# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Company Appeal (SJ) No.4 of 2014**
**IN**
**COM PET 201 of 2013**

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1. Mr. Yogendra Prasad, son of late Indrashan Prasad, NHPC Colony, Plot No.58, Pocket P-4, Gautam Budh Nagar, Uttar Pradesh-201308
2. Ms. Pratima Prasad, D/O of late Jagdishwari Sharan, NHPC Colony, Plot No.58, Pocket P-4, Gautam Budh Nagar, Uttar Pradesh-201308
3. Mr. Arun Kumar Sinha, son of late Jagannath Prasad, Uttarwari Pokhra, Bettiah, West Champaran, Bihar
4. Mr. Rajesh Upadhyay, son of Dr. Bharat Upadhyay, Sataha, Nowadih, District East Champaran, Bihar.

Respondents.... .... Appellant/s

Versus

1. Mr. Anil Aggarwal, C-156, Mahendru Enclave, G.T. Karnal Road, Delhi-110033
2. Mr. Satish Kumar Aggarwal, C-156, Mahendru Enclave, G.T. Karnal Road, Delhi-110033
3. M/s Visual Technology India Private Limited 370-371/2, First Floor, Hospital Road, Jungpura, New Delhi-110014
4. Mr. Jagdish Chandra Gupta, C-105, Sector-2, Greater Noida, Gautam Budh Nagar, Uttar Pradesh-201308

-------- Petitioners—Respondents.

5. M/s Prasad Refrigeration and Agro Industries Private Limited, 102-103, Suresh Apartment, Ramkrishna Path, North Krishnapuri, Patna-800013
6. M/s Kalyani Structures, $5^{th}$ Floor, Raman Tower, Sanjay Place, Agra.
7. M/s Rakesh Srivastava, Advantage Flat No.9154, Indirapuram, Ghaziabad
8. M/s Nidhi Singhal, D 45, Sector 40, Noida
9. M/s Gayatri Engineering, $5^{th}$ Floor, Raman Tower, Sanjay Place, Agra
10. M/s Veena Viasha, D-45, Sector 40, Noida
11. M/s Metro Communication, 33- $2^{nd}$ Floor, Commercial Block, Kaushambi, Ghaziabad
12. M/s Splendor Landbase Limited, Unit No.501-511, Fifth Floor, Splendor Forum, Plot No.3, Jasola District Centre, New Delhi-110025

--------Respondents-Performa Respondents.

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**Appearance :**

| | |
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| For the Appellant/s : | Mr. Virendra Ganda, Sr. Advocate, |
| | Mr. Y. V. Giri, Sr. Advocate, |
| | Mr. Ashish Giri, Advocate |
| | Mr. Rakesh Kumar, Advocate |
| For Respondent-Company: | Mr. Ankit Katriar, Advocate. |
| For Respondent nos. 1 to 4: | Mr. Sudipto Sarkar, Sr. Advocate, |
| | Mr. Sanjay Singh, Advocate, |
| | Ms. Moushumi Bhattacharya, Advocate, |
| | Mr. Arupnath Bhattacharya, Advocate. |

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**CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY**
CAV JUDGMENT
**Date: 20-12-2016**

Heard learned counsel for the appellants and learned counsel for respondents.

2. In the present appeal, appellants are challenging the judgment and order dated 29.9.2014 passed by the Company Law Board (hereinafter referred to as " the CLB") by which he has given reliefs as mentioned in paragraph 22 of the impugned order. The CLB has granted the following reliefs which are as follows:

> "22. Based on the above findings, the reliefs considered admissible are allowed as under:-
>
> (i) <u>Share Capital</u>:
>
> The allotments of shares in pursuance of Board Meetings dated 27.7.2012 and 05.03.2013 are hereby cancelled declaring the purported Board Meetings as invalid. The respondent company is hereby directed to allot shares at face value of Rs.100/- to the petitioners on the basis of investments made so far. The petitioners can infuse further funds upto Rs.6.65 crores for allotment of shares at par as per the terms of agreements and the respondent company is directed to allot the balance shares on receipt of requisite funds from the petitioners.
>
> (ii) <u>Board of Directors</u>:
>
> Since the petitioners are entitled to 52.5% of the paid up share capital of the company being majority shareholders, petitioner nos. 1 to 4 are allowed to reconstitute the Board with their own majority. For this purpose, within 30 days of receipt of this order, respondent nos. 2 shall send the names of 2 Directors to petitioner no.2 with consent letters to be on the Board. Similarly, petitioner no.2 will provide the names of 3 Directors for the new Board with their consent to respondent no.2. The constitution of the new Board and final appointment

of Directors has to be approved in a General Meeting of Shareholders strictly in accordance with law. After the new Board takes over, all the earlier Board resolutions passed are to be reviewed and necessary decisions may be taken to continue with such resolutions or to cancel the same.

The current Board shall not hold any meeting or authorize holding of any general meeting till the new Board comes into being as per the directions noted as above. The new Board shall replace the old Board, which shall stand dissolved.

(iii) Statutory Records:

The statutory records of the company including accounting records, licences, land ownership documents, legal file, audit reports, all accounting vouchers, fixed assets registers and other relevant documents are to be kept at the registered office of the company by the respondents for taking necessary inspection by the petitioners. If, after examination of the various documents by the petitioners group, it is established that respondent nos. 2 to 12 have personally benefited in cash or in kind from respondent no.1 company, the respondents are hereby directed to make good such loss and damages suffered by the respondents company and failure to do so, will constitute a lien on the personal assets of respondent nos. 2 to 5 and the persons who have benefited from such actions.

(iv) Reversal of personal benefits:

There is an allegation of siphoning off funds to the tune of Rs.8.5 crores (approx) by respondent nos.2 and other family members as indicated in para 2(xxiv) of this order.

The statutory auditor of the company is hereby directed to examine the necessary documents in this regard and prepare a report about the genuineness of such allegations and place it before the reconstituted Board of the respondents company. If the funds have been found to be siphoned off for non-business purpose for personal benefits of the respondents, the quantum of such funds may be determined by the statutory auditor and the concerned respondents shall return such moneys to the respondent company along with interest @ 10% p.a from the date of diversion of such funds till the date of actual refund to the company, within 90 days of receipt of this order."

3. Before dealing with the case on merit it is necessary to record the case was heard on different dates, full opportunity of hearing has been given to the parties and also after closer of the argument, this Court has granted an opportunity to both of them to file their respective written arguments**:**

4. On 4.4.2016 the appellants and respondents filed their respective submissions. On the direction of this Court the parties have exchanged written submissions whereupon this Court on the request of the parties, has given liberty to both sides, if so advised, they may file any reply submission and in pursuance thereof respondents have filed the supplementary written notes of argument on behalf of respondent nos. 1 to 4. On the request of the appellants vide order dated 5.5.2016, the case was adjourned to give them liberty to file written submission in reply to the written arguments filed by the appellants whereupon the appellants filed the supplementary written notes of argument on 9.5.2016, on the same day respondent nos. 1 to 4 filed corrigendum in the sense to correct and amend certain typographical mistakes which have taken place which is said, due to inadvertence and accordingly this Court closed the argument from both sides and reserved the case for final judgment.

5. This long procedure has been adopted by this Court to avoid any complaint from any side depriving the person from proper opportunity to place their respective cases.

<u>Brief facts arising from the records of the case</u>:

6. Prasad Refrigeration & Agro Industries Private Limited (hereinafter referred to as the "Company") was incorporated under the Companies Act, 1956 on 19th September, 1991 and registered office of the company is situated at 102-103, Suresh Apartment, Ramkrishna Path, North Krishnapuri, Patna. Respondent-Company is owner of a small Khandsari Mill situated at Village Sataha, Bettiah, West Champaran, Bihar. The authorized share capital of the Company is Rs.5,00,00,000/- divided into Rs.5,00,000/- equity shares of Rs.100/- each. However the Company submitted Form No.2 whereby authorized capital of the Company has been enhanced to 10,00,00,000/- divided into Rs.10,00,000/- equity shares of Rs.100/- each which is apparently clear from Form No.2 itself which was part of Company Petition at page 135. As per record, Anil Aggarwal, respondent no.1 and Satish Kumar Aggarwal, respondent no.2 having held 7160 and 500 equity shares in the Company respectively which aggregate to 1.90% of the paid-up share capital of the Company. Respondent no.3 has been allotted

32,340 equity shares of the company which constitute 8.06% of the paid-up share capital of the Company. Respondent no.4 being a friend of respondent no.2 has been allotted 12,500 shares in the Company comprising of 3.21% of the paid-up share capital of the company and total the respondents are in possession of more than 10% of the paid-up share capital of the Company claiming that they are entitled to 66.75% of the total paid-up capital of the Company which they have been deprived. The total number of share-holders in the Company are 35, out of which these respondents are four in numbers. Accordingly they constitute more than 1/10$^{th}$ of the total number of members of the Company, as per the decision of the management Yogendra Prasad (Appellant No.1) was in the process of dismantling the original Khandsari Mill with a capacity for crushing 750 tons of sugarcane every day, in order to make unit having capacity from crushing 3500 tons of sugarcane started looking to some partners for implementation of establishment of new and efficient sugar factory. For establishment of the sugar factory plant the management of the Company was required a heavy financial investment.

7. In order to muster the financial resources in 2010 Yogendra Prasad (appellant no.1) approached to Anil Aggarwal

and Satish Kumar Aggarwal (respondent nos. 1 and 2) respectively for joining the project and to provide required financial assistance. Respondent nos. 1 and 2 were given an impression by Yogendra Prasad (Appellant No.1) that all necessary permission and licence for establishment of the new Sugar Mill from the appropriate Government authorities for conversion of the Company from Khandsari Mill to a Sugal Mill had been obtained. Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) were informed that the total project cost for installation of new unit was Rs.100,00,00,000/- (hundred crores). It was agreed between Yogendra Prasad and Anil Aggarwal and Satish Kumar Aggarwal, respondent nos. 1 and 2 for installation of the Sugar Mill. The Bank loan would be required and for obtaining the Bank loan responsibility was solely attached to Yogendra Prasad (Appellant no.1) and all necessary collateral needed for the Bank loan would be solely arranged by him. As per the understanding Anil Aggarwal and Satish Kumar Aggarwal (respondent no.1 and 2) were to invest funds up-to Rs.4,45,00,000/- and agreed to allot them the shares to the extent of 44.50% of the total equity capital of the Company, accordingly respondent nos. 1 to 3 invested their money in the Company by way of share application money. It will be relevant to mention here that in order to obtain necessary financing from the lending bank, viz. Punjab National Bank, Patna, the promoters were required to arrange 30% of the total project cost amounting to about Rs. 30,00,00,000/- (thirty crores). As per estimate of Yogendra Prasad (appellant no.1) the value of existing assets of the Company including land, buildings, usable machinery, funds from the sales of suitable machinery etc. to be Rs.20,00,00,000 (twenty crores) and balance amount was to be invested by the promoters in the shape of equity share contribution. By 31st March, 2011 Yogendra Prasad and his family members had invested Rs.3,48,85,400/-in equity capital in the Company and accordingly Yogendra Prasad requested Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) to invest Rs.4,45,00,000/- and agreed to allot them shares equal to about 44.5% of the total equity capital of the Company and placing reliance on the statement of Yogendra Prasad, respondent nos. 1 and 2 invested in the Company by way of share application from time to time and as money was treated as equity share. Satish Kumar Aggarwal (respondent no.2) was inducted as Director of the Company with effect from Ist November, 2011 and necessary Form No.32 was filed with the Registrar of Companies showing the appointment of Satish Kumar Aggarwal as a Director of the Company. As there was no sufficient fund with Yogendra Prasad for establishment of new Sugar Mill requested respondent nos. 1 and 2 to arrange another investor having extensive technical background who would invest the money to the tune of Rs.2 crores to Rs3 crores in the equity so that they Company would become eligible to apply for requisite financial assistance from the Bank. At the request of Yogendra Prasad (Appellant No.1), Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) introduced Jagdish Chandra Gupta. Respondent no.4, (for convenience J.C. Gupta) to infuse Rs.2,25,00,000 (Rs.2.25 crores) as share application money in the Company and it was agreed between the parties that percentage of share will be acquired by J.C. Gupta to the tune of 22.25% of the paid-up capital of the company against his infusion of Rs.2,25,00,000 (Rs.2.25 crores) in the Company.

8. Yogendra Prasad (Appellant no.1) in order to make it reality and formally to streamline the investment for establishment of new concerned formally, Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) had entered into an agreement with Yogendra Prasad dated 22nd February, 2012 and similarly on the same date on the identical stipulation J.C. Gupta also entered into an agreement with the same terms

and conditions and ultimately it was agreed that respondent nos. 1 to 4 would be entitled to about 66.75%of the paid-up share capital of the Company. As J.C. Gupta (respondent no.4) by way of profession is an Engineer, Yogendra Prasad (appellant no.1)agreed to induct him as Director of the Board of the Company for the purposes of utilization of his expertise and accordingly, J.C. Gupta (respondent no.4) was inducted as one of the Director of the Company with effect from November, 2011 which is apparently clear from Form No. 32 has been marked in the company petition as P-8. As per terms of the agreement dated 22.2.2012 Yogendra Prasad was made responsible solely for arranging the Bank loan of Rs.75,00,00,000 to Rs.85,00,00,000 (Rs. 75 to 85 crores) for the Sugar Mill project. In lieu of the share subscription money invested by Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) shall be entitled to 22.25% each of the share capital of the Company. All collaterals for securing the Bank loan was responsibility of Yogendra Prasad (appellant no.1) solely. As per agreement, Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) were not made liable for any obligation but not limited to taxes of any kind utility bills, outstanding salaries and employment related taxes until the final Bank loan papers are signed. Anil Aggarwal and

Satish Kumar Aggarwal (respondent nos. 1 and 2 would be inducted as Directors of the Company. J.C. Gupta (respondent no.4) would also be entitled to share equivalent to 22.25% of the share capital in lieu of the amount invested by him in the Company and J.C. Gupta was also be inducted as one of the Director of the Company.

9. In the aforesaid agreement there is no stipulation that the equity share would be allotted at a premium amount but was confined to allotment of share without addition of any premium value of share. All moneys received from respondent nos. 1 to 4 were to be shown as Share Application Money in the books of the Company. The following table will show the share capital and share application money credited in the books of the Company as on 31st March, 2010, 31st March, 2011 and 31st March, 2012:

| | Share Capital | Share Application Money |
|---|---|---|
| 2009-10 | 28385400.00 | 28200000.00 |
| 2010-11 | 34885400.00 | 22200000.00 |
| 2011-12 | 34885400.00 | 48428870.00 |

10. Some time in the end of March 2012, Yogendra Prasad (appellant no.1) informed respondent nos. 1 to 4 that the total project cost had been increased from Rs.100,00,00,000/- (Rs. hundred crores) to Rs.150,00,00,000 to Rs.160,00,00,000 (Rs.150

crores to Rs.160 crores) approximately. Accordingly made representation for further contribution from the promoters in order to become eligible for seeking financial assistance from the Banks. After discussion with Yogendra Prasad (appellant no.1) on or about 15th April, 2012 when respondent nos. 1 and 2 did not find themselves satisfied with the development relating to the establishment of the project, they decided to exercise the exit option as provided in the agreement and terminate their association with the Company. By that time Anil Aggarwal and Satish kumar Aggarwal (respondent nos. 1 and 2) had already invested an amount of Rs. 1,90,50,000 (Rs. One crore ninety lacs and fifty thousand) in the Company and by that time the management of the Company had not allotted any equity share to them as Yogendra Prasad (appellant no.1) who was in-charge and in full control of the affairs of the Company, agreed to return the money by 31st August, 2012 along with interest to Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) from the date of investment of money till the date of actual payment. In the meantime, with a view not to jeopardizing the progress of the project expansion work, on the repeated request of Yogendra Prasad (appellant no.1), respondent nos. 1 and 2, in good faith and fair conscience, agreed to infuse further funds in the

Company and all the amount was agreed to be returned by 31st August, 2012. The money could not be returned by Yogendra Prasad as per his commitment the time was extended by 31st march, 2013. By the time respondent-petitioner nos. 1 to 3 had altogether invested Rs.4,00,00,000/-(Rs. Four crores) in the Company. Break up are as follows:

| | |
|---|---|
| 1. Respondent-Petitioner no.1 | Rs.71,60,00/- |
| 2. Respondent-Petitioner no.2 | Rs. 05,00,000/- |
| 3. Respondent-Petitioner NO.3 | Rs.3,23,40,000/- |
| Total | Rs.4,00,00,000/ |

11. On 19th March, 2013 a meeting was held between Anil Agarwal, Satish Kumar Aggarwal and J.C. Gupta (respondent nos. 1 , 2 and 4) and Yogendra Prasad (appellant no.1) in the office of Anil Aggarwal in Delhi where Yogendra Prasad (appellant no.1) expressed his inability to discharge the obligation towards respondent nos. 1 to 4 as contemplated under the two partnership agreements dated 22nd February, 2012. By the time respondent nos. 1 to 4 had already infused such a huge amount in the shape of share application money did not receive the allotment of shares and were under the bonafide impression that their shareholding would be 66.75% of the paid up capital of the Company as envisaged in the said agreements dated 22nd

February, 2012. For the first time in the meeting dated 19th March, 2013, Yogendra Prasad (appellant no.1) informed respondent nos. 1 and 2 that shares of the Company having been allotted to them to the extent of their share subscription amount lying with the Company. Respondent nos. 1 to 4 were shocked and surprised about the fact of allotment of share as prior to such date respondent nos. 1 to 4 were not informed about the allotments nor issuance of share certificates in respect of their shareholdings. At this stage it will be relevant to mention that J.C. Gupta (respondent no.4) did not invoke the exit option in the partnership agreement and never made any offer to exit from the Company rather he always wanted to continue in terms of the said partnership agreement and hold 22.25% of total paid-up share capital in the Company. However, he too was not aware of such allotment of share to him and did not receive any share certificate were said to have been allotted to him and when they have received such information from Yogendra Prasad about the allotment of the share in terms of stipulation mentioned in two partnership agreement dated 22nd February, 2012 that impelled respondent nos. 1 to 4 to verify the records of the Company from MCA Portal. From there following facts emerged:

(a) On July 27, 2012, 15500 equity shares of Rs.100/-

each, out of that, 12500 equity shares were allotted to J.C. Gupta (respondent no.4) 2,500 equity share was allotted to Anil Aggarwal and 500 equity shares were allotted to Satish Kumar Aggarwal (respondent no.2).

(b) The said equity shares of Rs.100/- each were allotted at a premium of Rs.900/- per share.

(c) On March 5, 2013, 37000 equity shares of Company were allotted, out of which 4660 equity shares were allotted to respondent no.1 and 32340 equity shares were allotted to respondent no.3. All the said 37000 equity shares of Rs.100/- were allotted at a premium of Rs.900/- per equity share.

(d) The Forms No.2 in respect of the aforesaid allotment were digitally signed by Mr. Arun Kumar Sinha (appellant no.3) as the Director of the Company and the list of allottees attached with the said Form was purportedly signed by the Yogendra Prasad representing himself as the Managing Director of the Company.

12. They had not given any consent or agreed or were aware of the issue and allotment of share was made on 27th July, 2012 without any information and consent, similarly also no information of meeting or consent was obtained for granting the share in the meeting dated 5th March, 2013 at a premium of

Rs.900/- per share. The face value of one share of the company was Rs.100/ each. As per the understanding and carrying a bonafide intention, in view of the share subscription money invested by them, their shareholding percentage would be 66.75% of the paid-up share capital of the Company but on contrary it shows in the record of Company only 12.16% of total paid-up capital. It will be appropriate to advert that no valid meeting of the Board was convened or conducted for deciding the allotment of issue of share at a premium amount without involving Satish Kumar Aggarwal (respondent no.2) and J.C. Gupta (respondent no.4) who were the Directors of the Company and were also not aware of any general body meeting wherein it was authorized to allot the share capital of the Company at the increased rate. It emerges from the record that on 31st March, 2012 as against a capital base of Rs.3,48,85,400/- the Company had accumulated losses of Rs. 1,23,32,637/- in this way 40% of the capital base of the Company had already eroded and there was no question of share that has been issued at a premium rate of Rs.900/-. As a consequence of the purported allotment of shares at a high premium, accordingly, the shareholdings of respondent nos. 1 to 4 have been shown at 13.07% as against the entitlement of 66.75% of the paid up share capital of the

Company.

13. The aforesaid fact of having incurred the loss to the tune of 40% of the capital of the Company have been mentioned in the balance sheet, profit and loss account of the Company for the financial year 31st March, 2010, 31st March, 2011 and 31st March, 2012. The act of Yogendra Prasad (appellant no.1) making allotment of share at a premium of Rs.900/- per share was intended to make respondent nos. 1 to 4 in minority and reduced the share from 66.75% is much below of 13.07% to 12.16% as has been claimed by respondent nos. 1 and 4 who are Directors of the Company had never received any notice of Board meetings which is said to have been convened on 27th July, 2012 and without their involvement the decision was taken to issue premium share of Rs.900/-. Allegation has been made by respondent nos. 1 to 4 that such a plan was orchestrated by Yogendra Prasad to take an opportunity to show issuance of shares at a higher premium with the motive to deprive respondent nos. 1 to 4 of proper and legal amount of compensation. Satish Kumar Aggarwal (respondent no.2) one of the Directors of the Company received a notice of Board meetings on 28th June, 2013 as he was outside the India he had sent E-mail to the Company expressing his inability to attend the said meeting and

in spite of the E-mail, Board meeting was conducted on 28.6.2013wherein Satish Kumar Aggarwal (respondent no.2) was incorrectly shown as absent without leave. In the said meeting, allotment of 1,000 shares of the face value of Rs.100/- per share at a premium of Rs.900/- per share was made in favour of Pratima Pratima, appellant no.2 and 29,488 equity shares of Rs.100/- each at a premium of Rs.900/- per share were allotted to Performa respondent nos. 6 to 12 with the sole purpose of reducing the percentage of shareholding of respondent nos. 1 to 4 from 13.07% to 12.16%. The challenge of the allotment of the share has been made on the ground that no proper valid or due notices of such Board meetings were ever received by SatishKumar Aggarwal or by J.C. Gupta (respondent no.4) of the Company. The hidden agenda was to surreptitiously issue and allot shares to respondent nos. 1 to 4 at an abnormal and astronomical premium behind the back and without the knowledge, consent and concurrence and thereby depriving them of their legitimate voting rights and shareholding strength of the Company.

14. Having come to know the aforesaid story Anil Aggarwal (respondent no.1) sent E-mail on 27th March, 2013 raised protest to Yogendra Prasad of its gross irregularities, oppression and

mismanagement. Yogendra Prasad (appellant no.1) vide letter dated 8th April, 2013levelled various charges and accusations against respondent nos. 1 to 4. Respondent nos. 1 to 4 were never agreed to accept the allotment of shares below 66.75% in view of the partnership agreement dated 22nd February, 2012respondent nos. 1 to 4 were entitled to hold 66.75% of the paid up share capital of the Company. Respondent nos. 1 to 4 in order to resolve the dispute sent E-mail message on9th May, 2013 to the Company raising a grievance the manner they were granted share indicates the unfair action of appellants with respondent nos. 1 and 2 and such action was taken with the sole motive to deny respondent nos. 1 to 4 to their entitlement of 66.75% of the shareholding and requested for necessary correction so as to reflect 66.75% shareholding in favour of respondent nos. 1 to 4 and break up in the following manner 44.50% share in favour of respondent nos. 1 to 3 and 22.25% share in favour of respondent no.4.They have shown willingness and readiness to pay all balance of Rs.1,42,50,000/-.

15. Satish Kumar Aggarwal (respondent no.2) received a communication dated 11th July, 2013 from Ygendra Prasad (appellant no.1) asking him to give personal guarantee in favour of Punjab National Bank for an amount of Rs. 103,00,00,000/-

(Rs.103 crores). The said request was made by Yogendra Prasad (Appellant no.1) being aware of the fact that there was/is no obligation on the part of the Satish Kumar Aggarwal (respondent no.2) to provide any collateral security for the Bank loan as the same is the sole responsibility of Yogendra Prasad (Appellant no.1). The said request was communicated merely an excuse to seek the illegal removal of Satish Kumar Aggarwal (respondent no.2) from the Board of Director of the Company. However, Satish Kumar Aggarwal (respondent no.2) complied the request of the Company and sent his no objection certificate to the Bank. Satish Kumar Aggarwal and J.C. Gupta (respondent nos. 2 and 4) were validly appointed as Directors, they have not received any notice of Board meetings save and except the meeting convened on 28th June, 2013.

16. Out of desperation, J.C. Gupta (respondent no.4) issued a letter dated 13th July, 2013 showing his intention to resign from the post of the Director of the Company on the ground that Company is being run as a family Company and not in accordance with the provisions of the Act but said resignation was, however, withdrawn by communication dated 4th August, 2013. The same was communicated to the Company as well as to the Government officials but Yogendra Prasad (appellant no.1)

some how or others managed to illegally shown the acceptance of resignation of J.C. Gupta (respondent no.4) as Director of the Company. It has further been claimed by respondent nos. 1 to 4 that Yogendra Prasad (appellant no.1) and his family members leased 29-30 acres of land located in Bettiah (West Champaran) which is located 30 K.M. away from the project site Sataha (East Champaran) for which lease rental of Rs.37,00,000/- (Rs. Thirty seven lacs) have been paid for the first year to Yogendra Prasad (appellant no.1) and his other family members. As the leased land is located at 25-30 K.M. away from the project site such lease agreement was entered into by the appellants and performa respondents with the Company for the sole purpose of personal benefit of Managing Director and his family members. Further the Company paid Rs.74,00,000/- (Rs. Seventy four lacs) out of the invested funds of the appellants for registration of the lease agreements of Bettiah land which was not required for the project. As per the letter of the Registrar of the Company the value of land as on 31st March, 2011 was shown Rs.58.8 lacs. The Company further purchased land worth of Rs.50.76 lacs during financial year 2011-12 and land was revalued at Rs.9.42 crores as on 31st March, 2012. Thereafter there was a purchase of land of Rs.62,00,000/- during financial year 2012-13. The purchase cost of land was Rs.1.63 crores. The Company got the same revalued at Rs.146.00 crores which had been shown as a closing balance on 31st March, 2013. The Company has paid unusual high valuation fee of Rs. 20,00,0000/- (Twenty lacs) for the land valuation to obtain revaluation at Rs.146.00 crores vis-à-vis Rs.9.4 crores showing at the beginning of the year. This was done to justify the allotment of shares of face value of Rs.100/- with a premium of Rs.900/- and to inflate the collateral security value for the Bank loan.

17. Though respondent nos. 2 and 4 were appointed as Directors on Ist November, 2011 but no notice was received of the Board meeting in between Ist November, 2011 and June 2013 and for the first time notice of Board meeting held on 28th June, 2013 was received by respondent nos. 2 and 4.

18. During the proceeding respondent nos. 1 to 4 filed counter affidavit to sur rejoinder on 17th June, 2014 mentioning there that Yogendra Prasad (appellant no.1) himself and his other family members including associates had illegally withdrawn Rs. 8.5 crores and most of which was withdrawn by way of cash from the Bank account of the Company, from the Punjab National Bank, Hazarimal, Dharamshala, Campus, Bettiah, West Champaran vide Account No.3939002100010101 and also from

another account vide Account No. 3939008700001028**.**

19. On the basis of the aforesaid averment respondent nos. 1 to 4 sought relief basically for a declaration that respondent nos.1 to 4 are entitled to 66.75% of the paid up capital of the Company and entry made in the paid up record of the Company is required to be rectified and also sought a declaration to issue the share for the face value of Rs.100/- each to the petitioner to the extent of application money subscribed in the Company being a sum of Rs.5,25,00,000/-.

20. The appellants have appeared and filed their reply to the Company Petition raising a plea that the Company petition is not maintainable, in view of the fact that entire controversy which the petitioners have raised in the Company petition can only be adjudicated in a civil proceeding before the competent civil court. It has further been raised that respondents have failed to make out case under Sections 397 and 398 of the Companies Act, 1956 (hereinafter referred to as "the Act") which deals actual mismanagement and apprehension of mismanagement of the affairs of the Company. Respondent nos. 1 to 4 did not disclose any act of the appellants to warrant any direction from CLB that the act complained are oppressive resulting into mismanagement of the Company. Basically in the present case relief has been

sought for enforcement of partnership agreement cannot be adjudicated within the jurisdiction of Sections 397-398 read with Section 402 of the Act. As the claim has been made to hold that petitioner have share of 66.75% of paid up capital share in the Company and wrongly has been shown who have been allotted 12.16% of the shareholdings. It has further been said, the money was given to appellant no.1 was a personal loan, having no connection with the affairs of the Company. The appellants placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Chatterjee Petrochem (1) Pvt. Ltd. v Haldia Petrochemicals Ltd & Ors**., reported in AIR 2012 SC 2753=(2011)10 SCC 466 where the Hon'ble Supreme Court has held that the CLB cannot entertain or adjudicate upon the issue relates to specific performance of contract which cannot be adjudicated in the proceeding under Sections 397 and 398 read with Section 402 of the Act. It has been raised that as respondent nos. 1 to 4 have challenged the allotment of share as per Board meeting dated 27th July, 2012 and 5th March, 2013 in which the share has been given in premium of Rs.900/-. It has been raised that such issue cannot be adjudicated upon by the CLB in exercise of power under sections 397 and 398 read with section 402 of the Act and so much it has been averred that the aforesaid issue of allotment of share in the premium rate would not come under the definition of oppression or mismanagement and said issue can only be considered and adjudicated in regular proceeding of civil court. The admission of respondent nos. 1 to 4 in paragraph 6.13 of the company petition where they have admitted as they were not satisfied with the developments and relating to the project, they decided to exercise the exit option as provided in the agreement. In such view of the matter, when respondent nos. 1 to 4 have terminated the partnership agreements, the question arises now they cannot seek declaration for enforcement of the relief mentioned in the Company petition, inasmuch as respondent no.4 himself tendered his resignation from the Board of the Company. On 13.7.2013 asked for return of the money in pursuance of revocation of partnership agreement dated 22.2.2012. There cannot be any question of the petitioners to enforce the aforesaid partnership agreement between the appellants and respondents nos. 1 to 4, in view of the fact that the Company which was not a party to the said partnership agreement. The said agreements were entered into by Anil Aggarwal and others (respondent nos.1 to 4) with Yogendra Prasad (appellant no.1) in their individual capacity and were more in the nature of rendering loan to appellant no.1.

21. The real dispute arose on account of advancement of the loan which the Company was necessarily required and applied for the same to the Punjab National Bank for establishment of the Sugar Mill. Though in the partnership agreement responsibility was attached to Yogendra Prasad (appellant no.1) to arrange for all collaterals but as per the banking practice they were asked for the personal guarantee from all Directors of the Company. But in utter disgust they refused to give personal guarantee for the loan to be sanctioned by the Punjab National Bank.

22. In stead of giving the personal guarantee respondent no.2 has given no objection certificate, for the loan, did not serve any purpose which was known to him and in such manner respondent nos. 1 to 4 did not co-operate directly and indirectly rather damages the case of the Company for loan from the Punjab National Bank.

23. Appellants had denied that they had ever agreed on 15.4.2012 to return the money invested by respondent nos. 1 to 4 with the interest at the rate of 14.5% instead of 10% before 31.8.2012 and they have denied that there was no question of returning such money and further denied that there was any understanding that the money would be returned back to respondent nos. 1 to 4 by 31.3.2013 rather the agreement was

there to return the money before 31.3.2015. While giving reply to the allotment of shares to respondent nos. 1 to 4 at a premium of Rs.900/-in the Board meeting dated 27th July, 2012 and 5th March, 2013 it has been contended that that the share has been allotted on the premium of amount of the aforesaid on account of change of land use, the price of the land of the Company was increased which was/is one of the main reason for increase of net worth of the Company. It has further been contended by the appellants before the CLB that respondent nos. 1 to 4 had invested Rs. 4 crores and on that strength claiming the share for 66% of equity is completely illogical, in view of the revised valuation of the assets of the Company. When the valuation of assets of the Company was Rs.20,00,00,000 (Rs. Twenty crores) and there was no question to agree to allot 44.5% of share in favour of respondent nos. 1 and 2. The assertion of respondent nos. 1 and 2 for 44% equity share is completely contrary to the understanding.

24. While dealing with the issue of notice of meeting dated 27th July, 2012 and 5th March, 2013 in reply it has been stated that if the resolutions are not correct for allotment of share in their favour than they do not even hold the share of the Company. In such view of the matter, application filed by respondent nos. 1

to 4 was/is not maintainable.

25. While dealing the challenge of increase of the authorized capital of respondent no.1 Company from Rs.5,00,00,000/-(Rs five crores) to Rs.10,00,00,000/- (ten crores) it has been contended that such increase of the authorized capital was done in accordance with the relevant provision of the Act and required Form 5 and Form 23 were filed to the Registrar of the Company vide MCA 21 Portal vide SRN No.DO5152582 and SRN No.B66990169 respectively.

26. While dealing the challenge with respect to allotting the share to appellant no.2 and performa respondent nos. 6 to 12 in the meeting dated 28th June, 2013, in the said meeting the Board of Directors has made allotment of 30,488 equity shares out of which 29,488 equity shares were allotted in favour of performa respondent nos. 6 to 12 and 1000 equity shares to Pratima Prasad (appellant no.2). The ground of challenge was led to respondent nos. 2 to 4 that they were not given notice of Board meeting on 28.6.2013 is based on wrong premises as respondent no.4 had attended the Board meeting dated 28.6.2013 in which he had given a dissent note. It has further contended that as respondent no.2 to 4 failed to infuse the money as per the commitment made in agreement, in such situation it was not expected that any

further offer of share would be made in favour of respondent no.1 and his associate. Accordingly no share was either offered or allotted to them. It has further been contended that they were agreed to infuse Rs. 4.50 crores but infuse Rs.4,00,00,000/-(Rs. Four crores) till November, 2012 and Rs.1.25 crores against the agreed amount of Rs.1.5 crores. The money of appellant no.2 and performa respondent nos. 6 to 12 had infused the money from March, 2009 to September, 2012 and in such situation and circumstances the allotment of share in favour of respondent nos. 1 to 4 and appellant no.2 and respondent nos. 6 to 12 (performa respondents) were allotted share at parallel rate, by the Company.

27. While dealing the issue of resignation by respondent no.4 as Director of the Company on 13th July, 2013 it has been contended that the said resignation purportedly had been withdrawn on 4th August, 2013 cannot be accepted in view of the fact that there is no provision under the Company Act by virtue of which even after tendering the resignation from the directorship of Board of the Company, withdrawal of the same is not permitted subsequently. Further said that respondent no.4 has made false statement because he had himself has written a letter to the Punjab Nation bank on 16.9.2013 thereby he has informed that he was no more Director of the Company, therefore, he was

not liable to provide any personal guarantee.

28. While dealing with the service of notice of Board meeting which the respondent nos. 1 to 4 has alleged that they have not received any notice of Board meeting except the notice dated 28th June, 2013. In reply to this stand it has been taken that the plea taken by them is completely falsified from the following facts as Satish Kumar Aggarwal (respondent no.2) and J.C. Gupta (respondent no.4)both of them attended the meeting on 23rd February, 2012, 5th October, 2012 and 20th November, 2012. With respect to other Board meeting it has been said that information was duly given to respondent nos. 1 to 4 telephonically and they were aware of the proceeding of different Board meetings of the Company. It has further been claimed by the appellants that they are wrong to say that respondent nos. 1 to 4 were not aware of the AGM held on 29.9.2012 or that no notice and/or intimation of General Meeting or AGM was sent to respondent nos. 1 to 4. Allegation of running the Company as family Company has been denied and has claimed that the Company is running as per provisions of the Act. Appellants have also denied that there was any commitment to Rs.40,00,000/- (forty lacs) per annum as remuneration but was not paid any single penny has been denied and also denied that

land belonging to the appellant and his other family members were sold to the Company at a much higher price than the prevailing circle rates at the time of sale. It has further been denied that respondent nos. 2 to 4 were not knowing or received notice of such Board meeting or General Body Meeting wherein the decision was taken to purchase the land by the Company.

29. Apart from merit, the appellants have also challenged the maintainability of the petition on different grounds and claimed that the nature of relief sought for is for enforcement of the specific performance of agreement which cannot be adjudicated under Sections 397 and 398 of the Act. It has been claimed that no mismanagement and oppression has been made out by the appellants. The CLB has heard the matter in detail from both sides and decided the case on the issue of maintainability of the petition as well as on its merit and it has been held that petition is maintainable as well as case of Haldia Petrochemicals is not applicable in the facts and circumstances of the case, in view of the fact there case was between two share holders and the matter was/is not related with the affairs of the Company. The CLB has taken approach that while deciding the application under Sections 397 and 398 of the Act the court should not take a narrow legalistic approach and allow technical

pleas to defeat the beneficial provisions of the section and in that situation the court is not power less to do substantial justice between the parties and ultimately the Tribunal has after discussion the material on record has arrived to a conclusion that respondent nos. 2 to 4 would make out a case of oppression as well as granted relief in the matter of share capital for reconstitution of Board of Directors, directed for examination of statutory records and also directed that if the funds have been found to be siphoned off by respondent no.1 and his family members such funds may be determined by the statutory auditor and appellant no.1 would return the money along with 10% interest per annum.

30. Learned counsel for the appellants submits that agreement dated 22.2.2012 is a partnership agreement in between Yogendra Prasad (appellant no.1), Anil Aggarwal and Satish Kumar Aggarwal (respondent nos. 1 and 2) and another agreement is of the same date is between Yogendra Prasad (appellant no.1) and J.C. Gupta (respondent no.4). The money was given by the respondents to the appellants for making investment in the Company but if the Company is not set up it will be the personal liability to return the same. In both the agreements the Company is not a party, but both are private

arrangements. It was a loan agreement for the purposes of establishment of Sugar Mill and is not subscription for the share of the Company. For this the appellants have placed reliance on the partnership agreement and attention has been drawn towards paragraph 6.7 and 6.8 of the application filed by respondent nos. 1 to 4. It has further been submitted that respondent nos. 1 to 4 were/are not interested in the share of the Company rather interested for loan amount which was given to the appellants be returned to them. It has further been submitted that there was increase of cost for establishment of the Sugar Mill, for that a discussion took place as the cost was increased from Rs100,00,00,000/-(Rs hundred crores) to 150,00,00,000-Rs.160,00,00,000/-(Rs. hundred fifty to hundred sixty crores) and accordingly respondents were not satisfied with the development and no longer interested for establishment of the Sugar Mill. After discussion with Yogendra Prasad (appellant no.1) on 15th April, 2012 they decided exercise to exit option. As per discussion money was to be returned by 31st August, 2012, the same was extended by 31st march, 2013 which shows that it was sort of loan with the condition to refund the same. The same can be substantiated from letter of Satish Kumar Agrawal to Yogendra Prasad (Annexure P-14) and he has placed reliance to the some of the extract from the letter where it has been mentioned that " Accordingly, we demand that our total amount given to you/PRAI of 4 Crores plus interest (as per the attached excel document) be paid back to us within 30 days from the date of this email. If we do not receive these funds within 30 days, we will have no choice but to seek any and all legal remedies available to us including legal fees, court costs and any damages for which we may be eligible" and also placed reliance the reply which the appellants have given dated 8.4.2013 (Annexure P-15) where it has been mentioned that the equity share which has been given to him is in the nature of collateral security equivalent to the aforesaid amount and further said that the amount would be returned by March, 2015 which is as follows:

"Kindly also note that the allotment of 10% equity of PRAAI in your favour is only for the purpose of giving you the collateral of securing your said amount. Which has been paid by you to me. In any case, while returning back the said amount to you, as agreed between us by March, 2015, I will take back the said 10% equity from you in my favour."

31. He has further placed reliance on reply given by Anil Aggarwal dated 9th May, 2013 through e-mail and appellants have relied certain extracts from the said letter to substantiate the

contention that share was given by way of security not for any other purpose for that specifically mentioned following paragraph of the said letter:

" As per the spread sheet already provided to you earlier and is attached to this email as well out total outstanding amount towards you and PRAAI as of March 20th 2013 is Rs.4.58 Cr.

You have mentioned in your last email that you have issued the 10% shares are security deposit against the money paid by us is not acceptable because we do not believe that the shares are worth 4.58 Cr."

By way of resolving the dispute Anil Aggarwal (respondent no.1 has suggested in the following manner which has been mentioned in the said letter which is as follows:

"We will sell the 10% shares so far issued to us to your daughter and brother-in-law in US for the total outstanding amount till the date of transaction. Instead of payment we will take a promissory note in US Dollars equal to the total outstanding amount as on the date of the transaction which is expected to be Rs.4.68 Cr. assuming this happens on Mary 20th of 2013. The note will also incur interest @14.5% per annum from the date payable every 4 months. A formal agreement will be made by our attorney for them to sign.

We sell the 10% shares issued to us to you against a promissory note backed by real estate (meaning land, apartments or house) in NCR region. Current value of this real estate must be at least 6.0 Cr Interest @ 14.5% will be payable to us every 3 months. We will hold this collateral till March 2015 and in case of non-payment, we will sell the collateral and take the proceeds. Of course you may pay us earlier than March 2015 and take the collateral back."

32. As per the norms of the Bank a letter was written to J.C. Gupta to provide the personal guarantee but he has replied vide e-mail letter dated 16th September, 2013 (Annexue-5) where he has informed that he is no longer associated with the subject project as a Director and any obligations and liabilities as a Director become null and void and accordingly he has withdrawn the personal guarantee papers which he has signed as a Director of the Prasad Refrigeration and Agro Industries Pvt. Ltd. whereupon the Bank shown their negative attitude, ultimately refused to grant the loan which is apparently clear from letter dated 3.10.2013. In such view of the matter, the Sugar Mill could not be established on account of misconduct committed by respondent nos. 1 to 4 specially informing that he is no longer interested with the Company and on that account the Bank vide

letter dated 3.10.2013 rejected the loan application. Appellants have claimed that it was a private agreement between the two persons, Company was not a party basically the amount was given as a loan with the stipulation to return the same and money was not given by way of equity share in the Company. He has further submitted that the CLB has not acted appropriately and committed a judicial misconduct as appellants were not given chance to place their cases in a proper manner and for that they have given certain dates of the proceeding which are as follows:

Company petition was filed on 13.9.2011, the case placed for hearing, ad-interim order of status-quo was passed against the appellants, on 19.9.2013, appellants filed reply on 8.11.2013, application for vacating the status-quo was filed on 8.12.2013 but no favourable order was passed in favour of appellants. Rejoinder was filed by the respondents on 24.1.2014, sur-rejoinder was filed by the appellants on 18.3.2014, argument on behalf of respondent nos. 1 to 4 was started on 21.3.2014, reply argument was made by the appellants on 13.5.2014, reply to sur-rejoinder was filed by respondent nos. 1 to 4 on 17.6.2014, final argument was made on 18.6.2014. Plea has been taken that respondent nos. 1 to 4 should not have been allowed to file affidavited reply to sur-rejoinder, one day before the final argument, without giving opportunity to give properly reply.

33. The petition was filed on 13.9.2013, case was placed for hearing on 19.9.2013 and accordingly vide order dated 19.9.2013 CLB has passed the interim order against the appellants giving direction for maintaining the status quo. The court passed the interim order of status quo and recorded that a prima facie case of oppression was made out against the appellants. On 8.11.2013 the appellants filed reply, on 18.12.2013 an application was filed by the appellants for vacating the order of status quo, on 24.1.2014 rejoinder was filed by the respondent and on 18.3.2014 filed reply to the rejoinder. On 21.3.2014 the respondents have led their argument and reply to argument was made on 13.5.2014, on 17.6.2014 one day before the final argument on 18.6.2014 filed reply to sur-rejoinder bringing new fact as well some additional documents and the written submission was allowed to be filed by both sides by 10th July, 2014 but the appellants filed written submission on 8th July, 2014 where the appellants have specifically taken a plea that CLB should not have allowed the respondents to file reply to the Sur rejoinder which is apparently clear from the written submission filed by the appellants and should have given opportunity to contradict new facts brought by the respondent nos. 1 to 4.

34. Further learned counsel for the appellants has submitted that on the basis of the fresh material brought by respondent nos. 1 to 4 through Reply to the Sur rejoinder was the basis for granting relief to respondent nos. 1 to 4. It has been submitted that nature of complaint is not related to the affairs of the Company and as such it does not fall under the provisions of Sections 397 and 398 of the Act. He put emphasis that transaction of money was loan between the two persons and the agreement was between two private persons having no role of the Company and cannot be said that the money lended by respondent nos. 1 to 4 is by way of investment in the Company rather it was giving and taking loan by two private persons. It is further stated that the agreement is in the nature of a contingent contract for the purposes of setting up Sugar Mill in Rs.100,00,00,000 (Rs. Hundered crores) subject to availability of Rs.70,00,00,000/-(Rs. Seventy crores) of loan. Yogendra Prasad was only responsible to arrange the loan and made personally liable for giving collateral. Other partners could have backed out till the loan was not sanctioned after loan was sanctioned they could not have backed out. Paragraph 6.13 of the application shows the intention of exit was invoked but later on infused the money with the stipulation the same would be returned along

with the interest and that itself shows that when respondent nos. 1 and 2 have invoked exit clause it will be treated that the agreement has been terminated. Total amount has been paid in the first phase Rs.1,90,50,000 and in second phase Rs.2,09,50,000, total amount was given Rs.4,00,00,000/-.

35. The thrust of the argument of the appellants is that the agreement was a loan amount which was paid to the appellants, not for share even the share word has been used in communication via E-mail but the said share was prepared to be sold to the daughter of appellants would take back with the promissory note, backed by the real estate and for that the appellants have placed reliance on paragraph 6.22 of company petition " However with a view to settle the acts complained of issued email on 9th May, 2013 to the Company a copy of the said email issued by the petitioner on 9th May, 2013 is annexed here to marked as Ext.P/16 and also placed reliance on paragraph 6.63 of company petition which is as follows "the petitioners state that despite repeated requests and reminders the acts complained of have not been redressed by the respondents and accordingly the petitioners are thus entitled to be declared as share holders in the Company representing 66.75% of the paid up share capital." He has further submitted that as they have rescinded the agreement

in view of the Section 62 of the Contract respondent nos. 1 to 4 can not compelled the appellants to comply the terms of the agreement which has already been annulled by respondent nos. 1 to 4 itself. It has further been submitted that the relief sought for cannot be granted even by the civil court which has been given by the CLB which is against the provisions of Section 14 of the Specific Relief Act. It has been said that the complaint of making allotment at a premium of Rs.900/- is a proper act of the Company as the valuation of the land which is in possession of the Company has already substantially enhanced and in such circumstances the Company has made allotment of 15,500 shares on 27.7.2012 and 13,000/- share on 15.3.2013 and later on 30480 shares are allotted in favour of the appellants and performa respondents on 28.6.2013 in the same rate. It has been submitted that respondents and appellants were allotted the share in the same rate in such circumstances the allegation of oppression against the appellants is completely far from truth. The relief which has been sought in the nature of specific relief act which cannot fall within the jurisdiction of CLB and in terms of Section 14 of the Specific Relief Act, in certain condition, the agreement cannot be enforced and nature of relief sought for cannot be enforced against the appellants and maximum they can seek the relief of damage not for enforcement of the agreement which is now become impossible to be carried out. He has relied on the judgment **Advansys (India) P. Ltd. and others V. Ponds Investment Ltd. and another,** reported in (2015)188 Companies Cases 122, Bombay High Court paragraph nos. 4, 6, 47 and 48, **Incable Net (Andhra) Limited and others v. Apaksh Broadband Limited and others**, reported (2010).6 SCC 719, paragraph nos. 23 and 37, **Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad and others**, reported in AIR 2005 SC 809=(2005)11 SCC 314 paragraph 191 and submitted that it is completely a private agreement. The Company is nowhere in the picture and as such CLB has no jurisdiction to adjudicate the matter between the two private persons when the matter is not related with the affairs of the Company. In the course of argument the appellants have drawn attention towards paragraph nos. (xix) (xxiii) and (xxv) and arbic paragraph 20 from the judgment of CLB. He has further submitted that appellants in the memo of appeal have raised this point in paragraph 7. Further counsel for the appellants has taken a plea that any act prior to the entry of the respondents in the agreement or application filed cannot be the subject matter of the consideration in the present case. As per counsel for the appellants the finality that partnership agreement is still subsisting is against the stand of the respondent himself. He has placed reliance on Annexure 18 paragraph 26 and submitted that this argument does not show the value of the share of the Company was not more than Rs. 100 per share. He has further submitted that the proceeding before the CLB should not have adjudicated the dispute on the matrix of the fact that respondent nos. 2 to 4 has appeared in Title Suit No.132 of 2014 which has been filed from the side of the appellants pending before the Sub Judge IV, Motihari and in which the petitioners have filed counter claim. Counsel for the appellants has heavily criticized the action of J.C. Gupta (respondent no.4) for his action of writing a letter dated 16.9.2013 whereby he has stated that he is no longer Director of the Company and the personal guarantee which was given by him has been withdrawn whereupon the Punjab National Bank wrote a letter to the Company dated 3.10.2013 informing the Company that as J.C. Gupta (respondent no.4) has withdrawn the personal guarantee, in such view of the matter the Bank is not interested to grant loan for the purposes of establishment of Sugar Mill.

36. The appellant in their written argument summarized the points in the following manner:

(a) What was the true nature and intent of the contract dated 22.2.2012 and whether the said agreement is a loan agreement or the agreement has been entered for share subscription. The thrust has been given that agreement is a loan agreement and has nothing to do with the share subscription and appellant no.1 has personally been made responsible in case of failure of return of the money by the Company, he was obliged to return the same.

(b) Another point has been raised that the nature of the contract is a contingent contract with the contingency attached to the agreement of sanctioning of loan with the exit option and respondent nos. 1 and 2 have opted for an exit and as such the question of being entitled for the equity share of 66.67% is no longer can be a matter of adjudication in view of the fact the contract become dead and frustrated contract cannot be enforced in a particular manner for giving equity entitlement in favour of respondent nos.1, 2 and 4

(c) Another point has been raised that as the agreement dated 22.2.2012 between the parties have been terminated, in such circumstances the CLB in exercise of power under sections 111, 397 and 398 of the Act should not have adjudicated the dispute, in view of the fact that on 15.4.2012 respondent nos. 1 to

4 decided to terminate the above contract as on 15th April, 2012 balance Rs.2.10 Crores was infused by them is meant to be returned back on or before 31.8.2012 extended up-to 31.3.2013. So in such circumstances the CLB should not have entertained the application under the aforesaid sections

(d) The appellants have taken a plea that on account of allotment of 10% equity shares in favour of respondent nos. 1 to 4 in two Boards meeting dated 27.7.2012 and 5.3.2013 cannot restore the agreement dated 22.2.2012 as the equity share of 10% was given by way of security inasmuch as respondent nos. 1 to 4 were demanding a security in better nature and after, having the knowledge of security, always insisted for refund the money which he has invested. In such situation the respondents cannot take plea of enforcement of the agreement in view of the fact their demand is only for return of the money.

(e) The appellants have taken another point that in view of the fact as narrated above it is clear that the respondents have no concerned with the affairs of the company, in such situation respondent nos. 1 to 4 do not have any cause of action to approach the CLB under Sections 397 and 398 of the Act making an allegation of oppression. The thrust of the argument is that that the CLB can exercise his jurisdiction when the matter is brought before him for consideration of strain relationship of two sets of shareholders and if running of the Company was got prejudiced on that account the Company has suffered that CLB will have an authority by way of corrective measures to avoid such situation. It has been submitted that in the present case respondent nos. 1 to 4 did not show any concerned in respect of the affairs of the Company upto July,2013 thereafter their inclination is for recovery of the money what they have invested and also interested for better security to secure the loan amount.

(f) Further point has been taken that the nature of relief sought for in the application filed by respondent nos. 1 to 4 are in the nature of specific performance of contract which itself was terminated between the parties and the nature of relief which has been granted to the respondents could not have been granted even by the civil court, the CLB has grossly misdirected and passed illegal and unsustainable order by giving direction for enforcement of the contract dated 22.2.2012, the CLB has gone beyond his jurisdiction and power, he could not exercise the jurisdiction in unfettered manner

(g) The ground has been framed even civil court would not have passed the order for specific performance of contract in the facts and circumstances of the case as Section 14 of the

Specific relief Act bars the relief in a contract for specific performance where the compensation of money will be adequate relief. In the present case respondent nos. 1 to 4 consistently asked to refund the invested money considering that on a consequence of termination of contract, when they were satisfied with the return of money, the question of granting relief for specific performance of terminated contract does not arise, placed reliance on Section 62 of the Contract Act , on that strength it has been submitted that when the agreement is rescinded the terms of original contract will not be performed as termination was unilateral. In such situation the present case falls within Section 62 of the Contract Act.

(h) The ground has been framed that under Sections 397 and 398 of the Act the respondents cannot file an application for recovery of the money i.e. also by arm twisting tactics upon the opposite party as Kerala High court in the case of Palghat Exports Private Ltd. & another v. T.V. Chandran and others, reported in (1994) 79 Company Cases 213 held that the company petition under Sections 397 and 398 of the Act is not maintainable for the purpose of recovery of money.

(i) The question has been raised that respondent nos. 1 to 4 are not entitled for share in the Company for the amount invested subsequent to termination of contract dated22.2.2012.Ground has been taken that as the agreement has been terminated on 15.4.2012 in such circumstances, additional share could not have been allotted to respondent nos. 1 to 4.

(j) Appellants have raised a very major grievance that CLB has delegated its judicial power in favour of respondent nos. 1 to 4 and the Statutory Auditor to take action against, the appellants and can even go to extent of passing the decree by cancelling lease deed and cancelling previous resolution by passing the impugned order which is completely illegal and not sustainable on the face of it.

(k) Another point has been taken with respect to respondent no.4 as he has not opted the exit option the right cannot not be enforced by him in terms of contract dated 22.2.2012 taking a plea that even in terms of the contract dated 22.2.2012 respondent no.4 was to invest Rs.2.25 crores in the Company in stead of contributing only Rs.1.25 crores. So much so he has intimated the Punjab Nation Bank writing a letter of having no association with the Company as a Director that prejudiced and jeopardize the project of establishment of the Sugar Mill and as such respondent no.4 cannot ask for enforcement of the contract.

(l) Appellants stated that CLB has committed misconduct by taking into consideration the voluminous documents which was filed by respondent nos. 1 to 4 on 17.6.2014 byway of reply to sur rejoinder only day before final argument on 18.6.014 and also affidavit dated 2.7.2014 i.e. after reserving for the judgment and on those materials the CLB has granted relief to the appellants and so much so the CLB has also committed mistake itself in applying the discriminatory approach in view of the fact that the CLB has taken into consideration the documents filed by them as stated about but the CLB has not taken note of the fact and materials which were brought by the appellants through an affidavit dated 14.7.2014 while passing the final order.

(m) The plea that has been taken by the respondents that the relief which has been sought by the respondent nos. 1 to 4 can only be granted by the CLB is a misconceived, misleading in view of the fact respondent nos. 1 to 4 can approach the civil court for redressal of their grievance and it is wrong to say that the civil court could not have given relief only the CLB has jurisdiction to pass such order with respect to the matter mentioned in their application. It has been said that civil court equally competent to grant relief as claimed so much so they have appeared before the civil court and filed counter claim. It has been said that argument advanced by the respondent nos. 1 to 4 is completely not tenable, frivolous and judgment that has been cited by the appellants in **Ammonia Supplies Corporation (P) Ltd. vs. Modern Plastic Containers (P) and others**, reported in AIR 1998 SC 3150 is not applicable to the facts of this case inasmuch as Hon'ble Supreme Court has stated categorically that the proceeding before CLB is summary in nature and the complicated question of fact cannot be adjudicated in exercise of jurisdiction of under Sections 397 and 398 of the Act and the relief which has been granted is beyond the imagination even in exercise of power to grant the relief of specific performance of contract.

(n) The last point that has been taken that respondent nos. 1 to 4 does not have any cause of action on account of two Boards meeting dated 22.7.2012and 5.3.2013 by which the Company has granted share at the rate of Rs.900/- premium, per share and further said that unfairness on the part of appellants does not constitute the oppression as has been held by Hon'ble Supreme Court in the case of **Shri V.S. Krishnan and others v. Westfort Hi-Tech**, reported in (2008) 3 SCC 363.

37. Learned counsel for the respondents with respect to filing of reply to sur rejoinder on 18.6.2014 it has been

submitted that before filing of reply to sur rejoinder notice was given one day before and no prayer was made by the appellants for giving an opportunity for filing of reply to reply of sur rejoinder. The CLB has granted three weeks time to both the parties to file their respective argument and accordingly the appellants have filed their written submission and at paragraph 10 they have given reply to reply of sur rejoinder and CLB has dealt with the issue of siphoning of the fund by the appellants in paragraph 13 of the written argument, has been taken into consideration and dealt with elaborately in paragraph xxv of the Judgment. So much so additional affidavit has been filed by the appellants on 14.7.2014 even after closure of argument. It has further been submitted that suit has been filed by the Company not by Yogendra Prasad on 15.2.2014 and after appearance, respondent nos. 1 to 4 have filed an application on 27.6.2014 under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the plaint. It has further been argued that respondent nos. 1 to 4 served reply to sur rejoinder as well as affidavit well before time so the contention that sufficient time was not granted to respondents is fallacious, far from truth before delivery of the judgment dated 29.9.2014. It is also significant that no objection was raised by the appellants in their notes of submission with regard to the affidavit filed by the respondents. Even though the affidavit was filed much before the judgment so much so no real prejudice has been caused to the appellants by affidavit dated 2.7.2014 as the CLB has only directed Registrar or Auditor to examine necessary document and prepare the report with regard to siphoning Rs.8.5 crores by the appellant from the Company account. Moreover the appellants have not given any answer of withdrawal of the huge amount of money without knowledge of the respondents who are also share holders of the company as well as Director of the Board and as such no prejudice has been caused to them inasmuch as the CLB is justified in setting aside the allotment in passing an order consequential thereto. It has further been submitted that civil suit can be filed for breach of contract but the civil court will not have jurisdiction to adjudicate the dispute in terms of Sections 397 and 398 of the Act as in the application respondent nos. 1 to 4 have not sought remedy for breach of contract as specifically respondents have sought relief for rectification of share, register of the company and to incorporate share holding of the respondent equivalent to 66.75% paid up share capital. The entire Company Petition is related to rightful ownership of the percentage of share of respondent which has been agreed by the parties in the partnership agreement, civil court cannot pass the order for cancellation of share and necessary correction to the share register can only be made under company petition under Sections 111, 397 and 398 of the Act. Respondent nos. 1 to 4 have led the submission of oppression and mismanagement of the affairs of Company, such relief cannot be granted by the civil court. Respondent nos. 1 to 4 are primarily aggrieved by allotment of share to them at a premium rate of Rs.900 per share instead of Rs.100 as a result of which respondents have been reduced to significant minority. The allotment has been made by the Company and as per the appellant the respondents are required to move the civil court but on the other hand the appellants have raised that Company is not party to this agreement in such circumstances respondents would have no forum available than the proceeding before the Company Court to raise their grievances and get proper relief.

38. The contention of the appellants that money was given by the respondents as a loan not by way of subscription it has been submitted that the money was given to the Company as a subscription which is apparently clear from the Book Accounts of the Company (**P-9**) which shows all the money have been credited in the account of the Company starting from 8.1.2010 to 10.4.2012 and later on from 16.4.2012 to 23.11.2012 total

amount of Rs. 4,00,00,000/-(Rs. four crores). The agreement dated 22.2.2012 itself shows that nature of payment has been made by way of subscription for purchase of share. It is amply clear that money has been given to the Company and money has not been acknowledged in the individual capacity which is very much clear from the recitals of the agreement. In the agreement, Yogendra Prasad has been shown representing the Company and money was given as share subscription mentioned therein. Agreement was not for personal loan, option has been given to back out from the project but up to the stage of sanction of loan the moment loan paper is signed the option of exit to be treated closed for ever. Entire arrangement shows that it was/is investment to the Company, it has been further argued that for understanding the nature of agreement, it has to be given a harmonious construction and has to be read as a whole not in a truncated manner. Averments made in the agreement indicates purchase of share and subsequently the same cannot be turned to be loan, in the event of default by the Company, Yogendra Prasad (appellant no.1) was made personally liable. It is also very much clear that the Company itself granted the share on 27.7.2012 and 5.3.2013 and both these allotments were made on account of stipulation mentioned in the agreement dated

22.2.2012. If the money would have been given by way of loan to Yogendra Prasad there was no question of the Company to allot the shares to respondents, treated the investment, as share application money, as the transaction was for investment for purchase of share of the Company, the agreement cannot be treated as agreement between two individual involving of contract of breach or otherwise. In the agreement, Yogendra Prasad and Company have been treated as one and the same. There is no single line in the agreement from which it reflects that share would be allotted to the respondents or money would be refunded to them has been made conditional only after completion of Sugar Mill. The stipulation mentioned in the agreement and allotment of share both acts itself indicates that both parties were knowing and understanding the agreement was for purchase of equity share of the Company. While dealing with the submission with respect to exit option it has been submitted that J.C. Gupta has altogether invested Rs.1.25 crores and has not opted to exit from the partnership agreement and never asked Yogendra Prasad to return the money invested. J.C. Gupta has also been allotted each share at premium of Rs.900 on 27.7.2012. In paragraph 6.13 reply to the company petition where it has been mentioned that the contents of rest paragraph is correct to the extent that they exercised exit option in terms of agreement and terminated their association with Company. It has further been said that as per investment of money is concerned, the same is matter of record, the said paragraph. itself shows that respondent no.4 has not opted exit option. Learned counsel for the respondents has placed reliance on the judgment in the case of **Rush & Tompkins Ltd v. Greater London Council and another**, reported in (1988) 3 All ER 737 on the principle in what manner the expression of "without prejudice" will be limited in the matter of negotiating the dispute between the parties. It has been submitted that the use of this expression means that in the event of negotiation proved to be unsuccessful they are not to be referred at the subsequent trial. This particularly relevant when the parties seek to compromise and evidence of the content of the negotiation will not be permissible at the trial and cannot be used to establish an admission on the part of any party.

39. Learned counsel for respondent nos. 1 to 4 has placed reliance on Annexure p-24 is the letter dated 14th July, 2013 addressed to Ms. Rachel Purti, Chief Manager SPL SSI Branch, Boring Road, Patna where it has been informed as per terms of the agreement he was not required to give a personal guarantee as

agreement between the parties but given no objection for processing and funding Rs.103 crores in favour of Prasad Refrigeration and Agro Industries Pvt. Ltd. (hereinafter referred to as PRAI). This letter has been relied upon to show that respondent has granted no objection and made it clear that as per terms of the agreement Anil Aggarwal and Satish Kumar Aggarwal were not required to furnish the personal guarantee for the loan. Respondents relied on another letter dated 13th July, 2013 P-22 addressed to the Board of Director of PRAI whereby informed that as per terms of agreement Aggarwal Brothers were not obliged to sign any personal guarantee for PRAI bank loans. It has further been mentioned in the letter that the Chairman informed his Officers to get signature of personal guarantee for Punjab National Bank whereupon he drew his attention to the clause in the agreement signed by Chairman himself which makes it clear that they were not required to sign any personal guarantee for the Bank loan. The Chairman of the Company threatened that if he would refuse to put his signature of the guarantee then he would remove him as a Director from PRAI by calling an extra ordinary AGM as more than 85% of shareholders were his friends and relatives, he would not have any problem to pass such resolution to show him the door, made an allegation of breach of agreement, pointed out that he has induced to make investment of Rs. 4.45 crores with the condition of allotment of 44.5% share of PRAI to Anil Aggarwal and his brother Satish Kumar Aggarwal and also mentioned that Bank has been informed Anil Aggarwal and Satish Kumar Aggarwal are not required to furnish personal guarantee for processing the loan. The Chairman with the intention to remove him has given 7 days notice vide letter dated 11th July to sign the personal guarantees to the Bank or he would be removed from the post of Director of the Company. And as per the agreement 44% share was to be given to the Aggarwal brothers but only granted 9.97% of share.

When he confronted, he replied that 10%share has been given them as collateral to them until he buys them back. Last date for returning the principal amount with interest was fixed on 31st March, 2013 and rejected the request to further extend the date any more and requested for issuance of 44% PRAI share against Rs. 4 crores of the money invested but instead of doing so he came with a scheme to remove him from the post of Directorship of PRAI.

40. J.C. Gupta has also written a letter through e-mail dated 16th September, 2013 (Annexure-5) whereby he informed the Bank as well as to the Managing Director that he was no

longer associated with the project as a Director and any obligation and liability as Director is hereby withdrawn and all personal gurantee paper which he had given as Director of PRAAI were also withdrawn. In such manner J.C. Gupta though remained as share holder but withdrawn from the post of Director and personal liabilities.

41. Learned counsel for the respondents has placed reliance on Annexure 18 which is part of the reply of the appellants to sur-rejoinder whereby a Chartered Accountant Company, Ghaziabad revalued of equity share of PRAI whereby enhanced the value of assets of the Company to the tune of Rs.135 crores. This document has been placed reliance on the point that shares have been allotted in the premium amount of Rs.900 each and the said revaluation has been made at the cost of payment of Rs. 20,00,000/- (Twenty lacs) The revaluation report of the Chartered Accountant made a note that valuation report has been prepared solely on the annual financial statement made available to them, through website of ministry of Company Affairs. Only on thorough a cursory analytical review respondents sought to establish the basis of revaluation is not based upon real factual matrix of finding and opinion are questionable. They had not carried out the work of audit with proper materials available and

will put question mark to correctness and completeness. The report has been prepared only on the basis of the information provided to the Chartered accountant. In support of submission, respondents have placed reliance on the judgment in the case of Sangramsinh P. Gaekwad (supra), paragraph nos. 201 and 202 on the point that while deciding the case whole conduct has to be looked into, placed reliance on the judgment in the case of **Needle Industries (India) Ltd. and others v. Needle Industries Newly (India) Holding Ltd. and others**, reported in (1981) 3 SCC 333, paragraph 17 on the principle of maintaining higher standard and submitted that case of **Haldia Petrochemical case (supra)** does not apply to the fact of the present case as **Haldis Petrochemical case (supra)** was related from the transaction of share between the two share holders having no relation with the affairs of the Company and the same was only a commercial dispute cannot be treated to be dispute of company matter. He has further stated that judgment in the case of Ms Ponds Investment Ltd (supra) does not apply as the same is related to Section 111 (sub clause (4)(b) of the Act. Sections 397, 398 and 402 of the Act deals with the power of CLB which postulate it has wide extensive and unlimited power. Further argued as and when the money has been consumed for the purposes of allotment of shares are no longer remained a loan on the Company. He has further argued that the share was to be given on the basis of the agreement between the two parties even though asset of the Company has been revalued but will not change the situation as the share has to be allotted as per the nature of the agreement not any subsequent development had taken place lead to improvement of prosperity of the Company. He has further submitted that appellants have to succeed only on question of law, not on fact in terms of Section 10F of the Act postulates the entertainment of appeal only on the point of law not fact, he has placed reliance on the judgment in the case of Sangramsinh P. Gaekwad (supra) **,** paragraph 195 and 376. The plea of the appellants of loan amount falls flat, the moment, the appellants had issued share in favour of respondent nos. 1 to 4 and was treated all thorough the money, was not for loan, but was taken money as subscription towards the share. Respondents have argued that the Managing Director mismanaged the affairs of the Company as appellants had sold their owned agricultural land to the Company at three times price over the prevailing circle rates at the relevant point of time. The land was valued at Rs.50,83,812/- in March, 2011 with addition of Rs.50,76,628/- and Rs.62,37,348/- in 2011-12 and 2012-13 but was revalued at

Rs.1,35,75,23,836/-in March, 2013 whereas the size of the land had increased from 26 acres to 52 acres during that period. The sale of land personally owned by the appellants to the Company at an astronomical price, leasing of land from appellant no.1 and his family to the Company and payment of Rs.37 lacs as lease rent to the appellantno.1, so much so the resolutions also included payment of unreasonable high remuneration to appellant no.1, his family members and amount being paid by the Company where appellant no.1 is Managing Director. It has also been alleged that appellants have siphoned out Rs.8,50,79,416/- as money was withdrawn by the family members and friends only for the personal gain. The land of Company was revalued to Rs.134 crores within the period of one year.

42. In reply to the argument of respondents, in order to show the procedural defect of the proceeding appellants have drawn the attention of this Court to the order dated 18.6.2014 of the order sheet of the last date showing that one day before the last date respondent nos. 1 to 4 have filed a voluminous rejoinder annexing the document without giving opportunity of proper hearing to the appellants. He has placed reliance on paragraph no. xxviii of ground of appeal. He has further submitted that the last date of the order sheet does not disclose the documents were filed

by the respondents, in such situation, cannot be taken into consideration and basis of the order does not exist in view of Regulation of the Company Law Board Regulation 1991, further submitted that the document would have been utilized or allowed to be filed subject to grant of leave by the CLB but counsel for the respondents has pointed out Regulation 44 of the Company Law Board conferred inherent power to CLB to pass such order as has been necessary for the ends of justice or to prevent the abuse of process of court. It has further been submitted that documents which were filed by respondent nos. 1 to 4 were not recorded in the order sheet, as such, unless the documents are mentioned in the order sheet, cannot be a basis for placing reliance on those documents filed on 17.6.2014 a day before argument was concluded. It is an admitted fact that no application was filed and no permission was sought or given to file reply to sur-rejoinder along with voluminous new documents. He has further drawn attention to certain paragraphs of the final judgment such as paragraph nos. (x), (xi),(xxi), (xxii), (xxiii) and (xxv). Emphasis has been given to those part of judgments, which were not part of the pleadings but based on statements mentioned in the reply to sur-rejoinder. The relief which has been granted is in the nature of specific relief and relief which has been granted from paragraph (xxiii) onwards has given on the basis of reply to sur-rejoinder. As per the appellants relief that has been granted thereby the CLB has given authority to statutory Auditor and reconstituted the Board, to examine the affairs of the Company with respect to account and if it is found wrong act on the part of the appellants, that amount would be refunded. The CLB is completely wrong in conferring such power to Private Body/Peron to be a Tribunal and decide the amount which the appellants are to return and in case of failure it will be treated as charge over personal property of these appellants. This relief has been given on the basis of reply to sur-rejoinder. By relief xxii the Tribunal has given power to statutory auditor and reconstituted Board to adjudicate the liability and the amount would be returned which amounts abdication of his own power and authority. The statement recorded in paragraph (xxiii) is also based upon to the statement made in the reply to sur-rejoinder.

43. Learned counsel for the appellants has placed reliance on Section 402 of the Company Act. He has further submitted that though in the civil suit Yogendra Prasad is not a party but in the counter claim Company and Yogendra Prasad has been made party in the proceeding. He has further placed reliance on paragraph nos. 5 to 13 of the counter claim which is nothing but

reiteration to the reply to the sur-rejoinder and also drawn the attention to paragraph 19 of counter claim where the relief has been sought against Yogendra Prasad also. In the present situation it has to be examined the factual aspect with respect to dates of filing of the suit and counter claim. Civil suit has been filed by the Company on 5.2.2014, application has been filed by respondent nos. 1 to 4 under Order 7 Rule 11 of the Code of Civil Procedure on 27.6.2014 Written statement has been filed by the defendant nos. 1 and 2 on 15.5.2014, written statement was filed by defendant nos. 3 and 4 on 27.6.2014 and on that basis counsel for the appellants submits that when respondents have filed counter claim the proceeding before the CLB could not have proceeded. He has further submitted that power of review provided in Regulation 27 of the Company Law Board has been deleted and regulation 23 deals with reply to sur-rejoinder, As per the appellants they were not given opportunity to file reply to sur-rejoinder, hence the entire proceeding vitiates. As per agreement money was given to the appellants, not to the Company but money was accounted in the account of the Company. As per the contract appellant were made personally liable to return the money, share was allotted to the respondents by way of security not otherwise. As per appellants the agreement has come to an end on 15.4.2012 and as such agreement cannot be enforced when both sides are at fault. The payment which has been made after 15.4.2012 not in terms of the agreement as on that date respondent nos. 1 and 2 had opted to exit from the Company. E-mail dated 27th March, 2013 and E-mail dated 10th May, 2013 (P14 and P-16) are the letters through e-mail addressed to Yogendra Prasad personally not to the Company. Both letters show that they were not concerned with the affairs of the Company but it was only to get return of their money. These letters talk giving of 66.66% shares, not talking about the affairs of the Company. The whole action of respondent nos. 1 to 4 can be said that it is mere breach of contract and respondents can go for enforcement of the contract in the civil court as it has nothing to do with the affairs of the Company. Letter dated 8.4.2013 (P15) shows that 10% share has been given as security with condition to return the share on payment of money. During argument, this Court has asked the appellants whether they are agreeable to return of the money whereupon reply has come that when respondent nos. 1 to 4 have acted with impunity, in such a manner, the condition of the Company has deteriorated, the question of return of money does not arise. Meaning thereby they are not ready to return the money itself indicate the intention of appellants.

44. Counsel for the appellants has placed reliance on the letter dated 22.7.2013 (Ext.P-28) and particularly has put emphasis to the paragraphs which are as follows: “We have noted that you have also written a letter to the bank on 14th July, 2013 thereby giving your NOC for sanctioning of the loan of Rs. 103 crores in favour of the Company by the PNB. Kindly note that the Company has seriously objected to your unilateral writing to the bank, without taking into confidence the board of the Company. The tenure of your letter clearly provides that you are intimating to the bank that you are not obliged to give any personal guarantee to the bank in respect of the loan taken by the Company. Writing of any such letter to the bank has seriously prejudiced the case of the Company for obtaining its loan of Rs.103 crores from the PNB.”

45. This portion has been relied upon to show the unreasonable behaviour of Respondent nos. 1 to 4 towards Company. He has placed reliance on the following judgments:

(i) **Chatterjee Petrochem (India) Private Limited V. Haldia Petrochemicals Limited and others**, reported in (2011) 10 SCC 466, paragraphs 13,17,20,95,99 and 103.

(ii) **V.S. Krishnan and others V. West Fort Hi-Tech**

**Hospital Ltd. and others**, reported in (2008) 3 SCC 363, paragraphs 10 and 23

(iii) **Incable Net (Andhra) Limited and others v. A.P. Akash Broadband Limited and others**, reported in (2010)6 SCC 719 Pragraphs 33 and 37,

(iv) **Advansys (India )P. Ltd and others v. Ponds Investment Ltd. and another**, reported in (2015) 188 Com Cases 122 Bombay, paragraphs 46,47, 48, 51 and 54.

(v) **Shanti Prasad Jain v. Kalinga Tubes Ltd**., reported in AIR 1965 SC 1535, paragraphs 32, 33,36

(vi) **Sangramsinh P. Gaekwad and others vs. Shantadevi P. Gaekwad and others**, reported in(2005)11 SCC 314, paragraphs 191

(vii) **Palghat Exports Private Ltd. v. T.V. Chandran and others**, reported in (1994) 79 Company Cases 213 (Kerla), paragraphs 18, 24 and 47

(viii) **Varun Mishra and others v. Shri Krishna Pharmacy P. Ltd. and others**, reported in (2014) 187 Com Cases 100 (CLB) paragraphs 32 and 89

(ix) **Nilesh Kumar Narayanbhai Panchal v. Jap Agro Foods P. Ltd. and others**, reported in (2016) 194 Com Cases 333 (CLB) paragraphs 61 and 63

(x) **R. Balakrishnan and others v. Vijay Dairy and Farm Products P. Ltd. and others**, reported in (2015) 125 Com Cases 661 (CLB) paragraphs 79 and 80

46. Learned counsel for the respondents has submitted that after closure of the argument on 2.7.2014 an affidavit was filed by the respondents with new fact, the copy was served in advance. Written submission was filed by appellants on 14.7.2014. The appellants have placed all cards in the written submission apparently clear there from the written argument. In this affidavit voluminous record of Bank has been attached. The CLB after examining the record has recorded adverse finding against the appellants. On 27.7.2012 the share was allotted in the first installment, before allotment of share respondents have requested for exit. On 5.3.2013 balance share was allotted. The share was allotted on the basis of valuation of Company as on February 2012 and within five months the value of share cannot be enhanced atomically and dramatically, that too without his consent, the value of share cannot be enhanced. In civil suit, valuation of share of Company cannot be examined or cancelled. In a civil suit remedy is not available as Section 100 of the Act deals with cancellation of share, that power lies with CLB. It has further been argued that collateral must be enforceable but the

share of the Company has no market and as such share cannot be treated to be collateral. This matter relates to allotment of share and all his money has been adjusted against the share which has been allotted in Rs.900 premium per share. There is no provision in the Code of Civil Procedure, can exercise the power of CLB. J.C. Gupta has never exercised the option of exit. The CLB has only jurisdiction and civil court does not have such power which has been conferred to the CLB. He has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Sangramsinh P. Gaekwad (supra) paragraph 201 (page 305 and 306). The money was not given to the Company as a loan but application for share and the share should be given as per commitment. The appellants were to act on the option given by respondents but options were ignored and share was granted. The appellants cannot be allowed to act approbate and reprobate at the same time. The letter dated 14.7.2013 addressed to the Bank of not giving guarantee as he was no longer Director of Company. The letter of J.C. Gupta did not come in the way of granting loan to the Company. He has placed reliance on reply to sur-rejoinder.

47. Paragraph 13 shows that in what manner the appellants have committed misconduct in withdrawing the money by the

Managing Director and family members including his friends. The written submission of appellants starts from page 786 to 811 paragraph (iii) has given reply about the withdrawal of the money by the appellants and family members including friends but no document has been filed by the appellant to supplement the argument and so much so the appellants have also filed an additional affidavit, never objected from taking into consideration the affidavit filed by the respondents on 2.7.2014. Investigation can be ordered by the Central Government in terms of Section 237 of the Act. Section 406 of the .Act empowers the Company Court to give substantial justice to parties. Respondents have dealt with the judgment placed reliance by the appellants in the case of T.V. Chandran (supra). In this case relief was granted for return of money back but no such prayer is in the present appeal.

48. Learned counsel for the respondents has submitted that the dispute of share of allotment at a premium of Rs.900 cannot be looked into by the civil court but only by CLB, placed reliance on the case of Amonia Suppliers Corporation (P) Ltd. (supra) paragraphs 25, Ponds Investment Ltd. (supra), R. Balakrishnan (supra), Shanti Prasad Jain (supra) paragraph 23.

49. As per the appellants respondents have not replied the

following points: Agreement was contingent contract which was terminated by agreement on March, 2012 and July, 2013. They have asked for money, never asked for allotment of share. Letters dated 27.3.2013 and 9.5.2013 show, the request was made for return of the money and better security. On 15.4.2012 a formal letter by which agreement was terminated and thereafter invested Rs.1,90,00,000/- cannot be basis for grant of share . He has placed reliance on Sessions 100 and 101 of the Act. Both sections have nothing to do with the power of the CLB, only talks about the power of the High Court. The CLB does not have power to pass a decree of specific performance of terminated contract. Prior to filing of the application, claim was for return of money, even civil court does not have power to pass such decree which the CLB has passed and CLB cannot pass such an order in exercise of power under Section 402 of the Act for enforcement of terminated buried contract. The CLB cannot pass order for Specific Performance of Contract. He has placed reliance on Section 62 of the Contract Act as well as Section 14 of the Specific Provision Act. Respondents have relied that case of Amonia Suppliers Corporation (P) Ltd. (supra) is related to the novation of the contract and substituted contract. does not applicable to the facts of the case.

In the present appeal the appellants have challenged the maintainability of the application filed by the respondents under section 397 and 398 of the Companies Act claiming that the dispute is not any way connected with the affairs of the Company rather it was private dispute in between two individuals, namely, Yogendra Prasad one side, Anil Aggarwal, Satish Kumar Aggarwal and Jagdish Chandra Gupta on other side . The amount of money was given to the appellant no.1 was in the nature of the loan not for subscription to the equity share of the Company.

50. The appellants in support of his contention has placed reliance on the documents, namely, the agreement dated 22.2.2012 in between Yogerndra Prasad in one hand, Satish Kumar Aggarwal and Anil Aggarwal on the other hand. Similarly on the same date Yogendra Prasad has entered into agreement with Jagdish Chandra Gupta. Both agreements are identical to each other. In the agreement Yogendra Prasad has been mentioned as YP and on the other side Satish Kumar Aggarwal and Anil Aggarwal have been mentioned as SA and AA. Similarly Jagdish Prasad Gupta has been classified as JC. In support of the submission appellants have placed heavy reliance on the judgment of Hon'ble Supreme Court in the case of **Haldia Petrochemicals Ltd. (supra)** and has also placed

reliance on the judgment of Madrass High Court in the case of **Prabir Kumar Misra v. Ramani Ramaswamy,** reported in 2010(154) Company Cases 658 Madras. It will be relevant to quote Sections 397 and 398 of the Companies Act:

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

*(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 (Company Law Board) may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.*

*398. Application to (Company Law Board) for*

*<u>relief in cases of mismanagement</u>,- (1) Any members of a company who complaint-*

*(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 (Company Law Board) 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 (Company Law Board) 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 (Company Law Board) may, with a view to bringing to an end or*

*preventing the matters complained of or apprehended, make such order as it thinks fit."*

51. To understand the issue of maintainability raised by the appellants it will be proper to examine the fact of this case including relevant judgments connected with the present appeal. Basically claim has been made that it was a private loan not for the subscription for equity share has nothing to do with the affair of Company.

52. Let us examine contention and relevant facts connected to decide the issue of maintainability of the application. Both agreements are identical. So for the purposes of deciding the issue agreement with Satish Kumar Aggarwal and Anil Aggarwal is taken into consideration. At the top of the agreement it has been mentioned that YP and his family have been running a 750 tons per day capacity Khandsari Mill under the name of Prasad Refrigeration & Agro Industries Private Limited (PRAI) in their home town of Sataha District Bettiah, Bihar. It has been mentioned that it has been in process of dismantling the Khandsari Mill and replaced with a Sugar Mill with a capacity of crushing of 350 tons of sugar cane per day. YP means Yogendra Prasad. Appellant no.1 offered SA and AA and both have agreed to purchase the share worth INR 2.225 crores each in PRAI

subject to following conditions:- YP will be solely responsible for getting the Bank loan of between 75 to 85 crores for Sugar Mill project. In exchange of purchasing Shares worth INR 2.225 crores each, SA and AA each will receive share equal to 22.25% of equity share which is part of the 10 Crores total equity share capital. SA and AA would jointly advance to YP in the form of advance towards share and may further grant loan additional money with mutual agreement under the loan agreement. Similar terms are mentioned in the agreement with Jagdish Chandra Gupta. All collateral related to the Bank for processing the loan will be arranged by YP. Satish Kumar Aggarwal and Anil Aggarwal including Jagdish Chandra Gupta will not be liable for any obligations including but not limited to all taxes of any kind, payable to suppliers, all utility bills, all outstanding salaries and employment related to taxes until the time the final Bank loan papers are signed and the funding is expected to begin. Further clause in the agreement is Anil Aggarwal, Satish Kumar Aggarwal and Jagdish Chandra Gupta were agreed to be Director of PRAI, SA and AA including JC may resign from directorship and ask for return of advances to them along with 10% per annum interest until final Bank loan paper was signed. Satish Kumar Aggarwal, Anil Aggarwal and Jasgdish Chandra Gupta will have an option to back out of the deal at any time without giving any reason until the final loan documents are signed. Yogendra Prasad will make sure that all the money invested by S.A., A.A. and JC is paid back by PRAI or by him with 10% per annum interest within 30 days of informing YP of quitting the project. The agreement further specifically mentioned that YP will be personally responsible and liable for the funds payable to S.A., A.A. and JC. Most important stipulation is as follows: "As of the date of signing of this letter S.A. and A.A. have jointly advanced 1.5 crore INR to YP in form of advance towards share capital by bank checks and may further loan additional money with mutual agreement under this loan agreement". Another important stipulation is as follows: "The second entitlement will be interest payment. Shareholders will get 8% (or as decided by the Board of Directors) interest on funds loaned to the Company".

53. So in the agreement as stated hereinabove it has been mentioned that the money was given not as a personal loan to YP as it is very much clear that money was given by way of equity share of PRAI. Subsequent event is also very much relevant to arrive to a finding that whether dispute is connected with the affairs of the Company or is a dispute between two individuals

having no connection with the affair of Company. It is an admitted fact that on 27th July, 2012, 15,500 equity shares of Rs.100 each were allotted at a premium of Rs.900/- per share out of which 12,500 equity shares were allotted to J.C. Gupta, 2500 share was allotted to Anil Aggarwal and 500 equity shares were allotted to Satish Kumar Aggarwal, respondent no.2. On 5th March, 2013, 37,000 equity shares of the Company were allotted at a premium of Rs.900/- per share and out of which 4,660 shares were allotted in favour of Anil Aggarwal respondent no.1 and 32,340 equity shares were allotted to respondent no.3.The dispute has been raised by the respondents that as per agreement the share has to be allotted at the rate of Rs.100/- each equity share and percentage of share will be total 66.75% of paid up share capital but the share has been reduced drastically to the tune of 13.07% against the entitled of 66.75% of paid up share capital. Though in the subsequent events the appellants have claimed that equity share has been given by way of security. It is also to be taken note that Satish Kumar Aggarwal and Anil Aggarwal were informed by Yogendra Prasad the project cost has been increased to 100 Crores to 160 Crores. Thereafter they have decided to exercise their option of exit but they continued to invest the money even after exit option and total amount of money invested comes to Rs.4 Crores. Different correspondence between one side the appellants other side private respondents discloses that though they have opted for exit clause but it was never acted upon in view of the fact that Yogendra Prasad has not only received the money but equity share has been issued for the total amount of Rs.4 Crores and letter of Yogendra Prasad dated 22.7.2013 to Satish Kumar Aggarwal with respect to grant of personal guarantee. In the letter dated 22.7.2013 following statements have been made:

> *"We have noted that you have also written a letter to the bank on 14th July, 2013 thereby giving your NOC for sanctioning of the loan of Rs.103 crores in favour of the Company by the PNB. Kindly note that the Company has seriously objected to your unilateral writing to the bank, without taking into confidence the Board of the Company. The tenure of your letter clearly provides that you are intimating to the bank that you are not obliged to give any personal guarantee to the bank in respect of the loan taken by the Company."*
>
> *You have clearly violated your fiduciary duty as Director of the Company and committed breach not only against the Company but also against the Co-Directors and shareholders by writing such letter to PNB.*

> *"In view of the fact that the amount in terms of partnership agreement provided by you was in the nature of loan given by you to another shareholder of the company. For the said loan, you have also been allotted certain shareholding in the company. For the said loan, you have also been allotted certain shareholding in the company as collateral. But in the said letter it has been mentioned that in view of the aforesaid facts and circumstances, you are hereby intimated that your conduct is not fit to become the Director of the Company. The Board of the Company, in its Board meeting will definitely consider your said misconduct and will take appropriate action against you. You are hereby asked to withdraw your letter dated 14th July, 2013 written by you to the Punjab National Bank. In the meanwhile, as consider it be your obligation, immediately provide the personal guarantee to the Company for obtaining the loan from the bank and the details of the Companies, where you are a Director within seven days of the receipt of this letter, failing which, the company shall be constrained to take appropriate legal action against you as per law."*

54. This letter itself shows that Satish Kumar Aggarwal was Director of the Company, he was asked by the Punjab National Bank to give personal guarantee whereupon he has given only

NOC, threatening was hurled by Yogendra Prasad that appropriate action will be taken by the Board of the Company and asked to withdraw the letter of NOC and give the personal guarantee including information required. This letter itself suggest that Satish Kumar Aggarwal and Anil Aggarwal though they have opted for exit option but it was never acted upon and all through both sides were treating that Agarwal's brother were connected with the affairs of the Company. Granting of shares at a higher rate which has been done by the Company through Yogendra Prasad as a Managing Director has represented the Company and entered into agreement with Satish Kumar Aggawrwal and Anil Aggarwal and Jagdish Chandra Gupta. So the submission that as the application which has filed under Section 397 and 398 of the Companies Act is not connected with the affairs of the Company per se is against the facts involved in the present case.

55. It is also relevant that the money which was transacted of Rs. 4 Crores was credited in the account of the Company not to the individual account of Yogendra Prasad which is manifestly clear from Bank Account of Company P-9 indicates that in what manner the money has been deposited in the Bank account of the Company by the present respondents. So the claim of the

appellants that it was a private transaction does not draw attention rather these actions substantiate the version of the respondents that money was given for equity share of the Company.

56. Now this Court will have to see the application and implication of Haldia case (supra) as appellants have placed heavy reliance on the aforesaid judgment which is discussed herein below.

57. In Haldia case (supra) West Bengal Industrial Development Corporation and R.P. Goenka Group have decided to establish Haldia Petrochemicals and the same was incorporated in 1985 by the West Bengal Industrial Development Corporation and R.P. Goenka Group. R.P. Goenka Group left the Company in 1990 and Tata Chemicals and Tata Tea were inducted into the project between 1990 and 1993. Not much headway was made towards implementing the project till June 1994 when Dr. Purnendu Chatterjee a non-resident Indian industrialist and financier, expressed an interest in the project. Accordingly, a memorandum of understanding was entered into between West Bengal Industrial Development Corporation and Chatterjee Petrochem (Mauritius) Company and the Tata on 3.5.1994. According to the said memorandum of agreement West

Bengal Industrial Development Corporation and Tata Group were to invest the money in the ratio of 3:3:1 respectively and Board of Director was to consist of four nominees each of West Bengal Industrial Development Corporation, Chatterjee Petrochem (Mauritius) Company and two Directors from Tata Group in the ratio of 4:4:2. It was decided that West Bengal Industrial Development Corporation and Chatterjee Petrochem (Mauritius) Company would invest Rs.300 Crores each and Tata Group would invest Rs.100 Crores, while Rs.500 Crores was to be obtained from the public, including non-resident Indians and financial institutions, towards equity keeping the debt equity ratio at 2:1. The agreement was executed and exchanged between the parties and it was agreed that between 24 months of the commencement of commercial production or within 60 months of the date of the Joint Venture of Agreement whichever is later, at least 60% of the shareholders of West Bengal Industrial Development Corporation would be offered to Chatterjee Petrochem (Mauritius) Company at Rs. 14 per share. Role of the Government in the Company would be limited to its promotion and guidance during the initial phases of the project and that the nominee of Chatterjee Petrochem (Mauritius) Company would be the Managing Director.

58. In 2001 commercial production was started. Further agreement was arrived whereby Chatterjee Petrochem (Mauritius) Company, the Government of West Bengal, West Bengal Industrial Development Corporation and Haldia Petrochemicals Ltd. have entered into an agreement with respect to financial and managerial restructuring. According to restructuring the Chatterjee Petrochem (Mauritius) Company would acquire a controlling interest of 51% shares in the equity of the Company and would have complete control over the day-to-day affairs of the Company including the right to appoint key executives. West Bengal Industrial Development Corporation also agreed to vote along with the nominee Directors of the Chatterjee Petrochem (Mauritius) Company.

59. All parties have entered into another agreement dated 8.3.2002 thereby 15,50,99,998 equity shares of West Bengal Industrial Development Corporation was transferred and delivered to Chatterjee Petrochem (Mauritius) Company on 8.3.2002 and said shares were pledged with West Bengal Industrial Development Corporation and accordingly the shares had been duly lodged along with the share certificates with West Bengal Industrial Development Corporation and pledge had been acknowledged.

60. In another agreement it was decided that Government of West Bengal would sell its entire share to Chatterjee Petrochem (Mauritius) Company. In the months of January and February, 2005 Haldia Petrochemicals Ltd. had approved the issuance and allotment of equity shares worth Rs.150 crores at par to Indian Oil Corporation (IOC). The same was objected. Chatterjee Petrochem (Mauritius) Company filed petition under Sections 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956 making an allegation that West Bengal Industrial Development Corporation and Government of West Bengal had failed to fulfill their commitment to transfer their balance 36% shares to the Chatterjee Petrochem (Mauritius) Company.

61. In that context the question arose whether the matter is connected with the affairs of the Company and as language of Section 397 of the Companies Act suggests that the oppressive manner in which the Company's affairs were being conducted could not be confined to one isolated incident but that such acts would have to be continuous as to be part of a concerned action to cause prejudice to the minority shareholders whose interests are prejudiced thereby. The Court has said that the failure of West Bengal Industrial Development Corporation and Government of West Bengal to register the 155 million shares

transferred to Chatterjee Petrochem (Mauritius) Company could not strictly speaking be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case is not under Section 397 of the Companies Act. It will be relevant to quote paragraph nos. 139 and 140 of the aforesaid judgment:

> *"139. In Shanti Prasad Jain's case (supra), referred to hereinabove, in a similar situation, it was observed by this Court as follows :-*
>
> > *"It is not enough to show that there is just and equitable cause for winding up the Company though that must be shown as a preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful, and mere lack of confidence between the majority shareholders and the minority*

*shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the Company's affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."*

*140. It will be evident that in order to pass orders under Section 397 of the Companies Act, 1956, the CLB has to be satisfied that the Company's affairs are being conducted in a manner oppressive to any member or members and that the facts would justify the making of a winding-up order on the just and equitable principle, but that such an order would unfairly prejudice the Applicant before the CLB."*

62. From the discussions of the aforesaid it appears that it was a private arrangement between two shareholders, namely, West Bengal Industrial Development Corporation and Chatterjee Group of Companies and nowhere the Halida Petrochemicals Ltd. was involved in the said transaction. In that context it has been held that it was merely a private arrangement between the two shareholders, cannot be said to be connected with the affairs of the Company and in that context Hon'ble Supreme Court apart from other grounds on this ground also has refused to grant relief

under Sections 397, 398 and 402 of the Companies Act but facts of the present appeal is quite different. It is Company who has issued equity shares in premium amount of Rs.900. So the submission that it was an agreement between two private persons and the money was given as a loan and non-refunding of money cannot be the subject matter of proceeding under Sections 397 and 398 of the Companies Act falls flat and does not survive.

63. In the case of **M/s World Wide Agencies Pvt Ltd. and another v. Mrs. Margarat T. Desor and others**, reported in AIR 1990 SC 737 where the fact was that Mr. S.K. Dosor was a British national and he was holding 600 shares in the said Company which was acquired by him from the Ex-Managing Director Mr. Amrik Singh Saluja. Mr. Desor died, Widow of Mr. Desor had applied for transfer of share of her late husband. The Board of Director himself resolved that they had no objection to transmission of the shares held by Mr. S.K. Desor but transfer will be subject to approval of Reserve Bank of India and the succession certificate. It was also recorded that respondent no. 1 application for allotment of 5 shares as per her letter of the same date was allowed by the Board of Directors and it was resolved that in view of allotment of these shares, her interest in the shares of her late husband, she be appointed as a Director of the

Company subject to Reserve Bank of India's permission. The service rendered by S.K. Desor as Managing Director-cum-Chairman of the Company was appreciated. The quorum of the said meeting was two Mrs. Amrit Gupta and Mrs. Savitrai Devi Khohli. The said meeting was approved but one Director Mrs. Amrit K. Singh raised objection on the ground that she was not informed of the last meeting. Ultimately application under Sections 397 and 398 of the Act was filed making an allegation of oppression. Objection was raised. It is first requirement that the name Mrs. Desor was required to mention in the register before an application under Sections 397 and 398 of the Act could be entertained. This submission was rejected holding that succession a right is created on the death of member whose name is still in the register and as such application under Sections 397 and 398 of the Act is maintainable. It will be relevant to quote paragraph nos. 25 and 26 of the aforesaid judgment:

> *"25. In some situations and contingencies, the "member" may be different from a "holder". A "member" may be a "holder" of shares but a "holder" may not be a "member". In that view of the matter, it is not necessary for the present purpose to examine this question from the angle in which the learned Single Judge of the Calcutta High Court analysed the posi- tion in the case of Kedar Nath Agarwal v. Jay*

*Engineering Works Ltd. and Ors., [1963] 33 Company Cases 102, to which our attention was drawn.*

*26. Admittedly in the present case, the legal representa- tives have been more than anxious to get theft names put on the register of members in place of deceased member, who was the Managing Director and Chairman of the company and had the controlling interest. It would, therefore, be wrong to insist their names must be first put on the register before they can move an application under ss. 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. It was contended on behalf of the appellant before the High Court that if legal representatives who were only potential members or persons likely to come on the register of members, are permitted to file an application under ss. 397 and 398 of the Act, it would create havoc, as then persons having blank transfer forms signed by members, and as such having a financial interest, could also claim to move an application under ss. 397 and 398 of the Act. The High Court held that this is a fallacy, that in the case of persons having blank transfer forms, signed by members, it is the members themselves who are shown on the register of members and they are different from the persons with the blank transfer forms whereas in the case of legal representatives it is the deceased member who is shown on the register and the legal representatives* *are in effect exercising his right. A right has devolved on them though the death of the member whose name is still on the register. In our opinion, therefore, the High Court was pre-eminently right in holding that the legal representa- tives of deceased member whose name is still on the register of members are entitled to petition under ss. 397 and 398 of the Act. In the view we have taken, it is not necessary to consider the contention whether as on the date of petition, they were not members. In that view of the matter, it is not necessary for us to consider the decision of this Court in Rajahmundry Electric Supply Corpn. Ltd. v. A. Mageshwara Rao & Ors., AIR 1956 SC 2 13. In view of the observations of this Court in Life Insurance Corporation of India v. Escorts Limited & Ors., AIR 1986 SC 1370 at p. 1412, it is not necessary, in our opinion, to consider the contention as made on behalf of the appellant before the High Court that the permission of the Reserve Bank of India had been errone- ously obtained and consequently amounts to no permission. In the present context, we are of the opinion that the High Court was right in the view it took on the first aspect of the matter."*

64. In such view of the matter, it is apparently clear that even those persons whose name was not in the register but on account of happening of certain events the right to have a share has automatically transferred by operation of law. The application

filed by her would be maintainable.

65. In view of the aforesaid discussion, of being dispute of two private individuals, having no connection with the affairs of Company is not accepted, and the same is rejected. This issue goes against the appellants.

Parameter and Scope of Appellate Jurisdiction under Appellate Jurisdiction:

66. Before dealing with the matter on merit certain incidental issues which are relevant for the purposes of disposal of this case is required to be dealt with, first and for most issue is parameters and scope of the jurisdiction of the appellate court. Section 10-F of the Act provides that any person aggrieved by the order of the CLB can approach to the High Court by way of appeal within 60 days from the communication of the decision or order of the CLB only on the question of law. It will be relevant to quote Section 10-F of the Act which is as follows:

> "10F. Appeals against the order of the Company Law Board.-Any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order"
>
> Provided that High Court may, if it is satisfied that the appellant was prevented by sufficient cause

> from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.”

67. So apparently it is clear that appeal can only be entertain able only on question of law. This issue has came for consideration before Hon’ble Supreme Court in the case of **V.S. Krishnan (supra)** where Hon’ble Supreme Court has held that Section 10-F is restricted to the question as to whether on the facts as noticed by the CLB and has placed before it, an inference could reasonably be arrived at that such conduct was against probity and good conduct or was mala fide or for a collateral purposes or was burdensome, harsh or wrongful, in such event Appellate Court would interfere under Section 10F of the Act in the event when conclusion is against the law or arose from consideration of irrelevant material or omission to construe relevant materials. It will be relevant to quote paragraph 16 of the aforesaid judgment:

> *“16. It is clear that Section 10-F permits an appeal to the High Court from an order of the Company Law Board only on a question of law i.e., the Company Law Board is the final authority on facts unless such findings are perverse based on no evidence or are otherwise arbitrary. Therefore, the jurisdiction of the appellate Court under Section 10-F*

*is restricted to the question as to whether on the facts as noticed by the Company Law Board and has placed before it, an inference could reasonably be arrived at that such conduct was against probity and good conduct or was mala fide or for a collateral purpose or was burdensome, harsh or wrongful. The only other basis on which the appellate Court would interfere under Section 10-F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to construe relevant materials."*

68. The same issue with regard to the manner and power of the High Court under appellate jurisdiction under Section 10-F of the Act has also been discussed by Hon'ble Supreme Court in paragraph 36 of the judgment in the case of **Dale and Carrington Invt.(P) Ltd. and another v. P.K. Prathapan and others**, reported in (2005)1 SCC 212. There also parameters for interference by the High Court has been delineated, provided area of interference.

69. It has been held that High Court, in exercise of appellate jurisdiction would be able to interfere with the order of CLB when findings are perverse based on no evidence is an arbitrary exercise of power and other question of law. This Court while exercising the power of Appeal, if on consideration of the fact, findings arrived at is possible one in such circumstances this

Court will refrain to interfere with those findings.

70. On enquiry it emerges this Court under appeal can interfere with the order on question of law as well as in a situation when findings are perverse based on no evidence.

Whether the CLB has jurisdiction to deal with the matter or the dispute ought to have been dealt with by the Civil Court.

71. Learned counsel for the appellants has raised jurisdiction of the CLB on the ground that the fact involved and the nature of relief sought for could have been decided by the Civil Court instead of CLB. As it has been claimed that the matter arising from breach of agreement between the two parties and the proceeding before the CLB is a summary proceeding as the claim has been filed in substance for recovery of the amount of money which the respondents have given by way of loan to the appellants. As all through and also exchange of letters itself shows that basically it is a dispute for recovery of the amount of money not for the purposes of matter relates to the affairs of the Company and as such this matter should have been tested by the Civil Court in view of the fact already appellants have filed a suit vide Title Suit No.132 of 2014 in which respondents have filed counter claim and as such the issues which are involved in the

present appeal is already pending before the Civil Court and as such matter should have been relegated to the Civil Court instead of adjudicating the dispute by the CLB or in the present appeal. Reply has been given that in the Civil Court Yogendra Prasad is not a party as the suit has been filed by the Company and any relief that has been sought in the present application is under Section 397 and 398 of the Act cannot be given by the Civil Court as whatever amount has been given it has been converted into share. The resolution of dispute of share is out side the realm of Civil Court. Relief has been sought in the present application that they are entitled the share at the rate of 66.75% of paid up capital and has also challenged allotment of share at the premium rate of Rs.900/-. Further prayer has been made for the rectification of the register of the Company reflecting the proper percentage of the share in favour of the respondents.

72. In such view of the matter, if the rectification is done then they will become major share holders in the Company and such relief cannot be conferred by the Civil Court, such relief can be given only by the CLB under Section 397, 398 and 402 of the Act.

73. The scope and power under Section 402 of the Act is a very wide swipe and for the ends of justice the CLB can grant

the proper and appropriate relief such relief cannot be given by the Civil Court.

74. To understand this objection this Court has to consider provisions of Section 9 of the Code of Civil Procedure which stipulates that Civil Court shall have jurisdiction to try all suits of civil nature except the suit of which their cognizance is either expressly or impliedly barred. So the Civil Court will have jurisdiction to try all suits of civil nature except which has expressly or impliedly barred. This issue has been considered by Hon'ble Supreme Court in the case of **Dhulabhai v. State of Madhya Pradesh and another**, reported in AIR 1969 SC 78. The Hon'ble Supreme Court after detailed discussion has held that if the dispute is not a dispute related to the enforcement of a right under the special statute remedy lies only to the Civil Court, if a dispute with respect to special statute arising out of a right or liability under general and common law and not under the Special Act, jurisdiction of the Civil Court is alternative leaving it to the election of suiter to choose his remedy for the relief which is competent to be granted in a particular remedy. If a dispute relates to the enforcement of a right or an obligation created under the Special Act, then the only remedy available it to get adjudication under the Special Act.

75. The Hon'ble Supreme Court in the case of **Dhulabhai v. State of Madhya Pradesh and another**, reported in AIR 1969 SC 78 the Court has culled out seven points in which situation the jurisdiction of the Civil Court will be treated to have been expressly or impliedly barred. It will be relevant to quote paragraph 32 of the aforesaid judgment:

> *"32. Neither of the two cases of Firm of Illuri Subayya, 1964-1 SCR 752=(AIR 1964 SC1942) or Kamla Mills, 1966 1 SCR 64=AIR 1965 SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-*
>
> *(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*
>
> *(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.*

*Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.*

*(3) Challenge to the provisions of the particular Act as ultravires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.*

*(4) When a provision is already declared unconstitutional. or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.*

*(5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.*

*(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or*

*there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.*
*(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."*

76. This matter again came for consideration in the case of **The Premier Automobiles Ltd. vs. Kamlakar Shantaram and others**, reported in AIR 1975 SC 2238. It will be relevant to quote paragraph 23 of the aforesaid judgment:

*"23. To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus :*

*(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.*
*(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in particular remedy.*
*(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.*

> *(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either section 33C or the raising of an industrial dispute, as the case may be.”*

77. In view of the aforesaid decision this Court will have to examine whether the dispute is related to enforcement of any right under the Act, or whether the dispute arising out of right or liability arising under the general or common law and not under the Special Law or dispute relates to the enforcement of right or obligation created under the Company Law, in sum and substance whether jurisdiction of the Civil Court is expressly or impliedly barred or issue could have been raised before the Civil Court but instead of going to Civil Court the respondents have preferred the forum provided under the Company Act. As in the present case primarily respondents have raised a issue of oppression and mismanagement of the Company affairs which has been specifically dealt with under Sections 397 and 398 of the Act. For adjudication of those issues forum has been provided is the CLB and power of the CLB has been dealt with extensively under Section 402 of the Act. On careful examination of pleading of parties, it specifically emerges, the relief claimed in present

proceeding is arising out of and connected with the affairs of the Company.

78. In such view of the matter, issue of mismanagement and oppression is arising out of and under the Company Act conditions have been provided which would constitute to be oppression and mismanagement of the Company and for adjudication of the dispute a special forum has been provided by the legislature including adjudicatory power has been conferred, may be, dispute would be decided in summary proceeding.

79. In view of the aforesaid discussion considering the judgment of the Hon'ble Supreme Court, this Court is of the view that objection about the maintainability of the application before the CLB by the appellants is not sustainable and so much so in view of the fact in the present appeal has filed by Yogendra Prasad whereas application making allegation of oppression and management has been made against Yogendra Prasad whereas the suit has been filed by the Company, nature of relief in the present case and the suit are completely different and distinct, completely in variation, though counter claim has been filed but the nature of relief sought for cannot be granted by the Civil Court. So much so the view aforesaid taken by this Court is buttressed from the view of the Hon'ble Supreme Court in the

case of **M/s Ammonia Supplies Corporation (P) Ltd. (supra)**. In that case the question arose with respect to the matter arising from Section 155 of the Company Act that relates to rectification of the register of the member maintained by the Company and Court has held that this can be adjudicated only by the court defined under the Company Act. Hon'ble Court has held that if the dispute relates to Section 155 of the Company Act for rectification of the register the court under the Company Act will have a jurisdiction and cannot be asked to the aggrieved person to approach the Civil Court. It will be relevant to quote paragraph 31 of the aforesaid judgment:

> *"31. Sub-section (1) (a) of Section 155 refers to a case where the name of any person without sufficient cause entered or omitted in the register of members of a company. The work 'sufficient cause' is to be tested in relation to the Act and the Rules. Without sufficient cause entered or omitted to be entered means done or omitted to do in contradiction of the Act and the Rules or what ought to have been done under the Act and the Rules but not done. Reading of this sub-clause spells out the limitation under which the court has to exercise its jurisdiction. It cannot be doubted in spite of exclusiveness to decide all matter pertaining to the rectification it has to act within the said four corners and adjudication of such matter cannot be doubted*

*to be summary in nature. So, whenever a question is raised court has to adjudicate on the facts and circumstance of each case. If it truly is rectification all matter raised in that connection should be decided by the court under Sec. 155 and if it finds adjudication of any matter not falling under it, it may direct a party to get his right adjudicated by civil court. Unless jurisdiction is expressly or implicitly barred under a statute, for violation or redress of any such right civil court would have jurisdiction. There is nothing under the Companies Act expressly barring the jurisdiction of the civil court, but the jurisdiction of the 'court' as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred. We have already held above the jurisdiction of the 'court' under Sec. 155, to the extent it has exclusive, the jurisdiction of civil court is impliedly barred. For what is not covered as aforesaid the civil court would have jurisdiction. Similarly we find even under Sec. 446(1) its words itself indicate jurisdiction of civil court is not excluded. This sub section states, '.......... no suit or legal proceedings shall be commenced ......... or proceeded with ....... except by leave of the court'. The words 'except by leave of the court' itself indicate on leave being given the civil court would have jurisdiction to adjudicate one's right. Of course discretion to exercise such power is with the 'court'.*

*Similarly under Sec. 446(2) 'court' is vested with powers to entertain or dispose of any suit or proceedings by or against the company. Once this discretion is exercised to have it decided by it, it by virtue of language therein excludes the jurisdiction of the civil court. So we conclude the principle of law as decided by the High Court that jurisdiction of Court under Section 155 is summary in nature cannot be faulted. Reverting to the second limb of submission by learned counsel for the appellant that court should not have directed for seeking permission to file suit only because a party for dispute sake states that the dispute raised is complicated question of facts including fraud to be adjudicated. The Court should have examined itself to see whether even prima facie what is said is complicated question or not. Even dispute of fraud, if by bare perusal of the document or what is apparent on the face of it on comparison of any disputed signature with that of the admitted signature the Court is able to conclude no fraud, then it should proceed to decide the matter and not reject it only because fraud is stated. Further on the other hand learned counsel for the respondent totally denies any share having been purchased by the appellant-company or any amount paid to it. No transfer of any such share was ever approved by the Board of Director. It is urged the money even if advanced to Sri V.K.Bhargava by the appellant-company if at all was a private transaction between* *the two to which respondent-company has no concern. So we find there is total denial by the respondent. We have gone through the judgment of the High Court. It has rightly held the law pertaining to the jurisdiction of 'court' under Sec. 155 and even referred to some of the documents of the appellant but concluded since they are disputed and said to be forged hence directed for seeding leave if advised for suit. We feel it would have been appropriate if the court would have seen for itself whether these documents are disputed and any document is alleged to be forged whether it said to be so jurisdiction of the civil court. So we conclude the principle of law as decided by the High Court that jurisdiction of Court under Section 155 is summary in nature cannot be faulted. reverting to the second limb of submission by learned counsel for the appellant that court should not have directed for seeking permission to file suit only because a party for dispute sake states that the dispute raised is complicated question of facts including fraud to be adjudicated. The court should have examined itself to see whether even prime facie what is said is complicated question or not. Even dispute of fraud, if by bare perusal of the document or what is apparent on the face of it on comparison of any disputed signature with that of the admitted signature the Court is able to conclude no fraud, then it should proceed to decide the matter and not reject it only because fraud is stated. Further on the* *other hand learned counsel for the respondent totally denies any share having been purchased by the appellant-company or any amount paid to it. No transfer of any such share was ever approved by the Board of Director. It is urged the money even if advanced to Sri V.K.Bhargava by the appellant-company, if at all was a private transaction between the two to which respondent-company has no concern. So we find there is total denial by the respondent."*

80. In such view of the matter, it is very much clear that claim made by the appellants that issues which have been raised, can be decided by the Civil Court is completely misconceived, misconstrued as the jurisdiction of Civil Court is impliedly barred, in conclusion the issue raised by the appellants is not sustainable in law and CLB has rightly assumed the jurisdiction and decided the issue.

<u>Whether proper opportunity was given to the appellants to defend or violated the natural justice.</u>

81. Learned counsel for the appellants has raised a grievance that proceeding before the CLB is vitiated on account of the fact that they were not given the proper opportunity to represent its case that violates the principle of natural justice as has been claimed that reply to the sur rejoinder was filed by the

respondents one day before the final argument consisting new facts without giving opportunity to take steps for proper reply. It has further been said that there is no procedure provided that the respondents have a right to file a reply to sur rejoinder and that too just before one day before the final argument.

82. For that he has placed certain dates to show that appellants were not fairly treated by the learned CLB. For deciding this dispute, it is relevant to take into consideration, certain dates. The petition under Sections 397 and 398 of the Act was filed on 13.9.2013, came for hearing, the CLB has formed an opinion that there is a prima-facie case of oppression against the appellants as a result of which the interim prayer was allowed by way of maintaining of status quo with regard to the share capital of the Company and constitution of Board of Directors of the Company and non alienation of the existing fixed assets of the Company till the next date of hearing. Present appellants filed an application on 18.12.2013 thereby made a prayer for vacating the order of status quo. Rejoinder was filed by the respondents on 24.1.2014. Reply was filed on 13.3.2014. Argument on behalf of the respondents was started on 21.3.2014, reply was given by the present appellants on 13.5.2014, date of final argument was fixed on 18.6.2014 but one day before the final argument i.e. 17.6.2014

a reply to the sur rejoinder was filed. It has been submitted that they were not given proper time to file reply, reply to sur rejoinder which was filed along with certain documents bringing new facts which caused prejudice to the case of the appellants without giving any sufficient time to meet the points raised by the respondents. It has been submitted that it was the duty of the quasi judicial body while adjudicating the dispute should have been given fair chance to give reply but instead of giving that opportunity of fair hearing, the matter was finally argued and decided against them and judgment has been passed by the CLB is based upon new facts brought by way of reply to the sur-rejoinder. It has been replied by the respondents that reply to sur-rejoinder was filed giving one day notice. No prayer was made by the appellants to grant time and to give opportunity to file rejoinder, inasmuch as CLB had given three weeks time to both the parties to file their written arguments, which was filed by the appellant, paragraph 10 of written argument deals with the reply to the sur-rejoinder. Primarily reply to the Sur rejoinder has brought the facts with regard to withdrawal of the money illegally by the appellants, his family member and his associates and thereby siphoning the property of the Company. So much so the additional affidavits was filed by the appellants on 14.7.2014 i.e. after closure of the final argument and in the affidavit appellants have not discredited factual aspect with respect to withdrawal of money. Even before this Court apart from taking technical plea of having not given proper opportunity to defend, did not deny the factual aspect of withdrawal of money illegally by the appellants and his associates. It is well known principle of law even the courts or Tribunal deviates to follow certain provision of procedural law, unless it is shown, it has created prejudice to the person who is making complaint, merely deviation will not vitiate the proceeding. Final verdict cannot be said to be illegal in view of procedural infraction. In the present case appellants only complained about the fact that a day before the final argument the reply to sur rejoinder was given but admittedly he on the next date, ought to have made a prayer for time but instead of making prayer for granting him opportunity, joined the proceeding on the next date of final argument. Mere procedural infraction and some sort of technical defect without causing any prejudice cannot vitiates the proceeding and final verdict of the Court or Tribunal as has been upheld by Hon'ble Supreme Court in the case of **State Bank of Patiala and others v. S.K. Sharma**, reported in AIR 1996 SC 1669 and same has been summarized in paragraph nos. 31 and 32 of the aforesaid judgment which is as follows:

> *"31. Now, coming back to the illustration given by us in the preceding paragraph, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (iii) be in the interests of justice or would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise."*

> *32. We may summarise the principles emerging from the above discussion. [These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee]:*

> *(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in*

*character. (2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.*

*(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudicate, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision g*

*expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.*

*(4)(a) In the case of a procedural provision which is not of a mandatory characters the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it mays the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.*

*(b) In the case of violation of a procedural provisional which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said*

*requirements either expressly or by his conduct. If he is found to have waived its then the order of punishment cannot be set aside on theground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could no be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in B.Karunkar. The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called.*

*(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a total violation of natural justice [rule of audi alteram] and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing".*

*(a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take*

*proceedings afresh according to law, i.e., in accordance with the said rule [audi alteram partem ]. (b) But in the latter case, the effect of violation [of a facet of the rule of audi alteram] has to be examined from the standpoint of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.] (6) While applying the rule of audi alteram partem [the primary principle of natural justice] the Court/ Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.*

*(7) There may be situations where the interests of state or public interest may call for a curtailing of the rule of audi alteram partem. . In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision".*

83. It is also very relevant that the appellants have filed a written submission including the affidavit after closure of the

argument. If appellants were of the view that wrong facts has been brought then naturally that should have been contradicted either in the written argument or should have dealt with when additional affidavit was filed or before this Court, in stead of bringing contradiction, stick to sole fact that they have not been given opportunity to give reply but has not dealt with in written argument or in additional affidavit contradicting the statement made in the reply to the sur-rejoinder. Mere infraction in following the procedure cannot vitiate the order or the proceeding. In such view of the matter, submission of the appellants does not survive and the same is rejected.

<u>Whether contract dated 22.2.2012 was/is a contingent contract or it is case of enforceability of terminated contract</u>

84. As per appellants, the agreement between appellants and respondents was the contingent contract providing the contingency that after sanction of Rs.100 crores, projects were to start. The Exit Option has been provided in the Agreement for return of money before sanctioning the loan and putting the signature. As sanction of loan never reached to its culmination and dream project was never came in reality. It is also a fact that Anil Aggarwal and Satish Kumar Aggarwal opted exit option as

per terms of the agreement. In such view of the matter, in view of terminated contract, Respondents, Anil Aggarwal and Satish Kumar Aggarwal including other respondents could not have claimed 66.67% equity share of paid up capital does not arise as said agreement become a dead contract and cannot be used for giving entitlement of equity share. The issue of being contingent contract has been dealt with in Sections 31 to 36 of the Act. It has been replied by learned counsel for the respondents that this point has been raised for the first time. This issue was never raised before CLB and as such the issue cannot be raised at the appellate stage as it is mixed question of fact and law. Admittedly, it appears from the record that for the first time the issue of contingent contract has been taken by the appellants at the appellate stage. This Court could have refused to deal with this point but for the ends of justice, it would be proper to decide this issue raised by the appellants claiming to be a contingent contract.

85. Contingent contract has been defined in Section 31, "Contingent Contract" is a contract to do or not to something, if some event, collateral to such contract, does or does not happen. Section 32 of Contract Act stipulates contingent contract to do or not to do anything if an uncertain future event happen, cannot be

enforced by law, unless and until that event has happened. Section 33 of the Contract Act deals with contingent contact to do or not to do anything if uncertain future event does not happen, can be enforced when the happening of that event becomes impossible and not before, Sections 34, 35 and 36 of the Contract Act is not much relevant for the purposes of this case.

86. To decide this issue it has to be seen that terms of the agreement as that itself will reflect as to whether it was a contingent contract or was a simple contract without putting any rider of contingency. Relevant portion of the agreement dealing with respect to the percentage of share vis-à-vis in what circumstances and in what situation the respondents will be at liberty to exercise exit option. For deciding this issue, it will be relevant to examine terms and conditions of the agreement between Anil Aggarwal and Satish Kumar Aggarwal one side Yogendra Prasad is as follows:

> *"Partnership Agreement: This agreement is between Mr. Yogendra Prasad (YP), Mr. Satish Kumar Aggarwal (SA) and Mr. Anil Kumar Aggarwal (AA)*
>
> *YP and his family have been running a 750 tons per day capacity Khandsari Mill under the name of Prasad Refrigeration and Agro Industries Pvt. Ltd. (PRAAI) for past many years in their home town of Sataha, District Bettiah of Bihar*
>
> *YP has been in process of dismantling the*

*Khandsari Mill and replacing it with a Sugar Mill with a capacity of crushing 3500 tons of sugarcane per day.*

*It was offered and SA and AA have agreed to each purchase shares worth INR 2.225 crores in PRAAI subject to following conditions.*

*YP will be solely responsible for getting the Bank loan of between 75 to 85 Crores for the Sugar Mill project.*

*In exchange for purchasing shares worth INR 2.225 cr each, SA and AA will each receive shares equal to 22.25% of equity shares, which is part of the 10 cr total equity share capital.*

*All collateral needed by the bank for the final processing of the loan will be arranged by YP.*

*SA and AA will not be liable for any obligations including but not limited to all taxes of any kind, payable to suppliers, all utility bills, all outstanding salaries and employment related taxes until the time the final Bank loan papers are signed and the funding is expected to begin.*

*SA and AA have also agreed to be directors in PRAAI. SA and/or AA may resign from the directorship and ask for return of advances to YP or to PRAAI with 10% per annum interest, until the final bank loan papers are signed.*

*SA and AA will have an option to back out of the deal at any time without giving any reason until the final loan document signing. YP will make sure that all the money invested by SA and/or AA is paid back by PRAAI or by YP with 10% per annum interest within 30* *days of SA and/or AA informing YP of quitting the project.*

*YP will also be personally responsible and liable for the funds payable to SA and AA.*

*As on the date of signing of this letter SA and AA have jointly advanced 1.5 cr. INR to YP in form of advance towards share capital by bank checks and may further loan additional money with mutual agreement under this loan agreement.*

*It is also agreed that SA will work as Director of Finance for PRAAI and manage financial affairs of the Sugar Mill. A salary will be decided for this by the Board of Directors.*

*Disbursement of profits (for the purpose of this calculation, depreciation will not be an expense and will be included in profit)*

*1. Before any disbursements are made, first payment will be to all the equity holding directors. The suggested amount is Rs.50 lacs each. This is to ensure a minimum financial compensation to all the equity holding directors.*

*2. The second entitlement will be interest payment shareholders will get 8% (or as decided by the Board of Directors) interest on funds loaned to the company.*

*3. After these payments have been made any profit remaining will be split as per equity shares.*

*4. Any salary due to any director, as determined by the Board, for providing additional services will be considered as part of the operating expenses.*

*If profits are insufficient to make the full payment listed in 1 above any profit will be distributed equally.*

*If the remaining profits are insufficient to make the interest payment in full, the remaining funds will be distributed proportionally to share ownership percentage.*

*At any time, Directors can purchase shares from each other at a mutually agreed upon price. Directors have right of first refusal if shares are being sold to an outside investor.*

*In the case of loss, PRAAI will secure a loan to cover the loss.*

*The Company should strive to maintain a cash reserve".*

87. It was offered and SA and AA have agreed to purchase the share worth INR 2.225 crores in PRAI subject to the following conditions: " YP will be solely responsible for getting the Bank loan of between 75 to 85 Crores for the Sugar Mill project".

88. In exchange for purchasing shares worth INR 2.225 crores each, SA and AA will each receive shares equal to 22.25% of equity shares which is part of Rs.10 crores total equity share capital. SA and AA will not be liable for any obligations including but not limited to all taxes any kind, payable to

suppliers, all utility bills, all outstanding salaries and employment related taxes until the time the final Bank loan papers are signed and the funding is expected to begin.

89. SA and AA have also agreed to be Directors in PRAI. SA and/or AA may resign from directorship and ask for return of advance to YP or to PRAI with 10% per annum interest until final Bank loan are signed. SA and AA will have an option to back out of the deal at any time without giving any reason until final documents are signed. YP will make sure that all the money invested by SA and/or AA is to be paid back by PRAI or by YP with 10% per annum interest within 30 days of SA and/or AA informing YP of quitting the project.

90. On perusal of the condition as mentioned above as per terms of agreement there is "<u>no stipulation of contingency</u>" with respect to issuance of equity share in a proper rate. There is no stipulation the equity share will be issued at a proper rate only after grant of loan by the Bank. Only the contingency has been provided that respondents will be at liberty to elect the exit option till the final loan documents are signed. So the question of contingent contract does not arise in view of the fact that as PRAAI has issued the share against the amount that was invested by them at the premium rate of Rs.900/-.

91. In such view of the matter, this Court is of the view that contingency may be an another aspect of the matter with regard to exit option to show for granting of share in a proper rate is not dependent of happening of any event. In such view of the matter, fallacy lies in the argument of learned counsel for the appellants calling issuance of share was dependent of happening of event and is a contingent contract. The fact is far from the truth and the argument led by learned counsel for appellants is rejected.

Whether the findings recorded by the CLB with respect to oppression and mismanagement of affairs of the Company is per verse, suffers from any illegality, based on no evidence and or otherwise arbitrator.

92. To adjudicate this issue this Court will have to examine the facts involved in the present case and only then this Court can arrive to a right finding.

93. As Hon'ble Supreme Court in the case of **A. Shanmugam v. Ariya Kshatriay Rajakula Vamsathy Madalaya Nandhavana Paripalanai Sangam**, reported in AIR 2012 SC 2010 has said that the entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. The truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel

proud to tell truth in the courts irrespective of the consequences. However, post-independence period has been drastic changes in our value system. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and Judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth. Justice system will acquire credibility only when people will be convinced that the justice is based on foundation of truth. It will be relevant to quote paragraph 24 and 25 of the aforesaid judgment:

> *"24. The entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in Dalip Singh v. State of U.P. and Others (2010) 2 SCC 114 observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system.*
>
> *25. This Court in Maria Margarida Sequeria Fernandes (supra) had an occasion to deal with the same aspect. According to us, observations in paragraphs 31 to 52 are absolutely germane as these*

*paragraphs deal with relevant cases which have enormous bearing on the facts of this case, so these paragraphs are reproduced hereunder:-*

*"31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.*

*32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.*

*33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.*

*34. In Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice* *but also to ensure that justice is being done.*

*35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.*

*36. In Ritesh Tewari and Another v. State of Uttar Pradesh and Others (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:*

*"Every trial is a voyage of discovery in which truth is the quest"*

*37. This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.*

*38. Lord Denning, in the case of Jones v. National Coal Board [1957] 2 QB 55 has observed that:*

*"In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."*

*39. Certainly, the above, is not true of the Indian Judicial System. A judge in the Indian System has to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty, if in the guise of remaining neutral, he opts to remain passive to the* *proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.*

*40. Lord Denning further observed in the said case of Jones (supra) that "'It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth…"*

*41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.*

*42. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges. Section 30 CPC reads as under:-*

*30. Power to order discovery and the like. – Subject to such conditions and limitations as may be prescribed, the Court may, at any time either of its own motion or on the application of any party, -*

*(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection,*

*production, impounding and return of documents or other material objects producible as evidence;*

*(b) issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;*

*c) order any fact to be proved by affidavit*

*43. "Satyameva Jayate" (Literally: "Truth Stands Invincible") is a mantra from the ancient scripture Mundaka Upanishad. Upon independence of India, it was adopted as the national motto of India. It is inscribed in Devanagari script at the base of the national emblem. The meaning of full mantra is as follows:*

*"Truth alone triumphs; not falsehood. Through truth the divine path is spread out by which the sages whose desires have been completely fulfilled, reach where that supreme treasure of Truth resides."*

*44. Malimath Committee on Judicial Reforms heavily relied on the fact that in discovering truth, the judges of all Courts need to play an active role. The Committee observed thus:*

*2.2………. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt. The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of* *preventing private retribution so essential for maintenance of peace and law and order in the society doubt and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the opposing case and to discover information the other side has not brought out. The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before court…....” 2.15 “The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth…..” 2.16.9. Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire* *the courts to pursue. This can be achieved by statutorily mandating the courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we have to regain the lost confidence of the people. Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth.*

*45. In Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421 to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre- variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in Courts when they would find that truth alone triumphs in Courts.*

*46. Truth has been foundation of other judicial systems, such as, the United States of America, the United Kingdom and other countries.*

*47. In James v. Giles et al. v. State of Maryland 386 U.S. 66 (1967) 87, S.Ct. 793, the US Supreme Court, in ruling on the conduct of prosecution in suppressing evidence favourable to the defendants and use of perjured testimony held that such rules existed for a purpose as a necessary component of the search for truth and justice that judges, like prosecutors must undertake. It further held that the*

*State's obligation under the Due Process Clause "is not to convict, but to see that so far as possible, truth emerges."*

*48. The obligation to pursue truth has been carried to extremes. Thus, in United States v. J. Lee Havens 446 U.S. 620, 100 St.Ct.1912, it was held that the government may use illegally obtained evidence to impeach a defendant's fraudulent statements during cross-examination for the purpose of seeking justice, for the purpose of "arriving at the truth, which is a fundamental goal of our legal system".*

*49. Justice Cardozo in his widely read and appreciated book "The Nature of the Judicial Process" discusses the role of the judges. The relevant part is reproduced as under:-*

*"There has been a certain lack of candour," "in much of the discussion of the theme [of judges' humanity], or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations." I do not doubt the grandeur of conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."*

*50. Aharon Barak, President of Israeli Supreme Court from 1995 to 2006 takes the position that:*

*“For issues in which stability is actually more important than the substance of the solution – and there are many such cases – I will join the majority, without restating my dissent each time. Only when my dissenting opinion reflects an issue that is central for me – that goes to the core of my role as a judge – will I not capitulate, and will I continue to restate my dissenting opinion: “Truth or stability – truth is preferable”.*

*“On the contrary, public confidence means ruling according to the law and according to the judge’s conscience, whatever the attitude of the public may be. Public confidence means giving expression to history, not to hysteria. Public confidence is ensured by the recognition that the judge is doing justice within the framework of the law and its provisions. Judges must act – inside and outside the court – in a manner that preserves public confidence in them. They must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth.”*

*51. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice.*

*52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to* *ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."*

94. In view of the aforesaid advice of Hon'ble Supreme Court, this Court must take endeavour to find out the truth by discarding chaff from grain. The factual events pertaining to this case are necessary to be examined. Respondents have entered into an agreement dated 22.2.2012 in which it has been mentioned that process of dismantling the Khandsari Mill and replacing it with a Sugar Mill. Parties were agreed to invest the money. There it has been mentioned that Bank loan between Rs.75-85 crores will be procured through in exchange of purchase of share for Rs.2.225 crores by Satish Kumar Aggarwal and Anil Aggarwal each will receive the share equal to 22.25%, Bank loan will be arranged by YP, Anil Aggarwal and Satish Kumar Aggarwal would not be liable to any obligation outstanding dues against the Company, such as payable to supplies, salaries and employment related taxes until the time final Bank loan papers are signed and funding is expected to begin. In term of agreement the post of Director was granted. Stipulation in the agreement was attached, fixing liability with

YP or the Company to return the amount along with 10% interest. So this document explicitly shows that money was given for investment in the Company for the purposes of converting the Khandasari Mill to Sugar Milland against the investment of money. Respondent would get the equity share. On the request of YP, Jagidsh Chandra Gupta was also introduced and agreed to invest to infuse the money of Rs.2.225 crores with the condition to share in terms of 22.25% equity share of paid up capital. In sum of three, agreement was for 66.75% equity share of paid up share capital. In March, 2012 Yogendra Prasad has informed to the respondents that total project cost has been enhanced Rs.100 crores to Rs.150-Rs.160 crores and requested for further investment. Anil Aggarwal and Satish Kumar Aggarwal find themselves not satisfied decided to exercise option of exit by that time Rs.1,90,50,00 was invested by Anil Aggarwal and Satish Kumar Aggarwal. Even after exercising option agreed to infuse the fund in the Company with the condition to return the same by 31st August, 2012, Respondent nos. 1 to 4 have altogether invested Rs.4 crores. It is also to be relevant that Jagdish Chandra Gupta never elected exit option. Appellants have taken a plea that it was private arrangement in between YP and other respondents and in personal capacity money was given as personal loan. The fact is otherwise, Bank accounts of Company which is Annexure P-9 shows that the money was deposited in Bank account in between 8.1.2010 to 10.4.2012 and 16.4.2012 up to 23.11.2012, total Rs. 4 crores were deposited in the Bank account of Company not in the individual account of YP nor in the account of close relative of Y.P. Other terms of agreement itself shows that agreement was there in the shape of proportionate equity share to the extent of 66.75% and it is also agreed to induct as a Director, in fact Satish Kumar Aggarwal and J.C. Gupta both were inducted as Directors of the Company. If it would have been a personal loan the question of mentioning of share does not arise as well as there was no question of induction as a Director, cannot be said an agreement for personal loan. So this chain of fact and events gives one only indication that YP had represented as a Managing Director of the Company, in representative capacity he has entered into agreement with respondents and in pursuance thereof they have invested the money. Percentage of share has also been stipulated in the agreement in as much in the meeting dated 19th March, 2013, for the first time YP informed that share has already been allotted to them proportionate to their subscription, earlier story of allotment of share was not known to respondent. J.C Gupta never invoked exit option, remained all through in the partnership agreement. When they have verified from record of the Company from the MCA Portal then they could know on July 27th, 2012, 15,500 equity shares of Rs.100/- each were allotted at a premium of Rs.900/- per share. Break up is in the following term that 12500 equity shares were allotted to J.C. Gupta respondent no.4, 2500 equity shares were allotted to Anil Aggarwal and 500 equity share were allotted to Satish Kumar Aggarwal. On 5th March, 2013, 37,000 equity share of Rs.100 each were allotted at the premium rate of Rs.900/- per share, out of the same 4660 shares were allotted to Anil Aggarwal and 32,340 shares were allotted to Visual Technology India. So from the action of the appellants in allotting share at the premium rate of Rs.900 was against to the terms of agreement. It has not been brought to the notice of this Court any document to show that the allotment was made in the knowledge of respondents that too at premium rate. A plea has been taken as the use of land has been changed and valuation of the capital was reassessed to Rs.146/- crores on that ground a plea has been taken, the value of equity share of the Company has gone up, hence the share was granted at the premium rate. It appears that against the capital base of Rs.3,48,85,450/- as on 31.3.2014 the Company accumulated losses of about Rs.1,23,32,637/- being

40% of the capital base of the Company. When there was loss to the extent of 40%, the grant of share in the premium, appears to be very absurd. Revaluation of asset has been made in a very erratic manner. It has been brought to the notice of this Court which has not been denied that appellants have sold their personal agricultural lands of 22 Acres in a very higher rate of Rs.1,58,42,866/-. The lease agreement for 90 years was entered into between respondents Company and one of the CMD's brother, namely, Ravinder Prasad at fixed the lease rent at Rs. One lac per year with a provision for increase of such lease rent by 10% and to fortify the such exorbitant lease rent, change of use of land changed, on payment of Rs.76,00,000/-. Yogendra Prasad and his family members leased out 29-30 acres of land which is located 30 K.M. from the project site for which rent of Rs.37.00 lacs have been paid for the first year to YP and his family members. The land was not for use of project. Rs.74 lacs was invested for Bettiah land which was not required for the project. The Company purchased land worth Rs.50.8 lacs during financial year 2011-2012 and land was revalued at Rs.9.42 crores as on at 31st March, 2012. Thereafter, there was purchase of land of Rs.62.00 lacs during financial year 2012-2013. The valuation of purchase land comes to the tune of Rs.1.63 crores but the land was got revalued at Rs.146.00 crores when the value of asset was of Rs.9.4 crores and for that Rs. 20.00 lacs was paid, in short span of time how there would be justification to allot the share of premium rate of Rs.900/-. Revaluation of assets has been obtained at a higher value on the payment of very high amount of fee.

95. Certificate of Statish Kumar Aggarwal Associate, Charter Accountant Annexure 18 is the revaluation of the land which itself shows that the land was revalued at Rs. 135.75 crores. This valuation has been done on the basis of the information and data available web site of Ministry of corporate affair. To show that there was no illegality and to cover up the ground of share at inflated rate, allotted the share to her wife and performa respondents in Boards meeting on 26.8.2013. When it was informed that Satish Kumar Aggarwal as he is away from India, which was communication to the Company, propriety demands that meeting for allotment of share should have been extended on the next date, even then absence without leave recorded. It has also to be examined whether there was no necessity to grant the share to his wife and family members rather it was action only for the purposes to reduce the percentage of share of the respondents. One fact is also very important which has not

factually been denied that Yogendra Prasad and his family members including associates have withdrawn Rs.8,50,79,416/- for his personal use from Bank Account No. 39339002100010101 and Account No. 3939008700001028. During argument nowhere and at no time, the appellants have assigned the reason for withdrawal of the aforesaid money of Company for their personal use which itself indicates mismanagement of Company property and so much so the manner the valuation of the land has been shown after payment of high cost including the personal land sold or leased out in a very high rate. It is nothing but it shows mismanagement and mishandling of the management of the Company. The aforesaid facts and chain of events demonstrate that share has wrongly been allotted at inflated premium rate of Rs.900/-. The next question would arise when the parties have entered into an agreement fairness and probity demands, the each side must pay respect and will receive equity share in terms and stipulation mentioned in the agreement, in view of fact, when agreement was of Rs.100 per equity share, it should not have been allotted at face value of Rs.900/- equity share. All wrongs have been done by the appellants.

96. It will be relevant to take into consideration that plea

has been taken by the appellants that Jagdish Chandra Gupta has tendered his resignation, on that account he was no longer a Director of Company. He tendered his resignation vide letter dated 13th July, 2013 but said letter of resignation was withdrawn on 4th August, 2013 before his resignation would have been accepted by Board of Director. A plea has been taken that there is no provision in Company Act for withdrawal of resignation is completely misplaced and misconceived, if a person tendered resignation it includes the right to withdraw before the same is accepted. Withdrawal of resignation cannot be denied. It is a universal right to withdraw resignation before the same is accepted. So the ground which has been taken that the Company Act does not provides withdrawal of resignation is misconceived. It also appears that Anil Aggarwal in his letter dated 27th March, 2013 raised protest of gross irregularities and gross mismanagement. It has further been raised that they are entitled to 66.75% of share and the manner they were treated was grossly unfair in the matter of allotment of share, wrongly reduced percentage of share whereupon Yogendra Prasad has shown that it was mere a security whereupon certain conditions were attached by Satish Kumar Aggawrwal in the subsequent letter. But in the letter it has been mentioned that this is by way of settling the dispute and cannot be used for future litigation. This issue will be dealt with subsequently.

97. To understand the parameters and sweep and consideration of the oppression it will be appropriate to deal with the judgments of the Hon'ble Supreme Court.

Position of Director in Company:

98. Before entering into examine the issue of oppression and mismanagement it will be appropriate first to consider the position of Director of the Company under the Act. A Company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a Company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the Company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors action on behalf of a Company is based upon fiduciary relationship and their acts and deeds have to be exercised for the benefit of the Company. They are agents of the Company to the extent they have been authorized to perform certain acts on behalf of the

Company. In a limited sense they are also trustees for the shareholders of the Company. To the extent the power of the Directors are delineated in the Memorandum and Articles of Association of the Company the Directors are bound to act accordingly. As agents of the Company they must act within the scope of their authority and must disclose that they are acting on behalf of the Company. The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a Company with utmost good faith, utmost care and skill and due diligence and in the interest of the Company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the Company. It follows that in the matter of issue of additional shares, the Directors owe a fiduciary duty to issue shares for a proper purpose. The Directors in a private limited Company are expected to make disclosure to the shareholders of such a Company when further shares are being issued. This requirement flows from their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a Company. The Act of Directors in a private limited are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. The act of the Directors is to be tested on the touch stone of "to act bonafide" requirement as well as a doctrine called the "proper purpose doctrine" regarding the duties of Company Directors. So the doctrine of proper purpose test over and above the traditional bonafide test would apply. The Directors should not only satisfy the test of bonafide, they should also show proper purpose. This issue has been dealt with in the case of Dale and Carrington (supra). It will be relevant to quote paragraph nos. 11(d), 23 and 24:

> **"***11(d). We may also test the alleged act of allotment of equity shares in favour of Ramanujam from a legal angle. Could it be said to be a bonafide act in the nterest of the Company on the part of Directors of the Company? At this stage it may be appropriate to consider the legal position of Directors of companies registered under the Companies Act. A company is a juristic person and it acts though its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors. act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised*

*for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company. To the extent the power of the Directors are delineated in the Memorandum and Articles of Association of the company, the Directors are bound to act accordingly. As agents of the company they must act within the scope of their authority and must disclose that they are acting on behalf of the company. The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts* *of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of Section 81 of the Companies Act in case of private limited companies casts a heavier burden on its directors. Private limited companies are normally closely held i.e. the share capital is held within members of a family or within a close knit group of friends. This brings in considerations akin to those applied in cases of partnership where the partners owe a duty to act with utmost good faith towards each other. Non-applicability of Section 81 of the Act to private companies does not mean that the directors have absolute freedom in the matter of management of affairs of the company. In the present case Article 4 (iii) of the Articles of Association prohibits any invitation to the public for subscription of shares or debentures of the company. The intention from this appears to be that the share capital of the company remains within a close knit group. Therefore, if the directors fail to act in the manner prescribed above they can in the sense indicated by us earlier be held liable for breach of trust for misapplying funds of the company and for misappropriating its assets."*

*23. The Tea Brokers (P) Ltd. and Others v. Hemendra Prosad Barooah, (1998) 5 Company Law Journal 463 was also a case of a minority shareholder who on becoming managing director of the company, issued* *further share capital in his favour in order to gain control of management of the company. Barooah and his friends and relations were majority shareholders of the respondent company having 67% of the total issued capital of the company. Barooah personally held 300 equity shares out of 1155 shares issued by the company. He was at all material times a director of the company. His case was that he was wrongfully an illegally ousted from the management of the company. One Khaund, who initially started as an employee of the company had 110 shares in the company and belonged to theminority goup. Khaund was appointed as the managing director of the company. Barooah's grievance was that Khaund took advantage of his position as managing director and acted in a manner detrimental and prejudicial to the interests of the company and in a manner conducive to his own interest. Khaund had hatched a plan with other directors to convert petitioner Barooah into a minority and to obtain full and exclusive control and management of the affairs of the company. In a petition filed under Sections 397 and 398 of the Companies Act, 1956, acts of Khaund were found to be by way of 'oppression and mismanagement' within the meaning of Sections 397 and 398 of the Companies Act. Allotment of 100 equity shares by the company to Khaund at a meeting of the Board of Directors said to have been held on 14th January, 1971 was held to be illegal. The Board of Directors of the company was superseded and a special officer was appointed to carry on manage-*

*ment of the company with the advice of Barooah, Khaund and a representative of labour union. There were several other directions issued by the court which are not necessary to be mentioned here. The Division Bench considered in detail the relevant legal position. Without using the phrase 'proper purpose doctrine' the principle enunciated therein, was applied. The following observations of Justice A.N. Sen are reproduced:*

*"It is well settle that the directors may exercise their powers bona fide and in the interest of the company. If the directors exercise their powers of allotment of shares bona fide and in the interest of the company, the said exercise of powers must be held to be proper and valid and the said exercise of powers may not be questioned and will not be invalidated merely because they have any subsidiary additional motive even though this be to promote their advantage. An exercise of power by the directors in the matter of allotment of shares, if made mala fide and in their own interest and not in the interest of the company, will be invalid even though the allotment may result incidentally in some benefit to the company."*

*24. Further it was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company by an act of the company or by its Board of Directors malafide, the said act must ordinarily be considered to be an act of oppression to the said member. The*

> *member who holds the majority of shares in the company is entitled by virtue of his majority to control, manage and run and affairs of the company. This is a benefit or advantage which the member enjoys and is entitled to enjoy in accordance with the provisions of company law in the matter of administration of the affairs of the company by electing his own men to the Board of Directors of the company."*

99. The issue of oppression by the majority shareholders came for consideration in the case of **Shanti Prasad Jain (supra)**. In that case the Company was floated as private limited Company. There were two groups Patnaik and Loganathan, Later on third party was added as Shanti Prasad Jain, each have one third share except few to French Company. The Controller of Capital Issues sanctioned the issue of share of the face value of Rs. 39 lacs. Dispute arose in what manner issues would be allocated. Jain was one side and Patnaik and Loganathan were in another side. Both groups wanted allotment of share in their own manner. Claim was made by Jain group that shares have been allotted surreptitiously and deliberately with the sole idea of defeating the right of shareholder represented by Jain group and seven persons are benamidar of Patnaik and Lokanathan. So it is oppression of minority share holders. The test has been provided that under Section 397 of the Act it proceeded on the assumption

that a case has been made out to wind up the Company on just and equitable grounds. It also gives a right to members of a Company who satisfy conditions of Section 399 to apply to the Court for relief under Section 402 of the Act or such other relief as may be suitable in the circumstances of the case, if the affairs of a Company are being conducted to a manner oppressive to any member or members including anyone or more of those applying. The Court then has power to pass such orders under Section 397 read with Section 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 to 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. It will be relevant to quote relevant portion of the aforesaid judgment:

> *"……..It gives a right to members of a Company who comply with the conditions of Section 399 to apply to the Court for relief under Section 402 of the Act or such other relief as may be suitable in the circumstances of the case, if the affairs of a Company are being conducted to a manner oppressive to any member or members including anyone or more of those applying. The Court then has power to make such orders under*

*Section 397 read with Section 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 to 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."*

100. It will also be relevant to quote paragraph 19 of the aforesaid judgment:

*"19. These observations from the four cases referred to above apply to Section 397 also which is almost in the same words as Section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397, It must further be shown that the conduct of the majority shareholders*

*was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to Section 397."*

101. In paragraph 26 of the said judgment Hon'ble Supreme Court has held that "…But mere loss of confidence between these groups of shareholders would not come within Section 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the Company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his

proprietary right as a shareholder….."

102. It will also be relevant to quote paragraph 32 of the aforesaid judgment:

> *"32. We now come to the case under Section 398. It provides that any members of a company who have rights to apply in virtue of Section 399 may complain : (i) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or (ii) that a material change has taken place in the management or control of the company and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company. On such application being made, if the court 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 matter of management or control of a company, it is likely that the affairs of the company will be conducted as aforesaid, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit. This section only comes into play as the marginal note shows, when there is actual mismanagement or apprehension of mismanagement of the affairs of the company. It may be contrasted with Section 397 which deals with oppression to the minority shareholders, whether there is prejudice to the company or not. In the present case, the*

*appellant relies on the following three circumstances to show that the affairs of the company were being conducted in a manner prejudicial to its interests, namely :*

*(i) that when the new shares worth Rs. 39 lakhs were issued in July, 1958, only a small part of the share-money was received in the beginning ;*

*(ii) that the Patnaik and Loganathan groups removed Rs. 7 lakhs from the coffers of the company;*

*(iii) that the company lost the support of the appellant.*

*It is true that when new shares of the value of Rs. 39 lakhs were issued, the company received only 15 per centum of the share money to begin with, namely, 5 per centum with the application and ro per centum on allotment. But the evidence shows that though there was some delay in the receipt of 85 per centum of share-money, shares worth Rs. 30 lakhs were fully paid up in the financial year 1959-60, and the only amount outstanding in that year was Rs. 7,65,000 (i.e., 85 per centum of shares worth Rs. 9 lakhs). The slight delay in the payment of the full value of the shares cannot therefore in the circumstances be said to be so prejudicial to the interests of the company as to call for any action under Section 398 of the Act."*

103. The issue again came for consideration in the case of

**Needle Industries (India) Ltd. (supra)**. In that case NIIL was incorporated as a Private Company under the Act with its Registered Office as Madras. Its factory was situated at Ketty, Nilgiris. This Company was a wholly owned subsidiary of Needle Industries (India ) Ltd., Studley, England. Coats Paton Ltd. Glasgow (UK) became 60% share capital of NIIL in favour of Coats and NI Studley and 40% share remained in the hand of Indian Shareholder. Foreign Exchange Regulation Act came in operation and according to law not more than 40% will remain in the foreigners hand. In the Boards meeting shares were allotted to Indian citizen which was challenged that adopting wrong method shares have been allowed as notice of meeting was not sent properly. Hon'ble Supreme Court though did not find on fact a case of oppression and held that oppression must be within the meaning of Section 397 of the Act. The meaning of oppression of Company within terms of 397 of the Act and circumstances in which the Company can be wound up on just and inequitable ground as provided under Section 433 (f) of the Act. Ultimately the Court has held that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that Section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which unfair to him and which causes prejudice to him in the exercise of his legal and proprietary right as shareholder. It has further been held that even if company petition fails having not made out ground oppression the Court is not power less to do the substantial justice between the parties place them as it in the same position in which they would have been. It will be relevant to quote paragraph nos. 44, 46, 47, 48, 49, 50, 51 and 52 and relevant portion of paragraph no. 172 of the aforesaid judgment:

> ***44.*** *Coming to the law as to the concept of 'oppression' section 397 of our Companies Act follows closely the language of section 210 of the English Companies Act of 1948. Since the decisions on section 210 have been followed by our Court, the English decisions may be considered first. The leading case on 'oppression' under section 210 is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer. (1) Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant society could justly be described as having behaved towards the minority shareholders in an 'oppressive' manner, that is to say, in a manner "burdensome, harsh and wrongful". The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that section 210 "warrants the court*

*in looking at the business realities of the situation and does not confine them to a narrow legalistic view". Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, "which is common to partnership, that there should be the utmost good faith between the constituent members". Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of section 210 (page 344 per Lord Keith; pages 368-369 per Lord Denning).*

*46. In an application under section 210 of the English Companies Act, as under section 397 of our Companies Act, before granting relief the court has to satisfy that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in Meyer, (supra) received further and closer consideration in Ebrahim v. Westbourne Galleries Ltd.,(1) wherein Lord Wilberforce considered the scope, nature and extent of the 'just and equitable' principle as a ground for* *winding up a company. The business of the respondent company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order under section 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words 'just and equitable' which occur in section 222 (f) of the English Act, corresponding to our section 433 (f), were not to be construed ejusdem generis with clauses (a) to (e) of section 222 corresponding to our clauses (a) to (e) of section 433. Lord Wilberforce observed that the 'words' just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; and that there is room 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:*

*"The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character 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". (p 379)*

*Observing that the description of companies as "quasi-partnerships" or "in substance partnerships" is confusing, though convenient, Lord Wilberforce said:*

*"company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in". (p 380) Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another context:*

*"Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances." (pp 374-375)*

*47. In his judgment in Re Westbourne Galleries (supra) Lord Wilberforce has referred at two places to the decision in Blissett v. Daniel, (1) which is recognised as the leading authority in the Law of Partnership on the duty of utmost good faith which partners owe to one another. Lindley on Partnership (14th Edition, pages 194-95) cites Blissett v. Daniel (1) as an authority for the proposition that:*

*"The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise 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".*

*48. The fact that the company is prosperous and makes substantial profits is no obstacle to its being wound up if it is just and equitable to do so. This position was accepted in the decision of the Court of Appeal in Re Yenidge Tobacco Co. (2) and of the Privy Council in Loch v. John Blackwood (3).*

*"49. The question sometimes arises as to whether an action in contravention of law is per se oppressive. It is said, as was done by one of us, N.H. Bhagwati J. in a decision of the Gujarat High Court in S.M. Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co., (1) that "a resolution passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company". On this question, Lord President Cooper observed in Elder v. Elder (2):*

*"The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the 'just and equitable' jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the 'just and equitable' jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such*

*as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy".*

*Neither the judgment of Bhagwati J. nor the observations in Elder are capable of the construction that every illegality is per se oppressive or that the illegality of an action does not bear upon its oppressiveness. In Elder a complaint was made that Elder had not received the notice of the Board meeting. It was held that since it was not shown that any prejudice was occasioned thereby or that Elder could have bought the shares had he been present, no complaint of oppression could be entertained merely on the ground that the failure to give notice of the Board meeting was an act of illegality. The true position is that an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. This may usefully be illustrated by reference to a familiar jurisdiction in which a litigant asks for the transfer of his case from one Judge to another. An* *isolated order passed by a Judge which is contrary to law will not normally support the inference that he is biassed; but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biassed and that the party complaining of the orders will not get justice at his hands.*

*50. In England, after the decision of the House of Lords in Meyer, (supra) a restricted interpretation has been given to section 210 by the Court of Appeal in re Jermyn St. Turkish Baths,(1) which has adversely criticised by writers on Company Law (see Palmer's Company Law, 22nd ed., page 613, paras 57-06, 57-07; Gore Brown on Companies, 43rd ed., para 28-12). In India, this restrictive development has no place, for, in S.P. Jain v. Kalinga Tubes, (2) Wanchoo J. accepted the broad and liberal interpretation given to the Court's powers in Meyer.*

*51. In Kalinga Tubes, Wanchoo J. referred to certain decisions under section 210 of the English Companies Act including Meyer (supra) and observed:*

*"These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each is whether the conduct of the affairs of the company, by the majority shareholders was oppressive to the minority*

*shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing upto the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity of fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts.....with reference to section 397".*

*(page 737) At pages 734-735 of the judgment in Kalinga Tubes, Wanchoo J. has reproduced from the judgment in Meyer, the five points which were stressed in Elder. The fifth point reads thus:*

*"The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order".*

*52. It is clear from these various decisions that on a true construction of section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had suggested the substitution of the word 'Oppression' in section 210 of the English Act by the words 'unfairly prejudicial' in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see Gower's Company Law, 4th edn., page 668). But that recommendation was not accepted and the English Law remains the same as in Meyer and in Re H.R.*

*Harmer Ltd., (1) as modified in Re Jermyn St. Turkish Baths. (supra) We have not adopted that* *modification in India.*

*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 as it may, in the same position in which they would have been, if the meeting of 2nd May were held in accordance with law".*

104. In the case of **Sangramsinh P. Gaekwad (supra)** Hon'ble Supreme court has considered the issue of oppression and Court has held that the Director acts in oppression or group manner or in a mala fide way then such act should be construed as oppression but if the Director acts bona fide in the interest of the Company then such act cannot said to be oppressive. It will be relevant to quote paragraph nos. 177, 178, 179, 180 to 183 and 206 of the aforesaid judgment:

*"177. Sections 397 of the Companies Act reads as under:*

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

*(2) If, on any application under sub-section (1), the Company Law Board is of the 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 Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."*

*178. Section 398 provides for relief in cases of mismanagement in the following terms :*

*"398. Application to Company Law Board for relief in cases of mismanagement.*

*(1).- Any members of a company who complain _*

*(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; 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 Company Law Board 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 Company Law Board 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 Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit."*

*179. Section 402 of the Companies Act provides for the reliefs which may be granted without* *prejudice to the generality of the powers of the court under the aforementioned provisions.*

*180. The expression 'oppressive', it is now well-settled, would mean burdensome, harsh and wrongful.*

*'Oppression' complained of, thus, must relate to the manner in which the affairs of the company are being conducted and the conduct complained of must be such as to oppress the minority members. By reason of such acts of oppression, it must be shown that the majority members obtained a predominant voting power in the conduct of the company's affairs.*

*181. The jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that 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 seem fit and proper, is warranted. (See Bennet Coleman & Co. Vs. Union of India and Others [(1977) 47 Comp. Cases 92] and Syed Mahomed Ali Vs. R. Sundaramurthy and others [AIR 1958 Madras 587] But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the* *situation and the court must arrive at a conclusion upon analyzing the materials brought on records that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress a minority of the members including the petitioners vis-`-vis the shareholders which a fortiorari must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding of the company but such winding up order would be unfair to the minority members.*

*The interest of the company vis-`-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956. .*

*182. Mala fide, improper motive and similar other allegations, it is trite, must be pleaded and proved as envisaged in the Code of Civil Procedure. Acts of mala fide are required to be pleaded with full particulars so as to obtain an appropriate relief.*

*183. The remedy under Section 397 of the Companies Act is not an ordinary one. The acts of* *oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The acts complained of may either be designed to secure pecuniary advantage to the detriment of the oppressors or wrongful usurpation of authority.*

*206. The said decision has been referred to with approval in Needle Industries (supra). (Para 49). The conduct which is technically legal and correct, thus, may justify grant of relief on the application of the just and equitable jurisdiction and conversely that conduct involving illegality and contravention of the Act may not suffice to warrant grant of any remedy. Isolated act of oppression may not be sufficient to grant any relief but there should be a continued oppression therefor. The test of lack of bonafide should be applied in both for the winding up petition while determining an application under Section 397 of the Companies Act. [See Re Guidezone Ltd. (2000) 2 BCLC 321] We may at this juncture notice that the Respondent No. 1 in her application under Section 397 of the Companies Act did not complain of any act of mis-management. Complaints of mis- management were made by the Respondent No. 12 only. For the purpose of grant of relief, the High Court could only consider the pleadings filed in Company*

*Petition No. 5 of 1991. If no relief could be granted having regard to the pleadings contained therein, it is inconceivable in law that such relief would be granted on the basis of the pleadings made in other proceedings and totally ignoring the admissions made by the Respondent No. 1 herein in the proceedings initiated by her".*

105. In the case of **V.S. Krishnan (supra)** where allegations were made of mismanagement, oppression and breach of fiduciary duty. It has been held that the Court will interfere in a situation when the case of oppression is made out in a sense where conduct is harsh, burdensome, wrong, mala fide has been done for the collateral purposes with ulterior object to give benefits to some share holders. Action is against probity and good conduct. It will be relevant to quote paragraph 14 and 17 of the aforesaid judgment:

*"14) . In a number of judgments, this Court considered in extenso the scope of Sections 397 and 398. The following judgments could be usefully referred to:*

*(a) Needle Industries (India) Ltd. and Others vs. Needle Industries Newey (India) Holding Ltd. and Others, (1981) 3 SCC 333.*

*(b) M.S. Madhusoodhanan & Anr. vs. Kerala*

*Kaumudi (P) Ltd. & Ors., (2004) 9 SCC 204.*

*(c) Dale and Carrington Investment (P) Ltd. & Anr. vs. P.K. Prathapan & Ors., (2005) 1 SCC 212.*

*(d) Sangramsinh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad (Dead) Through L.Rs. & Ors. (2005) 11 SCC 314*

*(e) Kamal Kumar Dutta & Anr. vs. Ruby General Hospital Ltd. & Ors. (2006) 7 SCC*

*613. From the above decisions, it is clear that oppression would be made out:*

*(a) Where the conduct is harsh, burdensome and wrong.*

*(b) Where the conduct is mala fide and is for a collateral purpose where although the ultimate objective may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis- `-vis the others.*

*(c) The action is against probity and good conduct.*

*(d) The oppressive act complained of may be fully permissible under law but may yet be oppressive and, therefore, the test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is mala fide or for a collateral purpose, it would amount to*

*oppression under Sections 397 and 398.*

*(e) Once conduct is found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put an end to such oppression is very wide.*

*(f) As to what are facts which would give rise to or constitute oppression is basically a question of fact and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact.*

*17. With this statutory background, let us find out whether the conduct of respondents 1 and 2 (M/s Westfort Hi-Tech Hospital Ltd. & Mr. K.M. Mohandas, Chairman) has been harsh, burdensome and wrong or mala fide or for collateral purposes or against probity and good conduct. In addition, we have to find out whether such conduct was prejudicial to the interest of the petitioners/appellants and the conclusion arrived at by the CLB or the High Court is acceptable in the facts and circumstances of the case."*

106. In the case of **Dale and Carrington** (supra) the Court has held that if the member who held majority of share in a Company is reduced to the position of minority shareholder in mala fide manner if it is an act of Board of Directors such act must ordinarily considered to be an act of oppression against the

said shareholder and Company Law Board would give appropriate relief depends on the facts of each case.

107. In the case of **Kamal Kumar Dutta and another v. Ruby General Hospital Ltd. and others**, reported in (2006) 7 SCC 613 majority share holders were reduced to the minority. An application under Section 397 of the Act was filed making an allegation of oppression and mismanagement. The Court held that, under Section 397, any person who is eligible to apply under Section 399 can apply before CLB that the affair of the Company are conducted in a manner prejudicial to the public interest or in a manner oppression to any member or member and winding up of the Company would unfairly prejudice members, but otherwise the facts would justify the making of winding up order on the ground that it would just and equitable to pass order of winding up. The Court has held that Directors are in a position of trust. They must confirmed to probity and their conduct should be above suspicion. It will be relevant to quote paragraph 30 of the aforesaid judgment:

> *"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".*

108. In the case of **Incable Net (Andhra) Limited (supra)**

also allegation of oppression was made. Hon'ble Court has considered earlier judgment and held that expression within the meaning of Sections 398, 399 and 402 of the Act means conduct of majority shareholders towards the minority shareholders was harsh, burdensome and wrong and that such conduct was mala fide and was for a collateral purpose which would result in an advantage for some shareholders over others, although the ultimate object might be in the interest of the Company. It will be relevant to quote paragraph 52 of the aforesaid judgment:

> *"52. The decision in V.S. Krishnan's case (supra) is more apposite to the facts of the case. Quoting Halsbury, this Court observed that the expression "oppression" within the meaning of the Sections 398, 399 and 402 of the Companies Act had been interpreted to mean that the conduct of the majority shareholders towards the minority shareholders was harsh, burdensome and wrong and that such conduct was mala fide and was for a collateral purpose which would result in an advantage for some shareholders over others, although, the ultimate object might be in the interest of the Company. However, the facts disclosed in this case do not establish such conduct on the part of the Respondent No.5. Until the conduct of the majority shareholders was found to be oppressive in terms of the above description, under Sections 397 and 398 of the Companies Act, 1956, the Company Law*

> *Board was not competent to invoke its jurisdiction under Section 402 of the said Act to set right, or put an end to such oppression."*

109. From the above discussion applying the principle that has been laid down by Hon'ble Supreme Court it has to be examined whether facts stated hereinabove actions of appellant no.1 does constitute prejudicial to public interest or oppression to any member or members, is to be tested in the present case, whether the action of the appellants was oppressive in nature or not. At first instance it comes that they have agreed to give 46% share at the rate of Rs.100 per equity share without any premium but equity share has been allotted without any information to respondents of the holding of Board of Directors meeting, thereby allotted the share in the premium of Rs.900/- in view of fact that when there was capital loss up to 40% just before the allotment of share merely because there was change of use of land does not satisfy the test of bonafide and probity. It is also to be relevant that appellants have sold their personal land at a very high rate and leased out his land and his brother land at high rate without considering what would be use of land which were/are not any way helpful to the project and that too in a very inflated rate itself indicates that Managing Director was not acting fairly

properly not for the benefit of the Company and not for the respondents, inasmuch as shares have been allotted to the family members and its associates without examining it purpose but with the sole purpose to reduce the percentage of share of the respondents. The act of oppression can be added with the fact that admittedly appellants and family members and its associates have withdrawn the cash amount from the accounts of the Company for illegal and mala fide purposes. Aforesaid facts indicate chain of oppressive and mismanaged act prejudicial to the interest of other share holders and also prejudicial to the interest of Company.

110. In such view of the matter, the act cannot be said to have been done in isolation but oppressive act has been done by the appellants successively and same has not been controverted that it is not done in the touch stone of probity, good manner for the benefit of the Company and in a bona fide manner.

110. In view of the aforesaid discussion, this Court is of the view that the finding recorded by the CLB with regard to the act of oppression by the appellants is completely and apparently clear. Accordingly, this issue is decided against the appellants and in favour of contesting respondents.

<u>Whether offer given by respondents for return of money in lieu of equity share, would be an act of estoppel</u>

<u>against respondents.</u>:

111. It has been argued that respondent nos. 1 and 2 have terminated the agreement dated 22.2.2012 and later on opted for return of money with interest which is evident from the correspondence between the parties. Letters dated 27th March, 2013 and 10th May, 2013 of Satish Aggarwal indicate that this application has been filed by way of arm twisting to recover the money, not for the purposes of making out the case of oppression and mismanagement of the Company, as in the letter dated 10th May, 2013 of Satish Aggarwal it has been mentioned that 10% share has been given by way of security deposit but offer was given that respondent nos. 1 and 2 will sale 10% share to the daughter of appellant no.1 and brother-in-law in US for the total outstanding amount till the date of transaction. Instead of payment they would take a promissory note in US Dollars equal to the total outstanding amount as on the date of the transaction, alternative option was given to sell 10% share to the appellants against a promissory note backed by real estate in NCR region. So it has been said that it is completely a case of recovery of the amount which can only be adjudicated in the Civil Court and the application of oppression is misconceived and misplaced, but has been filed to extract money by arms twisting but it has been

mentioned in the communication that offer of proposal cannot be used against them in the court of law. If the parties intend to settle the dispute through the process of reconciliation gives an offer for settlement of dispute that cannot be used as estoppel against respondents in a suit. Reliance has been placed in the case of Rush & Tompkins (supra)**.** It will be relevant to quote the relevant portion of the aforesaid judgment:

> *"…The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v. Head (1984) 1 All ER 597 at 605-606, (1984) Ch 290 at 306:*
>
> *"That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply), may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in Scott Paper Co. v. Drayton Paper*

*Works Ltd. (1927) 44 RPC 151 at 157 is encouraged freely and frankly to put their cards on the table…. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlements being brought before the court of trial as admissions on the question of liability."*

*The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice". I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements* *and the public interest in full discovery between parties to litigation.*

*.....For instance The Supreme Court Practice 1988 vol I, para 4/5/17 under 'Discovery and Inspection of Documents' reads:*

*"Without prejudice communications-Any discussions between the parties for the purpose of resolving the dispute between them are not admissible, even if the words "without prejudice" or their equivalent are not expressly used (Chocoladefabriken Lindt @ Sprungli A.G.v. Nestle Co. Ltd. (1978) RPC 287). It follows that documents containing such material are themselves privileged from production."*

*…….In my view, the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties. Accordingly I would allow this appeal and restore the decision of the official referee."*

112. In such view of the matter, if any offer was given to him for settling the dispute then offer cannot be used as a weapon against the proposer. In such view of the matter, this Court is of the view that mere giving proposal to resolve the dispute and mere it is said that it has been given way of security, will not absolve, from holding by this Court to have acted in malafide,

illegal manner, prejudice to the interest of the respondents with an intention to reduce their percentage of share in the Company resiling from his own commitment which he has made and as such claim of the appellants that petition under Sections 397 and 398 of the Act is not maintainable in fact as well as in law, is not sustainable so much so J.C. Gupta has never given such offer for settling the dispute in the manner that was extended by Satish Kumar Aggarwal and Anil Aggarwal. In view of above discussion, the plea of estoppel against the respondents is unsustainable.

**Relief:**

113. In the present case learned counsel for the appellants has argued that relief which has been given that could not have been given even by the Civil Court in the suit and the learned CLB, out of way has granted the reliefs to the respondents. To understand the objection it has to be construed the parameters and scope of Section 402 of the Act. Formulation of Section 402 of the Company Act stipulates extensive power to CLB in the matter of granting appropriate relief for the ends of justice even if the case is not made out of oppression.

114. In **Shanti Prasad Jain (supra)** case Justice Wanchoo has reproduced the judgment. Five points were stressed in

Elder's case and 5th points reads as follows: " The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order".

115. In the case of **Needle Industries (India) Ltd**. (supra) the Court has held that even case oppression is not made out the Court is not power less to do substantial justice in between the parties and place them as nearly as it may, in the same position in which they would have been.

116. The issue was also considered by the Director of Calcutta in the case of **Debi Jhora Tea Co. Ltd. V. Barendra Krishna Bhowmick and others**, reported in 1980(5) Company Cases 771 Calcutta. The Court has an occasion to examine the power and functions of CLB. There the Court has considered Sections 397, 398 and 402 of the Act held that there is no limitation on the Courts power in granting the relief under that sections, instead of winding up the Company, the Court is vested with ample power in order to achieve the object to continue the corporate existence. Under Section 398 and 402 of the Act the Court has power to supplant the entire corporate management. Under the aforesaid sections Court can give appropriate

directions which are contrary to the provisions of Articles of the Company or the provisions of the Company. It will be relevant to quote paragraph 26 of the aforesaid judgment:

> *"26. It should be borne in mind that when a court passes an order under Sections 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, the court 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 prevent 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 give appropriate directions which are contrary to the provisions of the Articles of the company or the provisions of the Companies Act."*

117. In view of the power conferred and decision of the Hon'ble Supreme Court and the High Court the power cannot be

said to be limited, raising the grievance that the relief which has been given, would not be given by the Civil Court, in a proper case, in order to save the corporate status and to do complete justice to the parties, learned CLB has sufficient power for the same.

118. In view of this parameter let us examine the relief one by one which has been granted by the CLB to the respondents.

119. In view of the aforesaid consideration the following relief's are given to the respondents.

120. The allotments of shares in pursuance of Board Meetings dated 27.7.2012 and 5.3.2013 is modified to the extent that the shares which have been allotted at the premium value of Rs.900/- will be treated at Rs.100/- per share and the share would be recalibrated in terms of the amount infused by the respondents and respondents if so like will be allowed to make further investment in terms of their agreement. Accordingly the Company is directed to allot the proportionate balance share of the total amount invested by the respondents and make necessary correction in the register of the Company. If any investment is made in future the rate of share will be decided by the Board of Directors. This Court directs the Board be reconstituted within 30 days from the date of further allotment of shares. The Boards

meeting dated 28.6.2013 which has allotted the shares in favour of associates of appellant no.1 will be treated to have been cancelled and names of beneficiary will be struck off from the register of the Company. After proper allotment of the share the present Board shall not hold any meeting or authorize of any holding of any general body meeting till the new Board comes into existence and new Board replacing old Board will be treated to have been dissolved.

121. The statutory records of the Company including accounting records related to land, legal file, audit reports, all accounting vouchers, fixed assets registers and other relevant documents are to be kept at the registered office of the Company for necessary inspection by the respondents as there is an allegation of misfeance. This Court directs the Central Government to appoint an Inspector to investigate the affairs of the Company. While making investigation the Inspector will exercise all powers conferred under the Act and if it is found that some wrong has been done will take action in terms of Section 242 of the Act and also directs that report should be placed within 90 days from the date of appointment of the Inspector before the newly constituted Board of Directors and if it is found

that appellants and performa respondents have personally been benefited in cash or in kind, the illegal beneficiary will be liable to make good such loss and damages suffered by the Company and failure to make good to the said loss, will be compensated from the personal assets movable and immovable property owned and possesses by the persons who have received the illegal benefit. On the report of the Inspector the newly Board of Directors will take action and will also examine with regard to purchase of land, lease of land, payment made for revaluation of land and withdrawal of cash money from the accounts of the Bank. If it is found by the newly constituted Board of Directors that lease of land and purchase of land in a higher side will be at the liberty to get it revalued and even the excess amount paid to the appellants or the respondents that will be recoverable from them and if it is found that the amount of lease and sell in a higher side and the illegal beneficiary are liable to return the amount along with 10% compound interest. The Board of Directors will also at liberty to examine as to whether the land which has been purchased or acquired through purchase and lease is of any use and purpose, and if it is found that it has having no purpose to the Company, they will take decision and action which is in the best interest of the Company.

122. As all the issues have been decided against the appellants, resultantly the appeal is dismissed.

**(Shivaji Pandey, J)**

Vinay/-

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