
(2013) 05 CAL CK 0044

In the Calcutta High Court

Case No : A.P.O. No. 154 of 2011, A.C.O. No. 42 of 2011 and C.P. No. 1 of 2010

Birla Education Trust and Others

APPELLANT

Vs

Birla Corporation Ltd. and Others

RESPONDENT

Date of Decision : 10-05-2013

Acts Referred:

Citation : (2013) 4 WBLR 214

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : S.K. Kapur, Sudipto Sarkar, S.N. Mookherjee, Partha Sarathi Sengupta, Jishnu Saha, Maushumi Bhattacharya, Ravi Kapur, Rohit Deb, Siddhartha Datta, Utsav Mukherjee and Bodhisatta Biswas, for the Appellant; Anindya Kumar Mitra, Pratap Chatterjee, Malay Kumar Ghosh, Paritosh Sinha, Debangsu Basak and Manju Bhuteria for the Respondent No. 1, P.C. Sen, Debanjan Mandal, Sanjiv Kumar Trivedi, Sourya Sadhan Bose, Soumya Ray Chowdhury, Deepnath Roy Chowdhury, Satadeep Bhattacharyya for the Respondent Nos. 2, 5 to 10, 36, 37, Ranjan Bachawat Abhrajit Mitra, Anirban Ray, Jishnu Chowdhury, Sarvapriya Mukherjee, Sayan Roy Choudhury, Rajesh Upadhyay, Suddhasatva Banerjee and Sirsanya Bandhyopadhyay for the Respondent Nos. 11 to 35, for the Respondent

Final Decision : Disposed Off

Judgement

Aniruddha Bose, J.—This appeal arises out of an order passed by the Company Law Board (CLB) presided over by its Chairman on 9th February, 2011. By the said order, the CLB has disposed of six interlocutory applications being C.A. Nos. 62, 97, 401, 606, 759 and 760 filed in connection with a petition registered as C.P. No. 1 of 2010 (the said petition). This petition has been instituted by the appellants before the CLB alleging mismanagement of the affairs of the respondent No. 1, Birla Corporation Ltd., (the company). In the said petition, oppression of the members of the said company by its present management has also been alleged. The appellant No. 1 is a charitable trust whereas the appellant Nos. 2 to 6 are companies incorporated under the provisions of the Companies

Act, 1956. The appellants, brought the said action of oppression and mismanagement before the CLB along with another group of shareholders who, it is claimed, have given written consent for institution of the said action. The appellants in combination with the said consenting shareholders hold more than 10% of the shares of total issued capital of the company. The main relief prayed for in the said petition in substance is for supersession of Board of Directors of the company. Direction has also been prayed for on the Securities Exchange Board of India (SEBI) requiring them to cause enquiry in regard to the allegations of violations of the provisions of different regulations guiding management of a company by the present management of the company. Permanent injunction has also been asked for in the petition for restraining the respondents therein from exercising any voting right or any other right in the company till final decision is taken by the appropriate Judicial forum in relation to succession to the estate of Priyamvada Devi Birla (since deceased). Various other ancillary reliefs have been prayed for in the main petition. So far as the interlocutory proceedings are concerned in relation to which the impugned order was passed, one set of proceedings related to shifting the office of the respondent No. 1 or its officers from Birla building at 9/1 R. N. Mukherjee Road Kolkata -700 001 to premises No. 1 Shakespeare Sarani. The company has its registered office at the former address and in the past it appears to have been carrying on its administrative activities primarily from that office only. There is also allegation of siphoning of funds of the company to certain individuals or commercial entities and restraint order has been prayed for over dealing of the company with those entities. In addition, it has been urged before me on behalf of the appellants to prevent the respondent No. 1 from making any further donation to a charitable trust, being Madhav Prasad Priyamvada Birla Apex Charitable Trust (MPPB Trust). In the application taken out in connection with the appeal, there is prayer for restraining the respondent No. 2 from dealing with a sum of Rs. 19 crores which has been donated to the said trust. Prayer had also been made for a direction that the main petition ought to be heard by any member barring the Chairman, who has passed the impugned order. This submission was made alleging that the Chairman was biased against the appellants. Learned Counsel appearing for the parties, however, submitted before me on the date of delivery of this judgment that the Chairman of the CLB had recused himself from hearing that proceeding. Thus this aspect of the controversy does not survive any further.

2. The company in question was originally promoted by Late G.D. Birla, which subsequently came under the control of M.P. Birla group of companies, headed by Late M.P. Birla. On death of M.P. Birla, his widow Priyamvada Devi Birla (PDB) came to exercise control over 62.9 per cent of the shares of the company, which was held by different entities, over which, it appears to me at this stage, PDB had control. On her death, there is dispute over succession of her estate and a probate proceeding is pending before this Court in respect of her Will, the legality of which is under challenge. Under the said Will, which is subject of the probate

proceeding, R.S. Lodha, being the father of the respondent No. 2 claimed to be the executor of the said Will, under which the property of PBD is also claimed to have been bequeathed to him. Said R.S. Lodha has also passed away. A Division Bench of this Court in an appeal proceeding arising out of the probate suit has appointed a three-member panel as Administrators Pendente Lite (API) over the estate of late PDB. The said action is now being prosecuted by the respondent No. 2. I do not consider it necessary in this judgment to narrate in detail the nature of claims and defence in the probate proceeding as the appellants before me have primarily founded their action as minority shareholders of the company. Some discussion on the said probate proceeding, however, would be necessary, as the right of the respondent No. 2 to continue as a director of the respondent No. 1, as also his authority to influence the decision making process of other entities who together exercise control over the said 62.9% shares in the company has been questioned on behalf of the appellants. To that limited extent, in this judgment I shall refer to the probate proceeding. So far as the main petition is concerned, I have been informed by the learned Counsel appearing for the parties that the same has matured for final hearing before the CLB.

3. In the order which is under appeal, the applications bearing C.A. Nos. 606 of 2010, 62 of 2011, 97 of 2011 and 760 of 2010 relate to the issue of shifting of office of the company out of its present registered address. C.A. No. 401 of 2010 was taken out by the appellants for grant of certain reliefs with regard to conduct of election at the Annual general meeting of the company. C.A. No. 759 of 2010 was also filed by the appellants primarily to prevent the respondent Nos. 2, 3, and 5 to 10 from acting as directors of the company. Certain ancillary reliefs were also prayed for in that application in relation to the shifting of office. The said applications were also disposed of without granting any relief to the appellants by the common order, which is impugned in this appeal.

4. The main ground on which the appellants seek to set aside of the impugned order is non-disclosure of reasons. Various decisions have been relied upon on this point, with thrust on a judgment of this Court in the case of *In Re: Uniworth Resorts Limited*, accept as a fundamental proposition of law that an order of a judicial or a quasi judicial authority must be supported by reason. For this proposition, I do not consider necessary to refer to any authority; Since the CLB has dealt with different issues in the impugned judgment forming the basis of different interlocutory applications, I shall examine later in this judgment as to whether the finding of the CLB in respect of these diverse issues can be said to have been backed up with reason or not. Supplemental to the prayer for supersession of the Board itself, certain interim reliefs over conduct of the affairs of the company have also been prayed for. Argument has been advanced in relation to four issues, as instances of mismanagement and oppression. My attention has been drawn to certain adverse findings on transactions of the company in the internal audit report of the company for the period ending November 2009. Questions have been raised over donations to the MPPB Trust, exercise of voting rights by the respondents and shifting of office. In the

impugned order, the CLB has first examined the controversy relating to shifting of office, and thereafter addressed the right of the respondent No. 2 and the other directors to continue in such capacity conducting the affairs of the company. As regards the other issues which form part of pleading of the main petition, the CLB has dealt with the arguments in a composite manner, and held:--

24. Besides the above and for the following reasons, I decline to grant the interim relief (c), (d), (e) and (f) in CR No. 1/2010:--

1. R-2 was appointed as Chairman and Managing Director of R-1 after a properly constituted A.G.M. held on 29.06.2010. Prima facie, in a corporate democracy, there being no prejudice to the rights of the Petitioners as shareholders, it would be unjust at the interim stage to disregard the will of the shareholders, by granting the interim relief prayed for.

2. Prima facie the Company Petition No. 1/2010 appears to be motivated and the Petitioners seem to be working for personal gains and not for protecting the interest of the Company

3. Identical reliefs were claimed in CP No. 57/2004 and not granted. C.P. No. 1/2010 came to be filed without wasting time by afresh set of Petitioners soon after dismissal of C.P. No. 57/2004 on grounds mentioned in para 12 Supra. The Petitioners had acquired the shares in R-1 totalling 1.08% in the year 2008. Acts of mismanagement complained of were much prior to the purchase of shares by the Petitioners in R-1. No one would buy shares of a company in which shareholders were oppressed or where the funds of the company were siphoned or the company was mismanaged. But the petitioners did and filed yet another petition inter alia for oppression, and mismanagement on grounds identical to those taken in CP 57/2004. Such litigation does not serve the public interest.

4. Prima facie the Petitioners have not been able to demonstrate that the Respondents have acted in a manner oppressive to the Petitioners in their capacity as shareholders or in a manner prejudicial to their rights as shareholders. None of the rights of the Petitioners under the Companies Act, as shareholders in R-1 have been demonstrated to have been breached. Thus, prima facie no irreparable injury to the rights of shareholders (petitioners) would be caused by refusal to grant injunction as prayed for at the interim stage.

5. R-1 is a profit making Company, professionally managed and consistently declaring dividends to its shareholders (the last being 60%). No public interest would be served in granting the interim relief prayed for at this stage.

6. Balance of convenience is not in favour of the petitioners but lies in maintaining the status quo and it would be unjust to grant interim relief (d) as an interim measure.

7. A serious question of maintainability of the Company Petition has been raised by the Respondents on the ground that C.P. No. 1/2010 must fail at the

touchstone of the qualitative aspect u/s 398 as propounded by CLB in C.P. No. 57/2004 which could be considered only at the final hearing and not at the interim stage in C.P. No. 1/2010. An appeal against the order passed in C.P. No. 57/2004 is yet to be admitted.

8. Granting interim reliefs as prayed for amounts to granting the main relief at the Interim stage which is impermissible in law.

9. The existing Board of Directors in R-1 comprises of eminent persons from the Corporate world. Balance of convenience does not lie in upsetting the existing Board of Directors in R-1 at the interim stage.

10. So far as allegations in the Petition relating to the internal audit reports, balance of convenience lies in directing the Respondents to take immediate and effective measure to ensure strict corporate governance and to prevent recurrence of events mentioned in the internal audit report in the R-1 company.

11. The High Court of Calcutta has passed an Order dated 27.8.2010 in proceedings for appointment of APL and quoted by me in para 28. Any other direction would amount to overriding the said order.

12. Petitioners have not been able to demonstrate any ground for winding up of R-1 Company under the just and equitable clause in Section 397 of the Companies act.

5. It has also been submitted on behalf of the appellants that in the impugned order, the Board had referred to six decisions, which were not relied upon by the learned Counsel for any of the parties in course of hearing of the said proceedings. These judgments are:- (i) American Cyanamid Co. v. Ethicon Ltd., (1975)1 Ail ER 504, 510, 511 (HL), (ii) 455 Jones v. Pacaya Rubber and Produce Company Limited, (1911) 1 K.B. 455, (iii) Bank of Maharashtra v. Rice Shipping and Transport Co. Pvt. Ltd. & Another, 1955 SCC (3) 257, (iv) Gujarat Mazdoor Sabha v. Indian Oil Corporation Ltd. and 3 Others, decided on 19.07.2005 by the Hon"ble High Court of Delhi Cloth and General Mills Co. Ltd. Vs. Shri Rameshwar Dyal and Another, and (vi) 712 and Anup Engineering Ltd v. Shreenarayan Kanhaiyalal, 1955 (1) G.L.H. 345. Referring to an English authority, Hadmor Productions Ltd. v. Hamilton, [(1982) 1 ALL ER 1042] and a judgment of this Court in the case of Damodar Valley Corporation v. Rajesh Kumar, [(2010)1 Cal HN 60], it was argued that such reference on the part of the CLB was in violation of the principles of natural justice.

6. Learned Counsel appearing for the appellants primarily pray for setting aside this order, and for reconstitution the Board of Directors of the company. In this regard, reliance has been placed on an order of a Division Bench of this Court passed on 23rd August, 2012, in G.A. No. 3356 of 2011, A.P.O.T. No. 551 of 2010 arising out of PLA No. 242 of 2004 (Harsh Vardhan Lodha & Ors. v. Devendra Kumar Mantri & Anr.) along with four other appeals in connection with the probate proceeding in which it has been held and directed:--

In our opinion, the rights and powers of the General administrators over the estate of the deceased depends on the nature of the property both movable and immovable and the respective statute which governs acquisition and enjoyment of such property. In so far as stocks and shares of the companies are governed by the Companies Act. In the light of the rules and regulations under the Companies Act, there are two modes by which shares of a company can be obtained i.e. by transfer and/or transmission as provided u/s 108 of the Companies Act to be entered into the register of members. In the fact situation of the case the stocks and shares which forms major part of the estate left by the deceased are the subject matter of administration of the estate, and the only manner these can be administered is by exercising propriety rights in the shares except distribution to the beneficiaries till the final adjudication in the matter.

The appellants/petitioners have specifically sought in their applications for being appointed as APL to enable him to collect dividends paid against the shares and all other incomes of the estate which is one of the trait and characteristic of the different kinds of rights emanating from ownership of shares, stocks of a company, as provided under the Companies Act, 1956. Proprietary rights of ownership of stocks and shares like

- a) the right to vote at ail meetings(Section 169);
- b) the right to requisition an extra ordinary general meeting of the company or to be a joint requisitionist (Section 169);
- c) the right to receive notice of a general meeting (172);
- d) in the case of a body corporate which is a member, the right to appoint a representative to attend a general meeting on its behalf (187);
- e) the right to require the company to circulate his resolutions (188).

Considering the fact that the Joint Administrators appointed by this Court will be required to administer property of the deceased including the share holding and stocks held by the deceased in various companies with the assured object of its protection and preservation, it cannot be said that the Joint Administrators would be mere spectators, if they are expected and/or permitted to collect dividend accruing out of these stocks and shares there is no reason why they should not be eligible and entitled to other privileges incidental to the ownership of such shares and stocks according to the exigencies found to exist as representative of the beneficiaries till the matter is finally decided by the Court and in their capacity as APL. Nothing prevents them to exercise all the rights, powers and privileges incidental to the ownership of the shares and stocks except that of distributing such estate to the legatees/beneficiaries which is required to be finally determined by the Court.

Therefore, even though they are appointed by the Court as APL nothing prevents them in their capacity as representatives of the beneficiaries to exercise all such rights which flow from the ownership of the shares and so enjoyed by the

deceased during her life time. Therefore, we have no hesitation to hold that in their capacity as representative of the deceased the estate of the deceased vests in them for that limited purpose of administering the same for the benefit of estate of which succession is in abeyance. It is true that in order to enjoy certain rights flowing from the shares and stocks of the companies held by the deceased they will have to apply to the respective companies to obtain such benefit viz. in case the company comes out with rights issue and/or bonus shares which otherwise can only be subscribed by the share holder. Therefore, as representative of the share holder they can always apply to the company to subscribe for such shares in their capacity "as representative of the deceased in the estate" and not as owners in their own names. In order to enjoy privileges incidental to the ownership of the shares an application will have to be made to the company as required by law to record their names in the Register of members and the companies will have to consider such an application in accordance with their Articles of Association and the provision of law which governs the same.

We do not want to discuss the various facets of such exercise of rights of ownership of shares by the Joint Administrators as we think it better to leave it to their best discretion and wisdom and, according to the exigency found to exist. In such an event it would be always open to the parties if they are aggrieved to approach the Probate Court (which has appointed a committee of three persons) as Joint Administrators (who) are subject to the immediate control of the Court and shall act under its direction.

We have to accept existence of such rights and powers in APL and the Court which appoints APL has every right to give directions to the Administrators regarding the property as a mode of equitable relief.

In the present case, it is not disputed that the deceased has controlling block of shares in M.P. Birla Group of companies and if the rights flowing from such shares are kept in abeyance during the pendency of the suit it may be detrimental to the interest of the companies as a whole as the companies may be managed by minority shareholders and/or suffer at the hands of vested interest.

We fail to understand the hesitation on the part of the appellants in permitting the Joint Administrators to approach the various companies of which the deceased owns and possess shares and stocks to get themselves recorded as representatives of the estate of the deceased appointed by the Court and to take all necessary steps to enjoy rights and privileges incidental to the ownership of the shares and stocks which consists of controlling power in M.P. Birla Group of Companies and safeguard the interest of the ultimate beneficiaries. This we say is necessary for the administration of the estate by way of an equitable relief and in the larger interest of the ultimate beneficiaries. Further this is not going to cause any prejudice to the parties to the suit as they will have every right to approach the Court to seek appropriate direction or order in case the Joint Administrators deviate from the trust and faith reposed in them to enable them

to exercise all the rights of share holding and stock subject to the exception of distributing such estate to any person for which they are accountable to the Court.

To conclude, we find that the parties for the purpose of administration of the estate having agreed to appointment of 3 Member Committee as Joint Administrators they shall be entitled to exercise of the rights and powers of General Administrators over the estate of the deceased other than the right of distributing such estate and we, therefore, direct them i) to prepare and file an inventory of the assets of the estate and appraisal of the value of such assets and ii) to take over possession of the assets of the estate in the manner provided under the law considering the nature of the property.

- a) From Receivers and Special Officers appointed by the Probate Court;
- b) From Executor's legal heirs;
- c) From the present Institution and companies as the case may be

The Receivers and Special Officers, appointed by the learned Single Judge (Probate Court) will hand over the assets to the Joint Administrators.

Receivers/Special Officers appointed by the Probate Court will on handing over the assets out of the estate of the deceased for which they were appointed will stand discharged on their submission and settlement of accounts by the Court.

7. On the issue of freezing of voting rights in the respondent No. 1 of HVL and the other entities over which HVL is alleged to have control, my opinion is that the directions issued by the Division Bench in the said order passed on 23rd August, 2012, would cover that aspect of the matter. On behalf of the appellants, it was submitted that they were not parties to the probate proceeding and they were founding their claim as minority shareholders to ensure that the company's affairs are not run or managed by unauthorized persons. The basic reasoning on which the appellants claim is based on this count, however, is directly relatable to the issues being examined in the probate proceeding. Claim of the appellants on this point in this appeal, in my prima facie view would have overlapping effect vis-à-vis the issues involved in the probate proceeding. In these circumstances, I do not think it would be proper for me to pass any order or express opinion pertaining to the estate of PDB. It would be for the APLs to take appropriate step so far as the estate of PDB is concerned, in terms of the direction of the Division Bench of this Court.

8. On the question of removal of Harsh Vardhan Lodha (HVL), who is respondent No. 2 in this proceeding, from the Board of Directors of the company, it has been argued that the CLB in impugned order did not consider the case on legitimacy of HVL to continue as Director. It has been submitted that a charge sheet has been issued alleging bribery in relation to a member of the CLB itself and HVL had also been found guilty of professional misconduct by the Institute of the Chartered Accountants. It has further been submitted on behalf of the appellants that the

observation that the company petition or the connected applications were motivated was not based on facts. This view was expressed by the CLB referring to an earlier petition under the same provisions of the Act, which was registered as CP 57 of 2004, by another set of shareholders. Contention of the respondents is that all these petitions have been filed to protect the interest of members the Birla family, who are contesting the proceeding for grant of probate of the Will of POB before the Probate Court, which contention prima facie appears to have been accepted by the CLB. Case of the appellants on this point is that CP 57 of 2004 was based on different set of facts instituted by a different set of petitioners. Certain factual errors have also been attributed to the order impugned. In paragraph 24(1) of the order, it has been recorded that the respondent No. 2 was appointed as managing director of the company, but it has been submitted on behalf of the appellants that he was appointed only as a director.

9. As instances of oppression and mismanagement, learned Counsel for the appellants have referred to two issues in particular pertaining to the operations of the company. It has been submitted that it was revealed by an internal audit report that there was fraudulent payment of brokerage to a company, Dhruv Industrial Co. Ltd., who according to the appellants did not render any service or to be entitled to such brokerage. It has further been submitted that brokerage has been paid even in respect of orders for supply procured from Birla Institute of Technology and Science (BITS) Pilani as well as Hyderabad Industries Ltd., for which no broker was engaged. Further brokerage has been claimed to have been paid in respect of transactions of the company with Hindustan Gum and Chemicals Ltd., and Bombay Hospital, both of which were part of the M.P. Birla Group, under the same management. The internal audit report also revealed manipulation of freight bills for transporting products of the company's cement unit. In the impugned order, the CLB has taken note of these irregularities, but found that balance of convenience lied in directing the respondents to take immediate and effective measures to ensure corporate governance and to prevent recurrence of events mentioned in the internal audit report. Relying on the decision of the Supreme Court in the case *Cosmosteels Private Ltd. and Others Vs. Jairam Das Gupta and Others*, it was submitted on behalf of the appellants that it was not adequate relief in proceedings of this nature to direct the wrongdoer himself to correct the wrongful acts. On the issue of siphoning of funds, it has been pleaded in the application taken out in connection with the appeal, being APO No. 154 of 2011, that approximately rupees nineteen crores had been donated by the company to the MPPB trust though the said trust did not have any tangible charity related activities. At the time of hearing, the figure representing donation to the trust was stated to be rupees twenty three crores fifty lacs approximately. According to the appellants, the said trust is under the control of H.V. Lodha and the trustees are his wife and one S.K. Daga, a close associate of his. It has been argued by the learned Counsel for the appellants that this aspect was totally ignored by the CLB.

10. On the aspect of shifting of office, the underlying argument of the appellants has been that the CLB has been over lenient in not dealing with the concerned respondents in proper manner, as they shifted the office in breach of an order of the CLB. The issue relating to shifting of office was the subject-matter of the proceedings registered as CA No. 606 of 2010, in which a restraint order was prayed for against the respondent No. 2 and his supporters preventing them from shifting the office of the respondent No. 1 or its officers from their current registered office at 9/1 R.N. Mukherjee Road Kolkata 700 001. On 24th September, 2010, an interim order was passed by the CLB in the following term:--

In view of the interim relief (i) sought by the petitioner in the main petition and the fact that the matter is listed for arguments on interim reliefs on 15.11.2010, respondents shall ensure that no such steps are taken by the respondents till the next date of hearing, as would render the interim relief (i) sought by the Petitioner in the main petition infructuous.

11. In spite of the aforesaid interim order, contention of the appellants is that large scale operations of the company had been shifted and were being carried on from 1 Shakespeare Sarani subsequent to the passing of the aforesaid interim order. Such acts on the part of respondents led to filing of an application for initiation of proceeding for contempt of the Company Law Board by violation of the order passed on 24th September, 2010. The said application was registered as CA 62 of 2011 and the respondents also filed an application, being CA 760 seeking dismissal the said application for contempt. After the ad interim order was passed on 24th September, 2010, the petitioners had published a notice in different newspapers outlining the content of said order. The said notice also cautioned the officers/employees of the company against such shifting, indicating that such act would be in contempt of the order of the Board. Case of the respondents on this issue, however, is that the newspaper publication wrongly projected the order of the CLB. It is submitted on their behalf that they did not undertake any activity which would have constituted violation of the said interim order, as the registered office remains in its original address. Contention of the respondents is that it should be left to the management of the company to decide on their functional convenience. It was also contended on behalf of the respondents that it was not a case of shifting of office of the company but expansion of its operations through another location. In substance, relief was rejected in CA No. 606 of 2010 and CA No. 62 of 2011 as the CLB examined the entire issue relating to shifting of office on merit and held:--

13. At the interim stage, the Petitioners have not been able to demonstrate any injury or prejudice caused to the Petitioners in their capacity as shareholders by the shifting of Corporate Office of the R-1 Company at 1, Shakespeare Sarani, Kolkata while retaining the Registered Office of the R-1 Company at Birla Building, 9/1 R.N. Mukherjee Road, Kolkata 700 001.

14. R-1 Company is a professionally managed, globally renowned huge profit

earning Company and has declared 60% dividend to its shareholders. The Petitioners were aware of the decision taken by the Board of Directors on 31st July, 2007 regarding setting up of an independent Corporate Office in any prime area of Kolkata and purchasing of a space at 1, Shakespeare Sarani, Kolkata by the R-1 Company in November 2007. They were also aware of the decision of the CLB in CP 57 delivered on 19.10.2009 in which an identical interim relief claimed by the Petitioners therein was not granted. It is not in dispute that an appeal has been preferred against the decision in CP 57/2004 which is yet to be admitted.

15. In view of the above, the Application CA No. 606/2010 for grant of interim relief is dismissed. Interim Order dated 24.9.2010 is vacated. In view of the reasons given in the preceding paragraphs, I am not inclined to initiate proceedings for contempt of the Order dated 24.09.2010 against the Respondents. Consequently, CA No. 62 also stands dismissed. CA No. 760 is disposed of accordingly with the following directions in view of which no further directions need be given in CA No. 97 which also stands disposed of.

16. The manner in which the Petitioners interpreted the Order dated 24.09.2010 and published notices in the newspapers is very unfortunate. It gives an impression that the filing of Application CA No. 606 or CA 62 and the publication of notices in the newspapers after the ad-interim Order dated 24.09.2010 was not to protect the interests of the Company or to uphold the Majesty of Law but to cause harassment to the Respondent No. 2. Petitioners are directed to make fresh publications and news-items in all the newspapers in which notices and news-items were published earlier in relation to the Order dated 24.09.2010 passed by me, stating that CA No. 606 in CP No. 1/2004 seeking injunction against the Respondents (Birla Corporation Ltd., its Directors and Promoter Group, shareholders, etc.) has been dismissed and interim Order dated 24.09.2010 has been vacated forthwith and that the Company Law Board has declined to initiate proceedings for contempt against the Respondents for the alleged breach of the Order dated 24.09.2010. Petitioners shall also withdraw their notice dated 8.12.2010 to various officers/Directors of R-1.

12. The issue relating to shifting of office has three components. The first one is as to whether the dismissal of the contempt petition was warranted or not on the allegation of violation of the interim order passed on 24th September, 2010. The second one is as to whether shifting the office itself constituted an act of mismanagement or oppression warranting revocation of the company's decision to operate from 1, Shakespeare Sarani. The third component on this aspect of the controversy is as to whether the direction of the CLB requiring the appellants to publish the rejoinder ought to be sustained or not. On the first two issues, I would not like to interfere with the decision of the CLB as the Board has examined various aspects of the controversy and passed its direction. Broad reasons have been disclosed in support of the decision of the CLB on this issue, and I do not consider such reasons to be perverse. In exercise of my appellate jurisdiction u/s 10F of the Act, I am not inclined to interfere with the finding of

the Company Law Board on a factual issue, and that too at the interim stage. So far as allegations of violation of the order of the CLB is concerned, in my opinion, a Tribunal which passes an order itself would be the best suited forum to determine that question. The CLB has also found no prejudice would be caused to the shareholders of the company if operations are carried on from 1, Shakespeare Sarani. The interim order, the violation of which is complained against, itself stands dissolved now, with dismissal of C.A. 606 of 2010. In this perspective, I would not like to substitute my own reason for the reason given by the CLB while interpreting the scope of its interim order. On this issue also, I do not think the impugned order is perverse.

13. Next comes the question as to whether the direction of the CLB requiring the respondents to make fresh publications and news items in all the newspapers in which notices and news items were published earlier in relation to the order dated 24th September, 2010, stating therein that CA No. 606 in CP No. 1/2004 has been dismissed and interim order dated 24th September, 2010 has been vacated and that the CLB had declined to initiate proceeding for contempt against the respondents for the alleged breach of the order dated 24th September, 2010.

14. Such direction in my opinion would not serve any purpose at this stage, and such direction had been given in improper exercise of discretion by the CLB. While the respondents may have the means to make publications in the form of advertisement in a newspaper, I do not think any party can be compelled to effect publication of any news item in regular newspapers, unless it is in a newspaper owned by such party. Publications of editorial matters fall within the domain of the publisher or editor of a newspaper. This direction in my opinion suffers from non-application of mind. If an order as a whole suffers from the vice of non-application of mind, part of it being incapable of being complied with, I do not think the part of the order, just because it is capable of compliance, could be sustained. The entire order shall stand vitiated in such circumstances. I do not find from the text of the notice, which has been reproduced in paragraph 49 of APO 154 of 2011, that the same contains anything outlandish which would warrant corrective measure of this nature after two and half years. As such I permanently stay the operation of the order as contained in paragraph 16 of the impugned judgment, as I find such direction to be not founded on any cogent reason.

15. While dealing with the prayers for interim reliefs contained in CP No. 1 of 2010, the reason for refusal thereof has been discussed in 12 sub-paragraphs in paragraph 24. These prayers for interim orders primarily seek to denude the respondent No. 2 and the persons and entities associated with him of the authority of running the company. In these sub-paragraphs, the disclosures in the internal audit report have also been referred to, and direction has been issued on the respondents to prevent recurrence of similar incidents. Stand of the respondents on this issue is that in a company of this dimension, such

leakage cannot be eliminated altogether, and there is no allegation that any member of the management benefited from such illegal activities. Foundation of the claim of the respondent No. 2 to manage the affairs of the company is derived from his control or influence over the entities having 62.9% shareholding of the company. The Division Bench of this Court has empowered the APLs to exercise all rights flowing from the ownership of the shares of PBD. It has also been submitted on behalf of the respondents that an inconsistent case is being run by the appellants as it has been pleaded in the main petition that Late M.P. Birla as also Priyamvada Devi Birla had transferred their properties including shares to five charitable trust. The jurisdiction to decide on this issue, thus, in my opinion, has largely shifted from the domain of CLB to the Probate Court and the Court for trial of suits.

16. Learned Counsel for the appellants argued that they are entitled to question legitimacy of those in control of the affairs of the company. I shall be testing the decision of the CLB in this limited context. The CLB found the company petition motivated as there was an earlier petition filed by another set of shareholders, which was registered as CP 57/2004 alleging mismanagement and oppression. The question of maintainability of the petition has been raised and the CLB wanted it to be tested at the touchstone of qualitative aspect. The CLB also found granting interim reliefs would constitute granting of main reliefs and on these basis prayers for interim order has been rejected. In my opinion, the reasoning on these counts contained in paragraph 24 of the impugned order are not sustainable. On the question of the petition being motivated, every petition has a motive and unless it is established that the petitioners are acting as proxy of another group who would be otherwise disentitled to come forward or for some reason would not like to expose themselves in a litigation, then a litigant can be non suited for carrying the banner of someone else. What would have to be ascertained in such a situation first is the dimension or degree of illegality alleged, to the extent it can be established at the threshold. If the degree of illegality alleged is of a high order, then the requirement on the part of the complainants to establish their bona fide would be of a lesser degree. Mere fact of pendency of several proceedings instituted by several sets of complainants on similar factual score would not by itself absolve wrongdoer or insulate him from judicial scrutiny, if any wrongdoing in real terms is established. But refusal to scrutinize the allegations of wrongdoing on this ground alone in my opinion is not warranted.

17. It was also erroneous, in my view on the part of the CLB to reject the reliefs prayed for, which have been outlined in paragraph 24 of the impugned judgment, solely on the ground that grant of interim reliefs would have constituted final relief. The cases relied upon by the appellants on this point are *Deoraj Vs. State of Maharashtra and Others*, *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*,) *Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty*, *C. Jhunjhunwala v. State of West Bengal*, (89 CWN 925 *Vijay Srivastava Vs. Mirahul Enterprises and Others*,) and an English authority, *Woodford v. Smith*, (1970) 1

WLR 806). Uniform view, in all these authorities, is that in appropriate cases, interim orders can be passed which may have the same characteristic of the final relief claimed. As I have already observed, primary test for adjudicating an action of this nature would be to ascertain as to whether there are instances of mismanagement or oppression or not. There can be mismanagement of a profit making company also. I also do not think "qualitative" aspect of shareholding, which I presume implies the extent of holding of the complaining shareholders, can alone determine the question of locus. The law itself, u/s 399 of the Act, lays down the qualification for bringing an action relating to oppression and mismanagement. Once the qualifying criteria is satisfied, ordinarily the locus of an applicant ought not be questioned if such applicant demonstrates specific cases of mismanagement and oppression. The level of discretion to be exercised by the CLB for considering grant of interim relief would be the same for all complainants satisfying the qualification criteria specified under the Act. Interim relief should not vary on the basis of extent of holding of the complaining shareholders in a company.

18. Substantial argument was advanced as regards donations made to the MPPB trust. Case of the appellants is that the said trust had no charitable activity but received a large sum of money over a short period of time. Case of the respondents, on the other hand, is that substantial charitable activities have been planned for the trust. It has also been argued on behalf of the respondents that no such relief had been prayed for in the main petition. On this point, judgment of the Supreme Court in the case *The State of Orissa Vs. Madan Gopal Rungta*, , a judgment of this Court in the case of *Government of West Bengal Vs. Chatterjee Petrochem (Mauritius) Co. and Others*, and the case of *K. Peramanayakam Pillai Vs. S.T. Sivaraman and Another*,) has been relied upon. In my view in the absence of any specific charitable activity, large donations to a trust prima facie would be prejudicial to the interest of the company. But such allegations have been denied by the respondent company and reference has been made to certain activities the said trust appear to have undertaken. Such donations, as part of a chain of allegations of mismanagement may be re-examined by the CLB while hearing the main petition. Leave is also given to the appellants to make appropriate application before the CLB to seek restraint order on further release of donation to the trust, and if such application is made, the CLB would pass appropriate order in that regard, upon considering the competing claims on that point. I do not accept the observations of the CLB that because the company is making profit, or their Board of Directors comprise of eminent persons, it ought to be presumed that the company cannot indulge in oppression and mismanagement to be legally tenable.

19. The other factual allegation relating to mismanagement of the affairs of the company was in respect of adverse opinion on the transactions of the company revealed in the internal audit report. I have briefly discussed in the earlier part of this order the flaws noted by the internal auditor. While the wrongdoer cannot be left to with the task of undoing the wrong, I am not inclined to issue any

substantive direction at this stage on this point. The CLB ought to reconsider these allegations while hearing the main petition.

20. While testing the validity of the order impugned, I will also have to examine the issue of reference to decisions in an order which was not cited by any of the parties to a litigation. Before me, no case was made out by any of the parties that these judgments were cited by way of them. In my opinion, however, if certain established principle of law is clarified by the Court itself on the basis of judicial authorities found by the Court by making its own research, that would not constitute an illegality, provided there was argument before the Court on such principle. In the event, however, a new point of law, not argued by any of the parties, is introduced in a judgment referring to authorities not cited by any of the parties, that would constitute violations of the principles of natural justice. The judgment of the Division Bench of this Court in the case of Damodar Valley Corporation (*supra*), does not hold in absolute term that such reference in all cases would be illegal and invalidate the judgment itself. In the judgment impugned, the six decisions referred to by the CLB deal with the principles for granting interim order, which was an issue before the Board. As such, I do not consider such exercise on the part of the CLB to be erroneous to that degree that the same would invalidate the order itself.

21. Argument was also advanced before me on the aspect of maintainability of actions under Sections 397 and 398 of the Act in a proceeding where case for winding up of the company was not made out or even in cases where no case for mismanagement or oppression was made out. This has been held in the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, and M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, . In the former decision, it was held that "even though a 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 May 2 were held in accordance with law." In the case of Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, however, it was held:--

12. In this background, the appeal having been allowed, we do not find any good reason to interfere with such an order. However, Shri Dipankar Gupta, learned Senior Advocate for the petitioners sought to urge the legal question as to the interpretation placed by the Division Bench that if the facts fall short of a case upon which the Company Court feels that the Company should be wound up on just and equitable grounds in that event no relief can be granted to the petitioners in regard to Section 397 of the Act. We find adequate support to the view taken by the Division Bench and we cannot read the provisions of Section 397 of the Act in any other manner than what has been done by the Division Bench. Therefore we find no merit in this petition. The same shall stand dismissed. No costs.

Tested on the basis of ratio laid down in these authorities, the view taken by the CLB in sub-paragraph 12 of paragraph 24 is not sustainable in law. The CLB ought to re-examine this issue.

22. I am accordingly of the opinion that the reasons contained in sub-clauses 2, 3, 5, 7, 8, 9 and 12 of paragraph 24 of the impugned order are not sufficient or adequate to reject the prayers for interim orders. But I am not directing the CLB to re-examine the prayers for interim orders as the petition has reached the final hearing stage before the said forum. The direction given in paragraph 16 of the impugned order is, however, set aside. As regards the prayers of the appellants/petitioners in C.P. 1 of 2010 are concerned, I am of the opinion that CLB should consider the case on its own merit. I, however, decline to interfere with the finding of the CLB in C.A. No. 401 of 2010, as I do not find any perversity in the reasoning of the CLB on this matter.

23. The appeal and the connected application stand disposed of in the above terms.

24. There shall be 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.