. In the meeting dated 3.3.1997 there was a complete chaos. The finding is that the meeting was not properly conducted. The letter from the IDBI was not brought to the notice of the appellant.

Thereafter the following relief was granted by the CLB which can be summed up as follows. That vacation of Office by the Directors cannot be sustained. It was directed that in future the issue of notices for the Board meetings should be made by registered post before 21 days to the addressees of the NRI Directors at their usual address in USA. It was further stipulated that NRI directors will have the right to appoint alternative Directors and if the right is exercised, then the alternative directors will also be given notices as stipulated. The shares allotted in the Board Meetings on 12.3.1996 and 24.7.1996 will not have any voting rights till the outcome of the proceedings before the Calcutta High Court. No further shares will be allotted against the share application money with the company either in the names of the NRI investors or in the names of the respondents. Both the parties were permitted to make further investments but the same will be kept as share application money till the disposal of the proceedings before the Calcutta High Court. It was further directed that status quo shall be maintained till the matter is disposed of by the Calcutta High Court. There will be no change in the composition of the Board other than that the appellants directors will function as Directors in addition to the Executive Directors.

This order was challenged by filing appeal before learned Single Judge of the Calcutta High Court. Learned Single Judge instead of going into minute details, examined the question with regard to the maintainability of the petition under Sections 397 & 398 of the Act before the CLB. Learned Single Judge after examining all aspects came to the conclusion that the appellants have failed to make out a case under Section 397 of the Act for winding up of the company on the ground of just and equitable. But the learned Single Judge recorded that Dr.Dutta acted prejudicial to the interest of the company and further held that the preconditions to have an order under Section 397/398 of the

Act have not been made out and this aspect was not dealt with by the CLB at all. Therefore, learned Single Judge set aside the order of the CLB relying on a decision in the case of Hanuman Prasad Bagri & Ors vs. Bagree Cereals Pvt. Ltd. & Ors. reported in 115 Company Cases 493 and left the appellants to any appropriate remedy by way of company suit which can give the terminated director every relief. It was also observed that he can file a suit for injunction and declaration and get himself reinstated as a director or if he has been removed from a directorship, he could have filed a suit for declaration. Learned Single Judge accordingly set aside the order of the CLB.

Aggrieved against this order passed by the learned Single Judge on 31.3.2005 the present Special Leave Petitions were filed by the appellants. We have given all necessary details about the whole affairs of the company from the order of the CLB to which we shall hereinafter refer to.

At the outset learned senior counsel, Mr.F.S.Nariman, appearing for the respondents has raised a preliminary objection that the appellants have alternative remedy of approaching the Division Bench of the Calcutta High Court under Clause 15 of the Letters Patent. Therefore, this Court should not entertain these appeals and the same should be dismissed as the appellants have alternative remedy under clause 15 of the Letters Patent before the Calcutta High Court. We shall first dispose of the preliminary objection raised by Mr. Nariman with regard to the maintainability of the appeal against the order passed by learned Single Judge of the High Court of Calcutta.

Appeal lies under Letters Patent from the judgment of the learned Single Judge of the High Court to the Division Bench. In this connection, learned counsel placed reliance on a decision of this Court in the case of Garikapatti Veeraya vs. N.Subbiah Choudhury reported in 1957 SCR 488 and submitted that the appeal is vested right and it cannot be taken away. Alternative submission was if clause 15 does not apply, appeal lies under Section 483 of the Act. In this connection reliance was placed on decisions of this Court in the case of Arati Dutta vs. M/s. Eastern Tea Estate (P) Ltd. reported in (1988) 1 SCC 523 and in the case of Maharashtra Power Development Corporation Limited vs. Dabhol Power Company & Ors. reported in [2003] 117 Company Cases 651. As against this, learned senior counsel for the appellants submitted that Section 10F of the Act came into being with effect from 31.5.1991. Prior to that application under Sections 397 & 398 of the Act was being filed with the Company Judge in the High Court. But after the amendment of the Act by Act 31 of 1988, this power under Sections 397 & 398 of the Act has been given to the CLB. Under Section 10E of the Act, the Company Law Board was created. It deals with applications under Sections 397 & 398 of the Act. Therefore, learned Single Judge has not exercised original jurisdiction and as such the appeal contemplated under clause 15 of the Letters Patent is not maintainable. Learned senior counsel invited our attention to Section 100A of the Code of Civil Procedure which came into being with effect from 1.7.2002. This section starts with non-obstante clause that notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge. Therefore, it was pointed out that in view of the latest amendment in the Code of Civil Procedure, Letters Patent or intra court appeal will not lie when the learned Single Judge has exercised appellate jurisdiction. In fact, this amendment seems to have been brought about on the recommendations of the Malimath Committee report that right

to appeal should be curtailed and only one appellate forum should be available. Therefore, in view of this recommendations, this amendment was brought about. In support of this contention learned senior counsel invited our attention to the following decisions.

(i) (2004)11 SCC 672 [P.S.Sathappan (dead) by LRs. Vs. Andhra Bank Ltd. & Ors.]

(ii) (2003) 10 SCC 361 [Subal Paul vs. Malina Paul & Anr.]

(iii) AIR 2003 AP 458 [Gandla Pannala Bhulaxmi vs. Managing Director, APSRTC & Anr.]

(iv) (1987) 62 Company Cases 504.

[Rev. C.S.Joseph & Ors. Vs. T.J.Thomas & Ors.]

(v) AIR 2004 Ker. 111 [Kesava Pillai Sreedharan Pillai & etc. vs. State of Kerala & Ors.] We have considered the rival submissions of the parties. The first question that we have to examine is whether the appeal against the order of the learned Single Judge lies before the Division Bench under Letters Patent or not. It may be relevant to mention here that prior to the amendment of the Act, the power under Sections 397 & 398 used to be exercised by the Company Judge of the High Court. Appeal against that order of the learned Single Judge lies under Section 483 of the Act before the Division Bench of the High Court. Section 483 of the Act reads as under :

" 483. Appeals from orders.- Appeals from any order made or decision given before the commencement of the Companies(Second Amendment) Act, 2002, in the matter of the winding up of a company by the Court shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction.

But after the amendment the power which was being exercised under Sections 397 & 398 of the Act by learned Single Judge of the High Court is being exercised by the CLB under Section 10E of the Act. Appeal against the order passed by the CLB, lies to the High Court under Section 10F of the Act. Therefore, the position which was obtaining prior to the amendment in 1991 was that any order passed by the Single Judge exercising the power under Sections 397 & 398 of the Act, the appeal used to lie before the Division Bench of the High Court. But after the amendment the power has been given to the CLB and appeal has been provided under Section 10F of the Act. Thus, Part 1A was inserted by the amendment with effect from 1.1.1964. But the constitution of the Company Law Board and the power to decide application under Sections 397 & 398 of the Act was given to the CLB with effect from 31.5.1991 and appeal was provided under Section 10F of the Act with effect from 31.5.1991. Therefore, on reading of Sections 10E, 10F , 397 & 398 of the Act, it becomes clear that it is a complete code that applications under sections 397 & 398 of the Act shall be dealt with by the CLB and the order of the CLB is appealable under Section 10F of

the Act before the High Court. No further appeal has been provided against the order of the learned Single Judge. Mr.Nariman, learned senior counsel for the respondents submitted that an appeal is a vested right and therefore, under clause 15 of the Letters Patent of the Calcutta High Court, the appellants have a statutory right to prefer appeal irrespective of the fact that no appeal has been provided against the order of the learned Single Judge under the Act. In this connection, learned counsel invited our attention to a decision of this Court in the case of Garikapatti Veeraya vs. N.Subbiah Choudhury reported in [1957] SCR 488 and in that it has been pointed out that the appeal is a vested right. The majority took the view that the appeal is a vested right. It was held as follows :

" that the contention of the applicant was well-founded, that he had a vested right of appeal to the Federal Court on and from the date of the suit and the application for special leave should be allowed.

The vested right of appeal was a substantive right and, although it could be exercised only in case of an adverse decision, it was governed by the law prevailing at the time of commencement of the suit and comprised all successive rights of appeal from court to court, which really constituted one proceeding. Such a right could be taken away only by a subsequent enactment either expressly or by necessary intendment."

So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified that such right can be taken away by a subsequent enactment either expressly or by necessary intendment. The Parliament while amending section 100A of the Code of Civil Procedure, by amending Act 22 of 2002 with effect from 1.7.2002, took away the Letters Patent power of the High Court in the matter of appeal against an order of learned single Judge to the Division Bench. Section 100A of the Code of Civil Procedure reads as follows:

" 100A. No further appeal in certain cases.- Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

Therefore, where appeal has been decided from an original order by a single Judge, no further appeal has been provided and that power which used to be there under the Letters Patent of the High Court has been subsequently withdrawn. The present order which has been passed by the CLB and against that appeal has been provided before the High Court under Section 10F of the Act, that is an appeal from the original order. Then in that case no further Letters patent appeal shall lie to the Division Bench of the same High Court. This amendment has taken away the power of the Letters Patent in the matter where learned single Judge hears an appeal from the original order. Original order in the present case was passed by the CLB exercising the power under Sections 397 and 398 of the Act and appeal has been preferred under section 10F of the Act before the High Court. Learned single Judge having passed an order, no further appeal will lie as the Parliament in

its wisdom has taken away its power. Learned counsel for the respondents invited our attention to a letter from the then Law Minister. That letter cannot override the statutory provision. When the statute is very clear, whatever statement by the Law Minister made in the floor of the House, cannot change the words and intendment which is borne out from the words. The letter of the Law Minister cannot be read to interpret the provisions of Section 100A. The intendment of the Legislature is more than clear in the words and the same has to be given its natural meaning and cannot be subject to any statement made by the Law Minister in any communication. The words speak for itself. It does not require any further interpretation by any statement made in any manner. Therefore, the power of the High Court in exercising Letters patent in a matter where a single Judge has decided the appeal from original order, has been taken away and it cannot be invoked in the present context. There is no two opinion in the matter that when the CLB exercises its power under Section 397 & 398 of the Act, it exercised its quasi-judicial power as original authority. It may not be a court but it has all the trapping of a court. Therefore, the CLB while exercising its original jurisdiction under Sections 397 & 398 of the Act passed the order and against that order appeal lies to the learned single Judge of the High Court and thereafter no further appeal could be filed.

In this connection, our attention was invited to a decision in the case of Arati Dutta vs. M/s. Eastern Tea Estate (P) Ltd. reported in (1988) 1 SCC 523. This was a case in which the power was exercised by learned single Judge under Sections 397 & 398 of the Act and against that order appeal lay to the Division Bench of the High Court under Section 483 of the Act. In that context, their Lordships observed that mere absence of procedural rules would not deprive the litigant's of substantive right conferred by the statute. We have already explained above that earlier the power under Sections 397 & 398 of the Act was being exercised by learned Company Judge in the High Court and therefore, appeal lay to the Division Bench under Section 483 of the Act. If the power has been exercised by the Company Judge in the High Court, then one appeal shall lie before the Division Bench of the High Court under Section 483 of the Act. But that is not the situation in the present case. Therefore, this decision cannot be of any help to respondents.

In this connection, our attention was invited to a decision of the Bombay High Court in the case of Maharashtra Power Development Corporation Limited vs. Dabhol Power Company & Ors. reported in [2003] 117 Company Cases 651. In that case, the High Court took the view that despite the amendment in Section 100A of the Code of Civil Procedure, order passed by the single Judge in appeal arising out of the order passed by the CLB under Sections 397 & 398 of the Act, appeal lay to the Division Bench and in that connection, the Division Bench invoked Section 4(1) of the Code of Civil Procedure which says that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force and therefore, the Division Bench concluded that the Letters Patent appeal is a statutory appeal and special enactment. Therefore, appeal shall lie to the Division Bench. We regret to say that this is not the correct position of law. We have already explained the facts above and we have explained Section 100A of the Code of Civil Procedure to indicate that the power was specifically taken away by the Legislature. Therefore, the view taken by the Bombay High Court in the case of Maharashtra Power Development Corporation (supra) cannot be said to be the correct proposition of law.

In this connection, our attention was invited to a Constitution Bench decision in the case of P.S.Sathappan (Dead) By LRs. Vs. Andhra Bank Ltd. & Ors. reported in (2004) 11 SCC 672. In this case, the Constitution Bench observed as follows :

> " From Section 100-A CPC, as inserted in 1976, it can be seen that when the legislature wanted to exclude a letters patent appeal it specifically did so. Again from Section 100-A , as amended in 2002, it can be seen that the legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100-A, no letters patent appeal would be maintainable in the facts of the present case. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal. The words used in Section 100-A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the legislature knew that in the absence of such words a letters patent appeal would not be barred. The legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 CPC. Thus now a specific exclusion was provided."

Similarly in the case of Subal Paul vs. Malina Paul & Anr. reported in (2003) 10 SCC 361, their Lordships observed as follows :

> " Whenever the statute provides such a bar, it is so expressly stated, as would appear from Section 100-A of the Code of Civil Procedure."

In the case of Gandla Pannala Bhulaxmi vs. Managing Director, APSRTC & Anr. reported in AIR 2003 AP 458, the Full Bench of the Andhra Pradesh High Court has taken a similar view in the matter. Same is the view taken by the Full Bench of the Kerala High Court in the case of Kesava Pillai Sreedharan Pillai and etc. vs. State of Kerala & Ors. reported in AIR 2004 Kerala 111. Therefore, in this view of the matter, we are of opinion that the preliminary objection raised by Mr.Nariman cannot be sustained and the same is overruled.

Now, coming to the merits of the case, learned counsel for the appellants submitted that learned Single Judge of the High Court has gone wrong in holding that no case is made out under Sections 397 & 398 of the Act as necessary ingredients of the said sections are not present in this case. In order to appreciate the contention of learned counsel for the appellants, we have to first examine the scope of Sections 397 & 398 of the Act. Sections 397 & 398 of the Act read as under :

> " 397. Application to Tribunal 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 Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Court is of opinion-

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

398. Application to Tribunal 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; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit."

As per Section 397, any person who is eligible to apply under Section 399, can apply before the CLB 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 and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up. If the Tribunal is satisfied that there exists a situation where the business of the company is being conducted in a manner prejudicial to the interest or in a manner oppressive to any member or members and that winding up of the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding-up order on the ground that it

was just and equitable that the company should be wound up, it may with a view to bringing to an end the matters complained of, make such order as it deems fit. Therefore, what it transpires in the present context is, we have to examine whether the acts of the company were oppressive to any member or members justifying the winding up as just and equitable. It is not necessary that in every case, the relief of winding-up should be made. It is an option with the Tribunal if it considers that in order to bring to an end the matters complained of, it can pass orders for winding-up if it is just and equitable or it can pass such order as it thinks fit. It does not necessarily mean that in every case such winding-up order need be passed. Similarly, under section 398 also, if 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 or that a material change not being a change brought about by, or in the interests of any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, the Tribunal can order winding-up of the company in order to bring to an end of all these mismanagement or make such order as it thinks fit. The condition of section 399 of the Act is also equally applicable in the present case. In fact, section 398 talks much about the mismanagement, or apprehension of mismanagement in the affairs of the company. As against this, section 397 deals with oppression of the members. Therefore, both sections 397 & 398 to some extent have commonality for the purpose like, prejudicial to public interest and application for winding-up can be made by members as per Section 399. Apart from this commonality, for the purpose of Section 397, if the company acts in a manner oppressive to any member or members and if it otherwise justifies on the ground of just and equitable, then Tribunal can wind up the company or pass such order as it thinks fit. Whereas in Section 398 the basic features are that the management is working in a manner prejudicial to the interest of the company by bringing about the material changes in the management or by alteration in its Board of Directors, then in that case, if it is found by the Tribunal that in order to bring to an end or preventing further mismanagement, it can pass such order as it deems fit including that of winding-up. Therefore, the parameters in both the Sections i.e. Sections 397 & 398 are very clear. It will depend upon case to case. No hard and fast rule can be laid down. In the case of oppression to the interest of member or members, if the Tribunal is satisfied that the winding-up is just and equitable then it can do so or pass any order as it thinks fit. Likewise in Section 398 if the management wants to bring any material change in the management and control of the company prejudicial to the interest of the company, then in that case, appropriate order can be passed by the Tribunal. The acts which would amount to oppression to the members or mismanagement or material alteration in the control of the company or prejudice to the interest of the company would depend upon facts of each case.

In this connection, our attention was invited to a decision of this Court in the case of S.P.Jain vs. Kalinga Tubes Ltd. reported in (1965) 2 SCR 720. In this case, their Lordships after examining the scope of Section 397 vis-`-vis Section 210 of the English Act vis- `-vis the English procedure on the subject observed as under :

> " It gives a right to members of a company who comply with the conditions of s.399 to apply to the court for relief under s.402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The court then has power to make such orders under s. 397 read with s.402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The law however has not defined what is oppression for purposes of this section, and it is left to courts to decide on the facts of each case whether there is such oppression as calls for action under this section."

Following the English cases referred to in Kalinga Tubes Ltd. (supra), similarly in the case of Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors. reported in (1981) 3 SCC 333, their Lordships concluded as follows :

> " The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour."

In the case of Kilpest Pvt. Ltd & Ors. vs. Shekhar Mehra reported in (1996) 10 SCC 696, it was held as follows :

> " The promoters of a company, whether or not they were hitherto partners, elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi- partnership should, therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Sections 397 and 398."

In the case of Hanuman Prasad Bagri & Ors. vs. Bagress Cereals Pvt. Ltd. & Ors. reported in (2001) 4 SCC 420, their Lordships held that in order to grant relief under section 397, the petitioner should make out a case for winding up of the company on just and equitable ground and in that case, their Lordships held that illegal termination of the directorship of the petitioner was not such a ground to justify winding up of the company.

In the case of M/s. Madhusoodhanan & Anr. vs. Kerala Kaumudi (P) Ltd . & Ors. reported in (2004) 9 SCC 204, it was found that notice not less than 21 days was not given by personal service or service by post and on facts it was found that requirement of Section 189 of the Act was not complied with.

Under Section 53 of the Act, service of notice of the Board's meeting by post and by certificate of posting were not found to be reliable when the relationship between the parties was already bitter. In this case, on evidence it was found that the entries in the register were not sufficient to establish the service of notice on the Director. So far as service by certificate of posting, it raises a rebuttable presumption and the onus is on the addressee to show that the document under certificate of posting was not received by him, In the case of Dale & Carrington Investment (P) Ltd. vs. P.K.Parthapan & Ors. reported in (2005) 1 SCC 212, their Lordships with regard to oppression held if a member who holds the majority of shares in a company is being reduced to the position of minority shareholder in the company by mala fide act of the company or by its Board of Directors, such act must ordinarily be considered to be an act of oppression against the said shareholder and what relief should be granted would depend on the facts of the case. The facts of the present case at hand are almost akin to the case referred to above. Allotment of additional shares to the Managing Director was found to be sole objective to gain control by becoming majority shareholder. That allotment was found to be mala fide and not in the interest of the company and no legal procedure prescribed in Articles of Association was followed and it was found to be a clear case of an act of oppression on the part of R towards P, the majority shareholder.

In the case of Sangramsinh P.Gaekwad & Ors. vs. Shantadevi P.Gaekwad (Dead) through LRs & Ors. reported in (2005) 11 SCC 314 their Lordships approved the decision in the case of Dale & Carrington Investment (P) Ltd (supra) and observed that the director if acts in oppressive, capricious or corrupt manner or in a mala fide way then such act would be construed to be oppressive but if the director acts bonafidely in the interest of the company then such act cannot be said to be oppressive. It was observed that the Director acts in a fiduciary capacity vis-`-vis the company. It was also observed that the court is bound to look at the business realities of the situation and not to confine to a narrow legalistic view. The interest of the company should be paramount and isolated incident may not be enough but it should be continuous oppressive conduct.

It was also observed as follows :

> " The jurisdiction of the court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. The court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. Moreover, in a given case the court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties."

Our attention was invited to a decision In the case of Tea Brokers (P) Ltd. & Ors. v. Hemendra Prosad Barooah reported in (1998) 5 Comp. LJ 463(Cal.). In this case, after examination of facts, the winding up order was found to be justified, though the effect of such order meant loss to the respondent as one of his concern which was otherwise flourishing one and advantageous to him. However, the net result was that allotting additional shares to minority shareholders on the facts of the case was set aside.

In the light of the cases bearing on the subject we have to examine whether the petition filed by Dr.Kamal Kumar Dutta would justify the order passed by the CLB or not. Therefore, in order to find out whether a case of oppression in the interest of the members is made out or not. As already pointed out, oppression depends on the facts of each case.

In Halsbury's Laws of England, 4th Edn., Vol.7, para 1011, it is stated :

> " 1011. Conduct amounting to oppression.- In this context, 'oppressive' means burdensome, harsh and wrongful. It does not include conduct which is merely inefficient or careless. Nor does it include an isolated incident; there must be a continuing course of oppressive conduct, which must be continuing at the date of the hearing of the petition. Further, the conduct must be such as to be oppressive to the petitioner in his capacity as a member; whatever remedies he may have in respect of exclusion from the company's business by being dismissed as an employee or a director, he will have none under the provisions relating to oppression.
>
> On the other hand, these provisions are not confined merely to conduct designed to secure pecuniary advantage to the oppressors; they cover the case of wrongful usurpation of authority, even though the affairs of the company prosper in consequence."

(Emphasis added) In Palmer's Company Law, 23rd Edn.,p.848 it is stated :

> " 64-02. Relationship is with company: the fiduciary relationship of a Director exists with the company; the Director is not usually a trustee for individual shareholders. Thus, a Director may accept a shareholder's offer to sell shares in the company although he may have information which is not available to that other, and the contract cannot be upset even if the Director knew of some fact which made the offer an attractive proposition. So in Percival v. Wright a person who had approached a Director and sold him shares in the company, afterwards, upon discovering that the Director had known at the time of the contract that negotiations were on foot for the purchase by an outsider of all the shares in the company at a higher figure, could not impeach the contract. In his judgment Swinfen- Eady,J. said' there is no question of unfair dealing in this case. The Directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the Directors and named the price at which they were desirous of selling'."

In Pennington's Company Law, 6th Edn. At pp.608-09, it is stated "

> " Directors owe no fiduciary or other duties to individual members of their company in directing and managing the company's affairs, acquiring or disposing of assets on the company's behalf, entering into transactions on its behalf, or in recommending the adoption by members of proposals made to them collectively. If the Directors mismanage the company's affairs, they incur liability to pay damages or

> compensation to the company or to make restitution to it, but individual members cannot recover compensation for the loss they have respectively suffered by the consequential fall in value of their shares, and they cannot achieve this indirectly by suing the Directors for conspiracy to breach the duties which they owed the company. However, there may be certain situations where Directors do owe a fiduciary duty and a duty to exercise reasonable skill and care in advising members in connection with a transaction or situation which involves the company or its business undertaking and also the individual holdings of its members."

Therefore, the upshot of the above discussions is that the Directors are in a position of a trust. They must confirm to the probity and their conduct should be above suspicion.

Now, adverting to the facts of the present case, we will examine whether there was any case of oppression of the member or attempt to materially change in the management or control over the company to the detriment of the company. We may recapitulate that this hospital was floated by Dr.Kamal Kumar Dutta with his brother, Sajal Kumar Dutta and a total investment of Dr.K.K.Dutta was Rs.4.26 crore which includes Rs.3.5 crore of equipment and Sajal Dutta made a contribution of Rs.1.23 crore and there was another investment of Dr.Binod Prasad Sinha also. If the share of equipment i.e. Rs.3.5 crore is not taken into consideration, then the share of Dr.K.K.Dutta is 46.378 % and the share of Dr.B.P.Sinha being 6.365% the total share of both of them comes to 52.74% and the share of Sajal Dutta is 46.26%. Thus, the company was floated by Dr.K.K.Dutta along with his brother for establishing a hospital in the name of his wife, Ruby Dutta. Dr.Dutta and Dr.Sinha both are NRIs. All the equipments worth Rs.3.5 crore were supplied by Dr.Dutta which were installed in the said hospital, though the equipments were second hand and this is how the hospital started functioning in 1995. It seems that it started running well but when it turned the leaf and showing some profitability then the trouble started brewing which led Dr.Dutta and Dr.Sinha to file the petition before the CLB under Sections 397 & 398 of the Act, in 1997. The seed of discord started with the resolution dated 19.4.1995 when a resolution was passed for infusing some more money in the company and it appears that the said resolution was passed in which Dr.K.K.Dutta, Mr.Sajal Dutta, Wing Cdr.(Retd.) T.Chaudhuri as Director were present along with special invitee, Dr.Ashok K.Maulik as Director and Mr.M.K.Datta was the Financial Controller and Secretary. Dr.Kamal Kumar Dutta took the chair as the chairman of the meeting. Other resolutions were passed for inauguration of the Hospital on 25.4.1995 at 11.0 A.M. by the Chief Minister of West Bengal, maintenance of books of accounts at a place other than the registered office, progress of project accounts and date of holding the annual general meeting etc. But the crucial resolution which was passed that gave rise to strained relationship between two brothers was to issue and allot not exceeding 40,00,000 (forty lacs) equity shares of Rs.10/- each at par to such persons, corporate bodies, banks, mutual funds or other financial institutions whether or not they are the existing shareholders of the company and in such manner as may be decided by the Board. This resolution was alleged to have been fabricated and not passed on the date though it is alleged that Dr.K.K.Dutta was present. According to Dr.K.K.Dutta this resolution was subsequently inserted and he was not made known about such resolution and he came to know about it only on a later date when he was said to be thrown out from the Managing Directorship. Though this aspect according to Mr.Nariman was not specifically challenged before the CLB but the answer of learned counsel for the appellants

was that in fact these resolutions were not made known to the appellants and they only came to know about it at a late stage when all these resolutions were placed by Respondent No.2, Sajal Dutta. It is alleged that objection to this was taken in a rejoinder filed by the appellants before the CLB. Though specific challenge was not made but in the rejoinder it was only mentioned as follows:

> " It is evident from the fact that 81(1A) resolution by Company shareholders was passed pursuant to some authorization purportedly obtained at the meeting held on 19th April 1995 in which petitioner No.1 was present and the decision to convene the Extra Ordinary General Meeting and to pass a resolution under section 81(1A) was considered and approved. However no details are furnished of such a decision and the petitioners are more than confident that the old minutes and the resolution was used by the answering respondent to gain illegal and unlawful majority and the action is being justified by hiding the contents of these resolutions. The answering respondent has deliberately and knowingly not annexed the copies of such minutes whereas the answering respondent has given all other resolutions, he has purposely and intentionally not given the copies of the resolution passed on 12.3.1996, 17.2.1996, 19th April 1995, 9.2.1996 and 16.2.1996."

Though this omnibus objection was taken in a rejoinder but specifically not challenged before the CLB except the argument that the appellant No.1 had no copies of these resolutions and therefore he came to know at a later stage and he has seriously doubted such resolution was ever passed. Mr.Nariman is right to this extent that the allegation of fabrication of the resolution was not specifically raised before the CLB. In fact the ill-feeling started by this resolution because this facilitated further bad blood between the two brothers. This aspect was noticed by the CLB and it was observed that the appellant No.1 had refuted that he ever agreed to the passing of the resolution under section 81(1A) on 19.4.1995. According to him the minutes were fabricated since the appellant was the chief promoter of the company having 88.88% shares in the company. But there is no specific finding with regarding to the fabrication of the resolution by the CLB. Be that as it may, but the fact remains that on the basis of this resolution an attempt was made to oust the person who held the majority of shares to be reduced to minority.

The CLB has in minute detail discussed with regard to all the resolutions which we have already adverted to. No proper notice was served on the appellant No.1 who is a major shareholder of the company or to appellant No.2. If the Board meeting had been convened without proper service of notice on the appellants by the respondent No.2 then such Board meeting cannot be said to be valid. Mr.Nariman however tried to explain various meetings and their subsequent confirmation by next board meeting to show that once the resolution of the subsequent meeting has confirmed the resolution of earlier meetings then those minutes stand confirmed irrespective of the fact that the appellants had been served or not. We shall highlight some of the instances. We would show that how subtle attempt was made to show that several notices were given to the major shareholders of the company at their local address in India knowing fully well that both the appellants are NRIs. The outstanding feature is that the appellant No.2 ,Dr.Binod Prasad Sinha has been shown as an NRI but notice to him was sent at the address P.O. Hirapur, District. Dhanbad, Bihar and those notices have even been sent with very short interval. The meeting was convened on 13.4.1996 and the notice was

sent on 8.4.1996. Likewise, another meeting was scheduled to be held on 5.9.1996 and the notice was sent on the very same day i.e. 5.9.1996, the date of meeting was 2.12.1996 and the notice was sent on 28.11.1996; the date of meeting was 12.3.1996 and the notice was sent on 8.3.1996. The meeting was to be held on 27.3.1996 but the notice was sent on 22.3.1996. Apart from this, it was known to the respondent- Sajal Dutta who is the brother of appellant No.1 that whenever his brother comes to Calcutta he does not stay in his house yet the notices were sent to Jodhpur Park, Calcutta. This shows lack of probity on the part of Respondent No.2 to somehow or the other oust his brother from the majority shareholding. Similarly, on the basis of such resolution, Dr.Binod Prasad Sinha, the appellant No.2 was ousted from the directorship under section 283 (1) (g) of the Act on the ground that he has not attended the meeting and he has no interest whatsoever. Similarly, the appellant No.1 was also ousted in the meeting which was held on 7.2.1996 when another meeting scheduled to be held on 16.2.1996 and it was within the knowledge of Sajal Dutta that his brother was likely to attend the meeting to be held on 16.2.1996. But suddenly the meeting was held on 7.2.1996 and the appellant No.1 was stripped off his chair as the Managing Director of the company. Hence, Sajal Dutta became the Managing Director in place of Dr.Kamal Kumar Dutta and the minutes of the said meeting dated 7.2.1996 were not brought forward in the meeting of 16.2.1996 in which Dr.K.K.Dutta was present. The IDBI nominee reported to have advised that the draft minutes of the meeting dated 7.2.1996 to be placed before the meeting dated 16.2.1996 which would correctly reflect Sajal Dutta as the Managing Director but it was not included in the meeting of 16.2.1996. However, Mr.Nariman tried to persuade us to show that there was some defect in drafting of minutes of the resolution and therefore, it was not reflected in the meeting dated 16.2.1996. It does not appeal to us. Be that as it may, when such an important decision was taken in the absence of the main promoter of the company to oust him from the Managing Directorship and to install Sajal Dutta in his place, it is the grossest act of oppression by the Board of Directors. Sometime after dispatching Dr.Dutta from the Managing Directorship most of the shares were cornered by the subsidiary companies of Sajal Dutta so as to acquire the management of the company and to alter material change in the management of the company. What can be more unfortunate than this ? When a material change is brought about in the management to the detriment of the interest of the main promoter it is squarely covered under section 398 (1)(b) of the Act. The company which is floated by the elder brother and which has been run by the younger brother in the absence of the elder brother the younger brother manages the whole company and that the Managing Director is totally ousted and shares are being cornered substantially so as to have full control of the company, is oppression being squarely covered by section 397 (1) (b) of the Act.

Apart from this, one of the most important features which has weighed with us is that Dr.Kamal Kumar Dutta brought second hand equipments, those were cleared by the Customs and permission was granted by the RBI. The hospital started with those second hand equipments and for almost one year no grievance was made and the hospital was running successfully with these equipments. On 22.3.1997 the RBI granted permission for allotment of 30,55,329 equity shares of Rs.10/- each to the appellant No.1 against supply of second hand medical equipments on repatriation basis. But Respondent No.2 without permission of the Board of Directors filed an application with the RBI seeking withdrawal of the permission granted for allotment of 30,55,329 equity shares to appellant No.1. The RBI on 2.6.1997 withdrew the permission granted for allotment of 30,55,329 equity shares to the appellant No.1. The respondent No.2 presented Directors report in the Annual General

Meeting along with audited balance sheet for the year ended 31.3.1997 wherein capitalization of second hand medical equipments supplied by the appellant No.1 was reversed. Then the appellants filed application under sections 397 & 398 of the Act before the CLB. The CLB directed the respondent company to amend audited balance sheet as at 31.3.1998 and restore capitalization of second hand medical equipments supplied by the appellant No.1 which was reversed by the respondent No.2. The RBI restored the approval for allotment of 30,55,329 equity shares to the appellant No.1 on 6.3.1999 and directed the company to issue 30,55,329 equity shares of Rs.10/- each under section 19 (1) (d) of FERA, 1973 on non-repatriation basis against import of second hand medical equipments. This was not enough. This matter was taken up by the respondent No.1/2 by filing a writ petition being W.P.No.525 of 1999 challenging the order of the RBI dated 6.3.1999 in Calcutta High Court. The Calcutta High Court directed the General Manager, RBI to hear the parties afresh and pass appropriate order. In compliance with that order, the Executive Director, RBI, Mumbai heard the matter and passed an order on 10.8.1999 confirming their earlier order. Then too the respondent No.1/2 did not feel satisfied and again respondent company filed a second writ petition being WP No.1977 of 1999 on 30.8.1999 before the Calcutta High Court. Pursuant to the direction given by the High Court in the aforesaid writ petition, the General Manager, RBI Calcutta heard both the parties and passed an order reaffirming the earlier order of the RBI. Then too the respondents did not feel satisfied and filed a third writ petition on 7.5.2004. No stay order was passed by the High Court. The subtle attempt on the part of the respondent No.2 was only to somehow oust the appellant No.1 of his majority by nullifying the order passed by the RBI so that the shareholding of the appellant is reduced otherwise against the equipments supplied by the appellant No.1 to the tune of Rs.3.5 crore, he will have the majority in the shareholding of the company. Therefore, this persistent effort was made by the respondents by filing one after another writ petition before the High Court to somehow reduce the shareholding of the appellant No.1. These attempts speak volumes in the subtle design on the part of the respondent No.2 to somehow see that the holding of the appellant No.1 is reduced and the management is passed on to his hands by outstripping the appellant No.1 from the office of the Managing Director by purchasing majority of shareholding pursuant to the resolution passed on 19.4.1995 , he wanted to control the entire company. The filing of repeated writ petitions in Calcutta High Court at the expense of the company adversely affected the interest of the company. If this is not the oppression of the member under section 397 and bringing material change in the management under section 398 then what could be the better case than this. We fail to understand the view taken by the learned Single Judge of the High Court directing the appellants to file suit for redressal of all grievances, we cannot sustain this order. We are of opinion that the view taken by the Calcutta High Court cannot be sustained. We are satisfied that this is the case of oppression of the member as well as would amount to bringing about material change in the management of the company.

Since the issue of granting of equity shares against the medical equipments supplied by the appellant No.1 to the tune of Rs.3.5 crore is pending before the Calcutta High Court in a writ petition, therefore the CLB has not passed any final order but passed a limited order as mentioned above. However, we have examined the matter in detail and we are satisfied that there is full proof case of oppression. But at the same time we do not feel inclined to pass an order for winding up of the company because it will not be in the interest of the company nor to the interest of the parties. Therefore, we allow the appeals and set aside the impugned order dated 31.3.2005 passed by the

learned Single Judge of the High Court and pass limited direction that all the resolutions which have been passed by the Board of Directors, or in the Annual General Meeting or Extraordinary General Meeting with regard to the raising of funds of Rs.40 lakhs in the meeting of 19.4.1995 and the meeting dated 16.2.1996 whereby the appellant No.1 was stripped off of his powers as Managing Director, the resolution by which Dr.Binod Prasad Sinha was removed from the office of Director and other resolutions by which the shares were allotted to the subsidiary company of Sajal Dutta or other persons are bad and we restore the position ante 19.4.1995 and direct that let a fresh meeting be convened and proper decision be taken in the matter in the interest of the company. We confirm the order and direction of the CLB.

Let a Board meeting be convened with 21 days notice to all the Directors by registered post at their NRI address in India as well as USA. The meeting shall be chaired by Dr. Kamal Kumar Dutta, Managing Director. In case any of the NRI Directors is unable to attend the meeting, he will have a right to make nomination. We again make it clear that all the resolutions are set aside with regard to raising of funds dated 19.4.1995, removal of Dr. Binod Prasad Sinha from Board of Director, outstripping of Dr.Kamal Kumar Dutta from the Managing Directorship, allotment of shares to Sajal Dutta's companies & to others and all other resolutions which adversely affect Dr.Kamal Kumar Dutta and Dr. Binod Prasad Sinha. Let a fresh meeting of the Board of Directors be convened with Dr. K.K. Dutta as Managing Director and proper resolution be passed in the interest of the company in accordance with law. No order as to costs.