

(2007) 07 CAL CK 0042

In the Calcutta High Court

Case No : AP No"s. 43 and 44 of 2007, ACO No"s. 74 and 75 of 2007 and TA No. 301 of 2007

Girdhar Gopal Dalmia and Others

APPELLANT

Vs

Belgachi Tea Co. Ltd. and New Terai Association Ltd.

RESPONDENT

Date of Decision : 02-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Companies Act, 1956 — Section 10F, 173, 397, 398, 402
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 — Regulation 10, 11, 12

Citation : (2007) 4 CHN 155

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : S.B. Mookherjee, Sudipto Sarkar, S.N. Mookherjee, Ratnanko Banerjee and Mousumi Bhattacharya, for the Appellant; Anindya Mitra, D. Basak and S. Kakrania, for the Respondent

Final Decision : Allowed

Judgement

Aniruddha Bose, J.—The present two appeals arise out of two company petitions filed before the Company Law Board (which I shall refer to as the "Board" in this judgment) under the provisions of Sections 397 and 398 of the Companies Act, 1956, by a group of shareholders in two companies, the Belgachi Tea Company Ltd. and the New Terai Association Ltd. alleging mismanagement of the affairs of the company as well as commission of acts which are harsh, oppressive and burdensome. The two petitions, along with a third petition involving Bateli Tea Company Ltd., in which the main parties to the present two appeals are the main shareholders, was disposed of by the Board by a common order passed on 22nd August, 2006. There are two cross-objections in respect of these two appeals, and the appellants in A.P.O. No. 44 (concerning The New Terai Tea Association Ltd.) has taken out an application being TA/ 301/07 bringing on record certain facts arising subsequent to the order passed by the Board. I propose to dispose

of both these appeals along with the cross-objections as also the application, being TA/301/07 by a common judgment, as they arise out of one order only, and there are overlapping factual and legal issues involved in both these appeals. There are three major shareholding groups in these companies, two of them originally belonging to one Dalmia family, whom I shall describe as G.G. Dalmia group and B.L. Dalmia group respectively, and the other one being the Saraff group. The G.G. Dalmia group are the appellants in those two appeals. There appears to be four branches within the Saraff group, but before the Board no conflicting stand was taken by any of these Saraff branches, who have been impleaded as respondents in both these petitions, and they were treated collectively by the Board. Main contest in these proceedings appear to be between G.G. Dalmia group and the Saraff group, the B.L. Dalmia group aligning with the latter.

2. By this order, the Board granted liberty to the B.L. Dalmia branch to purchase the shares in Belgachi Tea Company Limited whereas similar liberty was given to the Saraff group in the New Terai Tea Association Ltd. (These companies shall be referred to in the later part of this judgment as Belgachi and New Terai respectively). In the case of New Terai, direction was given that the representatives of the appellants in their Board of Directors shall be deemed to have ceased to be Directors with immediate effect, and such Directors were restrained from interfering with the affairs of both the companies. The financial claims of the appellants against New Terai and Belgachi were left to be settled in commercial terms, and the Board opined that in these proceedings the Board was concerned with shareholders' claim and not inter se corporate claims. The appellants were directed to indemnify the respondents against any claim in respect of Bateli Tea Co. Ltd. and the respondents in turn were directed to indemnify the appellants in respect of any claims concerning Belgachi and New Terai.

3. As regards complaint of the appellants over Bateli Tea Co. Ltd. ("Bateli" in short), B.L. Dalmia group as also the Saraff Group has been directed to sell their shares to the G.G. Dalmia branch. The Saraff Group was directed to release the G. G. Dalmia branch from the guarantees given in respect of New Terai within two months from the date of receipt of full consideration for the shares held by them in Bateli. The B.L. Dalmia group was likewise directed to release the appellants from the guarantees given by them in respect of Belgachi. In addition, certain consequential directions were issued as regards valuation of shares in Bateli, and also the two companies which form the subject-matter of the present proceeding in the event the B.L. Dalmia group and Saraff group exercised their option. An appeal against the order passed in the company petition involving Bateli has been preferred in this Court, being APOT No. 491 of 2006 and an Hon'ble Single Judge of this Court has been pleased to set aside the order of the Board so far as the same related to Bateli. His Lordship, however, had been pleased to stay the operation of the judgment which was delivered on 16th April, 2007 for a period of four weeks. The appellants herein has filed a petition for

Special Leave to appeal against this judgment before the Hon''ble Supreme Court of India. On 14th May, 2007, the Hon''ble Supreme Court has been pleased to pass the following order in this Special Leave Petition.

Stand over to 16.7.2007.

In the meantime, we request the High Court to hear and dispose of A.C.O. No. 86/2006 and A.C.O. No. 87/2006 on or before 1st July, 2007.

Pending hearing and final disposal of the present Special Leave Petition, we direct that the composition and the management of the three companies shall remain unchanged during the aforestated period.

During the aforestated period, there shall be no sale or purchase of tea except through public auction. This direction will also apply to all the three companies.

There shall be no transfer of funds by the said three companies to the sister companies or inter se.

Subject to the above, the order of the High Court dated 16.4.2007 (reproduced at page 92 of the SLP Paperbook) shall continue.

Needless to add that none of the parties on either side will seek adjournment of this matter in the High Court.

4. Both Belgachi and New Terai are engaged in the business of cultivation and sale of tea, each company owning a tea estate, known as Belgachi and Panighatta respectively. Originally, Belgachi was jointly acquired by one M.L. Dalmia and one Mathura Prasad Saraff, the patriarchs of the contesting groups who also were related to each other. Subsequently, Bateli and New Terai became the subsidiaries of Belgachi, but at present these are three independent companies. The Dalmia family is represented in these companies through two branches, G.G. Dalmia branch, who were the petitioners before the Board and appellants before me, and B.L. Dalmia branch. The appellants claim to be the registered owners of approximately 21% of the total paid up capital of Belgachi, whereas in New Terai, the claim of their holding is approximately 23%. In both these cases, the appellants have alleged conspiracy and collusion between the B.L. Dalmia branch and the Saraff group.

5. The grievance of the appellants made before the Board so far management of Belgachi is concerned, can be broadly categorised under three heads. First set of grievances relate to poor performance of the garden resulting in fall in production as also incurring financial losses. Even within the Terai region, it has been contended by the appellants that tea produced by the Company's estate is fetching comparatively lower price. There has been allegations of default in payment of workers' dues, salaries to executives, excise dues and other running costs like electricity charges etc; and failure to pay up the trade creditors. Particularly highlighted in this regard has been the company's failure to clear provident fund dues including the employees' share. This has exposed the

company to criminal action, which has led to criminal proceeding being instituted against the directors of the company, including two members of the appellants' group (being the appellant Nos. 1 and 2) who were directors of Belgachi upto 14th February, 2005. However, it has been alleged that this fact has not been intimated by the respondents to the Provident Fund Authorities, which continued to expose them to penal proceeding. This is the third head of the appellants' complaint. The appellants group also allege that they had advanced substantial sum of money in Belgachi, but the same remains unpaid.

6. In respect of New Terai, the allegations of mismanagement include similar charges, including non-refund of loan to Bateli. There is, however, additional allegation of allotment of shares, to persons close to the Saraff family without convening or holding general meeting for this purpose. Such issuance of shares, it has been alleged, is contrary to SEBI regulations and guidelines.

7. The appellants in their application being T.A. No 301 of 2007 have alleged that after passing of the impugned order, they have come to learn that the main respondents in New Terai have abandoned the tea garden altogether, and have handed over the same to another set of individuals. Leave has been prayed for in this application for placing reliance on certain documents in this regard in course of hearing of this appeal.

8. These allegations were denied by the appearing respondents by filing Reply. A common reply was filed on behalf of respondent Nos. 1,2,3,4,6 & 7 and an independent reply had been filed by respondent No. 5, who appears to belong to one of the Saraff sub-branches so far as Belgachi is concerned. It has been submitted by the learned Counsel that before the Board, none had appeared on behalf of the respondent No. 5. In the case of New Terai, learned Counsels have appeared for respondent Nos. 1 to 7, whereas none appeared on behalf of the respondent Nos. 8 to 17. It has been submitted on behalf of the appellants that service had been effected on all the respondents in both these appeals.

9. The respondent's answer to these charges, in substance, is that all the tea estates in that region are running losses and the defaults on different heads as alleged arise out of such losses which is endemic to that region. It has also been pleaded that the appellant Nos. 1 & 2 continue to be the directors of New Terai. In defence of the allotment of shares, it has been pleaded that provisions of the Companies Act, 1956 has been duly complied with and an Extraordinary General Meeting was convened for this purpose on 26th June, 2004 and shares were allotted in a Board Meeting held on 20th September, 2004. Calcutta Stock Exchange was informed of this development and prior notice was sent to the appellants under certificate or posting. Any breach of SEBI Rules and Regulations has been denied.

10. The Board, in the impugned order, opined that incurring losses and accumulating liabilities including non-clearance of Provident Fund dues necessarily could not be attributed to mismanagement. It has been observed in

the order that the same, at the best could reflect inefficient management. The Board was satisfied with the explanation of the company as regards the reasons for losses and statutory defaults. On the aspect of validity of allotment of shares in the case of New Terai, the Board indicated that such allotment could not be set aside because the company was in need of funds and the Saraff group had agreed that the appellants had the liberty of acquiring shares in proportion to their shareholdings from the 2nd and 8th to 17th respondents at the issue price. (Respondent Nos. 8 to 17 are the allottees of shares, which allotment is being complained against). This offer in the same terms was repeated at the time of hearing before me on behalf of the respondents in course of hearing of this appeal. The finding of the Board was that no act of mismanagement or oppression was established in the case of Belgachi whereas the allegation relating to oppression in New Terai had become infructuous in view of offer from the Saraff group to the appellants for acquiring proportionate shares from the respondent No. 2 and the respondent Nos. 8 to 17. The Board, in the impugned order, however, contemplated parting of the ways of the different branches, observing:

Therefore, as rightly pointed out by the learned Counsel for the petitioners, the most equitable way of putting to an end of the disputes would be to direct the group in control of a company to purchase the shares held by the others in that company on a fair value to be determined by an independent valuer.

11. In the impugned order reference was made submission of the appellants to a family arrangement between two branches of Dalmia group arrived at in April, 2004, under which the appellants were to manage Bateli and B.L. Dalmia group to manage Belgachi through inter se transfer of shares to give each group more shares in the respective gardens. But this aspect was not stressed in course of hearing before me by the learned Counsels of either of the parties.

12. This order has been assailed by the appellants on various grounds, but the main thrust of their argument has been that order for compulsory purchase of shares should have been passed in the case of both Belgachi and New Terai giving appellants option to purchase the shares of the respondents in the event there was default in such purchase by the respective groups having majority holding in these two companies. In both the cases, the Board had not placed the respondents under any time frame to purchase their shares, and there was no default clause and it was left to the unilateral decision of B.L. Dalmia group. and the Saraffs to purchase the appellants' holding in Belgachi and New Terai. The appellants' case has been argued by Mr. S.B. Mukherjee, Mr. Sudipto Sarkar and Mr. S.N. Mukherjee, learned Senior Advocates.

13. The appellants' case is based on finding of the Board on three counts, which, it has been submitted, is incompatible with the directions given. The Board has recorded in the Order:

Even though, the understanding of branch wise management of these companies

has not been supported by any document, yet, from the facts of this case, it is apparently clear that Bateli is under the control of the petitioners, Belgachi is under the control of B.L. Dalmia branch and New Terai is the management of Saraffs.

It has also been recorded that the learned Counsel for the respondents before the Board had submitted that with a view to put an end to the disputes, his clients were willing to purchase the shares held by the petitioners in all the three companies on a fair value. The Board opined that in the case of New Terai and Belgachi, relief could be granted to do substantial justice between the parties in view of the strained relationship among the parties. The Board had also observed:

...Therefore, as rightly pointed out by the learned Counsel for the petitioners, the most equitable way of putting an end of the disputes would be to direct the group in control of a company to purchase the shares held by the others in that company on a fair value to be determined by an independent valuer...

14. It is the appellants' case that the Board, having come to such finding, should have directed the respondents to make compulsory purchase in default of which the appellants should have been permitted to purchase holding of the appellants. The contention of the appellants in both these appeals is that as all these companies were in essence family-owned companies, and they bear the characteristic of partnership concerns and the requirement to maintain utmost good faith by individual partners would apply to each groups of shareholders. The obligations of shareholders in such companies go beyond that stipulated under the Companies Act. Under these circumstances, if the dispute between the contesting groups reach a deadlock, direction ought to be issued for compulsory purchase to put an end to the dispute. On the aspect of closely-held family companies assuming the character of quasi-partnership, the authority relied on was the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, , and the case of Ramashankar Prosad and Others Vs. Sindri Iron Foundry (P) Ltd. and Others, . An english authority, (House of Lords) Ebrahimi v. West Bourne Galleries Ltd. and Ors. 1972(2) ALL E R 492, which was referred to by the Hon''ble Supreme Court in the case of Needle Industry has also been relied upon by the appellants. The authorities cited in support of the appellants' prayer for compulsory purchase in view of breakdown of relationship arc an unreported decision of this Court in Company Petition No. 85 of 1975 delivered on 21th April, 1977 in the case of Cosmos Steel Pvt. Ltd., four judgments of the Hon''ble High Court of Delhi in the cases of Kriahan Lal Ahuja and Ors v. Suresh Kumar Ahuja and Ors. 53 CC 60, Suresh Kumar Sanghi v. Supreme Motors Ltd. 54 CC 235, Chander Kishen Gupta v. Pannalal Girdhari Lal (P) Ltd. 55 CC 702 and Caparo India Ltd. (U.K.) and Machino Plastics Ltd. Vs. Caparo Maruti Limited and Others, .

15. In the case of Belgachi, the appellants also assailed the finding of the Board that no act of oppression and mismanagement has been made out. The appellants' case of mismanagement and oppression in respect of this company

primarily rests on failure to pay up statutory dues like provident fund. There have also been allegations of continuous loss, failure to pay up salaries etc. On this count, it has been stressed on behalf of the appellants that two of the members of their group (the first and the second appellants) had resigned from the directorship of Belgachi on 14th February, 2005, but the management of this company had not informed the provident fund authorities of such resignation, as a result of which they were also being exposed to criminal action. As regards New Terai also, there are allegations of non-payment of statutory dues. Submission has been made on behalf of the appellants that dues, on account of provident fund, gratuity etc. arise out of social welfare legislations and default in payment of such statutory dues are per se prejudicial to public interest, as also prejudicial to the interest of the company. In support of the submission that the statutory breaches constitute mismanagement and oppression, reliance has been placed on the case of Needle Industries (supra), a decision of this Court In RE: Albert David 68 CWN 163, a decision of the Hon''ble High Court of Bombay in the case of Bhajirao G. Ghatke v. Bombay Docking Co. Pvt. Ltd. 56 CC 428 and a decision of the Judicial Committee of the Privy Council in the case of Loch v. John Blackwood Ltd. 1924(1) ALL ER 200. In addition, the decision of the Hon''ble Supreme Court in the case Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, , and a judgment of an Hon''ble Single Judge of this Court in the case of Rabindra Nath Banerjee v. Certificate Officer 131 CC 85, have been cited in support of the submission that legislations covering Provident Fund and Gratuity are welfare legislations. Another authority, Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, , has been relied upon by the appellants in order to demonstrate the liability of the Director of a company in case of default committed by the Company in discharging their obligations under such welfare legislations. In order to establish that such statutory violation cause prejudice to the company and expose the company itself to criminal prosecution, some authorities have been relied upon, but I do not consider it necessary to refer to such decisions as it is a well-established principle of law that a company can be prosecuted under a penal provision.

16. In respect of New Terai, the additional allegation is as regards issue and allotment of 42000 shares in favour of the respondent Nos. 2 and 8 to 17, which the appellants claim are contrary to the provisions of the Companies Act, 1956 as also the SEBI Guidelines. The substance of the appellant's grievance made out in the petition on this Count is that the respondent Nos. 2 to 7 have shown issuance and allotment of such shares in the month of June, 2004, of which appellants had no knowledge until the time little before filing of the petition. The charge is that no general meeting was convened or held for this purpose, and no notice of any General Meeting was issued or received by any of the appellants. Such allotment has been made to persons close to and/or nominees of the Saraff family. The companies to which such shares have been allotted are owned and/or controlled by the nominees of Saraff family, having common directors and shareholders. Such acts have been ascribed as mala fide, with the intention of

grabbing greater percentage of shareholding, and reduce the appellants group insignificant, minority. Relying on a decision of the Judicial Committee of Privy Council in the case of *Howard Smith Ltd. v. Ampoi Ltd.* (P.C.) reported in 1974 AC 822 the appellants' submission is that the Board ought to have cancelled such allotment.

17. The substance of the appellants' allegation is that substantial shares has been acquired by the respondents who were acting in concert. On this Count, charge of the appellants is that there has been breach of Regulations 10, 11 and 12 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, as no public offer was made. Allegation has also been made of breach of inter alia Clauses 13.1 A and 13.4 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000, in that that was no disclosure in terms of Section 173 of the Companies Act, 1956 and admittedly there was more that fifteen days" gap between the date of allotment and date of passing of the resolution. On the basis of such admitted facts, it was contended, in the absence of fresh consent of shareholders, such allotment was illegal. The submission of the appellants is that such allotment was void, and should have been set aside, relying on a decision of Hon'ble High Court of Bombay in the case of *Shirish Finance and Investment (P) Ltd. v. M. Sreenivasulu Reddy and Ors.* reported in 2002(2) Comp. LJ 386.

18. In the case of New Terai, there is dispute as to whether any member of the appellant's" group continued to be directors in the company. In the petition before the Company Law Board, it was pleaded that appellant Nos. 1 and 2 were directors of this company till 2002. In the reply, however, it has been contended on behalf of the respondents that they continue to be directors, as no letter of resignation had been received by them and they signed the company's balance sheet of 31st March, 2003.

19. The appellants' case is that the finding of the Board does not reflect appreciation of these facts, and if these facts were considered by the Board, it would have led to the conclusion that there was oppression of by the controlling group in both these companies of the appellants, who constitute minority group. The foundation of this appeal is that the finding of the Board is perverse, and such finding can be challenged in an appeal u/s 10F of the Act. The authority relied upon in support of this proposition is the decision of the Hon'ble Supreme Court of India in the case of *Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others*, . Argument on behalf of the appellants was advanced to the effect that acts of mismanagement and oppression need not be proved with precision, but such acts of oppression can be gathered from indirect evidence. The authorities referred to by the appellants in this respect are the cases of *Cosmostecl* (supra). In *re In Re: Albert David Ltd., and Sahasrangsu Sen Vs. Brahmaputra Fertilisers and Distributors (Private) Ltd. and Others*, , all being decisions of this Court.

20. Even if no case is made out establishing oppression and mismanagement, it

was also submitted on behalf of the appellants, the Board has power to pass such order it finds just and equitable. My attention has been drawn to a large body of authorities in support of the proposition, being the case of Needle Industries (supra), Sangramsingh P. Gaekwad v. Shantidevi P. Gaekwad AIR 2005 SCC 809 a decision of the Hon"ble High Court of Andhra Pradesh in the case of Sri Ramdas Motor Transport Ltd. and Ors. v. Karedia Suryanaryana reported in 110 CC 193 (this decision was set aside by an Appellate Bench of the same Court and the judgment of the Appellate Bench has been reported in 127 CC 336, but the contention of the appellants is that the opinion of the Single Judge on this proposition of law was not disturbed), the case of Chaader Krishan Gupta (supra), Caparo India Ltd. (supra). The Court's wide power to give directions u/s 402 of the Companies Act, 1956 has also been recognised by the Hon"ble Supreme Court of India in the case of Kilpest Pvt. Ltd. and Others Vs. Shekhar Mehra, . An Appellate Bench of this Court in the case of Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick reported in 50 CC 771, and by the Madras High Court in the case of Shoe Specialities P. Ltd. and Ors. v. Standard Distilleries and Breweries P. Ltd. and Ors. reported in 90 CC 1, recognised this proposition. Relying on an english decision, Re: a Co. 1999(2) ALL ER, it has been argued that in equitable consideration legal rights may be superseded in appropriate cases.

21. The appellants have also contended that though the Board itself was of the opinion that reliefs ought to be granted to the appellants, no relief in reality was granted.

22. In the cross-objections of the respondents, the main ground taken is that the petitions of the appellants (petitioners) should have been dismissed by the Board, and no relief ought to have been granted. On these cross-objections, preliminary objection was taken by the appellants on their maintainability in an appeal u/s 10F of the Companies Act, 1956. However, no elaborate argument has been advanced. I am of the opinion, however, that the power of this Court hearing an appeal u/s 10F of the Act retains the jurisdiction of the Court conferred on it under the Provisions of Rule 33 Order 41 of the CPC or at least the same principle shall apply subject to the limitation that the scope of examination, shall be only on point of law. Thus, if the grounds taken in the cross-objections are confined to points of law in my opinion the same shall be maintainable. Accordingly, I propose to consider the case of the respondents made out in the cross-objection.

23. Contesting the claim of the appellants, the main argument of Mr. Mitra is that these two appeals are not maintainable, as no question of law is involved and no appeal lies against an order of the Board on their finding of facts. He submitted that the questions of law do not arise out of the order of the Board, and hence these appeals ought to be dismissed. Moreover, the relief for compulsory purchase was not claimed before the Board, and this prayer cannot be pressed at the appellate stage, lie has taken me through the grounds taken in the

Memorandum of Appeal, and submitted that there is no grievance to the effect that the Board erred in not granting reliefs as claimed in the petition.

24. As regards allegations of mismanagement and oppression on the count of statutory violations, mainly being default in payment of gratuity and provident fund dues, Mr. Mitra has advanced a three-fold defence for his clients. Firstly, he has submitted that in New Terai, the two of the appellants were directors admittedly till February, 2005, and were part of the management. Substantial part of the dues pre-date their admitted date of resignation in Belgachi and the company is suffering loss also since the year 2000, when the members of the appellant group was in management of both the companies. No complaint was made on these aspects when they were admittedly in. management.

His further case is that there is no allegation of siphoning of funds by diverting provident funds, and there is no evidence that the company has adversely suffered because of non-payment of such statutory dues. To attract the mischief contemplated in Sections 397 and 398, his contention is that the prejudice complained of must be qua the company or its members. The default in clearing the statutory dues at the worst could be harmful to the workmen, and there are recovery modes prescribed in the respective statutes.

The failure to clear the dues was attributed to overall deterioration in the productivity of tea gardens in the Terai region, and he contended that the overall condition of these companies could be due to inefficient management or bad management, but that would not constitute oppression and mismanagement under the above-referred provisions of the Act. He has drawn support for this proposition from two decisions of this Court, in the cases of *Mohta Bros (P) Ltd. v. Calcutta Landing and Shipping Co.* 40 CC 119 and *Hungerford Investment Trust: Re v. Turnover Morrison and Co. Ltd.* ILR 1972 Cal 286.

25. On the aspect of the Directors being exposed to criminal proceeding, his case is that this fact, per se, cannot constitute mismanagement or oppression. The decision of Hon''ble Supreme Court of India in the case of *Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others*, , has been relied on by Mr. Mitra. In this case, an Hon''ble Division Bench of this Court found that if a Director even if illegally terminated could not bring grievance to termination as to winding up the company for that single isolated act, even if it was doing good business and even if the Director could obtain each and every adequate relief in a suit in a Court. This view of the Division Bench was affirmed by the Hon''ble Supreme Court. The case of *Needle Industry* has also been cited by Mr. Mitra to strengthen his argument on this ground, and the following passage from this judgment has been referred to:

The true position is that an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead

justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom these acts are directed....

26. As regards issue and allotment of shares in New Terai, he justified the same on the ground that the shares were issued to strategic investors for the benefit of the company, which was admittedly in need of funds. These shares, sold at a premium of Rs. 90/- in a loss making tea company was itself a testimony to the fact that the company benefited from such acts, Mr. Mitra argued. Rebutting the charge of not giving prior notice or holding of General Meeting, he replied that notice to the appellants was sent under Certificate of Posting, and an Extraordinary General Meeting was held for this purpose. He denied any violation of the 1997 SEBI Takeover Code or the 2000 Guidelines. His submission is that the allotment took place in the year 2004, and the appellants were well aware of such allotments. Moreover, there was provision for complaining to SEBI itself on the charge of violation, and this allegation could not be brought before the Board. The case of the appearing respondents also is that such allotment did not bring about any material change in the status of the appellants much less in the management of the company. They formed the minority group in this company, and continued to remain so. As a block, their holding was reduced to 14% from 22% approximately by virtue of such allotment, and such reduction in voting strength did not materially alter their position or status as a block.

27. On the point of prayer of the appellants for a direction of compulsory purchase with default clause, Mr. Mitra's submission is that no prayer was made out for such direction before the Board. There was no pleading to the effect that the relationship of the contesting groups had collapsed warranting such drastic intervention by the Board. There was no evidence of souring of relationship. The appellants, he submitted, were free to exit by selling their shares through the stock exchange, but they had no right as a minority group to compel the respondents to purchase their shares. As regards the jurisdiction or power of the Board to make such order for compulsory purchase, he submitted that such power ought to be exercised in rare cases. Responding to the various authorities cited by the appellants, his case is that such directions are issued usually in cases where a minority group surreptitiously gains majority control.

28. Mr. Mitra had also placed reliance on the judgment of a Bench of coordinate strength of this Court delivered in A.P.O.T. No. 491 of 2005, in the appeal filed by the Saraff group in the case of Bateli Tea Co. Ltd. In this judgment, the decision of the Board so far the same related to Bateli Tea was set aside. But the finding in this judgment was confined to Bateli Tea only. Learned Counsel for the appellants however, submitted that the operation of this judgment had been stayed by His Lordship only for a period of four weeks and the same position has been directed to be continued by the Hon"ble Supreme Court. Under these circumstances, I am of the opinion that these appeals are required to be decided on their own merits.

29. Argument had also been advanced by Mr. Mitra to the effect that the order which the Board has passed is a discretionary order and hearing appeal solely on point of law, this Court ought not to re-assess the evidence and test the manner in which such discretion has been exercised, and substitute its own discretion. Two judgments have been cited on this proposition, being *Wander Ltd. and Another Vs. Antox India P. Ltd.*, and *Pratima Dutta v. Nilima Seal* 1997(2) CLJ 409.

30. The first point which falls for determination in these two appeals is as to whether the appeals are maintainable. Large part of the arguments on behalf of the appellants was directed on non-consideration or misappreciation of evidence and pleadings by the Board. For this purpose, certain facts have indeed been brought to my notice. While hearing an appeal u/s 10F of the Companies Act, law does not totally prohibit this Court from looking at facts. In the case of *Dale and Carrington Invt. (P) Ltd.* (supra), the Hon'ble Supreme Court, examining the scope of power of High Court in appeal u/s 10F of the Companies Act, held:

It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law.

In order to examine as to whether a finding of fact is perverse or based on any evidence or not, examination of facts, though for this limited purpose, becomes inevitable. And it is well within the jurisdiction of this Court to scan through the facts to test as to whether finding based on such facts are perverse or not.

31. The next point of Mr. Mitra questioning maintainability of this appeal is that the questions of law argued do not arise out of the order of the Board. I am unable to accept this submission also. If an order is assailed on the ground that the findings recorded in such order is perverse, this becomes a question of law arising out of the order itself.

32. In these two appeals, what has been mainly assailed is the finding of the Board that no mismanagement and oppression has been established in the cases of *Belgachi* and *New Terai*. In paragraph 21 of the order, considering the allegation on running up liabilities including provident including and incurring losses, the Board held:

Incurring losses or existence of huge liabilities need not necessarily mean mismanagement. It may, at the most, reflect inefficient management. The petitioners have repeatedly compared the performance of *Bateli* with the performance of other two companies. The respondents have adequately explained the reasons for the unsatisfactory performance of these two companies with which I am convinced.

33. This finding was sought to be challenged on two counts, lastly, it was contended that breach of these statutes exposed the companies to criminal proceeding, and were prejudicial to the interest of the company as well as public

interest. The directors belonging to the appellants' group were also being exposed to criminal action. Secondly, it was argued that performance comparison made by the appellants before the Board-related to companies in the Terai region only, and not between Bateli whose garden is situated in Assam and these two companies. The finding based on the performance of the two companies in relation to Bateli, which led to the conclusion that it was not act of mismanagement was assailed as being perverse.

34. Several authorities have been cited by the appellants to establish that statutory violation could constitute acts of mismanagement and oppression. But in none of these authorities has been held that any violation of statute or violation of any statute by the management would constitute acts of mismanagement and oppression. This position of law has been explained in the case of Needle Industry (supra). The passage from this judgment dealing with this issue has been referred to in the earlier part of this judgment. It has been further held by the Hon"ble Supreme Court in the case of Needle Industries:

But a series of illegal acts following upon one another can in the context, lead justifiably to the conclusion that they are a part of the same transaction of which the object is to cause or commit oppression the oppression of persons against whom those acts are directed.

35. In the case of Albert David (supra), the allegation was mainly of misfeasance. The allegation in the case of Bhajirao G. Ghatke (supra) related to various breaches of the Companies Act. In Loch v. John Blackwood Ltd. (supra) also, the grievance of breach of the provisions of the Companies Act. Thus, there was a direct nexus between the acts complained against and the shareholders' rights. In the cases of subject companies, appellants formed part of management as directors of both these companies during substantial period of time when the breach took place. Though it cannot be said that default in provident fund or gratuity is not prejudicial to public interest, in my opinion the same cannot, by themselves constitute acts of mismanagement or oppression under the provisions of Sections 397 and 398 of the Companies Act, 1956, unless it is also established such acts were part of an overall scheme to commit oppression of the members of the appellant group. The mere act of failure on the part of the respondent group to report the factum of resignation of the first two appellants to the provident fund authorities cannot constitute acts of mismanagement and oppression. It has been submitted that the directors belonging to the respondents' groups are also facing criminal prosecution. The comparison of the performance of the two gardens with Bateli whereas the appellants' comparison table showed performance of the tea estates situated within the Terai region only in my opinion is a trivial mistake. The Board has come to a finding on considering these facts that no case of mismanagement or oppression has been made out, and it would be beyond the jurisdiction of this Court hearing an appeal u/s 10F of the Companies Act, 1956 to embark upon a fresh enquiry on this issue. I do not find any perversity in the finding of the Board on this issue. The ratio of the

decision of this Court in the case of Mohta Bros (P) Ltd. is applicable on this point. As regards the other authority cited by Mr. Mitra reported in ILR 1972(1) Cal 286, learned Counsel for the appellants submitted that this judgment was set aside by an Hon'ble Division Bench of this Court by a judgment delivered on 21st May, 1981 in the case of Hungerford Investment Trust Ltd. v. Turnover Morrison and Co. Ltd. this was a composite judgment passed in Appeal Nos. 250, 251, 252, 253, 259 and 255 of 1970.

36. I shall consider now the legality of the Board's finding on the complain relating to the violations of SEBI Regulations and Guidelines. This issue is confined to New Terai. For the purpose of issuing shares u/s 81(1A) of the Companies Act, 1956, a general meeting is required to be convened and the notice for such meeting is required to be issued containing various informations, including the identity of the proposed allottees. Allotment pursuant to the resolution taken in a general meeting is required to be made within fifteen days from the date of passing of the resolution. Under the SEBI Regulations, 1997, if there is acquisition shares empowering the acquirer with 15% or more voting rights of a company, public announcement is required to be made. It has been alleged that the respondent Nos. 8 to 17 are acting in concert and has acquired more than the stipulated voting rights in New Terai without making any public announcement. A case of violation of SEBI (Disclosure and Investor Protection) Guidelines has been made out in that more than fifteen days have lapsed between the dates of passing of resolution at the purported meeting of shareholders granting consent for such issue, and the actual date of allotment. The case of the appellants is in the absence of a fresh consent of the shareholders, as per Clause 13.4.3 of this Guidelines.

37. In the impugned order, the argument of the appellants for setting aside the allotment has been recorded in paragraph 9. Substance of the allegations have also been recorded. But this allegation has not been examined at all. The Board has held:

Any way, this allotment cannot be set aside for two reasons: that the company was in need of funds and that Saraff group has agreed that the petitioners can have the liberty of acquiring shares in proportion to their shareholdings from 2nd and 8th to 17th respondents at the same price.

38. This finding of the Board, to the extent the Board has altogether declined to examine the appellants' allegation in my opinion is perverse. The Board has ignored the allegations of certain important investors' protection regulation. In the case of Shirish Finance and Investment (P) Ltd. (supra), it has been held that shares issued in breach of the Take-Over Code is void. I am of the view that just by offering the appellants the shares in proportion to their holding in the company, such acts, cannot be ratified. The allegation of the appellants is that this entire exercise was conducted behind their back. If such allegations are proved, the acts complained of would render the allotment void, as held in the case of Shirish Finance (supra). The acts complained of have resulted in

substantial reduction of voting rights of the appellants. This allegation is qua the company, touching upon the rights of minority shareholders. The company's need of finance could not justify overriding of the SEBI Regulations. I am of the view that the Board should have examined the allegation of the appellants on this count, and come to a finding.

39. Respondent's contention is that this point was not argued before the Board, and in any event, the Securities and Exchange Board of India Act, 1992 and the regulations framed thereunder being self-contained code(s), relief would be available under that code only. I am unable to accept this contention. I am also unable to accept the contention of Mr. Mitra that just because the appellants' status vis-a-vis their voting right did not suffer any material alteration the appellants cannot make out a grievance.

40. From the impugned order itself, it is apparent that this point was argued before the Board. But the two grounds on which the Board has sought, to ignore this part of the appellants' complaint without, examining it cannot be sustained. If the acts alleged against are of such nature that once such allegations are sustained, the act complained against would be void, a subsequent offer to make the complainant a party to the same wrong cannot cure it of its initial defect and legitimise a void act. Even if by such act, the appellants do not suffer loss from any special status in the company, their voting rights get considerably reduced.

41. It is true that before the Board, the respondents have denied these allegations. But this aspect, in my opinion, ought to have been examined. The allegations in this respect touches upon the rights of the appellants as shareholders and might constitute oppression if established. The Board should have examined these allegations.

42. The failure on the part of the Board to examine this aspect of the controversy and coming to a finding that such allegation of oppression has become infructuous cannot be sustained. The Board failed to consider relevant materials in testing the appellants' case of oppression and mismanagement on this head.

43. There is another aspect of the finding of the Board in the case of New Terai which needs to be examined. In the impugned order, Saraff group has been given the liberty to purchase the shares of the appellants. At the same time, the members of the appellant group who were on the board has in substance, been stripped of their directorship. There has been no reason given as to why the appellants' shares have been allowed to be retained in the Company at the will of the respondents but their representatives have been divested of the directorship. This direction, without directing proper parting, ex facie appears to be perverse.

44. In the case of Belgachi, I have held that no case of mismanagement or oppression has been made out. The arguments of the appellants have been that even if oppression or mismanagement is not made out, appropriate direction can be given by the Board to bring about complete settlement between the parties.

Such power of the Company Court, and of presently of the Board has been consistently recognised in this field of jurisprudence. In the case of Needle Industries (supra) it has been observed:

Even though the company petition fails and the appeals succeed on the finding that the Holding Company has failed to make out a case for oppression, the Court is not powerless to do substantial justice....

Having observed so, the Court passed certain directions. This principle has been re-confirmed in the case of Sangram singh P. Gaekwad (supra):

In a given case the Court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties.

45. Substantial justice, it has been argued by the appellants, in the present case would be a direction for complete parting of the two groups, giving option to the respondents to purchase the appellants' shares within a time frame, in default of which giving appellants such right. The case of the appellants is that having regard to the relationship between the contesting groups, that is the only way the two companies could be saved. Such course is permissible in law particularly in situations where the company's holdings are controlled by family groups. This would be evident from the directions issued in the cases of Krishan Lal Ahuja (supra), Chander Kishen Gupta (supra), Suresh Kumar Sanghi (supra) and Caparo India Ltd. (supra).

46. I accept the respondent's argument that such direction can be given only in exceptional cases. The direction for compulsory is also passed mainly in case where shares are allotted to alter the majority holding. This position of law emerges from the decision of Hon'ble Supreme Court in the case of Kamal Kumar Dutta and Anr. v. Rubi General Hospital Ltd. and Ors. 2006(5) Comp.LJ (SC) 511. An Hon'ble Division Bench of this Court in the case of Tea Brokers (P) Ltd. v. Hemendra Prasad Barooah 1998(5) Comp LJ 463, quoted with approval by the Hon'ble Supreme Court in the case of Dale and Carrington Invt. (P) Ltd. (supra), held:

A majority shareholder should not ordinarily be directed to sell his shares to the minority group of shareholders, if per chance through fortuitous circumstances or otherwise, the minority group of shareholders comes into power and management of the Company....

47. The power to direct compulsory purchase of shares to one of the contesting group thus is within the discretionary power of the Board, though such power ought to be sparingly used. In the cases involved in the present appeal, in exercise of the discretionary power, the Board has prescribed certain solutions for the two companies. The question that arises in this context is that in an appeal u/s 10F of the Act, when the Court is to hear appeal against the order only on point of law to what extent the directive given in exercise such discretion can be

tested? The two authorities, being the cases of Wander Ltd. (supra) and Pratima Dutta (supra) are for the proposition that such orders can be interfered only in cases where it is shown that the Court of First Instance has acted arbitrarily, capriciously or perversely. Though in these two cases, the subject of challenge was interlocutory order of injunction, the same principle, in my opinion, would apply in case of a final order passed on just and equitable ground, which essentially implies an order passed in exercise of discretion.

48. In the order impugned, the following submission of the learned Counsel for the respondents has been recorded: "Summing up his arguments, the learned Counsel submitted that the prayer of the petitioners that each group should control the ownership and management of one company cannot be granted. However, with the view to put an end to the disputes, his clients are willing to purchase the shares held by the petitioners in all the three categories."

49. While considering the reliefs to be granted, the Board held:

Therefore, in so far as Bateli is concerned, as acts of oppression has been established, relief could be granted and in so far as New Terai and Belgachi are concerned, relief could be granted to do substantial justice between the parties in view of strained relationship among the parties.

50. Learned Counsel for the respondents, advancing argument on the basis of cross-objections, submitted that there was no material before the Board to grant any relief and the petitions should have been dismissed straightaway. He also argued that finding of souring of relationship was confined to Bateli Tea Company Limited's case. In support of this submission, reference was made to the following passage in the order:

From the proceeding before me, it is evident that the relationship between the parties have soured so much that the respondents now are even trying to completely oust the petitioners from the management of Bateli by appointing a CEO.

51. Whether relationship between the parties had soured or not is essentially a question of fact. On the part of the respondents, their Counsel admitted that there was dispute between the parties and his clients offered a buyout to completely end the dispute. While in the pleading before the Board there is no overt manifestation of insoluble dispute through series of conflict situations between the parties before the present proceeding was started, there is a specific finding by the Board that the relationship between the parties was strained, and such finding was not confined to Bateli Tea Co. Ltd. In petitions of this nature, the rights of the parties ought not to be measured solely in terms of the assertions made in the petition, as has been held in the case of Ramashankar Prosad and Others Vs. Sindri Iron Foundry (P) Ltd. and Others, . The Board could have arrived at such a finding from the position of the parties taken during the proceeding also. The Board also concluded that the appellants were entitled to relief in Belgachi and New Terai. But the relief granted in my opinion was illusory,

in that only liberty was given to the respondents to buy the shares of the appellants in these two companies, without prescribing a time-frame and without a stipulation as to what would happen if they do not exercise such liberty.

52. A case was made out by the respondents that the appellants were free to sell their shares in the stock exchange and exit, and they could not compel the appellants to purchase their stake. It was also their case, that the appellants never applied for compulsory purchase before the Board, and they should not be permitted to urge this issue at the appellate stage.

53. Before the Board, however, reliefs were claimed in very broad terms. u/s 402 of the Act, the Board has been vested with very wide power to pass any order which in the opinion of the Board would be just and equitable. Thus, it is open for the Board to pass orders even if the same goes beyond the prayers specifically made in the petition. But such orders must be reasonable, and the directions issued must have a direct nexus with the findings of the Board.

54. I am of the opinion that in the impugned order--there are apparent inconsistencies which I have discussed in the earlier part of this judgment. Even if the appellants had not made their prayer before the Board for compulsory purchase specifically, because of the specific finding of the Board that the relationship between the parties had become strained and the appellants were entitled to relief, they become entitled to some form of relief for ultimate resolution of dispute. In reality, however, practically no relief was granted. The fact that the parties are free to exit by selling their shares by itself cannot be the sole ground for resisting a prayer for compulsory purchase. These are closely held companies having quasi-partnership characteristic and there are several authorities to some of which reference has been made in the earlier part of this order, compulsory parting can be directed.

55. Because of the reasons discussed above, I do not think the impugned order can be sustained, so far the order is applicable to Belgachi and New Terai. I am also of the opinion that the matter should be remanded back to the Board for deciding the issue afresh, since I am inclined to set the order for non-consideration of certain relevant factors in the case of new Terai, and for apparent inconsistency in the finding of the Board and the reliefs granted in the case of both the companies. Since my jurisdiction is confined to testing the order on questions of law only, I do not wish to, nor do I have jurisdiction to determine the nature of reliefs the appellants would be entitled to, for which factual issues would have to be considered and it is--the Board which has been vested with the discretion to decide the form of relief to be granted on just and equitable ground. This is the course which has been prescribed by the Hon'ble Division Bench of the Andhra Pradesh High Court in the Case of Sri Ramdas Motor Transport Ltd. v. D.S. Rao reported in 127 CC 336 (AP), with which I respectfully agree.

56. So far as the appellant's application being TA/301/07 is concerned, I do not think there is any scope of introducing new facts at this stage, and the same is

dismissed.

57. Both the appeals under the circumstances stand allowed with the above observation, and the impugned order, so far the same relate to Belgachi and New Terai are set aside. Both the cross-objections stand dismissed, and the Company Law Board is hence directed to decide the two Company Petitions afresh in the light of observations made in this judgment.

Parties to bear their owe cost.

Later:

Let an urgent xerox certified copy of this order, if applied for, be supplied to the parties forthwith, subject to compliance with all requisite formalities.