Pearson Education Inc. (Formerly ... vs Prentice Hall India (P) Ltd. And Ors. on 8 September, 2005

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JUDGMENT

A.K. Sikri, J.

1. Prentice Hall Inc. (now merged with Pearson Education Inc.-appellant in Co. A. (SB) No. 20/2004), a well known publisher of international repute, wanted its foothold on Indian soil. Cerebrated move was to incorporated a company in India in accordance with the provisions of the Indian Companies Act. The proposed company was intended to be its subsidiary in India with objective to print and publish Indian editions of its educational titles for sale in India and export to such countries as would be specfied. This idea struck Prentice Hall Inc. some time in the year 1962. There were stringent laws at that time for setting up a subsidiary company by a foreign company and prior permission of the Government of India was a requisite precondition for thisurpose. It, therefore, sought approval of the Government of India for this purpose. This request of Prentice Hall Inc. was considered by the Government of India and it accorded approval for setting up a company for the aforesaid purpose with the condition that the foreign shareholding in the proposed company would be on a minority basis and not exceeding 49%. This foreign company, therefore, needed an Indian partner and understanding was accordingly arrived at with one Mr. B.D. Laroia for the incorporation of a company. Resultantly, Prentice Hall of India Pvt. Ltd. (hereinafter referred to as the Company) was born when certificate of incorporation was given on or about June 6, 1963. The raison-d'-atre to incorporate this company was made its primary object viz., to acquire the rights to print, reprint, translate, adapt, publish and sell in India and export to any other Asian or other countries low-cost, standard text books and other books for schools, colleges, universities or other institutions orooks for any other purpose primarily relating to subjects to Science, Technology, Literature, Fine Arts, Economics, Law and other subjects the copyright of such books which are owned or may be owned by Prentice Hall Inc., USA, (A Corporation registerednder the Laws of the State of Delaware, USA) or by any of the Corporations associated with or subsidiary of the said Prentice Hall Inc., USA, and to allow royalty and other payments to be made to Prentice Hall In c., USA, or to any of its associate or susidiary corporation or to any Indian or foreign authors on sales made in India or outside India on such terms and conditions and for such duration as may be mutually agreed upon, subject to restriction, if any, imposed by the Government of India.

2. On June 6, 1963 itself, a Collaboration Agreement was also entered into between Prentice Hall Inc. and the company under which Prentice Hall Inc. granted license to the company, inter alia, to re-print and sell the books included in the schedule to such agreement of which Prentice Hall Inc. was the owner of the copyright and in respect of such other books as would be mutually agreed between Prentice Hall Inc. and the company. Life of this agreement was 10 years, subject to the right of Prentice Hall Inc. to terminate the same. This collaboration agreement also provided that in the event the appellant terminated the agreement, the company would omit the words "Prentice" and "Hall" from its name. Prentice Hall Inc. also permitted the companyto use its mark i.e. "Prentice Hall".

3. Mr. B.D. Laroia continued to hold the majority shares in the company and after his death the said shareholding was transferred in the name of his wife. Mr. Ashok K. Ghosh joined the company as an employee and some time in the year 1972 he was appointed as the Managing Director. In the year 1973 Mr. Ghosh purchased the entire shareholding of Laroia's, as widow of Mr. B.D. Laroia was reluctant to continue to be associated with the company. In that year Foreign Exchange Regulation Act, 1973 was also eacted by the Indian Parliament as per which, foreign equity in a company had to be below 40%. Prentice Hall Inc. accordingly reduced its shareholding to 38% by off-loading 11% share in favor of Mr. Ghosh and the corresponding shareholding of respondent No. 2 was increased. To remain in tune with Indian law, later on its shareholding was further reduced to 32% with corresponding increase in the stocks held by the other group.

4. According to Pearson Education Inc., notwithstanding the fact that it was a minority partner only because of the Indian law, it had dominant role in the management of the affairs of the company, as the company was to do the business of publishing the titles of the Prentice Hall Inc. in which Prentice Hall Inc. had copyright and, therefore, the company's business was dependent on the permission of Prentice Hall Inc. to allow the company to publish those titles for which collaboration agreement was alsoentered. Further, to ensure complete say of the Prentice Hall/Pearson in the management, Article 82 of the Articles of Association of the company provided that as long as it held Rs. 20,000/- worth equity shares in the company it will have the right to nominate the directors on the Board of the company not exceeding 50% of the total strength of the Board. Of the five Directors of the company Prentice Hall Inc. had three of its nominees. For a long time Managing Directors of the company were the personsnominated and approved by Prentice Hall Inc. The company carried on its business by publishing the titles of Prentice Hall Inc. and its business grew manifold during 1980s and 1990s.

5. With the change in the policy of the Government in 1990s restrictions on foreign shareholding in Indian companies were also eased. At the same time significant changes took place in the management of the Prentice Hall Inc. as it got merged with Pearson Education Inc. (hereinafter referred to as 'Pearson') by the end of 1997 and new management took over. Somehow the new management and Mr. Ashok K. Ghosh, majority stake holder in the company, could not pull on well. Differences started between them which thickened with the passage of time. Two civil suits were filed against each other, which are pending in this court. Pearson filed another suit relating to copyright in the year 2003 in this Court, which is also pending. Soon thereafter, Pearson alsfiled a petition being CP No. 73/2003 before the CLB under Sections 397/398, 402, 406 and 408 of the

Companies Act (in short the 'Act') alleging certain acts of oppression and mismanagement. This petition has been disposed of vide impugned order dated 6th July 2004 Aggrieved against certain findings in the judgment, Pearson has filed appeal being Co. A. (SB) No. 20/2004 Aggrieved against other part of the judgment Mr. Ashok K. Ghosh and other respondents have filed Co. A. (SB) No. 21/2004 It is these appeals with which we are concerned here. Since there are two cross appeal, for the sake of convenience Pearson is described as the petitioner hereinafter whereas Mr. Ashok K. Ghosh and other respondents are described as the second respondent (the nomeclature adopted by the Company Law Board in its judgment).

6. The case of the petitioner before the Company Law Board (in short the 'CLB') was that when transformation of Prentice Hall Inc. and change of guard was taking place, which started in the year 1990 and ultimately the petitioner came to control Prentice Hall Inc. in November 1998, there was hiatus during this period, though up to 1990 the parent company was in full control of the affairs of the Indian company. However, during this period second respondent started managing the affairs of the company on own and when the petitioner decided to have some checks and balances in the affairs of the company, the second respondent resisted the same and started acting against the interest of the company. He did not issue any notice of Board meetings to the noinees of the petitioner. Notices were also not issued in the AGMs and the second respondent kept the petitioner in dark about the affairs of the company. The second respondent also appointed his wife/respondent No. 3 as director and also his own nomineenamely, respondent No. 4 Mr. K. Shivarmakrishnan. He also appointed his daughter/respondent No. 5 as Marketing Co-ordinator of the company. By the time the petitioner took control of the Prentice Hall Inc., the second respondent had taken over completeharge and control of the affairs of the company. He increased his remuneration substantially from Rs. 3 lacs in 1994 to Rs. 30 lacs in the year 2000. The second respondent also filed suit against the petitioner for seeking enforcement of the 1983 collaboation agreement because of which the petitioner was also constrained to file suit against the company in regard to the rights of the company to publish the titles of the petitioner. The second respondent also refused to provide various documents/informaion which the petitioner demanded in terms of Section 163(3) and (4) of the Act. He also shifted all the records of the company from the registered office to the premises belonging to M/s. Mediamatics, a sole proprietorship concern of the wife of the seond respondent. The second respondent also increased the share capital of the company by issue of further shares. No proper notice of the meeting, when the purported decision was taken, was sent to the petitioner as offer letter contained incomplete adress and the offer was received by the petitioner only after closer date due to which, the petitioner could not subscribe to its entitlement. This resulted in further reduction of the petitioner's equity in the company from 32% to 18.78%. Allegation inthe company petition was also made to the extent that the second respondent did not account for various publications printed and sold by the company in the account books of the company and thus, pocketed sale proceeds thereof. The respondent contested te petition on various grounds, including preliminary objection to the maintainability of the petition.

7. After hearing the parties the CLB passed the impugned order returning the following findings:-i) Contention of the respondents that the petition was filed with oblique motives was not found to be justified as the civil suit filed by the parties against each other and pending in Delhi High Court related to the contract between the company and the ptitioner, while in the company petition filed

before the CLB, the petitioner was alleging oppression and mismanagement which reliefs could be granted only in these proceedings and not in the civil suits;ii) the preliminary objections of the respondents that Pearson had no locus standi to file the petition and that Sh. Ravi Oberoi was not authorised to file the petition on behalf of Pearson were rejected holding that with the change of the name from Prentce Hall Inc. to Pearson, the entity would remain the same and, therefore, Pearson was the shareholder of the company. It was also found that Sh. Ravi Oberoi had the proper and valid power of attorney executed in his favor by the petitioner to file theetition. The objections that affidavit verifying the petition signed by Sh. Ravi Oberoi was not in accordance with the CLB's regulation was also turned down; and iii) further issue of shares in the year 2000, which was a right issue, the petitioner had been denied its entitlement as offer was sent to the petitioner at a wrong/incomplete address deliberately to deny the petitioner of its entitlement. iv) The decision taken to issue further shares, as a right issue, was not bona fide either inasmuch as the company was making good profits and did not require increase in the working capital; 75% of the amount raised as share capital had been paid as diviend within a short period; offer letter was addressed to the petitioner at wrong address deliberately; and that the issue was made during the pendency of civil suits between the parties;v)Although the petitioner had a right to appoint its nominee on the Board of the company in terms of Article 82, in view of strained relations between the parties, pending civil proceedings between the petitioner and the company and the petitioner havingits own business in competition with that of the company, the CLB did not find it proper to have the petitioner's nominee on the Board as it would result in conflict of interests and would not be in the interest of the company; vi)Without going into the allegations of the petitioner that it was not receiving notices of the meetings and various documents like Annual Reports etc. or defense of the respondents that these were duly sent and the petitioner had not voiced any grievane in this respect for a long time, the CLB directed that all notices should be sent to the petitioner at the address given by it at least 30 days in advance and the company should also supply all documents sought for by the petitioner, as mentioned in Anexure P-19 to the petition; vii)The CLB did not find any substance in the allegations about the increase in the remuneration of the second respondent, appointment of his wife as Director and his daughter as Marketing Co-ordinator as well as dealing of the company with M/s. Mediamatcs, which is a proprietary concern of the wife of the second respondent.

8. After giving the aforesaid findings the CLB thereafter deliberated upon the nature of relief which could be granted in the facts of this case. It noted that it was a closely held company run on quasi partnership basis. However, due to differences inrelations it was not possible for both the petitioner and the respondent No. 2 to continue together and parting ways was the only plausible solution to put an end to the dispute. The petitioner suggested two alternatives: (i) the petitioner could purchasthe shares held by the second respondent and his group; and (ii) petitioner was willing to go out of the company and sell its shareholding to the second respondent only if the second respondent omitted the words "Prentice Hall" from the name of theompany. The CLB did not find favor with the fist alternative. In so far as second option is concerned, dropping of the words "Prentice Hall" from the name of the company was found to be inequitable by the CLB and, therefore, the CLB left it to theoption of the petitioner the choice of either continuing with the company as a shareholder or going out of the company on receipt of aforesaid consideration for its share. In case the petitioner opted to remain in the company, the CLB directed that thehares issued in the year 2001 be canceled. In case the petitioner chose to go out of the company, it has been ordered that fair value of the

shares shall be determined by the independent valuer based on balance-sheet as on 31st March 2003 being the proxmate date of the petition on the basis of share capital that existed before the issue of shares in the year 2001. The petitioner was directed to communicate its choice of option to the company and to the second respondent within one month from the datef the impugned order. It has also been observed in the impugned order that in case the petitioner decides to go out of the company, the CLB would appoint an independent valuer to determine the fair value of the shares.

9. Pursuant to the impugned order, the petitioner exercised its option vide letter dated 18th August 2004 through its Advocate and decided to remain a shareholder of the company. This was, however, without prejudice to its right to file appeal. As notedabove, the petitioner has in the appeal filed by it challenged the directions given by the CLB qua the nature of relief. On the other hand, in the appeal filed by the respondents the primary challenge is to the finding of the CLB about the issue of furher share capital. It would be appropriate to first deal with the appeal of the respondents.

10. While holding that the issue of right shares in the year 2001 was not legal, the CLB has given the following reasons:-i)There was no need or justification for making the issue;ii)the notice sent to the petitioner was at incomplete address and, therefore, the same was received after the stipulated date.

11. Learned counsel for the respondents submitted that although the right issue was made in May 2001, no grievance was made by the petitioner about the same for seeking setting aside of the action. Filing of the petition and making the grievance after aperiod of two years would clearly show that the petitioner had acquiesced into the action and the petition on this account shall also suffer from latches and delays. His submission was that this aspect was not at all considered by the CLB in the impugnejudgment. He further submitted that notice was sent at the correct address, though it was received belatedly and delay cannot be attributed to the company. It was also argued that one alleged act of issuing share capital would not constitute "oppresion" or "mismanagement" and the petition under Section 397/398 of the Act was not maintainable. Reliance was placed on the judgment of the Supreme Court in the case of Hanuman Prasad Bagri v. Bagress Cereals Pvt. Ltd. where the Spreme Court, agreeing with the Division Bench of the High Court observed that the termination of Directorship would not entitle such person to ask for winding up on 'just and equitable' ground inasmuch as there is an appropriate remedy by way of companyuit which can give him full relief if such action had been taken by the company on inadequate ground. A Director, even if illegally terminated, cannot bring his grievance as to termination for that single and isolated act, even if it was doing good busiess and even if the Director could obtain each and every adequate relief in a suit in a court.

12. It may be mentioned at the outset that the respondents have not at all given any justification for issuing further share capital. The CLB recorded categorical findings to the effect that this move of the respondents lacked bona fide, more so when 75%of the money collected by issue of the share capital was paid back as dividend within short period. It also returned specific finding that in view of the profitability and cash flow of the company, issue of further shares was not a business necessity.

No reason was spelled out requiring such a move. Significantly these findings of the CLB are not even questioned by the learned counsel for the respondents. In this background, the CLB also noted that sending the letter at wrong address was deliberatect on the part of the company. The only justification for sending the notice at the given address is that the particular address is the one printed by the petitioner on the books published by it. That is a far fetched explanation. In terms of Section 63 of the Act notices are required to be sent to the addresses which are registered with the company. The CLB has also recorded the finding of fact, which also was not disputed, that the company/second respondent had the knowledge of the correct addressf the petitioner. Still the notice was not sent at that address. The CLB was, thus, right in drawing an inference that it was a motivated act, as by sending the letter at another address the motive of the company was to ensure that it is not received bthe petitioner in time and the petitioner loses its chance to apply for the right shares and the respondents, in fact, succeeded in this mischievous attempt. In the backdrop of the aforesaid findings, would it be permissible for the respondents, in thefacts of this case, to argue that the Court gloss over their mala fide and motivated act-even illegal act-of issuing the share capital and refuse to interfere merely because the petitioner did not challenge the same immediately? Answer has to be in theegative. It may be mentioned that the petitioner had immediately sent letter dated 4th May 2001 pointing out that the respondent's offer dated 26th February 2001 was sent at wrong address and that the petitioner was deprived from exercising its right asa shareholder to subscribe for further shares on the basis of right share basis. No doubt, in this letter there was no specific demand for recalling of the action of issuing further capital or for allowing the petitioner to exercise its right in this bealf. However, that would not mean that the respondents could get away with such a gross act, particularly in a quasi-partnership set up which disturbs the equilibrium further. The respondents are wrong in their submission that the CLB did not deal withthe aspect of delay. After taking note of boom doggle move of the respondents in issuing these shares the CLB proceeds to observe as under:"The respondents have claimed that by keeping quiet for over two years, that too, after coming to know of the issue, the petitioner cannot now complain and they have relied on the case of Bengal Luxmi Cotton Mills. It is true that delay and acquiescece are relevant factors to be considered, but in the present case, the delay of two years cannot be considered to be such that the petitioners cannot make a complaint of oppression. The respondents have also relied on Palghat Exports case, to contend tht a single act cannot give rise to a petition under Sections 397/398. This Board has held in a number of cases, that in the matter of issue of shares, even it is a single act, since its effect is a continuing one, the same could be a subject matter of apetition under Section 397. Further, the petitioners have also made other allegations."

13. In Howard Smith Ltd. v. Ampol Petroleum Ltd. and Ors., 1974 All.E.R. 1126 while holding that if there is no pressing need to issue further share capital, such an issue could be struck down, the Court made the following pertinent observations:-"xxxxx when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, ws not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

This was, in their Lordships' view, the course taken by Street J. His conclusion as to the objective situation was expressed in these words:

> 'It is clear on the evidence that Millers was, as at 6th July 1972, in a position of tight liquidity. It did not have within its own funds sufficient money to cover its present and foreseeable financial commitments. It had, however, been in a positionof tight liquidity for many months before 6th July 1972. There is a history of a series of financial crises; but at the same time there is a trend of improvement during the months preceding the meeting of 6th July.... In short, I am satisfied that as at 6th July 1972 there was a need for capital. I am satisfied that this need had been recognised for many months past and that a policy had been followed of meeting it by loan capital rather than by share capital. I am satisfied that the company's financil affairs were at crisis point due to unavailability of capital, or that there was a pressing need to obtain cash funds by a share issue'.

14. The Privy Council in the aforesaid judgment took note of the two extreme views prevailing as laid down in some of the judgments of different Courts and ultimately settled the legal position in the following manner:-

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best bdone in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach aconclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimte conclusion has to be as to the side of a fairly broad line on which the case falls.
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> 'The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment.' The main stream of authority in their Lordship's opinion, support this approach."

15. We may also usefully refer to the following observations of the Supreme Court in the case of N.I.I. Ltd. v. N.I.N.I.H. Ltd., :-"118. It is necessary to clear a misunderstanding in regard to the power of Directors to issue shares. It is not the law that the power to issue shares can be used only if there is need to raise additional capital. It is true that the power to issueshares is given primarily to enable capital to be raised when it is required for the purposes of the company but that power is not conditioned by such need. That power can be used for other reasons as, for example, to create a sufficient number of shareolders to enable the company to exercise statutory powers (see Punt v. Symons and Co.), (1903-2Ch 506) or to enable it to comply with legal requirements as in the instant case. In Hogg v. Cramphorn, (1967-1 Ch 254) Buckley J. (p. 267) agreed with the sttement of law of

Byrne J. in Punt. And so did Lord Wilberforce (pp. 835-836) in Howard Smith (1974 AC 821) where he said:

> "It is, in their Lordships' opinion, too narrow an approach to say that the only valid purpose for which shares may be issued it to raise capital for the company. The discretion is not in terms limited in this way: the law should not impose such a limtation on Directors' powers. To define in advance exact limits beyond which directors must not pass is, in their Lordship's view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing Directors of different typeof Company in different situations cannot be anticipated".

The Australian decision in Harlowe Nominees (121 CLR 483) took the same view of the directors' power to issue shares. It was said therein:

> "The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as thosreasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hand of the directors themselves or their friends".

We have already expressed our view that the rights shares were issued in the instant case in order to comply with the legal requirements, which, apart from being obligatory as the only viable course open to the Directors, was for the benefit of the compay since, otherwise, its developmental activities would have stood frozen as of December 31 1973. The shares were not issued as a part of a takeover war between the rival groups of shareholders.

172. Even though the company petition fails and the appeals succeed on the finding that the Holding Company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly asit may, in the same position in which they would have been, if the meeting of 2nd May were held in accordance with law. The notice of the meeting was received by Sanders in U.K. On the 2nd May when everything was over, bar the post/meeting recriminationwhich eventually led to this expensive litigation. If the notice of the meeting had reached the Holding Company in time, it is reasonable to suppose that they would have attended the meeting, since one of the items on the Agenda was "Policy-(a) Indiaisation, (b) allotment of shares". Devagnanam and his group were always ready and willing to buy the excess shares of the Holding Company at a fair price as is clear from the correspondence to which our attention has been drawn. In the affidavit date May 25, 1977, Devagnanam sated categorically that the Indian shareholders were always ready and willing to purchase one-third of the shareholding of the non-resident shareholders, at a price to be fixed in accordance with the Articles of Association by the Reserve Bank of India. On May 27, he sent a cable, though 'without prejudice', offering to pay premium if the Holding Company were to adopt disinvestment as a method of dilution of their interest. In the trial Court, counsel for the India shareholdes to whom the rights shares were allotted offered to pay premium on the 16,000 rights shares. The cable and the offer were mentioned before

us by Shri Nariman and were not disputed by Shri Seervai. There is no reason way we should not call upon the Indan shareholders to do what they were always willing to do, namely, to pay the Holding Company a fair premium on the shares which were offered to it, which it could neither take nor renounce and which were taken up by the Indian shareholders in the enforcd absence of the Holding Company. The willingness of the Indian shareholders to pay a premium on the excess holding or the rights shares is a factor which, to some extent, has gone in their favor on the question of oppression. Having had the benefit othat stance, they must now make it good. Besides, it is only meet and just that the Indian shareholders, who took the rights shares at par when the value of those shares was much above par, should be asked to pay the difference in order to nullify theiunjust and unjustifiable enrichment at the cost of the Holding Company. We must make it clear that we are not asking the Indian shareholders to pay the premium as a price of oppression. We have rejected the plea of oppression and the course which we ae now adopting is intended primarily to set right the course of justice, in so far as we may." Even when it was found that there was a justification in issuing rights share, the Court, in order to do substantial justice, restored the earlier balance in given fact situation.

16. Recently in the case of Dale and Carrington Invt. (P) Ltd. and Anr. v. P.K. Prathapan and Ors., , the Supreme Court had the occasion to dwell on this aspect in detail by taking note of most of the available judgments on the subject. It may be noted that the facts of that case bear close proximately with that of the present case inasmuch as in that case also the company was having two groups of shareholders, one Indian group and one foreign group. The Managing Director and his wife rpresenting the Indian group allotted additional shares to themselves and in the process he and his wife became majority holders, thus reducing the non-resident a minority holder. The Court held as under:-"29. In the present case we are concerned with the propriety of issue of additional share capital by the Managing Director in his own favor. The facts of the case do not pose any difficulty particularly for the reason that the Managing Director has neither placed on record anything to justify issue of further share capital nor has it been shown that proper procedure was followed in allotting the additional share capital. Conclusion is inevitable that neither was the allotment of additional shares ifavor of Ramanujam bona fide nor was it in the interest of the company nor was a proper and legal procedure followed to make the allotment. The motive for the allotment was mala fide, the only motive being to gain control of the company. Therefore, iour view, the entire allotment of shares to Ramanujam has to be set aside."

17. In the facts of this case even one such act would be sufficient to constitute oppression and mismanagement as it disturbs the equity stakes decisively by bringing down the equity share of petitioners from 32% to 18% (which would have relevance in taking many managerial decisions where majority of 75% or more is required) [See Clemens v. Clemens Bros. Ltd. and Anr., 1976 (2) All.E.R. 268]. However, it may be noted that in the present case this was not the solitary instance alleged in the petitionfiled by the petitioner and many acts of oppression and mismanagement were alleged.

Thus, in so far as the respondents' Co.A. (SB) No. 21/2004 is concerned, I do not find any merit therein and dismiss the same.

18. It may be noted that in so far as the appeal of the petitioner is concerned, although number of other findings are also challenged, the learned counsel for the petitioner at the time of arguments confined their arguments to the relief part and, therefore, it is this aspect which I propose to deal with. The admitted position in this case is that it is the Prentice Hall Inc. which wanted to establish its business in India. Indubitably, the purpose and objective of establishing Indian company was prining and publication of books of Prentice Hall Inc. The intention of Prentice Hall Inc. was to set up its subsidiary. For this purpose, as per prevailing law, Prentice Hall Inc. asked for the permission of the Indian Government. However, in view of govrnment regulations that prevailed at that time, while granting this permission in the year 1963, Prentice Hall Inc. was only permitted to set up the Indian company with minority stakes and minority control. As Prentice Hall Inc. had no option in the mater, it took with it 49% shareholding and gave 51% shareholding to Mr. Laroia, a partner found by Prentice Hall Inc. for this joint venture. Since "Prentice Hall" has international reputation and fame, it decided to lend its name to its "Indian bab" as well and it is how "Prentice Hall of India (Pvt.) Ltd." was conceived and incorporated. The obvious intention was that the public at large is able to relate the Indian company with its main promoter. However, with mere incorporation, the objctive with which the company was formed, could not be achieved. Therefore, simultaneously Joint Venture/Royalty Agreement was also signed by Prentice Hall Inc. with the Indian company to the business viz. that of printing and publishing the books of the petitioner. But for this Joint Venture/Royalty Agreement the Indian company could not have undertaken the printing and publishing the titles belonging to the petitioner. It may also be noted at this stage that the foreign partner reduced its share in euity as and when there was change in legal position in India; first from 49% to 38% and thereafter from 38% to 32%.

19. When the prohibition/restriction on the equity share to be held by a foreign company in an Indian company was eased by the Indian Government, the petitioner wanted to raise its stakes in the Indian company, which, according to the petitioner, was itslegitimate aspiration. However, what is of relevance to us is that disputes arose between the two groups and number of legal battles ensued, stock whereof has already been taken above. Apart from two cross suits for injunction and declaration filed byoth the parties in this High Court, the petitioner also filed a suit for injunction alleging infringement of its copyright and trade mark. Thereafter proceedings were filed by the petitioner before the CLB culminating into passing of the impugned order. Simultaneously, with the eruption of disputes between the parties, the petitioner has collaborated with other company in India and has started doing competing business. The respondents have also started publishing other titles.

20. The position which emerges and with which both warring group agree is this; the two groups cannot continue as partners in the joint venture, i.e. the company. In these circumstances, giving two alternate proposals by the petitioner before the CLB wasin right earnest. There is no quarrel on this move. The parties differ about the manner in which the two proposals have been dealt with by the CLB.

21. The first alternative suggested by the petitioner was to take over the company by buying out the shares held by the second respondent and other members of his group. The company was brain child of the Prentice Hall Inc. (predecessor of the petitioner), which gave its name to it as well and

also ensured that it does the business of printing and publishing petitioner's title for which it was incorporated. According to the petitioner, this goodwill is the part of the contribution of the petitioner apat from investment in the share capital. The petitioner had, per force, given a particular percentage of shareholding to Mr. Laroia and thereafter to the second respondent and his group because of the Government regulation. Otherwise, it was the intentin of the petitioner to create the company as its subsidiary. In these circumstances, it may be the legitimate expectation of the petitioner to now gain control of the company after the embargo by the Government is removed. The very objective of incorpoation of the company was to do the business of printing, publication and sale of the titles belonging to the petitioner. In fact, the petitioner could introduce its publication directly in India for sale. However, by incorporating the Indian company, iis through the Indian company that the petitioner wanted to circulate these books in India at cheaper rates. If the primary object of incorporation of this company was to have the books, copyright whereof is with the petitioner, printed in India, and now the two groups are at loggu's head, there is no reason not to allow the petitioner to have the control of the company and give it the option to buy out the second respondent group. I do not agree with the opinion of the CLB that the petitioner shoulde asked to quit. Doing so would mean taking out the soul of the company, as the very purpose for which it was incorporated would be frustrated. The upshot would be that although the company would no longer print and publish the copyrighted books of the petitioner but some other books and at the same time retain the nomenclature given by and associated with the petitioner. If the second respondent has, during this period, started publishing other books, not belonging to the petitioner, it can very wellstart another venture and incorporate other company for doing that business. It may be noted that during arguments Mr. Sarkar, learned senior counsel for the petitioner, has offered to pay the second respondent a sum of Rs. 20 crores if he willing to go out. On the other hand, if only other alternative given by the petitioner was acceptable to the second respondent and the second respondent was agreeable to drop the name "Prentice Hall", the petitioner had offered to transfer all its share in favouof the second respondent without any consideration.

22. Cases are in abundance where directions are given of sale of shares by the majority shareholders to the minority shareholders under Section 402 of the Act (See (i) N.I.I.L. v. N.I.N.I.H.L., and (ii) Re. A company (No 00709 of 1992) O'Neill and Anr. v. Phillips and Ors., 1999 (2) All.E.R. 961).

23. The CLB did not find favor with the first alternative suggested by the petitioner on the ground that the petitioner did not contribute to the growth of the company and did not take any interest in the company right from 1990, whatever might be the reason. The CLB also was influenced by the consideration that during this period the second respondent managed the company himself and the turnover has gone up from Rs. 3 cores in 1993 to over Rs. 24 crores in the year 2002-03 and it would not be equitableo direct a person, who has nurtured the company very profitably, to go out of the company and give it to the other group. However, what is ignored by the CLB, in the entire discussion, is that the respondent No. 2 has been able to increase the turnover busing the name "Prentice Hall". No doubt, second respondent must have put his best efforts to achieve this. But he could get the entire credit as these strides are made by riding on the goodwill of "Prentice Hall". It would have been a differnt thing had there been a growth in business without associating this name. It is a common experience that in many cases the products are sold only because of goodwill attached to a particular brand. Therefore, the CLB may not be entirely correct in going total credit to

the second respondent for the growth of the company.

24. Be as it may, even if the first alternative is not to be accepted and the second respondent wants to retain the company and want the petitioner to go out, would it be proper in that eventuality, that the company retains with its name the words "Prentice Hall", which is also its sobriquet and the Indian company is, in fact, commonly known by this epithet alone? If the question is to be answered on equitable principles, the answer would be in the negative. The name "Prentice Hall" and the goowill attached to it legitimately belongs to the petitioner. Shakespearean retort 'What's there in a name' cannot be applied in the sphere of economics. In the business, name would mean everything. In the given circumstances if the petitioner is to beorced out of the company, it has right to take back its name also. Where the company is no longer associated with the petitioner/'Prentice Hall' and is doing an independent business, nay, the competitive business, it would lose moral right to use the nae "Prentice Hall" and it would be inequitable answer. In fact, allowing the company to use the name "Prentice Hall" would mislead the public and thus, would be against the public interest. I was informed during arguments that most of the books published by the petitioner are educational books. The company is also publishing same kind of books. Giving an impression to the public at large-academicians and students-that the books published by the company are that of the petitioner/'Prentice Hall would be perplexing and obfuscating. Furthermore, if the second alternative suggested by the petitioner is not acceptable to the second respondent group who wants to retain the name of the company as well and is agreeable to purchase the shares of the petitioner, which is not acceptable to the petitioner, the effect would be that the stalemate would continue. Consequently, the unfortunate and bitter litigation which has started between the parties would also continue. It may not be in the interest of the company as well to continue with these litigations. Therefore, if the second alternative has to be examined purely on equitable grounds, the petitioner has better case in equity to press for deletion of the words "Prentice Hall" from the respondent company's name.

25. Next question is, whether it is legally permissible and such directions can be given under Section 402 of the Companies Act? The CLB has accepted the second alternative but without accepting the condition of the petitioner that the second respondent omits the words "Prentice Hall" from the name of the company. It has given the following reasons in support:

> i) Although the petitioner had permitted the company to use the words "Prentice Hall" in its name, whether the consent to use the word was because of the association with the management or because the company is to publish the titles of the company is not clear.
>
> ii) There is nothing in the Articles to the effect that once the petitioner ceases to be a shareholder, the company would omit the words "Prentice Hall" from its name. On the other hand there is a provision in the Articles that as long as the petitioer holds shares worth Rs. 20,000/-, it would have right to appoint directors. Such a provision regarding name of the company could be incorporated in the Articles as well.

iii) Although Agreement dated 6th June 1963 contains a provision to this effect (clause 10 of the agreement), it is only a contractual right which cannot be enforced through a petition under Section 397/398.

iv) The petitioner has already filed a civil suit for restraining the company from using the name "Prentice Hall" for enforcing its civil right. The petitioner can seek appropriate relief in the said civil proceedings.

v) In a petition under Section 397/398 the interest of the company is paramount and, therefore, an order cannot/should not be passed which would be detrimental to the interest of the company.

26. First reason given by the CLB is clearly erroneous and while making those observations the CLB has conveniently ignored the circumstances in which the Indian company was incorporated at the initiative and at the instance of the petitioner/Prentice Hall Inc. Agreement dated 6th June 1963 was signed between them. The CLB has also failed to consider the objective with which the company was formed. The primary purpose was to print and publish the titles of the petitioner/Prentice Hall Inc. It is a matter of record that till the disputes started between the parties, the Indian company had published only those titles copyright whereof was with the petitioner and permission was given by the petitioner to the company to publish and sell those titles. Terefore, the CLB is not right in observing that it is not clear as to whether the consent to use the words "Prentice Hall" was because of the shareholders' holding in the company and association with the management or because the company was to publish the titles of the petitioner. It has already been observed that as far as the shareholding is concerned, its pattern changed from time to time to comply with the Government regulations. Moreover, even the agreement to publish the titles of the petitiner has since been terminated.

27. Second and third reason given by the CLB is also not valid. Maybe, what is provided in clause 10 of the Agreement dated 6th June 1963 is not contained in the Articles of Association. Had there been such a provision in the Articles of Association to the effect that if the petitioner ceases to be a shareholder the petitioner would omit the words "Prentice Hall" from its name, the petitioner would have enforced the same as a matter of right. Even the CLB admits so. However, the question is as together a direction of this nature is warranted in the given case, de-hors the Article of Association? Jurisdiction of the CLB (and ultimately of this Court in appeal) under Sections 397/398 and 402 is much wider and direction can be given even contraryo the provisions of the Articles of Association. It has even right to terminate, set aside or modify the contractual arrangement between the company and any person [see Section 402(d) and (e)]. Section 397 specifically provides that once the oppressiois established, the Court may, with a view to bringing to an end the matters complained of, make an order as it thinks fit. Thus, the Court has ample power to pass such orders as it thinks fit to render justice and such an order has to be reasonable. It is also an accepted principle that "just and equitable" provision in Section 402(g) is an equitable supplement to the common law of the company to be found in its Memorandum and Articles of Association. Explaining this principle in Ebrahimi v. Wetbourne Galleries Ltd. and Ors., [1972] 2 All.E.R. 492, after taking stock of various judgments of Commonwealth jurisdictions, the House of Lords observed (per Lord

Wilberforce):-"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be oen to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality of law of its own: that there iroom in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Compnies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' povision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal characer arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequate and exhaustively laid down in the articles. The super-imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continuedn the basis of a personal relationship involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeing' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out hisstake and go elsewhere."

28. This judgment was followed by the House of Lords in Re. A company (No 00709 of 1992) O'Neill and Anr. v. Phillips and Ors., (1999) 2 All.E.R. 961. In Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick, (1980) 50 CC 771 Calcutta High Court has expanded the scope and width of Section 402 of the Act by going to the extent of observing that this provision gives the power to supplant the entire corporate management. The relevant observations in that case reads as under:-"It should be borne in mind that when a court passes an order under ss. 397, 398 and 402 as has been done in the instant case there could be no limitation on the court's power while acting under the sections. Instead of the winding up of a company, thcourt under the abovementioned sections has been vested with ample power to continue the corporate existence of a company by passing such orders as it thinks fit in order to achieve the objective by removing any member or members of a company or to prevnt the company's affairs from being conducted in a manner prejudicial to the public interest. The court under Section 398 read with Section 402 of the Act has the power to supplant the entire corporate management. Under the aforesaid sections, the court can giveappropriate directions which are contrary to the provisions of the articles of the company or the provisions of the Companies Act."Therefore, there cannot be straight-jacket formula which would fit in all the circumstances. It will depend on the totality of the circumstances as to what kind of

relief(s)/direction(s) is/are warranted in a particular case. To find "just and equitable" solution, at times even the provision of Articles are to be given go-by. In the impugned judgment itself, it has gone contrary to the Articles while directing that the petitioner's nominee would not be one the Board, because of conflicting interet. However, while considering this aspect it has taken shelter of the very Articles of Association to reject the petitioner's submission and acrimonious relations between the parties. The CLB has thus adopted narrow and incommodious approach to this is ue. In the facts of this case, as already observed by me, equity is in favor of the petitioner. Such a situation should not be allowed where the petitioner/Prentice Hall is not associated with the company but the company carries on with its name. It is an exceptional kind of a case where the petitioner who is responsible for the incorporation of the Indian company is driven out of the company but the company continues to adopt its name and wants to continue to ride on its goodwill without being assocated with it. Such unprecedented situation would call for unprecedented solution and in my opinion the second alternative suggested by the petitioner that in case the petitioner has to go out from the company it is willing to do so provided the wordsPrentice Hall are also dropped from its name, is not something which is unreasonable. In such a situation, the argument of the learned counsel for the respondent that the company is a separate entity and the appellant's attempt is to identify itselfith the company, may also be of no relevance. No doubt, the company has separate legal entity. But we are here concerned with the proceedings under Section 397/398 of the Act and in the process the issue being discussed is as to whether direction can beissued under Section 402 of the Act for change of the name of the company. Such a direction would be permissible in the facts of this case where the petitioner brought this corporate vehicle to India and gave its name is now asked to pull apart and breaoff and would be no longer associated with it. Width and amplitude of CLB's powers under Section 402 is already delineated above. That apart, if the entity of the company has to be maintained as it is, the 2nd respondent should accept the first alterntive by selling his stakes in the company to the petitioner. He cannot be allowed to create a situation of "having a cake and eat it too".

29. Once the power to issue such a direction is found in Section 402, pendency of other suit shall not deter the Court to pass appropriate direction in these proceedings. More so, when the issue of copyright is to be examined on different parameters andthe suit was filed when the petitioner was a shareholder in the company. Here, we are discussing the modalities of parting the ways.

30. The only other aspect which has to be gone into is as to whether giving of such a direction would be against the interest of the company, as found by the CLB. No doubt, interest of the company is paramount in proceedings under Section 397-398 of theAct, as held in Nurcombe v. Nurcombe and Anr., 85(1) All. E.R. 65, Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd., . However, wisdom of CLB's remarks was questioned by the learned counsel for the petitioner, and rigtly so, by submitting that under the garb that it would be against the interest of the company the company cannot be allowed to take what is not legitimately due to it (for example, trade mark, deposit of outgoing director, technical know-how provided boutgoing group or the bank guarantees submitted by the outgoing group (refer Suresh Kumar Sanghi v. Supreme Motors Ltd., [1983] 54 C.C. 235 pp.240-241). To my mind, even de hors the agreement, dated 6th June 1963 between the petitioner and the companythe very conceptualization of the company was because of the permission of the petitioner to the company to use its name and to use it so long as the foundation

and the basic understanding of the arrangement remains, namely, the petitioner allows the cmpany to publish and sell the books in which company has the copyright. Therefore, it is either the petitioner who should be allowed to continue to control the company and as a result the respondent No. 2 should sell its shareholding to the petitioner o, in the alternative , if the petitioner is to be forced out of the company, it has right to take away its name with it, which it lent to the petitioner. Thus, the respondent cannot raise the plea that such a course would not be in the interest of theompany. I do not agree with the contention of the respondents that present petition is filed for collateral purpose and oblique motives and, therefore, the same was not maintainable and should have been dismissed by the CLB. Reliance on In Re. Bellador Slk Ltd., [1965] 1 All. ER 667 by the respondent in the present case would, therefore, be of no avail.

31. In view of the aforesaid discussion, the nature of relief, as granted by the CLB, is hereby set aside. The appeal filed by the petitioner is allowed in the following terms:- A) An opportunity is granted to the second respondent and his group to exercise his option to accept one of the two alternatives suggested by the petitioner, namely, either to come out of the company and sell the shareholding to the petitioner or to by the shares held by the petitioner in the company;(B) In case first option is exercised, the petitioner shall pay a sum of Rs. 20 crores to the second respondent and his group. If according to the second respondent, the shares held by him have higher value, in that eventuality he may approach the CLB for appointment of an expert for the valuation of the shares;(C) In case second alternative is accepted by the petitioner, the petitioner shall transfer all its shares in favor of the second respondent without any consideration (as per its own offer) and the second respondent in that eventuality take steps for change of the name in the Indian company by dropping the words "Prentice Hall". (D) 2nd respondent is given 30 days time to exercise his option. If the option is not exercised within 30 days, it would be open to the petitioner to exercise its option either to accept the first alternative or the second alternative.

32. There shall be no orders as to costs.