

(2011) 03 CAL CK 0077

In the Calcutta High Court

Case No : A.P.O.T. No. 355 of 2010, A.C.O. No. 86 of 2010, C.A. No. 25 of 2010, C.P. No. 1 (Kol) of 2010 and A.P.O.T. No. 445 of 2010, A.C.O. No. 120 of 2010, C.A. No. 25 of 2010 and C.P. No. 1 (Kol) of 2010

AI Champ any Industries Limited

APPELLANT

Vs

Blanketed A.G. and Others
 Aldgate International S.A.

RESPONDENT

Vs AI Champ any Industries Limited and Others

Date of Decision : 21-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 11 Rule 13, Order 11 Rule 14, Order 11 Rule 15, Order 11 Rule 16
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 163, 17, 196, 197, 209
Company Law Board Regulations, 1991 — Regulation 11, 12, 13, 14, 15
Criminal Procedure Code, 1973 (CrPC) — Section 195
Evidence Act, 1872 — Section 65, 66
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2011) 3 CHN 399 : (2011) 164 CompCas 122 : (2011) 4 CompLJ 101

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : S.B. Mookherjee and S.N. Mookherjee and Debangsu Basak, Abhijit Guha Roy and Neeina Chatterjee, in A.P.O.T. Nos. 355 and 356 of 2010, Sudipto Sarkar, Siddhartha Mitra, Mousumi Bhattacharya, Bindiya Raichura and S.K. Bajoria, in A.P.O.T. Nos. 443 and 445 of 2010, for the Appellant; Sudipto Sarkar, Siddhartha Mitra and Mousumi Bhattacharya, Bindiya Raichura and S.K. Bajoria, in A.P.O.T. Nos. 355 and 356 of 2010, S.B. Mookherjee, S.N. Mookherjee, Sr. Advs. Debangsu Basak, Abhijit Guha Roy and Neeina Chatterjee, in A.P.O.T. Nos. 443 and 445 of 2010, for the Respondent

Judgement

I.P. Mukerji, J.—Two appeals and two cross appeals were heard by me. They were against the order dated 17th May, 2010 passed by the Company Law Board, Kolkata Bench. The order was passed in each of the two applications for disclosure of information and documents made by the applicants Lad gate International SA and Blanca tax AG and others before the Board in aid of the proceedings filed by them u/s 397 and 398 of the Companies Act, 1956. In fact

there was one main proceedings before the Company Law Board, filed by each of the above companies, being C.P. 1 (Kol) 2010 C.P.(2) (Kol) 2010 respectively. Two appeals were filed by these applicants and two by the first Respondent company in these proceedings, A.I. Champ any Industries Limited, which were heard together and are being disposed of by this judgment.

2. At this stage I may note that this disclosure of documents was stated by the applicants to be necessary inter alias for filing their reply to the main company proceedings.

3. There is some contention between the parties regarding the order dated 17th May, 2010. It appears that an order without reason and containing only the ordering part was furnished to the parties immediately after passing of the said order. Thereafter, a detailed order described as a "common order" was supplied to them by the Company Law Board on 10th June, 2010. Now, in the short unreasoned order which was supplied there was a remark at the foot "vide separate order". There was no provision, that the reasons for such order would be supplied later or that it was only the operative part of the order. The order which was supplied to the parties much later also did not say that the order constituted the detailed reasons in support of the said unreasoned order. This order was just described as a "common order". It is the allegation of Champ any that this order was subsequently made and circulated by the Company Law Board, in anticipation of the appeal to be filed. This is indeed a very serious allegation and is not substantiated by any grounds. In any event the learned Counsel for that company implored me to treat the unreasoned order as the order under appeal and to ignore the detailed order described as a "common order"

4. I will deal with that controversy later.

5. Each of the applicants before the Company Law Board Blanketed AG and Lad gate International S.A. had made identical applications. In the said application each applicant had wanted disclosure of the documents referred to in paragraph 21 of the petition.

6. Paragraph 21 is set out hereunder:

21. In light of the above facts and circumstances, it is humbly prayed that this Hon"ble Board be pleased to direct the Respondents to disclose on oath the following information and documents to this Hon"ble Board and to provide the Petitioner with copies and inspection of the originals thereof: -

a. Original file/register maintained by the Respondent No. 1 Company in relation to the Board Notes and the papers put up/provided to the Board of Directors of Respondent No. 1 in respect of:

i. Closure of operations at the Rampur Texpro Unit;

ii. Reviving the operations of the Rampur Texpro Unit; iii. Closure of operations at

the Shalimar Unit;

iv. Reviving the operations of the Shalimar Unit;

v. Respondent No. 1 diversifying into the Construction and Real Estate Business;

vi. The Respondent No. 1 Company incorporated subsidiary companies for the purposes of diversifying into the construction and Real Estate Business;

b. Original Board Minutes of every Board Meeting of Respondent No. 1 wherein the Board of Directors of the Respondent No. 1 company discussed:

i. Closure of operations at the Rampur Texpro Unit;

ii. Reviving the operations of the Rampur Texpro Unit;

iii. Closure of operations at the Shalimar Unit;

iv. Reviving the operations of the Shalimar Unit;

v. Respondent No. 1 diversifying into the Construction and Real Estate Business;

vi. The Respondent No. 1 Company incorporate subsidiary companies for the purposes of diversifying into the Construction and Real Estate Business;

vii. Expenditure and possible avenues of income that may be generated from the Shalimar and Rampur Texpro Units.

c. The letters/correspondence as well as contemplated business plan that was addressed/sent to and exchanged with the Bank's (who have mortgages over the property) seeking their permission to transfer the Rampur Texpro Unit and the Shalimar Unit to the Respondent Nos. 5 and 4 respectively.

d. Business Transfer Agreements dated 31st March 2009 entered into by the Respondent No. 1 Company with the Respondent No. 5 for the transfer of the Rampur Texpro Unit.

e. Any Business Transfer Agreement or other similar entered into by the Respondent No. 1 Company with the Respondent No. 4 Company for the transfer of the Shalimar Unit entered into or proposed to be entered into.

f. The arrangement with percentage of commission that may have been agreed to be paid to Mr. Nikhil Thakkar of Vinnik associates who is the relative of Mr. Jayant Pujara for finding Pidilite as a purported proposed lessee for the Godown at the Rampur Texpro Unit.

g. With respect to Annexure "V" to the Reply of Respondent Nos. 1 to 3, being "Copy of the chart comparing the price paid by Abilco (UK) Ltd. to the then prevailing prices", the following information and documents:

i. The basis on which the Market Price per metric ton in the last column of the chart is determined.

- ii. Copies of all Invoices raised by AI Champ any on Abilco UK Ltd.;
- iii. Terms of Payment in respect of each sale;
- iv. Supporting documentation for determining the net realization per metric ton, including:
 - a. The Credit period extended;
 - b. The freight rate applied and the basis for the same;
 - c. The Foreign Exchange rate applied;
- h. Original file/register maintained by the Respondent No. 4 Company in relation to the Board Notes and the papers put up/provided to the Board of Directors of Respondent No. 4 in respect of:
 - i. Proposed transfer of the Shalimar Unit;
 - ii. Business plan for developing the said Shalimar Unit into a Commercial viable real estate project.
- i. Original Board Minutes of every Board Meeting of Respondent No. 4 wherein the Board of Directors of the Respondent No. 4 Company discussed:
 - (i) Proposed transfer of the Shalimar Unit;
 - (ii) Business plan for developing the said Shalimar Unit into a commercial viable real estate project.
- j. Original file/register maintained by the Respondent No. 5 Company in relation to the Board Notes and the papers put up/provided to the Board of Directors of Respondent No. 5 in respect of:
 - i. Purported Transfer of the Rampur Texpro Unit;
 - ii. Business plan for developing the said Rampur Texpro Unit into a commercial viable real estate project.
- k. Original Board Minutes of every Board Meeting of Respondent No. 5 wherein the Board of Directors of the Respondent No. 5 Company discussed the:
 - (i) Purported Transfer of the Rampur Texpro Unit;
 - (ii) Business plan for developing the said Rampur Texpro Unit into a commercial viable real estate project.
- l. Any further orders as this Hon''ble Board may deem fit;

By the said order dated 17th May, 2010 the Company Law Board directed Champ any to furnish copies of only the following documents and no others:

- (a) Original file/register maintained by R - 1 Company in relation to the board minutes in respect of R-1 Company incorporating subsidiary companies for the

purpose of diversifying into the construction of real estate business and expenditure and income that may be generated from Rampur Texpro Unit and Shalimar Unit.

(b) Business transfer agreement dated 31.03.2009 entered into by R-1 Company with R-5 Company for the transfer of Rampur Texpro Unit.

(c) Business transfer agreement, if any, R -1 Company entered into with R -4 Company for the transfer of Shalimar Unit.

Both parties preferred appeals before this Court, as stated above. Champ any feels it is not obliged to offer any document for inspection. Legate and Blanketed want inspection of more documents.

CASE OF LEGATE AND BLANKETED:

7. Now I propose to discuss the grounds on which Blanketed AG and Legate Industries S.A. wanted disclosure of the above documents.

8. The case can only be appreciated if the grounds on which the main proceeding u/s 397 and 398 of the Companies Act, 1956 rest are examined.

9. Blanketed A.G. and Legate International S.A. are foreign companies. They together hold about 37 % shares in AI Champ any Industries Limited. Now, Champ any Constructions Limited is a 100% subsidiary of AI Champ any Industries Limited and the Respondent No. 5 in the proceedings before the Board. The persons in control of AI Champ any Industries Limited, according to Blanketed and Legate wanted AI Champ any Limited to engage in real estate business which was not provided in the objects clause of its memorandum. Hence they needed the consent of these two applicant companies for amending the objects clause, which needs a special majority (See Section 17 of the Companies Act) to enable it to carry on that business. They were quite certain that they would not get such consent. Therefore, on the decision of the Board of Directors of AI Champ any Industries Limited its unit called Rampur Texpro unit, which has very substantial landed property was transferred to Champ any Construction Limited. AI Champ any Industries Limited has absolute control over Champ any Construction Limited as the latter, as stated before is its 100% subsidiary. The intent behind such transfer, it is alleged is that the persons in control of AI Champ any Industries Limited through its Board would be able to do exactly what they wanted to do, that is, entering into construction and real estate development without obtaining the consent of Legate and Blanketed as once the said unit was transferred to Champ any Construction Limited which was controlled by AI Champ any Industries Limited, no such consent would be required.

10. On 12th January, 2010, the Company Law Board had passed an order restraining Champ any Construction Limited from "alienating or granting any third party rights with respect to the fixed assets of Rampur export division till the next date of hearing." From the records it appears that the said order of

injunction is still continuing.

11. It is further stated that the said persons in control of AI Champ any Industries Limited intend to let out the substantial landed property in Rampur Texpro Unit, in circumstances which are detrimental to the interest of Blanketed and Legate and also of the holding company AI Champ any Industries Limited and its 100% subsidiary, Champ any Construction Limited.

12. A lease is sought to be granted, it is alleged, by the Respondent No. 5 in favour of Vinnik Associates, a concern belonging to one Nikhil The Taker It is said that Nikhil Taker is a close relative of the Chairman of AI Champ any Industries Limited. Furthermore, it is stated that Rampur Texpro Unit is closed since July 2003, according to some explanatory statements of the company. Hence, there is no urgency to let out this unit, at this point of time, it is submitted.

13. It is also said that the Respondent No. 3 in those proceedings, that is, Mr. Nirmal Pujara in collaboration with the other Respondents is selling and exporting large amounts of the products of AI Champ any Industries Limited, to one Alnico (UK Limited) a British Company. The third Respondent's brother Mr. Jayanta Pujara, is a substantial shareholder in this United Kingdom company and also a director of Champ any Construction Limited. These transactions are not done on equal terms or on an "arms length basis", it is argued. The effect of this transaction is loss to the Respondent No. 1 and benefit to M/s. Nirmal and Jayanta Pujara and the other Respondents acting in concert with him. The above case is also substantially enumerated in the application for disclosure of documents.

14. The Advocate on Record for Blanketed and Legate by their letter dated 10th March, 2010 had asked the Respondents in the Company Law Board proceedings to furnish the said information and documents.

APPLICATION FOR INTERIM RELIEF:

15. Before proceeding further with this judgment I may note that an application for interim relief was made before the Company Law Board, by Blanketed and Legate for restraining AI Champ any Industries Limited from letting out or parting with possession of the said Rampur Texpro Unit. An order to such effect was made on 12th January, 2010. Champ any sought vacation or modification of that order. The Company Law Board disposed of that application by an order dated 17th May, 2010 passed in a way similar to the way the order dated 17th May, 2010 was passed in the application of disclosure of documents. A copy of an order was released shortly after passing of the order followed by a detailed order described as a "common order" much later on 10th June, 2010. The same contentions were made by Champ any with regard to this order as was made with regard to the order made in the application for disclosure of documents. Considering the circumstances this Court by an order dated 24th June, 2010 remanded the matter back to the Company Law Board to pass a reasoned order in the said application. The order restraining Champ any from transferring or

parting with possession of the said industrial unit was reaffirmed by the order of the Board dated 9th August, 2010. An appeal from the said order has been preferred in this Court by Champ any, and is pending.

DISCUSSION:

16. What is commonly known as representative and derivative action in company law has been codified in chapter VI of the Companies Act, 1956 with the title "Prevention of oppression and mismanagement". If the affairs of a company are conducted in a manner prejudicial to the members or to the interest of the company or to public interest, then an appropriate action can be filed under the said Chapter before the Company Law Board. The Board has the power to make orders as it thinks fit. Some specific powers of the Board, without in any way affecting the general powers given to it u/s 397 and 398, are enumerated in Section 402 of the Companies Act, 1956. It is now an accepted legal position that the scope of this chapter is such that if an application is entertained by the Company Law Board, it may virtually become a proceeding in ram affecting the shareholders, Board of directors, officers, creditors, contributories, the Government, the statutory authorities and so on, depending on the scope of the enquiry and the nature of the orders that are contemplated and passed by the Board. Now, such an application, under the Companies (Court) Rules, 1959 has to be heard on affidavits. (see also Regulation 11 to 23 of the Company Law Board Regulation 1991) Rule 6 of the said Rules specifically provides for application of the CPC when the provisions of the code are not inconsistent with the provisions of the rules. Supplemental to the above rules are the said Regulations, of 1991. Regulation 24 of these regulations provide as follows:

24. Power of the Bench to call for further information/evidence - The Bench may, before passing orders on the petition required the parties or any one or more of them, to produce such further documentary or other evidence as the Bench may consider necessary -

(a) for the purpose of satisfying itself as to the truth of the allegations made in the petition; or

(b) for ascertaining any information which, in the opinion of the Bench, is necessary for the purpose of enabling it to pass orders on the petition.

17. Different principles of law have to be placed side by side and examined. First, are the provisions of the Companies Act, 1956 for disclosure of certain information, resolutions, deliberations and documents to the shareholders, creditors and the public at large. There are also provisions which provide for secrecy in the conduct of affairs of the company.

18. An incorporated company carries on commercial activities. Pursuing such activities involve holding of meetings, making deliberations and taking decisions. Registers of shareholders and debenture holders and returns have to be kept and maintained by the company and offered for inspection. (See Section 163 of the

Act). Minutes of the proceedings of the general meetings and of the Board of directors have to be prepared and maintained. (See Section 193 of the Act). Sections 196 and 197 prescribe for restricted inspection of the minute books of general meetings in the registered office of the company for not less than two hours in a day and for providing any member a copy of such minutes upon his making a requisition.

19. But, the same provisions are not made for making public the decision by the board of directors. There is no provision in the Act to provide any person a right of inspection of the minutes of the board. Not even to a shareholder, far less any member of the public. There is substantial justification for this. A company functions through its board of directors. Some decisions are bound to be taken which have to be kept secret in the interest of the company so that they are not known to its competitors. A member of the public or any shareholder may be a competitor in the business of the company and if such persons have knowledge of the proceedings in a meeting of the board of directors, they might use it to their advantage and to the disadvantage of the company. Thus, substantial secrecy is necessary in any corporate decision making process.

20. The CPC has a detailed procedure for disclosure of documents. Each party has to disclose the documents he wishes to rely on.... Each party is entitled to ask the other party to disclose all the documents in his possession or power. (See Order 11 Rules 12 to 21 of the Code of Civil Procedure). But our legal system is still adversarial. Each party is to adduce his evidence only and cannot compel the adversary to produce evidence to help the other party.

21. It is clearly stated in order XI Rule 13 that in the affidavit of documents filed pursuant to an order for discovery under order XI Rule 12 a party has the right to object to production of one or some documents. However, if a document has been referred to in the pleadings a party has to give inspection of such document (See order XI Rule 15).

22. Here our Evidence Act gives a guidance. If a document in favour of one party is in the possession of the other party, he may give notice to him produce the document. If he produces, well and good. If he does not, he cannot be compelled. The party seeking reliance on the document may then proceed to give secondary evidence of the document. (Sections 65 and 66 of the Indian Evidence Act, 1872) The Court can also draw an adverse inference. (See Padam Sen and Another Vs. The State of Uttar Pradesh, cited by Mr. S.B. Mookerjee, learned Senior Counsel).

23. Now let me examine the powers of the Company Law Board, conferred by the Companies Act, 1956:

10E.(4C) Every Bench referred to in Sub-section (4B) shall have powers which are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely: -

- (a) discovery and inspection of documents or other material objects producible as evidence;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
- (c) compelling the production of documents or other material object producible as evidence and impounding the same;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence on affidavits.

(4D) Every Bench shall be deemed to be a Civil Court for the purposes of Section 195 and [Chapter XXVI of the Code of Criminal Procedure, 1973 (1 of 1974) and every proceeding before the Bench shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and for the purpose of Section 196 of that Code.]

(5) Without prejudice to the provisions of Sub-sections (4C) and (4D), the Company Law Board shall in the exercise of its powers and the discharge of its functions under this Act or any other law be guided by the principles of natural justice and shall act in its discretion.

24. Now, Section 397 and 398 of the Act empower the board to pass any order to bring to "an end the matters complained of." Without prejudice to those general powers some specific powers have been conferred upon the board by Section 402, which is in the following terms:

402. Powers of [Tribunal] on application u/s 397 and 398. - Without prejudice to the generality of the powers of the [Tribunal] u/s 397 and 398, any order under either section may provide for -

- (a) the regulation of the conduct of the company's affairs in future;
- (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;
- (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
- (d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand; and any of the following persons, on the other, namely:
 - (i) the managing director,
 - (ii) any other director,
 - (iii)

(iv)

(v) the manager, upon such terms and conditions as may, in the opinion of the [Tribunal], be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in Clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application u/s 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the [Tribunal] it is just and equitable that provision should be made.

25. Regulation 24 of the said regulations provide the powers to the board to order production of documents, as enumerated above.

26. The qualification for filing an application u/s 397 and 398 of the Act is one tenth of the number of shareholders or 100 members whichever are less or by shareholders representing not less than one tenth of the issued share capital of the company provided that the applicants have paid the entire call amount. (See Section 399 of the Act). Therefore, a small minority of the shareholders of the company can file an application under those sections. Just because such a minority files such an application, does it follow that the company, should provide inspection of their documents and provide copies to them, which they were otherwise not entitled to do under the other provisions of the Act and the CPC and Evidence Act discussed above? Should the Company Law Board upon mere filing of an application exercise its power under regulation 24 asking the company to disclose the documents and provide copies to the applicants?

27. It is true, that when such an application is decided and is being heard it assumes the character of a proceeding in ram where creditors contributors, the government, the other statutory authorities may become involved. When the proceedings under these sections become open to the world, the affairs of the company are also open to view by the world and the Company Law Board has to pass orders accordingly.

28. At what point of time, does the Company Law Board proceed to pass orders in the nature of those which are prayed for in this application?

29. Our appeal court in Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others, cited by Mr. S. B. Mookerjee, learned Sr. Advocate said that refusal to give access to or inspection of the books of account of the

company was not oppression as a shareholder had no such right. Allowing such inspection, would, according to the court, be asking the directors to do something they were not obliged to do in law and granting something to the shareholders which they were not obliged to receive. That exposition of law is, in my opinion, very relevant to adjudge whether a company can be compelled to disclose the documents asked for in this case. A case before the Division Bench of the Delhi High Court in *Rajdhani Roller Flour Mills Pvt. Ltd. v. Mangilal Bagri and Ors.* reported in 70 Company Cases 788 was cited by Mr. Sudip to Sarkar, learned Sr. Advocate. From the facts narrated in the decision, inspection of documents at the time of witness examination was in issue. In that context and rightly so the court said:

The Calcutta case, in our opinion, would not apply in the given situation and we express our disagreement with the view that the right of inspection is limited to the board of directors u/s 209(iv) and that right is not available to shareholders for inspection of the books of account of the company in the course of proceedings under Sections 397 and 398 of the Act.

30. Rightly so, because when a Section 397 and 398 proceeding is admitted and heard by examination of witnesses, it becomes a proceeding in rem, as I have said before. Once the proceedings partake of that character the court or the Company Law Board, after satisfying itself that there is a prima facie case can direct the company or persons in control of it to produce documents mentioned in regulation 24 of the Company Law Board Regulation 1991. It should do so only upon such conviction, because the qualification to file this kind of an application is 10% of the shareholders or 100 members whichever is less and shareholders having 10% of the value of shareholding. Then in that case each and every minority group of shareholders can by filing an application u/s 397, 398 compel the company to disclose its affairs to them, contrary to the other provisions of the Companies Act. Such order in my opinion, can only be passed after the prima facie case is established. If the prima-facie case is not established then the principles in the case of *Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others*, have to be followed.

31. Furthermore, in my opinion, no such prima facie case was established by the applicants to warrant passing of an order for disclosure of some very secret internal documents of the company.

32. The following findings of the Company Law Board in its order dated 17th May, 2010 are reproduced herein below:

14. On the submissions of either side, this Bench decided these applications as follows: Though the Respondents relied upon *Mahatab Brothers* case and *Maharani Lalitha Rajalaxmi* case to state that the shareholders are not entitled to the inspection of the documents, whereas the Hon"ble Delhi High Court, Division Bench, in *Rajdhani Roller Flour Mills Pt. Ltd. v. Mangilal Bagri and Ors.* - Delhi High Court - DB (1991) 70 Comp C 788, held that whenever any member or

members filed petition under Sections 397 & 398 of the Act setting out the facts showing prejudice towards either the share holders or the company, they are entitled to inspect the documents relevant to the material facts mentioned in the petition because the documents are necessary to decide as to whether oppression and mismanagement is there or not. Here, in this case, the Petitioners specifically stated that the R - 3 i.e. the director of R - 1 Company is none other than the brother of one of the directors of R-5 Company i.e. Jayanta Pujara, it being not disputed by the Respondents, it can not be decided at this juncture whether the dealing done is at arms length distance or not unless and until the documents relevant to the dealings are looked into. Thereby the citations relied upon by the Respondents are not applicable to the present case.

As per Section 300 of the Companies Act, if any director is directly or indirectly interested in the contract or arrangement or dealings of the Company, his presence shall not be counted for the purpose of forming of quorum at the time of any such discussion, and if he `does vote, his vote shall be void. Indeed the director who knowingly contravene the provisions of this section shall be punishable as well, it being the position, R-3 having not disputed that he is brother of Jayanta Pujara who is one of the directors of R-5 Company, for time being it cannot be assumed that the dealing with R - 5 is at arms length distance. It is also requisite to see the documents concerned as to whether he participated in the resolution passed or contracts entered with R-5 Company. Likewise, it being said that the brother of R-3 is a director of ABLICO Company (UK), the same analogy is applicable in this aspect as well. In this scenario, it can not be said that the disclosure sought by the Petitioners is not relevant and it also cannot be said that the disclosure is to collect evidence in favour of one party as long as there is cloud of oppression and mismanagement subsisting by the acts of the directors who were cited as Respondents 2 & 3, hence, those material facts are very much required for adjudication of this case. Having the Petitioners herein asked for inspection over number of documents, this Bench is of the opinion that some of these documents are not required.

33. These findings do not show that any prima facie case u/s 397 and 398 has been appreciated by the Company Law Board.

34. The Board, in my opinion, has adopted a wrong approach. The Board was required to see whether the existing pleadings and materials disclosed any prima facie case. In this type of an application, prima facie case means a case, which on the available evidence, has a reasonable likelihood of success at the trial. If such a case was established then it would have been proper, to exercise its powers under the law, to order disclosure of documents. The approach taken by the Board was that the prima facie case was to be established by ordering disclosure of documents, which was erroneous.

35. I make it absolutely plain that the prima facie case to be determined is the prima facie case in the Section 397, Section 398 proceedings. Such case has to be determined after filing of affidavits therein, on the available evidence. The

Appellants, Blanketed and Legate have not filed their reply. Their reply is to be filed within two weeks from date.

36. Moreover, I pass this order assuming that the reasons given subsequent to releasing the operative part of the order dated 17th May, 2010 are reasons in support of the order. In this case, there is no point sending back the matter to the Company Law Board, as I had done in the earlier case because the reasons supplied later are also not adequate. Therefore, for mere absence of reasons there is no point in sending the matter back.

37. But, the matter has to be send back to the Tribunal, for the said reasons, for appreciating the prima facie case of the parties upon giving them a fresh hearing and to consider passing an order for disclosure of documents in the light of the observations made above.

38. These appeals are disposed of accordingly by setting aside the order dated 17th May, 2010.

39. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.