

(2013) 05 CAL CK 0015

In the Calcutta High Court

Case No : A.C.O. No. 71 of 2011, A.P.O.T. No. 281 of 2011 and and C.P. No. 1 of 2010

Birla Corporation Limited

APPELLANT

Vs

Birla Education Trust and Harshvardhan Lodha and Others

RESPONDENT

Date of Decision : 10-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 14, Order 6 Rule 17
Companies Act, 1956 — Section 10E, 10F, 17, 17(1), 17(1)(a)
Constitution of India, 1950 — Article 368

Citation : (2013) 3 CALLT 61 : (2013) 4 CHN 626 : (2014) 118 CLA 291 :
(2013) 3 WBLR 798

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Anindya Kumar Mitra, Mr. Pratap Chatterjee, Mr. Debangsu Basak, Mr. Manju Bhuteria and Mr. Paritosh Sinha, for the Appellant; S.K. Kapur, Sudipto Sarkar, S.N. Mookherjee, Mr. Partha Sarathi Sengupta, Jishnu Saha, Ms. Moushumi Bhattacharya, Ravi Kapur, Rohit Deb, Siddhartha Datta, Utsav Mukherjee, Bodhisatta Biswas, Advocates for the Respondents Nos. 1 to 6, Mr. Soumya Ray Chowdhury, Debanjan Mandal and Mr. Sanjiv Kumar Trivedi, Advocates for Other Respondents, for the Respondent

Final Decision : Allowed

Judgement

Aniruddha Bose, J.—In this appeal, under challenge is an order of the Company Law Board (CLB) passed on 17th June 2011, in an application, registered as C.A. No. 302/2011, seeking certain interim reliefs. The application was taken out by the petitioners in C.P. No. 1 of 2010, (the main petition) which is pending for final adjudication before the CLB. The respondent Nos. 1 to 6, who instituted both the proceedings before the CLB have made various allegations over mismanagement of the affairs of Birla Corporation Ltd. I shall refer to them as petitioners later in this judgment. There are also allegations of conducting affairs of the company in a manner prejudicial to public interest, causing oppression to the members of the company. On behalf of the appellants such allegations have

been denied. The appellants have attributed motive behind institution of the original proceeding, C.P. No. 1 of 2010. There is an ongoing dispute of the respondent No. 2 over succession to the estate of Priyamvada Devi Birla (PDB), widow of late M.P. Birla. That dispute originates from an application for grant of probate of a will said to be the last will of PDB, which was filed by Rajendra Singh Lodha (since deceased), as the executor of the said will. Now the said proceeding is being prosecuted primarily by the respondent No. 2, being the younger son of late Rajendra Singh Lodha. A Division Bench of this Court A.P.O.T. No. 551 of 2010 arising out of PLA No. 242 of 2004 has appointed a three member panel as Administrators pendente lite (APL) over the estate of PBD. In the main proceeding before the CLB, the petitioners have applied in substance for supersession of the Board of Directors of the appellant company. Several applications have been filed from time to time seeking interim reliefs concerning operations of the said company in connection with the said proceeding. Before I refer to the finding of the CLB in the impugned judgment, I consider it necessary to refer to substance of the allegations and rebuttal thereof before the CLB. The application out of which the present appeal arises was registered as C.A. 302 of 2011. The main grievance of the respondents/petitioners in that application stems from a notice for postal ballot notice dated 28th April, 2011, for the purpose of passing a special resolution for amending the object clause contained the memorandum of the company permitting it to commence a new line of business. It was proposed to introduce two new clauses in the memorandum, 17(O) and 17(P) in the object clause of the company in the following terms:-

(17O) To undertake the business as general traders and merchants, and buy, sell, export, import, deal in commodities, goods, things, contracts of all types, to deal in any commodity market, commodity exchange, spot exchange, for itself or for others, transaction in the nature of hedging, spot trading, forward commodity contracts, rate swaps, commodity future/swaps, commodity options, futures and options and in derivatives of all the commodities, whether for the purpose of trading, investment, hedging, arbitrage, or any other purpose, whether in India or abroad and to undertake the activity of warehousing and processing as may be required for the aforesaid purpose(s).

(17P) To invest, acquire, subscribe, purchase, hold, sell, divest or otherwise deal in securities, financial instruments, financial products, shares, scrips, stocks, equity/index linked securities, units, bonds, commercial papers, acknowledgements, deposits, notes, obligations, warrants, government securities, loans, loan certificates, all kinds of derivatives including interest derivatives, futures, forwards, options, calls, swaps, rights or interest in securities, foreign currencies, carbon credits financial securities and any other securities issued by any entity whether for the purpose of hedging, arbitrage, or for any other purpose.

2. In the said application, the right of the respondent No. 7 in this appeal (HVL) to continue as a director in the company has also been questioned and additional

prayer is for freezing of voting rights in respect of 62.9% shares of the company which was earlier controlled by PDB through different commercial entities. On behalf of the appellants, certain element on inconsistency in describing source of control of 62.9% shares of the company on the part of the petitioners have been referred to. In the main petition, petitioners have alleged that these shares belong to certain charitable trusts and societies. According to the appellant, in C.A. No. 302, it has been stated that these shares form part of estate of PBD. I am not addressing this question in this judgment as the petitioners have framed the action as a petition by minority shareholders only, and the instant appeal being an appeal from an order in an interlocutory proceeding, I do not think I ought to examine this issue in detail.

3. The petitioners in the said proceeding before the CLB have also alleged that without bringing about the amendments to the object clause, the company has started dealing with financial products in the money market and in this regard my attention has been drawn to transactions of the appellant with certain companies in relation to financial products, being funds generated by MIBOR linked debentures as well as Collateralized Borrowing and Lending Obligations (CBLO) segment of the Clearing Corporation of the India Ltd. it has also been stated by the appellant that the company is making substantial investment in mutual funds through two companies having direct link with HVL, generating profit for HVL or his family members in the process.

4. As regards these financial dealings of the company, case of the petitioners is that a large number of financial transactions have been undertaken through investment companies with which HVL is associated along with his family members, these two companies being Lodha Capital Market Ltd., and PLC Securities Ltd. On this count, stand of the petitioners is that HVL and his family members are beneficiaries of financial transactions made through these two companies and such transactions were clandestine, in violation of the provisions of section 299 of the Companies Act, 1956. It was also argued that the HVL has been implicated in a bribery case involving a member of the CLB itself and the Central Bureau of Investigation had issued charge sheet against him along with other accused persons. On that count, it was contended that the HVL was not fit to continue as a director of the company. This application was disposed of by the CLB with following directions and observations:-

85. In view of the foregoing, the Applicants having succeeded in making out a prima facie case for granting of interim reliefs, granting of which, in my opinion, in the facts and circumstances of this case shall not cause any prejudice to the respondents, in fact, not granting of interim reliefs sought would cause irreparable loss and damage to the instant public listed company, the substratum itself would go, the Company would land up in the money market and get lost, the prayers sought are urgent in nature, require immediate remedial action before it is too late to salvage the situation. The balance of convenience being in favour of the Applicants their contentions remaining uncontroverted, to do

substantial justice between the parties, the following reliefs are hereby granted to remedy the situation and to regulate the conduct of the Company's affairs in future, it is just and equitable to order that:-

I. The R-1 Company and other Respondents are hereby restrained from further proceeding with the voting through Postal Ballot in respect of the Special Resolution seeking Amendment to the Object Clause of the Memorandum of Association of the R-1 Company. Action taken in respect of Postal Ballot Notice (dated 28.4.2011) so far and hereafter is hereby declared as null and void.

II. The R-1 Company and other Respondents are hereby restrained from taking any action for alteration of the Object Clause as per Special Resolution in the Postal Ballot Notice dated 28.4.2011 and sought to be incorporated as Clause No. 17 O and 17 P or any clause of the same kind or having similar provisions and stipulations.

III. The R-1 Company and other Respondents are hereby restrained from doing any business of the kind proposed to be commenced or in fact already doing as contemplated or envisaged under the proposed clauses 17 O and 17 P sought to be incorporated in the Memorandum of Association of the R-1 Company.

IV. The Respondents and the Applicants are hereby restrained from exercising any voting rights directly or indirectly in respect of their shares to carry through the Special Resolution for Amendment to the Object Clause of the Memorandum of Association of the R-1 Company as contemplated or envisaged under the proposed Clauses 17 O and 17 P sought to be incorporated in the Memorandum of Association of the R-1 Company.

V. The Scrutinisers appointed in terms of the said purported postal ballot notice are hereby directed to completely ignore and disregard any vote that may have been cast by the shareholders so far in response to the said postal ballot notice. Such record be put in a sealed cover and be produced before the Company Law Board on the next date of hearing in C.P. No. 1/2010.

VI. In view of the allegations against the R-1 Company of already dealing in securities, etc. as reflected in the Financial Statements contained in the Final accounts, through the R-2's family companies, the prima facie case having been made out, the allegations made have not been controverted, the firm namely Emst & Young are hereby appointed as Investigating Auditors for investigating into such dealings during the years 2008-2009, 2009-2010, 2010-2011 to ascertain the profits made through such dealings by the R-1 company and the Lodha Capital Markets Ltd., PLC Securities Pvt. Ltd. and others through whom such business was done. Investigative Audit be completed within three months of receipt of this order. R-1 Company shall pay the Audit fee for Investigative Audit as per the prescribed Rules & Procedures (as per men hours). On completion of the requisite Audit, the Investigating Auditors shall present their Report to the Company Law Board, Principal Bench, New Delhi as well as to the R-1 Company.

VII. In view of the Applicants having succeeded in making out a prima facie case for granting interim injunction in aid of the main prayers in C.P. No. 1 of 2010, in facts and circumstances of this case, the Applicants' prayer as contained in para 67 at page 38 of the CA 302/2011 seeking leave to add, alter, amend, modify C.P. No. 1/2010 is hereby allowed, prima facie case having been made out in respect of subsequent act of oppression and mismanagement, C.A. No. 302/2011 is to be read as part of C.P. No. 1/2010, C.P. and relief sought therein stand amended to that extent.

86. C.A. No. 302/2011 is disposed of in the above terms. No order as to cost.

87. Order Dasti.

5. On behalf of the appellant, it has been submitted that the CLB had no jurisdiction to take cognizance of facts which accrued subsequent to filing of the main petition without proper amendment of pleadings having been made in the main petition. On this issue, further submission of the appellant is that no specific prayer had been made in C.A. 302 of 2011 either for amendment of pleading. In paragraph 67 of the application of the petitioner made under Regulation 44 of the Company Law Board Regulations 1991 (the 1991 Regulations), it has been stated:-

67. The petitioners crave leave to add to, alter, amend and/or modify the instant petition if the need so arises and to refer to and rely upon such other documents as may be found relevant at the time of hearing of the petition, if so required. The petitioners further submit that this petition, if necessary, may be treated as part of C.P. No. 1 of 2010 and the main petition be ordered and directed to stand amended accordingly.

6. In paragraph 202 of the main petition, in the form of submissions, it has been pleaded:-

202. The Petitioners crave leave to add to, alter, amend and/or modify the instant petition if the need so arises and to refer to and rely upon such other documents as may be found relevant at the time of hearing of the petition, if so required.

7. The CLB, in the order impugned, however, justified interference on the basis of the subsequent facts brought before it by the aforesaid application referring to Clause 46 of the 91 Regulation. The said Regulation provides:-

General power to amend - A Bench may, at any time, and on such terms as to costs or otherwise, as it may think fit, amend any defect or error in any proceeding before it; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

8. On behalf of the appellant it has been argued before me that the direction to amend the main petition containing the impugned order is not sustainable in law

as there is no specific prayer for amendment of the main petition in C.A. No. 302 of 2011 relying on two judgments of the Supreme Court in the cases of *Manohar Lal (D) by Lrs. Vs. Ugrasen (D) by Lrs. and Others*, and *Gurdial Singh and Others Vs. Raj Kumar Aneja and Others*, . In the former decision, it has been held that a Court cannot grant relief which has not been specifically prayed for by the parties. In the latter judgment, strict adherence to the procedure for incorporating amendment of pleadings has been prescribed:- "An amendment may involve withdrawal of an admission previously made may attempt to introduce a plea or claim barred by limitation, or, may be so devised as to deprive the opposite party of a valuable right accrued to him by lapse of time and so on. It is, therefore, necessary for an amendment applicant to set out specifically in his application, seeking leave of the Court for amendment in the pleadings, as to what is proposed to be omitted from or altered or substituted in or added to the original pleadings."

9. On the same issue, a judgment of an Hon'ble Single judge in the case of *Government of West Bengal Vs. Chatterjee Petrochem (Mauritius) Co. and Others*,] was also referred to on behalf of the appellant to contend that in a petition alleging mismanagement and oppression under the Companies act, the CLB should have confined itself to the case made out in the petition, and not look at other evidence relating to events occurring subsequent to filing of the petition. Other authorities relied upon in this point were (i) *Maqboolunnisa Vs. Mohd. Saleha Quaraishi*,) (ii) *Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others*, , *Union of India (UOI) and Others Vs. Jagdish Pandey and Others*, and a Bench decision of this Court in the case of *Bharat Bhari Udyog Nigam Ltd. Vs. Jessop and Co. Ltd. Staff Association and Others*,

10. In course of hearing, however, learned counsel appearing for the parties submitted that amendment of the main petition by incorporating the allegations contained in C.A. 302 of 2011 has been allowed by the CLB by an order passed on 25th September, 2012. Thus, in this judgment I would have to decide as to whether at the point of time the CLB took cognizance of the allegations contained in the said application, it was lawful for the CLB to consider those allegations or not. This question has to be examined both in relation to form as well as content of such amendment. It is permissible for the Court to allow introduction of subsequent events in a pending proceeding if such subsequent events are consequential to the main lis, but an absolute inconsistent case or a new case altogether cannot be permitted to be raised by way of amendment of the pleadings. None of the authorities relied on behalf of the appellant lays down in absolute terms that no Court can take into cognizance of subsequent events. In the case of *Chatterjee Petrochem (Mauritius) Co. (supra)*, relief was sought for in connection with facts introduced to the proceeding by way of rejoinder. In the case of *Sangramsinh P. Gaekwad (supra)*, the ratio is that case for relief in petitions of similar nature must be made out in the petition itself and the defects in the petition could not be cured or lacuna filled up by other oral or

documentary evidence. The other decisions also contain the same line of reasoning. In the instant case, the basic grievance of the petitioners is over mismanagement of the company as well as oppression of the members. Dispute has been raised over the authority of the present controlling group to exercise voting rights over 62.9% shares. In the application, out of which this appeal arises, the petitioners have alleged certain acts on the part of the present management, which according to the petitioners were committed subsequent to institution of the petition. Case of the petitioners is that such acts would lead to further prejudice to the interest of the company. In my opinion, though the acts complained against are not directly connected with the instances of mismanagement and oppression as alleged in the main petition, so far as allegations made in C.A. No. 302 of 2011 are concerned, there is a link to the basic foundation of the petitioners' complaint. The acts complained against in C.A. 302/2011 are relatable to the core allegations made in the said petition and can be said to form part of a chain of events. I do not think in a conflict pertaining to allegations of mismanagement and oppression in a company, for each instance of mismanagement and oppression, filing of an independent petition under sections 397/398 of the Companies Act, 1956, would be necessary if the subsequent acts can be said to be connected with the main allegations. Moreover, since such amendment has already been allowed by the CLB, I do not think the matter ought to be remanded to the CLB for reexamination as *prima facie* opinion of the CLB on the disputes involved in C.A. 302 of 2011 has already been expressed.

11. Now comes the question of form in which such amendment is required to be carried on. Both the decisions cited by the appellants relate to amendment of pleadings under Order 6 Rule 17 of the Code of Civil Procedure. In the judgment under appeal, while directing amendment, jurisdiction appears to have been exercised by the CLB in terms of Clause 46 of the 1991 Regulations. Though in my opinion, the practice prescribed in the decision of the Supreme Court in *Gurdial Singh* (*supra*) ought to be followed by the CLB as well, in the absence of a clear cut legal mandate excluding any other procedure, I am not inclined to hold the decision of CLB on this count to be invalid. In the event certain facts are before a Court or Tribunal in pleading, and the opponents have the opportunity to deal with such facts, and thereafter the Court or Tribunal forms an opinion based on such pleading and submissions made thereon and order is passed on that basis, I do not think such decision would suffer from a fatal flaw just because formal procedure pertaining to amendment of pleadings is not adhered to in that case. Relief can flow from the Court or the Tribunal on the basis of materials produced before it, provided the opposing party had the opportunity to address on the issue.

12. Substantial arguments were also advanced on the ground that the petition was premature so far as proposal for amendment to the object clause in the memorandum of the company was concerned. My attention was drawn to the provisions of The Companies (Passing of the Resolution by Postal Ballot) Rules,

2001 by the learned counsel for the appellants. Clause 4 of the said Rules includes alteration of the object clause of memorandum as one of the businesses for which resolutions are required to be passed through postal ballot. On behalf of the appellant, it was also contended that since the resolution was yet to be cleared by the requisite majority of the shareholders, that question could not have been gone into by the CLB at that stage. No effect has as yet been to be given to the proposal. Section 17 of the Companies Act provides for amendment of the object clause of the memorandum of a company by special resolution and the relevant part of this provision stipulates:-

17(1) A company may, by special resolution, alter the provisions of its memorandum so as to change the place of its registered office from one State to another, or with respect to the objects of the company so far as may be required to enable it-

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum; or
- (f) to sell or dispose of the whole or any part of the undertaking, or of any of the undertakings, of the company; or
- (g) to amalgamate with any other company or body of persons

13. The appellant has contested the attempt of the respondents to forestall passing of the said resolution on two grounds. First, it has been argued that the CLB under the law has no jurisdiction to question the legality of amendment to the object clause of a company, permitting it to engage in a new line of business, once and if the company by a special resolution carries through such amendment. Secondly, it has been argued that in any event CLB ought to have waited till the resolution was passed to examine the legality of the alterations making way for introduction of new provisions to the object clause in the memorandum of the company. Submission of the appellant on this point is that it could not be contended that carrying through the resolution was fait accompli as admittedly the appellant did not have control over shares to push through a special resolution. Analogy was drawn with the legislative process, with which a Court of law cannot interfere, when the lawmakers are considering a proposed legislation. A decision of this Court in the case of *Shyamsundor Gupta v. Union of India & Ors.*, (AIR 1994 Cal 64) was referred to by the learned counsel for the appellant. In this case the petitioner had challenged the legality of the Constitution (64th Amendment) Bill 1989, which was yet to be enacted. It was

held in this judgment:-

21. In view of the discussion made by me hereinbefore I am of the opinion that the legislative competency of Parliament must not and should not be interfered with by the High Court at a stage when the Constitution (Sixty-Fourth Amendment) Bill, 1989 is under its active consideration. The Court must not create a constitutional crisis by passing any order which may affect the smooth functioning of Parliament. I have no hesitation to hold that the Bill, presently before Parliament, if enacted and enforced and thereafter if it affects the federal structure and the framework of the Constitution then only the vires of the same can certainly be challenged in a Court of Law having jurisdiction and will be justiciable. The legislative competence of Parliament and the application of the "constituent power" under Article 368 of the Constitution cannot be the subject-matter of challenge and adjudication in the High Court at this stage. No cause of action arises until the Bill is enacted into the Constitution (Sixty-Fourth Amendment) Act and its enforcement by notification is made, and till such period the doctrine of *brutum fulmen* (i.e. the threat to which effect cannot be given) prevails.

14. A similar view was taken by this Court in an earlier judgment, *Sural Kumar v. Union of India*, AIR 1989 Cal 197. In the case of *Chander Sekhar Singh Bhoi Vs. State of Orissa*, , it was observed that the Courts ordinarily ought not to go into the question of the validity of an Act or a provision of an Act unless it has been brought in force. These authorities recognize the sovereignty and authority of the legislature in the lawmaking process. But can the said principle be applied to the shareholders of an incorporated company in relation to the question of amendment of the memorandum of the company? Of course, there is the concept of corporate democracy and the majority rule in conducting the affairs of a company. But a company is not the Parliament or the Assembly of a State in the Indian context, which are principal organs of the State with sovereignty and autonomy to conduct its affairs. A company is creature of a statute, its functions being circumscribed by the provisions of law. While a company ought to be permitted autonomy to run its own affairs, if a proposal is brought for ratification by the prescribed majority, which proposal would be *ex facie* illegal, if carried through, then in my opinion, it would be permissible for the shareholders of that company to resist the proposal at the threshold. Such a proposal, in my opinion, would not have the sanctity of a legislative process making it altogether immune from judicial scrutiny even at the proposal stage. Members or shareholders of a company do not have *carte blanche* power to carry on the affairs of a company in any manner they wish to. If a proposal is made to undertake something which would be *per se* illegal under the statute, then initiating the very proposal itself could constitute mismanagement and oppression, and justify shareholders' action, whether in the form of an application under sections 397/398 of the Act, or an independent suit.

15. On behalf of the petitioners it was argued that there is a bar under the

provisions of section 17 of the Act on entering an altogether new field of business. Referring to sub-section (a) of section 17(1) of the Act, it was submitted on behalf of the petitioners that alterations of the provisions of the object clause in the memorandum of a company was permissible so far such alteration would have had enabled the company to carry on its existing business more economically, and sub-Clause (d) of the said sub-section ought to be construed in that context. Referring to section 17(1)(a) of the Act, it was submitted that any new venture of a company sought to be undertaken u/s 17(1) (d) of the Act should have link with its existing business, and substratum of a company cannot be altered by altering the object clause. On this point the leading authority is the decision of this Court in the case *In Re: Bhutoria Brothers (Private) Ltd.,*). In this judgment it has been held:-

Therefore, it is clear from the language of the section that some business which is not already there under the existing Memorandum may be introduced by alteration of the Memorandum provided such business can be conveniently or advantageously combined with the business of the company under existing circumstances. The important conditions to bear in mind in interpreting section 17(1)(d) of the Companies Act are (1) that "existing circumstances" of the company should be considered and (2) that the nature of the proposed new business must be such that either on the ground of convenience or of advantage the new business can be combined with the existing business of the company. In considering what can either be "conveniently" or "advantageously" combined with the existing business of the company, foremost regard should be given to the views of the share-holders which in this case have been expressed by their unanimous resolution. There is still a residuary power and duty of the Court to see that this expression of view by the share-holders is a sensible one and the introduction of the proposed new business is obviously not something which cannot with reason be conveniently or advantageously combined with the existing business.

16. The same view prevails in later decisions on this point, and cases referred to in this regard are *In Re: Bharat Mining Corporation Ltd.,* , *In re: The Eastern Wollen Mills Ltd.,*

17. Learned counsel for the appellant, however, has argued that the aforesaid judgments were delivered when under the Companies Act, resolution for amending the object clause in the memorandum required sanction of the Court. Amendment of the Companies Act subsequently has done away with this requirement and at present the CLB has no jurisdiction to sit over the decision of the shareholders carrying through such a proposal for amendment of the memorandum by passing a special resolution. I do not accept this argument. The limitation on a company to bring about alteration of the object clause in the memorandum has not been repealed altogether, and alteration in the object clause can be effected by a special resolution only for the purposes specified in sub-clauses (a) to (g) of section 17(1) of the Act. What has been repealed is the

provision which required sanction of the Company Court and later the CLB for such amendment to become effective. As I have already discussed, in the event the shareholders of a company even by a special resolution seek to bring about alteration of the object clause beyond what is permissible under sub-section (1) of section 17 of the Act, such action would be illegal. That would be void in terms of the provisions of section 9 of the Companies Act, which provides:-

Save as otherwise expressly provided in the Act-

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of the Act, become or be void, as the case may be.

18. As regards the nature of objects sought to be introduced, the CLB found that there was no justification for diversion from the company's profitable business in the field of cement, jute and power. The CLB found that entry of the company into the money market, which is volatile and speculative would be dangerous for the health of the company. The reasoning of CLB on this ground, inter alia, appears from paragraph 70 of the judgment, in which it has been held:-

The company will be left to venture in markets that are notoriously volatile and speculative, and characterized by unstable and irregular trading conditions with a group of unqualified employees led by the R-2 without any experience or expertise whatsoever to deal in such erratic commodities. HVL (R-2) is a Chartered Accountant, he has neither any qualification nor any experience to take the company and its funds into such potentially dangerous trades, even in the mercantile world he is an amateur and inexperienced, he has taken over the charge of the Company since 2008 after the demise of RSL, his projection to take the company into financial businesses which require years of experience to achieve even minimal levels of competence is very dangerous for the health of the Company, the reserves created over a long period of time as well as the current funds are likely to be depleted deplorably.

19. This conclusion appears to have been arrived at by the CLB on basis of submissions made on behalf of the petitioners that under the provisions of section 17 of the Act, it would be impermissible for a company to amend its object clause to permit the company to venture into an altogether new field of business. It has been observed by the CLB in paragraph 74 of the judgment:-

74. The CLB cannot shut its eyes to the flagrant violation of the provisions of section 17 and the fraudulent manner in which those who are under fiduciary

duties having breached the same by not letting the shareholders know whether the company is "to commence" this business in future or it has already been going on since 2008 or so, the proposed Postal Ballot Notice has failed to disclose the interest of the Directors through whose concern the proposed business is allegedly having been done through the concerns which are allegedly the family concerns of the Director(s) specifically R-2 in this matter. Expertise or no expertise, surplus funds or long term borrowings, the management of the R-1 company has proceeded blindly or deliberately to tread the paths which are unknown, to get lost in the wilderness and that too appears to be advantageous to a few being at the helm of affairs. There is no way that such act of the mismanagement can be allowed to reach a logical conclusion which certainly shall be disastrous for the R-1 company whose interest is paramount to the CLB.

20. Section 17(1)(d) of the Act permits amendment of the object clause to enable a company to carry on its business more economically or more efficiently or to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. In none of the authorities to which reference has been made on this point, mere introduction of a provision in the object clause to permit the company to venture into an altogether a new field of business has been held to be contrary to the provision of the Act. The earliest case on this point which was cited before me is an English authority, of Cyclists' Touring Club (1907) 1 Ch. D 269. In that case, a club which was incorporated as a limited company had as its objects to promote, assist and protect the use of bicycles, tricycles and other similar vehicles on public road and render certain other forms of assistance to their riders. The object clause was sought to be expanded to permit the club to promote the sport of touring in motor vehicles. This was rejected by the Court, and it was held:-

If the business of catering for motorists is combines with this, the club could only protect bicyclists against the dangers arising from motors by taking measures against another class of its own members; and it seems to me that the result would be that it would be impossible to combine (I am relying on the evidence filed in support of the petition) the business of catering for and protecting the rights and interest of motorists with the business of catering for and protecting the rights and interests on the roads of those who ride bicycles and tricycles.

21. The decision in which a new line of business has been permitted to be undertaken by the Court is the case of Juggi Lal Kamlapat Jute Mills Co. Ltd. Vs. The Registrar of Companies,). In that case, the company was engaged in the business of jute and wanted to undertake the business of manufacturer of natural and synthetic rubber and rubber goods. Referring to the judgment of this Court in Bhutoria Brothers (supra) it was held in the judgment:-

This case is thus distinguishable on facts; and as laid down therein also, the Company can be permitted to carry on a new business provided that such business can, under existing circumstances, be conveniently or advantageously

combined with the existing business of the Company and such business is not detrimental to the existing business.

22. Similarity in the line of business, in my opinion, is not the sole yardstick by which a proposal of a company to venture into new business by altering the object clause in its memorandum can be tested. None of the authorities cited in clear terms lay down that a company cannot amend its object clause in the memorandum to enter into a new field of business. No doubt if the line of business in which a company proposes to venture into is similar, it would be presumed that venturing into such business would be permissible in terms of sub-Clauses (a) and (d) of section 17(1) of the Act. But a different line of business in my opinion, can also be started by a company by altering the memorandum if such business can be conveniently or advantageously be combined with the subsisting business of the company. The provisions of section 17(1)(a) of the Act, which provides for alteration of the object clause enabling a company to carry on its existing business more effectively or more efficiently cannot be interpreted in a manner to mean that the said sub-clause would dominate the rest of the sub-clauses of section 17(1). Each sub-clause in that sub-section has its independent sphere of application. The conjunction "or" has been employed at the tail of each of these sub-clauses, which deals with a specific purpose for which the object clause can be amended. I do not think there is any implicit bar under the Act on the type of business a company can venture into, upon amending its object clause. The test to be applied to ascertain permissibility for expansion into a new field of business would be as to whether the proposed business can be combined with the subsisting business of the company conveniently or advantageously. The CLB has restrained the proposed alteration on the presumption that it would be unwise for a profit making company in the field of cement, jute and power to enter into the volatile money market. But I do not find from records that there was any material before the CLB to come to such a conclusion. The CLB, in the given facts, has the limited jurisdiction to test as to whether extension of the business in the field of financial products could be advantageously combined with the present business of the company or not under the existing circumstances. The materials on the basis of which the CLB has come to its conclusions appear to me to be common and traditional prejudice against, what was referred to in the impugned judgment, as "speculative business akin to phatka and trading of a kind equivalent to gambling in commodities in currencies." Formation of opinion on these materials on the basis of construction of the provisions of section 17(1) by the CLB in the impugned judgment while hearing an interlocutory application in my opinion was erroneous, and unsustainable in law. But to decide this issue, in my opinion, before giving chance to the shareholders to deliberate on it, more detailed examination was necessary, supported by evidence. I am of the opinion that the CLB ought to reexamine this issue in the light of observations made in this judgment.

23. Now comes the question of legality of the existing financial transactions of the company, which the petitioners contend is impermissible having regard to the

object clause contained in the memorandum of the company. The CLB has prima facie accepted the case of the petitioners that the company has already entered into the money market, and has appointed an audit firm, Ernst & Young to conduct an investigative audit. On this aspect of the controversy, before the CLB, the case of petitioners was that the company was already acting beyond its object clause, by undertaking business which it sought to introduce by way of amendment of the said clause by indulging in extensive money market transactions. Learned counsel appearing for the parties have invested substantial efforts in explaining to me, with some degree of success, the meaning and intricacies of CBLO and MIBOR linked non-convertible debentures. Case of the appellant is that CBLO is an instrument through which they can borrow money against Government securities at an interest rate lower than the rate prevailing in the market. The acronym MIBOR, I am apprised, represents Mumbai Inter-Bank Offered-Rate, and MIBOR linked debentures carry interest rate set by MIBOR. The company's stand is that money borrowed through these instruments was utilized for working capital and other requirements of the company. Stand of the petitioners, on the other hand is that the company already having large surplus was resorting to market borrowing for the purpose of entering into money market transactions. And these transactions were being carried on through investment companies owned or associated with HVL, generating in the process substantial profit for HVL or his family associates. I have been taken through the balance sheets of the company by the learned counsel for the petitioners for the last few years, on the basis of which it has been sought to be argued that there were high-frequency high volume transactions and substantial investment was made in mutual funds. I am avoiding specific reference to the figures representing the volume of trading in such products in this judgment, as this appeal is against an interlocutory order only, but substance of the argument of the petitioners in this matter is that the company was borrowing money to play in the money market, which goes contrary to main line of business of the petitioners, being cement, jute and power. According to learned counsel for the petitioners, such transactions were being run through finance companies in which HVL was interested, and these acts also constituted mismanagement and oppression.

24. Investment of idle funds of a company in financial instruments by itself would not be illegal and constitute mismanagement and oppression. Moreover, the appellant has relied on clauses 28 and 28 of the memorandum, which permits financial transactions of this nature. These clauses stipulates:-

28. To make, accept, endorse, execute and issue Promissory Notes, Bills of Exchange, Bills of Lading, Debentures and other negotiable or transferable instruments.

29. To invest or deposit the moneys of the company not immediately required in such securities or in such manner as may be determined from time to time.

25. I shall examine the finding of the CLB on this set of allegations from two

different perspectives. First, whether such borrowing and investments constituted conducting those very business which were sought to be brought into the company's permissible field of operations by the alterations contemplated in the object clause or not. If that was the case, then it could be contended that there was mismanagement of the affairs of the company, by going beyond the object clause. Secondly, I shall examine as to whether such transactions by themselves constituted mismanagement or not.

26. As I have already observed, mere investment of the funds of the company in financial products in this case would not constitute violation of the object clause of the memorandum. If it is established, in this case, however, that such investments have become the main activity of the company, and the quantum of investment of the surplus funds in financial products is of such dimension that its regular activities for all practical purpose would stand abandoned, that would constitute engaging in business the nature of which the company proposed to enter by altering the object clause, which alteration was yet to take effect. Otherwise, trading in securities as contemplated in proposed clauses 17(O) and 17(P) would imply a company developing its own financial products through borrowed or self-generated funds and floating such products in the market. The CLB, however, has not come to any finding in that regard, but on the other hand, directed appointment of the said audit firm to ascertain profits made by HVL in relation to dealings through Lodha Capital Market Ltd., and PLC Securities Ltd. As regards the allegation that HVL is an interested party, it was submitted on his behalf that this point was not taken in the pleadings and the provisions of section 299 of the Act is not applicable in the instant case. Case of the appellant as well as HVL is that the said section applies in the event there is an arrangement or agreement between two companies but so far as investment in mutual fund is concerned, the agreement or contract is between the appellant and the mutual fund and sub-clause (6) of section 299 of the Act also does not apply as HVL does not hold two per cent or more of the share capital of both the companies. So far as this issue is concerned, again the matter has to be remanded to the CLB for further consideration as CLB does not appear to have had examined applicability of the aforesaid provision in detail.

27. On the legality of directing investigation, the case of the appellant is that the provisions of the Companies Act, 1956 does not permit such investigation. Referring to the provisions of sections 235, 240, 247 and 250 of the Act it has been argued that it is only the Central Government who can direct such investigation. Under the provisions of section 235(2), the CLB has the jurisdiction direct investigation, but inspectors in such cases are to be appointed by the Central Government only. The decision of the Supreme Court in the case of Padam Sen and Another Vs. The State of Uttar Pradesh,) has been cited by the learned counsel for the appellant to contend that Court ought not to fish for evidence at the instance or on behalf of a party to a litigation and it would be for the parties to a proceeding to come up with a clear case to warrant intervention by the Court on issues like this. In the case of Padam Sen (supra), the

defendants on apprehension that the plaintiffs might fabricate certain books of accounts applied for seizure of the account books before the Court. A commissioner was appointed to seize the books of accounts. In that context, it was held by the Supreme Court:-

11. The defendants had no rights to these account books. They could not lay any claim to them. They applied for the seizure of these books because they apprehended that the plaintiff might make such entries in those account books which could go against the case they were setting up in Court. The defendants' request really amounted to the Court's collecting documentary evidence which the defendants considered to be in collect evidence for a party or even to protect the rival party from the evil consequences of making forged entries in those account books. If the plaintiff does forge entries and uses forged entries as evidence in the case, the defendants would have ample opportunity to dispute those entries and to prove them forgeries.

28. So far as the transactions themselves are concerned, I am of prima facie view that mere involvement of the company in CBLO or MIBOR linked debentures or investment in mutual funds through the two finance companies per se would not warrant an order or investigation. It does not appear again that the CLB had examined that issue in detail but investigator was appointed on being satisfied that the company was conducting business through entities connected with one of the Directors. As regards overall jurisdiction of CLB to direct investigation into accounts of a company through an auditor, such jurisdiction can be derived from section 403 of the Act read with Clause 46 of the 1991 Regulations. Such power or jurisdiction can also be traced to sub-section (4C) of section 10E of the Act, read with Rule 14 of Order 11 of the Code of Civil Procedure. It would be within the inherent jurisdiction of the CLB to take assistance of specialized agencies where having regard to nature of information required, it may lack specific expertise or infrastructural support. But such investigation is to be directed only after a case is made out of prima facie mismanagement and oppression in connection with a company in relation to the subject on which investigation is being directed, and only after such case is established, again prima facie by the petitioners, who seek investigation about large scale misapplication or unauthorized application of company's funds. Question, however, may arise as to what would be the course if silhouettes of irregularities appear in financial statements of a company but actual identification of such irregularities become impossible from available materials. In such circumstances, in a shareholders' action, in my opinion, directions for disclosures of particulars or other legal methods akin to discovery proceeding may be undertaken, and directions may follow such disclosures.

29. I do not think in the instant case sufficient materials were available before the CLB for directing investigation. Learned counsel for the petitioners sought to demonstrate before me, referring to the annual reports of the company for different years, the manner of employment of funds. But while exercising my

jurisdiction u/s 10F of the Act over a judgment of the CLB in an interlocutory proceeding, I do not think I ought to embark upon such a factual enquiry. For the reasons indicated above, I permanently stay that part of the order of the CLB by which investigation is directed by the audit firm. As regards directions contained in clauses I to V of paragraph 85 of the impugned judgment, I have discussed the legal position and also expressed my opinion on the reasoning and decision of the CLB in the earlier part of this judgment. Till the matter is reexamined by the CLB, or any further direction is passed by the CLB in the light of observations made in this judgment, status quo ought to be maintained so far the proposed Special Resolution for amending the object clause in the memorandum of the company is concerned.

30. I give liberty to the petitioners to apply before the CLB for particulars pertaining to borrowing and application of funds of the company over which there is allegation of misuse. If such application is made, the same shall be dealt with by the CLB in accordance with law.

31. The appeal and the connected application stands disposed of in the above terms.

32. There shall be, however, no order as to costs. Urgent certified photocopy of this order be made available to the parties, if applied for, be furnished to the appearing parties on priority basis.