
(1993) 03 CAL CK 0008
In the Calcutta High Court
Case No : O.P. No. 254 of 1988
In Re: Bagri Cereals Pvt. Ltd.

Date of Decision : 22-03-1993

Acts Referred:

Companies Act, 1956 — Section 149(2)(a), 198, 283(1)(g), 397, 397(2)(a)
Evidence Act, 1872 — Section 2
Specific Relief Act, 1963 — Section 16, 16(c)

Citation : 98 CWN 617

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Judgement

Umesh Chandra Banerjee, J.—Relief against the oppression of minority in the corporate management has been provided under the provisions of the Companies Act in Sections 397 and 398. The statute provides that in the event of oppression of a member or members. Law Courts would be within its jurisdiction to grant such relief or reliefs as the Court may deem fit and proper having due regard to the concept of justice. In the instant matter the petitioner has moved this Court for redressal of such a grievance. Before, however, advertent to the rival contentions, the preliminary point in regard to the maintainability of the application as raised by Mr. Sen ought to be dealt with at this juncture as that goes to the very root of the matter.

The preliminary point refers to the non-maintainability of the action before the Court by reason of lack of necessary averments as provided in Section 397(2)(b) read with Rule "88 of the Companies Court Rules framed under the Companies Act. 1956 and the form prescribed being Form No. 43. For convenience the above-noted provisions are noted hereinbelow:-

(2) If, on any application under Sub-section (i), the court is of opinion...

(b) That to wind up the Company would unfairly prejudice such member or members but that otherwise the facts would justify the making of winding up order on the ground that it was just and equitable that the Company should be wound up

Rule 88 of the Companies Court Rules provide:

(i)... a petition u/s 397 shall be in form No. 43...

From No. 43 as prescribed under the Companies Court Rules after detailing out the other formalities in Paragraph 7 provides:-

....(conclude as follows)...

In these circumstances, the petitioner(s) submit/submits that the affairs of the Company are being conducted in a manner oppressive to a part of the members of the Company including the petitioner(s), and that while it would be just and equitable that the company should be wound up, to do so would unfairly prejudice the petitioner(s) and that part of the members.

2. Relying on the above-noted provisions it was contended that on a plain reading of Section 397(2)(b) read with Rule 88 and Form 43 that it is for the petitioner to allege that to wind up the company would be prejudicial to the members of the Company but the facts and circumstances of the case justify the making of the winding up order on the just and equitable ground. Mr. Sen drew attention of the Court that since no case for winding up has at all been made out in the petition and in the absence of pleading of winding up, the petition is liable to be dismissed in limine, as otherwise the petition does not disclose a cause of action.

3. The issue, therefore, arises for consideration as to whether there is a mandate under Rule 88 that the petitioner in an application u/s 397 must conform to Form No. 43. Incidentally it is to be noted that the Companies Court Rules have been framed under the Act and has due statutory sanction, similar is also the position in regard to forms as prescribed under the rules and it is on this basis it is contended that Form No. 43 makes it obligatory to the applicant to make the averments as prescribed in the form as noted above.

4. It is on this perspective Mr. Sen contended that there must be a formation of opinion on the part of the Court that on the facts alleged an order of winding up would be justified on just and equitable grounds and in the absence of such an averment, question of formation of opinion would not arise by reason wherefor the question of assumption of jurisdiction under the act to deal with the matter like the present would not arise.

5. There is no denial of the fact that forms prescribed under the statute ought to be strictly adhered to as otherwise the whole intent and purpose of providing the form would be frustrated and the intent of the legislature, would be rendered nugatory and the Law Courts can never be a party to such a situation but the fact remains to be considered as to whether the form as prescribed under the statute can be treated as one mandatory or directory. In the event the Court finds that the requirement of the forms are mandatory in nature then and in that event there is no option left to the Court in declaring it to be so. The situation would, however, be different in the event the Law Courts find that the forms

prescribed are merely directory in nature. The Law courts in the event, however, shall have to consider as to whether omission to conform to the requirements of the form would lead to an injustice and it is against this backdrop the Law Courts shall have to consider as to whether the form prescribed under Rule 88 can be termed to be mandatory in nature so as to declare the action as not maintainable as contended by Mr. Sen.

6. It is to be noted that the Rules framed under the act do not in fact envisage that it is only upon compliance with the statutory form, the Court will have the jurisdiction to entertain the application neither it is provided that in the absence of such a compliance Law Court loses its right or authority to entertain the application. Where instances of obvious oppression are brought to the notice of the Court without there being any averment to the effect and as prescribed in Rule 88 Read with Form No. 43, would the Law court be justified to be a mere passive spectator of such a situation and refuse relief to an applicant who has sought redress before the Court on the ground of such an oppression ? Technicality ought not to be allowed to impede the course of justice - The old draconian concept of law has changed : it is no longer a feasible proposition of law that in spite of the fact that grievance exists Law Court cannot intervene by reason of such a technicality. In my view, Law Courts cannot afford to be that pedantic in its approach - Law Court exists to give relief in appropriate cases since technicality there might be many but that ought not to put an embargo on the assumption of jurisdiction in the event the facts warrant such an assumption.

7. Turning on to the stricter terms of law, however, it is time for the Law Courts to consider as to whether the requirements can be termed to be mandatory or not. It will, therefore, have to be read into the act that in the event of non-compliance of the requirements of Form-43 the same would be a bar to a relief u/s 397 - Is there any bar to such relief u/s 397? A slight diversion at this juncture may prove to be very useful. Section 16(c) read with explanation of the Specific Relief Act, 1963 prescribes that a party, who fails to aver and provide that he has performed or always been ready and willing to perform the essential terms of contract which are to be performed by him other than the terms the performance of which has been prevented or waived by the defendant. The legislature has introduced this particular section in the Statute with a heading "Personal bars to relief there is thus a specific provision for bar to relief in the absence of such a pleading of readiness and willingness to perform his part of the obligation. The statute, therefore, itself derecognizes and makes it abundantly clear that in the event of there being no such averment in the pleading, the party making the grievance shall not be allowed to obtain any redressal of his grievance from a Court of Law. There is, however, no such provision in the statute under consideration. The rules framed under the statute also do not prescribe such a restriction. In the absence of such restriction, can it be said to be mandatory in nature ? In my view, the answer cannot but be in the negative. It is also to be noted, at this juncture, there it is a pleading of fact that is required to be pleaded under the Specific Relief Act. The requirement of Form 43 is a

satisfaction of the Court on the basis of the facts as enumerated in the petition viz., that the facts would justify and order for winding up on just and equitable ground but shall not direct such winding up as it would be prejudicial to the members of the Company. There is some amount of difference between the pleading of fact which the statute requires and a submission to Court on the basis of which the Court will form its opinion in regard to the existence of certain facts. There is, thus, therefore, a basic difference between a mandatory requirement of the law as is prescribed u/s 16 of the Specific Relief Act and the requirement of law as is prescribed in Form No. 43 read with Rule 88 of the Company Court Rules -whereas in one case it is a matter of fact that has to be established before the Court, in the other case the Court has to form an opinion on the basis of which justice shall be administered. Strong reliance was placed on the decision in the case of Ouseph Varghese Vs. Joseph Aley and Others, but in my view, since the decision pertains to Section 16 of the Specific Relief Act the same is clearly distinguishable in the facts and circumstances of the matter under consideration and as such has no application in the matter in issue. Two other decisions relied upon by Mr. Sen, vis. 70 CWN 468 (In the matter of Bangeswari Cotton Mills Ltd.,) and Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others, do not really advance his case any further. Whereas the decision in Bangeswari Cotton Mills case (supra) has merely stated that the Companies Court Rules and the form prescribed therein have the due statutory force and the decision of Maharani Lalita Rajya Lakshmi's case AIR 1962 Cal - 127 (Supra) has in no uncertain terms laid down that the Court must be satisfied on both the counts as laid down in Section 397 (2) (a) and (b) viz., that it would be just and equitable to wind up the company but winding up order would unfairly prejudice the petitioner. As a matter of fact, the observation as above obtains support on last of the two decisions noted above : It is a formation of opinion of the court to the effect that the facts warrant such a conclusion since the order of winding up would be prejudicial to the interest of the company or its members. The Court will assume jurisdiction u/s 397 to redress the grievance of a member. It is a formation of opinion of the Court which cannot be equated to a pleading of fact as laid down u/s 16 of the Specific Relief Act and in order to have such a formation of opinion of the Court all necessary facts must be pleaded. Assuming for the time being that no fact is pleaded for the purpose of such a finding of fact by the Court but there exists an averment as laid down in Form No. 43, as opposed to all details and facts pleaded without such an averment, can it be said that in the former case Court will assume the jurisdiction whereas in the latter the Court cannot assume the jurisdiction because of omission of such an averment ? Mere assertion of statutory ingredient, as contended by Mr. Nag appearing for the applicant, u/s 397 or 398 will not amount to compliance with paragraph 7 of either Form-43 or 44 and I am in full agreement with Mr. Nag's contention in regard thereto.

8. The other count which has been very strongly canvassed by Mr. Nag ought also to be adverted in this context. It was contended that the averment of

submission can never amount to a pleading of jurisdictional fact as a condition precedent. Mr. Nag submitted that verification of pleading of submission can never be true to knowledge or based on information and will not confirm to the definition of fact as defined by Section 2 of the Indian Evidence Act. As an illustration of pleading of jurisdictional fact Mr. Nag referred to the usual prayer for leave under Clause 12 of the Letters Patent and submitted that the same is not a pleading of jurisdictional fact. I am, however, unable to accept the contention of Mr. Nag on this count that pleading under Clause 12 verified as submission cannot be termed to be a pleading of jurisdictional fact being a condition precedent in the matter of maintainability of a suit.

9. In any event, however, in the view, as noted above, and by reason of the fact that Section 16 of the Specific Relief Act cannot be termed to be in pari materia with Section 397 of the Companies Act at all the analogy drawn by Mr. Sen on this count cannot also thus be accepted. The decision of the Supreme Court in 1969 2 SCC (supra) does not also lend any assistance to Mr. Sen in the facts of the matter under consideration since Supreme Court was mainly concerned with Section 16 of the Specific Relief Act and the same is thus clearly distinguishable, as noted above, more so by reason of the fact that there is no restriction imposed by Section 397 or even by Rule 88 of the Companies Court Rules. Incidentally it is to be noted that though the provisions of the CPC have full application, there is however, no application for taking the petition off the file under Order 7 Rule 11 of the Code. As a matter of fact, the Company's case is not that the petition, as it stands, does not disclose any cause of action or is barred by any law as provided under Order 7 Rule 11(a) and 11(d) of the code. In short, the issue ought to be judged on the concept of justice, as noted above. The old concept of law has changed and the Law Court must proceed on the basis of the need of the present day since process of law is a social process, it must change with the changing needs of society. In the event, the Court is of the opinion that there is, in fact, substantial injustice, by reason of such defects of irregularities the Court shall not hesitate to dismiss the action. Can it be said that in the facts and circumstances of the matter under consideration the averment in terms of Form No. 43 is of such a serious nature that it has resulted in gross injustice ? In my view, it cannot be termed to be so, but a formal defect and no injustice can be said to be caused to the company by reason of the absence of such an averment. Form No. 43 has been prescribed under the Companies Court Rules as mere matters of guidance as to the existence of sufficient material before the Court for the purpose of dealing with the matter in proper perspective. In the event, there is an averment of essential ingredients of the statutory form the departure from rigorous adherence to such form would, in my view, not make the pleading demurrable in the sense of nullity. The observation of this Court in Darjeeling Commercial Company Limited vs. Pendent Tea Company Limited (1981 Tax L.R 2485) lends support to the view expressed above. In the result the preliminary point as raised by Mr. Sen cannot, thus be accepted.

10. It is at this juncture however, a brief reference to the factual aspect of the matter ought to be made.

11. The respondent No. 1 company, Bagri Cereal Private Ltd., was incorporated under the provisions of the Companies Act in November, 1970 having its registered office at 207, Maharshi Debendra Road, Calcutta-700 007. The Article of Association of the Company, inter alia, provides that until otherwise determined by the company in general meeting, the number of Directors shall not be less than two and not more than seven and one Mandir Bagri and Puran Chand Bagri became the first Directors of the company. The qualification of a Director in terms of the Article of Association shall be holding in his own name at least 50 equity shares of the company. The article further provided that no Director shall be disqualified by his office as such from contracting with the company either as vendor, purchaser, lessor, lessee, lender or otherwise nor any such contract or arrangement shall be avoided by the company. It is the definite case of the petitioner and there is no dispute in regard thereto that the company is a family concern as the entire shareholding of the company is controlled by the members and/or persons connected with the Bagri family. According to the petitioner, all the company's firms and trusts belonging to the Bagri family have been created, developed and nurtured from out of profits of the parent firm M/s. Moti Ram Ratan Chand of which the petitioner No.1 and some of the respondents are the partners. The petitioner contended that this firm of Moti Ram Ratan Chand under its umbrella has various other companies and trusts being the joint family business of Bagri Group with Mangilal Bagri. The respondent no. 6 and the eldest brother of the petitioner no. 1 are the Managing Partners and keep Bagri Group of family business.

12. On the factual score it appears that a partial family partition was effected in March, 1965 when Mohan Lal Bagri, Raghu Nath Bagri both being the brothers of petitioner no. 1 separated from the family business after dividing the business of the partnership firm and other companies among the partners. The petitioner nos. 1, 2 and 3, as it appears from the records, jointly owned 13.92% of the total paid up equity capital of the company consisting of 4,800/- fully paid up equity shares of Rs. 100/-each. The break up of which as below:-

H.P. Begri 2050 shares, Mrs. Ranu Bagri 1250 shares and Ms. Sonali Bagri 1500 shares.

13. Incidentally it is to be noted that after incorporation on 18th November, 1970 the company commenced his business in March/April, 1971 by way of operating a Marwari Flour Mill. Subsequently the flour mill of the company shifted its operation from 244/2, A.P.C. Road to 15, Canal Road setting up new flour mill there.

14. It is at this juncture that the petitioner's contention shall have to be noted. The petitioner in no uncertain terms submitted that the company was at all material times intended to be the family concern and was in effect a partnership

concern of different members of the Bagri family and the interest of the partners was shown as shareholders of the company. The petitioner submitted that, as a matter of fact, when the petitioner was studying in United States of America the respondent No. 6 herein urged and persuaded the petitioner to come back to India to look after the business of the respondent no. 1 which was then about to commence. The petitioner on such a representation did, in fact, come to India and the business of the company commenced in or about March, 1971 and the petitioner was taken on the Board with all benefits. The petitioner contended that the petitioner used to receive such benefits until, however, it was illegally stopped in March, 1987. It is the petitioner's definite contention that the company was, in fact, a family company and the assets of the company were treated as such. As an instance of such a family company the petitioner submitted that the flats and the cars purchased by the company were being used by the family members totally being unconnected with the company.

15. Incidentally it is to be noted that in a petition u/s 397 of the Act it is left to the Court to decide on the facts of each case as to whether there exists any oppression which calls for action. There is statutory definition of what oppression is but the fact remains it must be shown that the conduct is oppressive and the events shall have to be shown in such a manner so as to evince a consecutive set of facts which would render the Court to come to a conclusion that the company is being conducted in a manner oppressive to some members of the company. The conduct shall have to be burdensome, harsh and wrongful. It is now well settled principle of law that isolated act by itself may not support the inference that there was a mala fide intention or that the act can be termed to be as such oppressive or burdensome. It is further to be noted that a mere lack of confidence would not bring home the charge of harsh and wrongful act neither it can conclusively prove an oppression of a minority by the majority. There must be an existing element of lack of probity or fair dealing to a member in the matter of his rights as a shareholder. In this context, reference may be made to the decision of the Supreme Court in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., It is to be noted further that inefficient management will not amount to an oppression neither the Court is to act as a supervisor to the grievance of disgruntled share-holders.

Having considered the law, as above, let us now try to analyse the factual details and the grievance of the petitioner in slightly more greater detail.

16. The allegations of oppression, as made out in the petition, can be broadly classified under two heads, namely, Specific and General.

17. As regards the general allegations the petitioner has contended that a change in attitude of M.L. Bagri towards the petitioner was noticed after 1984 since the above noted M.L. Bagri conferred on to his son a greater voice and control in the management of the company.

18. On the second count it has been alleged that though, M.L. Bagri has ceased

to be a Director of respondent No. 1 yet he controlled the entire show in regard to the management of the company.

19. On the third count the petitioner's grievance has been in regard to the deprivation of even free access to the registered office from December, 1986.

20. On the specific allegations issue the petitioner alleged the following:-

i) The registered office of the company was at 207, Maharshi Debendra Road which was subsequently shifted to 33A, Jawaharlal Nehru Road (Chatterjee International Centre) being a property purchased by the company but from July, 1987 the registered office was shifted back to 207, Maharshi Debendra Road. In the records of the company, however, such shifting was shown to have taken place in July, 1987. It is on this count that Mr. Nag placed very strong reliance, that shifting of the registered office was effected for total ouster of the petitioner herein. There has been no Board resolution and the same was done with a purpose. Such wrongful shifting of registered office was duly brought to the notice of the Registrar of the Companies in December, 1986 by the petitioner.

In the letter to the Registrar of Companies, the petitioner was a principal executive as also a Director of the company but he was not allowed to enter the registered office for almost a year at 33A, Chowringhee Road which had been kept under lock and key and the other two Directors viz., Ghanashyam Das Mundra and Jagadish Prasad Bagri were operating from 207, Maharshi Debendra Road although that was not the registered office of the company.

ii) From the balance sheet it appears that various loans have been granted by the respondent no. 1 to the companies and/or firms controlled by M.L. Bagri and to his family members to the extent as indicated in the petition viz., To Howrah Flour Mills Rs. 17,06,699.70 P. Gita Devi Bagri, wife of M.L. Bagri Rs. 5,31,041.00 P. and M.L. Bagri charitable Trust Rs. 3,05,000.00 P.

A personal loan appears to have been given to one Mangilal Bagri amounting to Rs. 3,89,063.60P by the respondent. It is the petitioner's definite case that loans to different relations of M.L. Bagri are patently illegal more so by reason of the fact that the respondent no. 1 company has been borrowing large sums of money from bank and paying interest thereon. The petitioner further alleged that a sum of Rs. 4,55,465.50P has been shown as the outstanding balance in respect of loans that were granted to J.P. Bagri by the respondent no. 1. Incidentally it is the petitioner's definite case that the petitioner no. 1 has never sanctioned any of the loans and was totally unaware of it and only came to know about the same from the balance sheet of the respondent no. 1 sometime in March, 1988. On this count the petitioner, therefore, submitted that the entire funds and assets of the company, being the respondent no. 1, have been and still are being utilized for the personal profit and gains of the family members of Jagadish Prasad Bagri and M.L. Bagri and their sons and daughters to the exclusion of all others including the petitioners.

iii) The balance sheet of the respondent no. 1 as on 31.12.1986 depicts that the respondent no. 1 has purchased 1/6th undivided Interest in premises no. 28, Chandi Ghosh Lane, Calcutta. The acquisition of the said property by utilisation of the funds and assets of the company has been stated to be illegal, inasmuch as the same necessarily involved blockage of huge capital of the company which, in any event, is totally alien to the running of a flour mill. In fact, the petitioner alleges that there is no immediate possibility of utilisation of the property for any business of the respondent company. The petitioner further stated that this particular acquisition of undivided interest was had for the benefit of the members of Jagadish Prasad Bagri and there exists no Board resolution confirming such a purchase.

iv) In March, 1988 six (6) roller boxes, belonging to the respondent company were sold to Saria Roller Flour Mills, Saria, Dhanbad, inspite of the same being hypothecated to the United Bank of India, at a very nominal price. The petitioner contended that these roller boxes are required for proper and effective functioning of a flour mill and sale of such machinery was in any event wholly illegal and wrongful. The petitioner further contended that the sale of the above noted roller boxes is also in violation of the condition of licence obtained by the respondent no. 1 issued under Industries (Development and Regulation) Act, 1951. It has been stated that flour is a schedule item under item 27 of the First Schedule to the Act and every flour mill has a capacity of crushing, dependent on the number of roller boxes that the particular unit has at its factory and the wheat is sanctioned on the basis thereof. It is the petitioner's definite case that inspite of sale of the above-noted six (6) roller boxes no intimation has been given to the authority concerned and the same quota of wheat is being obtained on the basis of the number of roller boxes which constitutes infringement of the condition of licence.

21. Before proceeding further in the matter, it would, however, be convenient to note one of the basic objections of Mr. Sen that this application, being basically a petition for enforcement of the rights of the petitioner No. 1 qua-Director, is not maintainable u/s 397. It is to be noted that Roy Chowdhury J., in the case of Cosmos Steel Ltd., held that relief under 397 is not only available to qua-member but even qua-Director or even qua-creditor. In *In Re: Albert David Ltd.*, it has been held that the right to appoint a Director is a valuable membership right and when that right is infringed, his right as qua-member is also affected. Furthermore, and in the event the instant application is a composite application u/s 397 and 398 of the Act. Section 398 expressly provides for a change in the composition of the Board as one of the grounds for Court's intervention if as a result of that it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or to company's interest. It is to be noted that Section 398 is not inconsistent with or alternative to Section 397 and Section 398(1)(b) clearly shows that a Directorial complaint if prejudicial and likely to affect company's interest will be actionable. It cannot and does not mean that no complaint can be made regarding Directorial office or the

Directorial deliberations or the bafrications of the Director's Minutes Book. In the instant case the first petitioner has been shown to have vacated office as a Director on different date and thereafter sought to have been removed at Extra Ordinary General Meeting. This establishes not only uncertainty but illegality of de jure character - of the present. Board. To satisfy the requirements of Section 398(b) it is enough to establish that there was a likelihood of the affairs of the company being conducted in a manner prejudicial to the interest of the company. Needless to record here that the shareholders have a right to appoint a Director, though not only he is a majority shareholder but such a right may exist if he is a minority share holder. The association of the company was formed on the basis of an understanding that be would remain associated with the management and the shareholders, thus, has also a right to retain his Directorial office pursuant to such an understanding. In fine, it is to be noted that removal and appointment of a Director by the Court is permissible u/s 210 of the English Companies Act, 1948 and similar relief was granted in Albort David (surpa) and if relief can be granted regarding the Directorial matter, in my view, there cannot possibly be any reason as to why complaint regarding a Directorial matter cannot be entertained u/s 397.

22. The other aspect of the matter, before going on to the merits, ought not to be lost sight of. Mr. Sen was extremely vocal in the matter of delay in presenting the instant application, so far as the petitioner is concerned. It is well-known equitable maxim that delay defeats equity but can the application be thrown out in limine on the ground of delay? It is to be rioted here that the relief, asked for is not a relief in equity but a statutory right. Statute in no uncertain terms has recognized the right of the minority shareholders that in the event there being any oppression. Law Courts would be authorized to remedy the wrong, as such, delay by itself ought not to be a deterrent factor in the matter of grant of relief under Sections 397 and 398, though, however, it cannot possibly be said that if delay amounts to abandonment of the right, law Court would not be justified in entertaining a petition. The action of a petitioner over a long period of time with full knowledge of his rights and in the event a petitioner refrained from exercising his right, the question of delay needs to be considered even in a petition under Sections 397 and 398 of the Companies Act. There must be positive waiver resulting in, which involves release and total abandonment since that might involve prejudice so far as the company is concerned. Can it be stated that the petitioner herein has abandoned his right ? In my view, by reason of the repeated complaint of the petitioner no. 1 to different persons over a period of time including the Directors do not establish any waiver or release or abandonment. Significantly enough, however, the point has been argued at length but there is no pleading of actual sufferance of any prejudice by reason of such a delay, so far as company is concerned in the counter-affidavit. Be it noted here, that this is not an application u/s 397 and cannot be equated with an application for grant of interlocutory injunction but a statutory relief has been claimed in order to have a defence of delay and laches to succeed. It must

appear that there has been unreasonable delay by the petitioner in the commencement of prosecution of proceedings. In the instant case various returns filed with the Registrar of Companies and other authorities showing diverse date of vacation of office of the petitioner no. 1 as a Director. The resolution passed at the Extra Ordinary General Meeting on 17th May, 1998 proposing removal of petitioner no. 1 with the retrospective effect involves the question of construction of public records.

23. In that view of the matter, the question of delay being a bar in the presentation of a petition under Sections 397 and 398 of the Companies Act does not and cannot arise.

24. Before proceeding further, however, the submission of Mr. Sen also ought to be noted viz., that the petition has been made with the oblique motive. Mr. Sen submitted that if the petition is filed with an oblique motive and not for redress but to extort money it should be dismissed as an abuse of process of this Court. In support of this submission Mr. Sen relied upon Buckley on Companies Act, 14th Edition, page 492 as also Halsbury's Laws of England, 4th Edition, vol. VII, paragraphs 1010 and 1011. Further in support of his submission Mr. Sen drew the attention of the Court to Paragraph 28 of the petition wherefrom it is evident that the petitioner is aggrieved since November/December, 1986 and there is no explanation what the petitioner did upto May 1988 when the present application was moved. Mr. Sen submitted that in order to succeed in an application u/s 397 the Acts must have to be a continuous act and concluded actions are not sufficient. Incidentally it is to be noted that on and since March, 1988 correspondence followed wherefrom the grievance of the petitioner was lodged and as such, question of there being any delay or no explanation does not and cannot arise. It is also a connected issue with the issue of delay and by reason of the observation, as noted above, the contention of Mr. Sen as regards the petition being barred by reason of oblique motive of the petitioner does not and cannot arise.

25. Turning attention on to the merits of the matter and this specific allegation, as noted above, Mr. Sen submitted that the Registered Office of the company which are formally situated at Alu-Posta was shifted to 33A, Jawahar Lal Nehru Road, Calcutta and thereafter shifted back to Alu-Posta with effect from 1st January, 1986 and then shifting to Chatterjee International Centre at Chowringhee Road was at the instance of petitioner no. 1 alone but when it was found that the business of the company was being adversely affected by reason of transfer of the Registered Office, the Registered Office was again shifted back to Alu-Posta with effect from 1st July, 1987. In support of this submission Mr. Sen submitted that another difficulty was faced by the company that it had to incur double expenses for maintaining two offices viz., at Alu-Posta and one at Chatterjee International Centre. Admittedly, Alu-Posta Office was maintained and the reason for shifting again from Chatterjee International Centre to Alu-Posta, as Mr. Sen submitted, is that the Alu-Posta area being the main market for grain

dealers the latter were unwilling to come to Chowringhee to deal with the company and as such, the registered office was shifted back again to Alu-Posta. If the Alu-Posta office was subsisting, question of experiencing any difficulty by the whole-sale grain dealers or they are unwilling to come to the Registered Office does not and cannot arise. The grain dealers will have to deal with the company in its graining activities which was admittedly at Alu-Posta and not in the Chatterjee International Centre, as such the reason for shifting back to Alu-Posta cannot be appreciated. As regards the submission of transfer being at the instance of petitioner no. 1 apart from a bare allegation in regard thereto there is no other documentary support as a corroborative evidence before the Court. Petitioner No. 1's insistence cannot, therefore, be substantiated in any way and I am unable to accept the contention, as has been put forth by the company, in regard to the shifting of the Registered Office from Alu-Posta. In any event, the petitioner no. 1 cannot be termed to be that important in the company so that his insistence would be given effect to. There is no record of such insistence and the petitioner's grievance, as appears from the Registrar of Companies, in December, 1986, being a contemporaneous records, sounds a different note, more so by reason of the fact that the petitioner was not allowed to even enter the Registered Office at Chatterjee International Centre and the Alu-Posta Office was being operated by the other two directors, to the total exclusion of the petitioner tell a different story. The factum of continuation of trading through Alu-Posta Office is an admitted fact and the machination of Mr. M.L. Bagri, as Mr. Nag submitted, cannot, thus be obliterated at all. He was at the helm of affairs and controlling the company on the factual context, therefore, the petitioner's grievance on first score succeeds.

26. As regards the second count viz.. loans and advances being given by the company to the companies and/or firms controlled by Mr. M.L. Bagri and his family members. Mr. Sen contended that there is no truth in the same Mr. Sen submitted that on usual course of business the company received wheat from the Food Corporation of India and in as much as the company is required to make advance payment and Food Corporation of India in turn releases wheat according to available quota, the company had deposited a sum of Rs. 19.30 lakhs with the F.C.I. in the expectation that the wheat for the equivalent amount would be received by the company. Mr. Sen further submitted that since the company had declared a look out at its mill in November, 1986 and in as much as the F.C.I. requested the company to lift the quota of wheat which the company could not consume in its factory due to the above-noted look out, the company approached Howrah Flour Limited to take the wheat which the F.C.I. had allotted to the company and it was under such circumstances value of the said wheat being a total sum of Rs. 19.49 lakhs was shown in the accounts of the company as advanced to Howrah Mills Limited on the advice of the Howrah Flour Mills Limited to the company who was thus, benefited by reason of the co-operative attitude of the Howrah Flour Mills Limited. Mr. Sen, therefore, submitted that the entire allegation about the alleged loan said to have been given to Howrah Flour Mills

Limited follows flat in the fact.

27. On the factual score, it appears that the flour mills of the company was under lock out between 10th November, 1986 to 11th May, 1987 and the information about the look out was also sent to the Registrar of Companies, Auditors as also to the Companies' Directors. Before proceeding on to the validity of the loan Mr. Sen's submission as to the effort of the Howrah Mills to save the prestige of the company, there is no manner of doubt that the wheat quota is given to a particular flour mill on the basis of milling capacity, the quota cannot be transferred and the sale therefor is illegal. It is an actual users quota and in the event of inability to lift the quota, it is incumbent on the quota-holder to surrender the quota or the allotment to the Food Corporation of India. There is no right or authority to seel the same in favour of a third party. No question of trading in wheat quota arises. As such, the concept of transfer of wheat quota allotted to the company in favour of the Howrah Flour Mills does not and cannot arise and the action in regard there to cannot but be termed to be in utter disregard of the existing law and practice and is thereby illegal. The company admittedly has indulged into an illegal activity which by no stretch be allowed to continue. On the specific issue of loan, it appears from the balance-sheet for the year ending 31st December, 1986 that there exists a loan of 17,6,699.72 to Howrah Flour Mills. The amount is said to have been repaid by 11th May, 1987. The balance-sheet nowhere records or indicates this loan due to the sale of wheat stock or transfer of any stock. There is no manner of dispute that the Howrah Flour Mills is under the control of Mr. M.L. Bagri. In the counter-affidavit, it has been stated that at the suggestion of the auditors, the amount has been shown in the balance-sheet as a loan. No confirmation from the auditor, however, has been produced before the court in regard thereto. There is no evidence, on record, of advance to Howrah Flour Mills shown in the Books on the advice of the auditor of the company. In the affidavit-in-reply, however, the petitioners have come out with a case which is significant to be noted herein to the effect that the respondent-company made secret profit from the transaction. Release orders of about 900 M.T. worth of Rs. 19.30 lakhs for the purchase of wheat was obtained from F.C.I. during the lookout period. F.C.I. delivered the wheat at Rs. 200 and Rs. 205/- for two qualities per quintal together with sales tax at the rate of one per cent, the open market of wheat price, however, at the relevant period was Rs. 255/- to Rs. 260/-per quintal. As such, it has been alleged that secret profit has been made to the extent of Rs. 4,500,000/- There may not be factual basis but can this be totally ignored is there a possibility at least of such a secret profit. I do not intend to answer the same but the fact remain that Mr. Nag has been successful in his attempt to create at least a doubt in the mind of the Court. In the normal course of events, in the event there being temporary inability to lift the wheat quota, the company ought to have informed the F.C.I. about such inability and as such, asked for postponement of the issuance of the quota or the licence but from the fact of the matter under consideration, we do not find any such step or steps, on the contrary, the company without any hesitation came

forward with a case that to assist the respondent company, Howrah Flour Mills give an immense support and cooperation in the matter of lifting of the wheat what happened to the wheat since, admittedly, as per milling capacity of Howrah Flour Mills was also allocated a quota-this remains totally unanswered - has the production of Howrah Flour Mills doubled or the wheat obtained been sold in the market at a premium-the company is delightfully silent on that score. Mr. M.L. Bagri, as noted above, is at the helm of affairs at both the Howrah Flour Mills as also at the respondent company. One would have expected in all fairness a definite statement by Shri M.L. Bagri as to the subsequent conduct after obtaining the wheat quota. Shri M.L. Bagri obviously was more interested in Howrah Flour Mills than the respondent company since clandestine sale of wheat quota would attract penal consequence as also may lead cancellation of the milling licence but that would not bother Shri M.L. Bagri and I find sufficient justification in the criticism and comment of Mr. Nag in that regard. Considering the above. I am not in a position to accept the submission of Mr. Sen on this factual score that Howrah Flour Mills, as a matter of fact, tried to render the fullest co-operation to the respondent company when the company made its wheat quota available to Howrah Flour Mills. I find sufficient justification in Mr. Nag's submission and I am in agreement with the contention that the act cannot but be termed to be malafide and utterly illegal.

28. As regards the other loans, it is to be noted that the company granted loan in favour of companies, firms and trust controlled by Shri M.L. Bagri as also to M.L. Bagri and his wife Gita Devi Bagri, J.P. Bagri and his wife. Following tabulations would depict the exact picture.

A) Loan to M.L. Bagri, being the respondent No. 6 during the year 1986.....Rs. 4,10,353,81

B) Loan to J.P. Bagri, being the respondent No. 3 and son of M.L. Bagri during the year 1986.....Rs.4,55,465,30

C) Loan to Gita Devi Bagri, Respondent No. 10 wife of M.L. Bagri.....Rs. 5,31,041,00

D) Loan to M.L. Bagri Charity Trust.....Rs.3.05,000,00

29. This is, however, apart from the loan shown to Howrah Flour Mills, to the extent of Rs. 17,06,699,722 which has been dealt with hereinbefore. On the factual score, therefore, it appears that in the year 1986 the company has divested itself by way of a loan to M.L. Bagri and his close relatives and organizations in which Shri M.L. Bagri is connected to the extent of Rs. 34,08.599,85p. Balance-sheet as on 31st December. 1986, however, shows that secured loan from United Bank of India to the extent of Rs. 17.96 lacs out of which Cash Credit Account 4.06 lacs and Term Loan Account Rs. 13.90 lacs, also unsecured Loan of Rs.51.03 lacs. The defence of the company, however, has been that loans were given to M.L. Bagri. J.P. Bagri and Gita Devi Bagri to earn interest during the lookout period and the company has not suffered in any way

on account of those loans. Incidentally, it is to be noted that no interest was, however, earned from Howrah Flour Mills Ltd. On the factual score, it further appears that the loan was extended beyond the respondent company's lookout period. Therefore, during the lookout period without having the money remaining idle that concept cannot, in my view, be accepted. It is to be noted that there is no special resolution for the grant of loan nor the object clause provide such a grant and, as such, transaction cannot but be termed to be void in view of the penal provision u/s 149(2)(a) of the Companies Act, 1956.

30. The loans, as noted above, have all been given by the company to the respondents in the year 1986. Further loan, however, was also effected in the year 1987. The company has advanced fund in favour of O.P. Lahoti, being the respondent No. 4 to the extent of Rs. 49,000/-: Laxkhmi Shyam-sundar in which O.P. Lahoti is a partner to the extent of Rs. 1,65,000/-and M.L. Bagri Charity Trust for Rs. 20,000/

31. Significantly, it is to be noted that the position of J.P. Bagri and his wife Neelam Bagri has been sought to be changed by mere book entries with another company viz., Bagrees Investments (P) Ltd. Admittedly, the Bagree Investment (P) Limited is still under the control of M.L. Bagree Group. The position of J.P. Bagri has been changed by making mere book entries in the annual accounts of the Company as on 31st December, 1987 for adjusting against Bagree Investment (P) Ltd., and showing as debtors to the company of Rs. 1,23,477/- without producing account of Bagree Investment. Similar adjustment of liability of J.P. Bagri's wife being Sm. Neelam Bagri against the same company was also effected to the extent of Rs. 52,254/-. As noted above, this is significant since no attempt has been made to produce the account of Bagree Investment. Can it be said to be a fair dealing of the situation by Mr. Sen's client in regard to book adjustment said to have been effected. The production of books for scrutiny, at least so far as the court is concerned, ought to have been effected.

32. The above narration, though slightly longish in nature, however, goes to show the nature of dealing of funds of the company The petitioner, though director. at the relevant point of time, has been kept completely in the dark and cogent evidence is available on record in regard thereto. Considering the above, in my view, the petitioner's accusation of mishandling of fund cannot thus be ignored. There exists an obligation on the part of the Directors of the company to deal with the finance of the company in a manner and for benefit of the company. As such, if on the other hand, it appears to Law courts that the financial matters have been dealt with in a manner contrary to that of the normal course of events and loans and advances are being given to favour one section of Directors, the Law Courts should take appropriate steps in the matter so as to prevent an oppression and injustice and an illegality in regard to the affairs of the company.

33. Turning attention on to the third count of Mr. Nag's submission in regard to

the purchase of 1/6th one-sixth undivided interest in premises No. 28. Chandi Ghosh Lane, Calcutta. Mr. Sen submitted that acquisition of immovable assets are included in the objects of the company and the purchase is surely going to repay handsome profit of the company as the market value of the same has already appreciated tremendously and is likely to appreciate further in due course of time. It is to be noted that the petitioner himself, however, has purchased 1/6th (one-sixth) share in the self-same property through another company namely M/s. Bagri Synthetic Private Limited which was promoted by the petitioner no. 1, In that view of the matter, Mr. Sen submitted that the above-noted acquisition by the company cannot be termed to be bad or illegal. While it is true, as Mr. Nag contended, that blockage of capital is being effected for purpose totally alien for running up a flour mill but such an acquisition, in my view, cannot be termed to be of such a nature so as to call for a detailed financial investigation or be a ground for an application u/s 397 of the Companies Act. It is true that there is no Board resolution but that does not, by itself render the same to be a ground for an application, as in the present one. As such, I am unable to accept the contention of Mr. Nag on this score.

34. Turning on to the more serious allegation of Mr. Nag viz. sale of the roller boxes, as noted, at a very nominal price, Mr. Sen submitted that these roller boxes were in worn condition and not functioning properly, by reason wherefor manufacturing process was very severely hampered due to mal-functioning of the roller boxes and since it was necessary for the company to replace the roller boxes in order to maintain the quality of the produce the same were sold. Mr. Sen contended that the roller boxes were purchased in the year 1980 at a cost of Rs. 75,000/- in aggregate and the same were sold at an aggregate price of Rs. 96,000/- thus, benefiting the company to the extent of Rs. 60,000/- approximately.

35 Mr. Sen contended that the company has got 38 roller boxes out of which, 24 are in operation and the rest are to be replaced since the same have become unserviceable and unuseable. It was Mr. Sen's definite contention that the performance of the roller boxes which were sold was very poor and the boxes were consuming heavy electricity and it was neither remunerative nor proper for the company to continue to have the roller boxes which were unremunerative.

36 There cannot possibly be any manner of doubt that unremunerative components cannot and should not be allowed to continue so as to suffer a continuous loss in the matter, but if otherwise kept capable to replace the same, it ought to be replaced without any hesitation but every action of the company ought to be guided by reasons and backed by corresponding documents. The non-serviceability or the non-remunerative aspect, however, cannot be a mere subjective decision of a particular individual in the company. There must be proper records and evidence in regard thereto -the company not being the personal property of any-one, at the helm of affairs, has to place it before the Board since sale of roller bixes is a major decision in regard to the administration

of the company; What we find is a complete ipse dixit of one or two individuals in the company in regard to the day to day administration. No report from the workshop as to the loss of production on account of these roller boxes being damaged has seen the light of the day. There cannot be any manner of doubt that the issue as regards sale of roller boxes is a substantial one governing the policy of the company and as such, the same ought to have been discussed at the Board level, but, admittedly, there is no such discussion at the level as noted above. Unremunerativeness or lack of usefulness cannot be inferred in any and every case. There must be cogent evidence in regard thereto and there should be proper consideration of the same at the highest level in order to deal with the matter but in the facts of the matter under consideration unfortunately there is none.

37. Continuing with the self-same issue as regards the sale of roller boxes, it appears from records that the entire set of machinery of the company is hypothecated to the United bank of India. There is no apparent material on record that the sale had taken place with the approval of the Bank. Mr. Sen contended that hypothecation agreement with the Bank did not prevent the sale of the hypothecated property. But the hypothecation agreement has not been produced before the Court so as to enable the Court to consider the factum of the submission of Mr. Sen in regard thereto. In the normal course of events, at least a concurrence is required but in the present case this concurrence was not produced. In my view, question of accepting the contention of Mr. Sen in regard thereto that the hypothecation agreement with the bank did permit the sale of specific components of the machinery does not and cannot arise. In any event, Mr. Sen contended that by reason of the factum of deposit of sale proceeds with the bank, question of any irregularity in the matter does not and cannot arise. I am, however, unable to record my concurrence in view of the observation, as noted above. In any event, the petitioner no. 1 is the guarantor of that account and in the event of any sale of any component there should have been proper intimation to the petitioner no. 1 and the whole thing seems to be dealt with in a fashioning which is contrary to the normal practice. Petitioner no. 1 is entitled to know what was happening in regard to the machinery in terms of the hypothecation agreement and any deviation or departure therefrom seems to be not in accordance with the known principles of law.

38. Incidentally it is to be noted that the factory went in production in December, 1982. There were, in fact, two lockouts in the mill in the year 1984 and for a longer period in 1986-87. The machineries, and there is no contra evidence on record, still have considerable useful life and, as a matter of fact, purchasers of similar machinery are still utilising the same in another flour mill of the family at Guwahati. It is to be noted further that there is no evidence that in fact, there are subsequent purchase of another six roller boxes. The production capacity in a flour mill is based on the number of the roller boxes and the grinding capability and as such, sale of roller boxes would automatically reduce the grinding capacity of the mill and as such, the quota based on grinding capability cannot

be asked for there is bound to be a reduction in the allotment of quota. If fact, however, there is no reduction of quota which mean and imply that there was total silence on the part of the company in the matter of obtaining the quota of wheat. The quota must have been continued on the basis of the existing state of affairs and obviously there was no intimation in regard to the sale of 6(six) roller boxes as otherwise and as stated above, it would have been reflected in the quota itself. The act or acts on the part of the company seems to have indulged an illegality in the matter of sale of roller boxes.

39. Two other minor points have been raised as regard sale of roller boxes viz., (1) sale of roller boxes at a great under -value and installation of additional plant and machinery except balancing equipment procured indigenously. I am afraid, there are no specific corroborative evidence in regard thereto, as such, I need not dilate much on these two issues, as raised by Mr. Nag during the couse of this submissions. It is to be noted that the balance-sheet does not reflect deposit of the sale proceeds in the term loan account with the company's banker. United Bank of India towards the liquidation of the loan. Furthermore, no evidence is available regarding modernization nor permission in that regard was sought for from the concerned authority.

40. The other issue, as raised by Mr. Nag in addition to the issues noted above. sought to be dealt with at this juncture viz., the commission received by Shri M.L. Bagri in implimenting Japanese contract of installation of Thermal Power Station for Assam State Electricity Board and shown as income of the company. Apprently, this cannot be a ground for an application u/s 397 and 198 of the Companies Act but Mr. Nag drew the attention of the Court on the ground that Shri M.L. Bagri has been treating the company as his own property and has been acting in a manner in accordance therewith and without taking any recourse to the provision and/or adhering to even the normal courtesy of information to all the members of the Board. It is his personal property for private gains and in the process he had been depositing as also withdrawing diverse sums of money without having any obligation to comply with the formalities of the law. It is on this count Mr. Nag laid emphasis and submitted that this, by itself, will constitute a ground for oppression of the minority.

41. The records of the respondent No. 1 depict that a commission of Rs, 23,02,032.50 lakhs was earned by Shri M.L. Bagri in his personal capacity from Mitsubishi Corporation which has been shown as income of the company during the financial year ending on 31st December, 1986. In the event, the income had not been shown, the company would have suffered a loss of Rs. 4 lakhs. On deposit of the amount of money, as noted above, Mr. Nag has a two-pronged attack, the first is that his commission has been earned by Shri M.L. Bagri and shown as income of the company was adjusted with the carry forward losses of the company to save tax on personal income of Shri M.L. Bagri and secondly, as noted above, if the commission had not been shown as income, the company would have suffered loss of over 3 lakhs and by this process the losses as shown

have been wiped out by fabrication and jugglery of accounts treating the company for his personal gain.

42. Mr. Sen, however, submitted that the question of using the company for personal gains of Shri M.L. Bagri does not and cannot arise. Mr. Sen submitted that the company had entered into an agreement in July, 1982 with Shri M.L. Bagri to render all services to and for the said Mitsubishi Corporation in India and the agreement provides also that the said agreement can be entered into by M.L. Bagri in his personal name for the sake of convenience as may be necessary, all the expenses of the services to be rendered to Mitsubishi Corporation would have been incurred and paid by the company as also travelling, boarding and lodging expenses so incurred by M.L. Bagri, will also have to be borne by the company and for which the company has been earning huge amount of commission in foreign currency and since the agreement with the said Mitsubishi was entered into the name of Shri M.L. Bagri payment was also received from them in his name and which the above noted, Shri M.L. Bagri paid through his own cheque to the company and the company in turn also paid the expenses incurred in regard to the services rendered. Mr. Sen contended that, as a matter of fact, the company had been earning commission and other incomes on different variety of agency businesses since the year 1975 and as such, it is nothing new in the matter for the purpose of earning of commission.

43. Incidentally it is, however, to be noted that the agreement between Shri M.L. Bagri and the Mitsubishi Corporation has not seen the light of the day; as a matter of fact, on 10th March, 1989 this Court directed the Registrar, High Court, Original Side to address a letter to the Registrar, Delhi High Court with a request to issue a subpoena upon Mitsubishi Corporation, New Delhi to produce necessary documents and papers before this Court regarding the above contract. The Letter was sent in terms of the order and reminders were also sent but no paper has so far been produced before this Court, as regards, the agreement between the company and Shri M.L. Bagri, though not annexed to the counter - affidavit filed in the matter, but subsequent production revealed that it is by way of a letter addressed to M.L. Bagri by J.P. Bagri, that is to say, from the son to the father. The agreement was contained in the letter is to be noted and as such, for convenience's sake the relevant extract of the letter is noted hereinbelow:

We take pleasure in appointing you as the Agent of our Company to negotiate on its behalf in the matter of services to be rendered to the Foreign supplier of Japan M/s. Mitsubishi Corporation, for execution of the contract of supply by the said Corporation to the Chandrapur Thermal Power station of the Assam State Electricity Board (hereinafter called ASEB) of second 30 M plant on terms and conditions as set out hereinafter:-

1. That as our Agent you would negotiate exact terms of the services to be rendered to the said Corporation and also the quantum of commission to be paid by the said Corporation for such services. You can also enter into an agreement in your name with the Corporation, the foreign Supplier.

2. That you will keep in contact with the A.S.E.B. to obtain confirmation the project for transmission of the same to the Corporation in foreign supplier.
3. That you will keep the said Corporation informed of the A.S.E.B.'s preference and requirements in matters technical and otherwise.
4. That where the Corporation requires advice for successful completion of the contract as well as the execution of the supply contract you will give such advice and assistance.
5. That you will always report the development in the matter of negotiation and even during the course of execution of the contract of supply to the Board of Directors of this Company from State and take ratification of the Board of Directors on all important matters of technical and financial implication which may render the company liable to any financial liability.
6. That you will not make any representation, promise, warranty, contract or do any other act binding the Company except under express prior consent of the Board of Directors of the Company.
7. That you will be bound by any instruction that the Board of Directors may give you on any specific matter in the course of discharge of your function as the Agent of the Company and shall be bound to conform strictly to such instruction.
8. That as Agent you are authorised to receive the commission that may be agreed to as payable by the Corporation the foreign supplier and your acknowledgement to the said Corporation on receipt of the commission money shall be valid discharge of the liability of the Corporation to the Company for the services rendered.
9. That the commission as may be received by you from the said Corporation shall always be the property of the Company of which you will be receiptant only in your fiduciary capacity. As the Agent of the Company and the receipt by you will be constructive receipt by the corporation and in that view you will be liable to restore and reimbursed forthwith to the Company the amount received from the Corporation to the Company.
10. That you will however be entitled to such remuneration as the Board of Directors may determine, having regard your actual contribution to the successful performance of the contract.
11. That if however, any liabilities arise on account of any wrongful act, default or negligence on your part of fact in excess of the powers herein conferred on you as Agent you shall be liable for such loss or mischief.
12. That you are not entitled to appoint any sub-Agent or delegate your power hereunder to any third party or parties.
13. That you will continue to act as our Agent on the terms and conditions hereinbefore set out unless the Board of Directors considers it on grounds of

failure, negligence, infringement of terms hereof on your part or on the part of your servants.

14. That you are at liberty for discharge of your duties of Agency hereunder to use the name and style of your proprietorship firm M/s. M.L. Bagri & Company.

15. You can enter into agreement in your name the Corporation in foreign supplier subject to prior approval of the Board of Directors of the Company.

16. The Company as the principal shall render all assistance - technical and financial, as you may require for discharge of your function as its Agent and shall bear all financial commitments unless arising directly from negligence and lack of due care in which you will forfeit your claim for remuneration".

44. Before proceeding further, however, the other contention is raised a few words of which are noted at this juncture as regards the agreement between the company and Shri M.L. Bagri. While it is true that ratification, as contained in Paragraph 5 of the agreement, Paragraph 1 thereof, however, is extremely significant vis-a-vis the criticism of Mr. Nag that it has become a personal business of Shri M.L. Bagri rather than a limited company. Agent has been authorised to negotiate the terms to be rendered to the Corporation and also the quantum of commission and to top it all the agent can enter into an agreement with the Corporation being the foreign supplier - Does that mean and imply any scope of any agency or independent transaction ? Mr. Nag's criticism, in my view, to this effort cannot be brushed aside. That the agent has been authorised to decide the terms and the quantum of commission from the foreign supplier is rather unknown in the agency law. The further action on the part of the company seems to be rather difficult to accept viz., agent may enter into the agreement in agent's own name with the foreign supplier then and in that event, the situation negates the relationship between the principal and agent.

45. Reading the document in its entirety the situation is rather than anomalous, whereas in clause 1 the agent is authorised to enter into an agreement in the agent's own name with the foreign supplier. In Clause 6, it is recorded that the agent will not make any representation, promise, warranty or enter into any contract or indulging any other act, which would otherwise, bind the company except under express prior consent of the Board of Company - There is no Board resolution - at least not seen the light of the day, and as such, obtaining of consent from the Board does not and cannot arise. Under what circumstances Shri J.P. Bagri, being the son of Shri M.L. Bagri did write the above-noted letter in favour of the company - there is total silence in regard thereto.

46. Incidentally it is further to be noted that in Clause 14 of the agreement Shri M.L. Bagri has been authorised to use the name and style of the proprietorship firm M/s. M.L. Bagri & Co., though, however, in clause 15 it has been stated that Shri M.L. Bagri would be at liberty to enter into an agreement in his own name but that is, however, subject to the prior approval of the Board of Directors of the Company. This approval of the Board of Directors is a new addition in Clause 14

and Clause 15 since such an authorisation to enter into the agreement in his own name has already been envisaged in terms of Clause 1 of the agreement; The terms envisaged therein apparently, however, are mutually inconsistent and in any event, it is to be considered as to whether it is within the normal functioning of a company to allow such an agreement to be executed. In my view, normally this is never done. What prevented the company from doing business in its own name rather than appointing an agent - no explanation, however, was forthcoming; Assuming, a company decided to have the business done through an agent, why did the son had to write a letter to the father, to the extent indicated above, without obtaining any sanction or approval from the Board - apparently, there is no answer neither any attempt has been made by Mr. Sen to answer these enquiries excepting, however, recording that there is no bar in the matter of entering into such an agreement. May be there is no bar in law, is it the normal business relationship or certain steps have been taken contrary to the normal standing of the company or whether the Court would accept such a state of affairs on its face value or accept the same with some reservation - In my view, the answer cannot but be that the acceptance of the same by the Court be only with certain reservations about the same - Why did they not place the matter before the Board and obtain the Board's approval in regard to the appointment of Shri M.L. Bagri. There is no answer to that effect.

47. The other aspect of the matter also ought to be noted viz., as to why the company could not do the business itself and why the company has appointed an agent therefor; whereas this remains unresolved. Mr. Nag submitted that a letter from the son to the father is a mere letter and cannot be treated as such, as an agreement. There is no Board resolution neither there is any approval and as a matter of fact, the deposit of commission in the fund of the company would go to show that the whole business at all point of time was to the exclusion of all others excepting the father and the son wherein there is free intermingling of personal and corporate funds and the withdrawal of the fund also at the ipse dixit of the father and the son, being the 2(two) Directors of the company - can the Court allow continuance of such a state of affairs, in my view, considering the facts of the matter under consideration, the answer cannot but be in the negative.

48. Let us now turn on to the financial claim of the petitioner so far as the company is concerned.

On this score, however, Mr. Nag submitted the following note in support of his contention that a substantial amount of money is laying to the credit of the petitioner and there is total denial of such a claim. For convenience's sake Mr. Nag's submission is summarised in the manner following:

1 Credit Balance : Remuneration A/c. Balance Sheet, F.Y. 31.12.1986

Rs. 822.00

2. Claim for the year 1987 (Balance Sheet for the year ended 31.12.1987 (Audit Report

Rs. 1,03,378.71

2. Claim for the year 1988

Rs. 1,18,986.71

3. Loan A/c

i) Credit balance as on 31.12.1986 (Balance Sheet)

Rs. 5,11,313.00

ii) Credit Balance as on 31.12.1987 Balance Sheet

Rs. 5,66,535.00

iii) Add :Accured interest upto March 31, 1989.....

Rs. 84,980.25

Rs. 6,51,515.25

Total.....

Rs. 8,74,702.67

iv) Add: Interest upto the date of payment on Rs. 6,51,515.25 @ 12% from 31.3.89

49. Incidentally. Mr. Nag also drew the attention of the Tax Audit Report in support of his submission. Mr. Sen, however, disputed the contention of Mr. Nag. Mr. Sen contended that loan to the company by the petitioner has already been repaid to M/s. Sumati Projects Ltd. It is, however, to be noted that no tangible evidence has been forthcoming for payment of such loan to M/s. Sumati Project Limited. The loan was supposed to be repaid by an oral advice in January, 1987 without there being any corresponding documentary support thereof - No Board Resolution has been effected neither any document produced to corroborate the statement in regard to the repayment of loan. Statement of Account dated 31st March, 1987, however, depicts a different picture since the same shows the petitioner no. 1 still a debtor for Rs. 4,99,365.00. The only tangible evidence produced in regard thereto in a letter dated 8th January, 1988 wherefrom it appears that M/s. Sumati Projects Limited is supposed to have received by cheque Rs. 5,66,535.00 on 6th Jan. 1988 from the respondent company. Nonetheless, however, M/s. Sumati Projects Limited shows the petitioner no. 1 as its debtor. In any event, question of payment of Rs. 5,66,535.00 does not and cannot arise since the debit balance upto December, 1987 was to the extent of Rs. 4,99,365.00 and interest is added thereon does not exceed Rs. 5,66,535.00. There is, therefore an excess payment of about Rs. 37,208.00. There is no explanation for such an excess payment.

50. Turning attention now on to the main thrust Mr. Nag in regard to the termination of office of the petitioner no. 1. It was contended that petitioner no.

1 ceased to be Director of the company on the failure to attend three consecutive meetings on 16th November, 1985, 14th February, 1986 and 10th May, 1986. On the factual score, however, Mr. Nag contended that at the meeting dated 22nd May, 1985 the petitioner no. 1 did attend but it was stated by the respondent that it was the meeting last attended by the petitioner no. 1. Similar is the situation in regard to the meeting of 19th August, 1985 and the company has stated that this was the meeting last attended by the petitioner no. 1. There is, therefore, a discrepancy as to the date of the Board Meeting said to have been last attended by the petitioner no. 1. There is no manner of doubt that u/s 283(1) (g) of the Companies Act, in the event, the director is absent from three consecutive meetings of the company the office of Director shall become vacant. Mr. Sen, appearing for the company in no uncertain terms submitted that by reason of absence of the petitioner no. 1 from the Board Meeting on the three dates, noted above, question of continuation of the petitioner no. 1 as a Director of the company does not and do not arise. There cannot be, Mr. Sen submitted, any manner of hesitation in coming to the conclusion in regard to the cessation of office. The facts, however, depict a slightly different picture between May, 1986 and March, 1987. The petitioner no. 1 was paid remuneration as a Director including all his car expenses. Life Insurance premium, advance Income Tax, Professional Tax on his account as a Director and certificates in regard thereto were duly signed by the respondent no. 5. Incidentally, be it noted that the cheques were produced under sub-peona in court. The director's report dated 5th June, 1987 for the year ending 31.12.86 signed by the Respondent nos. 2, 3 and 5 further depicts that the petitioner no. 1 was an Executive Director of the Respondent Company as on 31st December, 1986. The balance-sheet for the year ending 31st December, 1985 was signed by the petitioner no. 1 on 31st June, 1986 as a director along with the Respondent No. 5. Annual Return dated 29th June, 1987 for the year ending 31st December, 1986 also depicts the petitioner no. 1 as a Director of the Company. Annual Report of Bagree Synthetic dated 29th December, 1987 as on 31st June, 1987 shows the petitioner no. 1 as a Director of the respondent company. Advance income tax paid by the company for the financial year ending 31st December, 1987 on account of petitioner no. 1 was by depositing Rs. 2500/-with the United Bank of India, Lohapatti Branch on 15th June, 1987. This amount, however, was subsequently adjusted with the remuneration account of Shri J.P. Bagri, as appears from the necessary books of accounts.

51. Further on 23rd June, 1987 the company paid a sum of Rs. 7938/-towards Corporation Tax on account of the petitioner no. 1's residential flat as a Directorial perquisite and the cheque was signed by Shri J.P. Bagri, being the respondent no. 3. The cheque was produced under subpoena. Incidentally it is to be noted that the cheque was produced under subpoena before this Court during the course of hearing. It is further to be noted that this payment has been subsequently shown in the balance-sheet for the year ending 31st December, 1987 as an arrear of tax in respect of the mill. The company also paid

professional tax on behalf of the petitioner no. 1 to the extent of Rs. 250/- and deposited the sum with the United Bank of India on 13th August, 1987. Subsequently, however, this was shown as a payment on behalf of Shri M.L. Bagri in the accounts and Mr. Nag laid stress on the factum of Shri M.L. Bagri, being not a Director at the relevant time and submitted that this clearly establishes a total jugglery of the company's accounts.

52. It is to be also noted that the petitioner no. 1 did also sign the cheques issued by the company to State Bank of India on account of provident fund along with Shri G.D. Mundra upto 21st September, 1987. The records further disclosed the letter by Shri J.P. Bagri, being the respondent no. 3 on 27th October, 1987 addressed to the Manager, United Bank of India, Lohapatti Branch claiming him as a key person and Director of the company and also showing petitioner no. 1 as one of the Directors of the company. It is to be noted, however, that Form No. 32 was duly filed by the company under the signature of Shri J.P. Bagri with the Registrar of Companies on 15th January, 1988 showing cessation of Directorship of the petitioner with effect from 21st December, 1987 and since then it has been maintained although out that the petitioner ceased to be in office of Director of the Company since 21st December, 1987. While it is true that Section 283(1)(g) prescribed ip-so-facto vacation of the office of a Director by reason of happening of the contingency viz., absent from three consecutive meetings. But when did the petitioner actually vacate the office? Is it on the non-attendance of the Board Meeting dated 16th November, 1985, 14th February, 1986 and 10th May, 1986 or the vacation of the office" with effect from 21st December, 1987 as per Form No. 32 as noted above -There was, however, total silence on this score, by Mr. Sen, appearing for the company. Does that mean and imply that the petitioner no. 1 continued to be a Director upto 21st December, 1987 but then why did he cease to be a director ? Section 283(1)(g), if to be taken recourse to, will not come in aid of Mr. Sen's client since the vacation of office ought to have taken place on 10th May, 1986.

53. The narration above, however, shows contra-picture upto 27th October, 1987. There exists a clear indication of the petitioner no. 1's actual participation in the affairs of the company and all records pertaining thereto establish the same. The case, of the respondent that the petitioner ceased to be in office by reason of non-attendance of three Board Meetings in May, 1986, therefore, cannot withstand the test of justiciability. Mr. Sen's submission that the factum of certain signatures here and there or putting the petitioner's name in some of the documents would not entitle the petitioner to be in office in the event, the statutory bar takes into effect. Admittedly, the onus is on the company as regards the issue of cessation of Directorship but has the company discharged its onus - There is no evidence on record as regards the service of the notice of the Board Meeting, in the absence of which, in my view, Mr. Sen's contention cannot be accepted. The decision of the Supreme Court in Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI), has its fullest application.

54. Incidentally it is to be noted that for the first time on 10th March, 1988 in reply to a letter from the petitioner no. 1 the company informed him about the cessation of office and surrendering of the car so long used by the petitioner no. 1, as a Director of the company, this also, however, goes to show the effect of the company's decision as regards cessation on 10th May, 1986. Normally it is expected that immediately on cessation the entire accounting together with the return of company's vehicle ought to have been intimated. This delay, however, negates the contention that the petitioner no. 1 ceased to be a Director on and since 16th May, 1986.

55. On the factual score, therefore, the petitioner no. 1 continued to act as a Director of the Company upto December, 1987 and all returns, books, papers and documents affirmatively depict such a picture. There is no reason whatsoever, however, as regards discontinuance of the office of Director so far as the petitioner no. 1 is concerned, neither any attempt has been made by the company to establish such a discontinuance after December, 1987. The case made out by the respondent company in regard to absence of the petitioner no. 1 in three consecutive Board Meetings would have been otherwise a substantial defence but on the factual score there is no corroborative support, on the contrary, Mr. Nag has been careful enough to lead consistent evidence by production of documents from various sources during the course of hearing as regards the continuation of office by the petitioner no. 1 as a Director of the company and the acceptance thereof by the respondent Company. What has happened after 27th December, 1988? Is it the pleasure of the other Directors not to allow the petitioner no. 1 to continue as the Director of the company or there is substantial reason therefor - No reason, as acted above, has come forward. The resultant conclusion, therefore, that the petitioner no.1 could not continue because of the fact of displeasure of the other Directors : Can a Director be thrown out only on the pleasure theory; Would the company's administration be termed to be fair and proper when, in fact, a Director would be thrown out at the pleasure of some other Directors - the answer cannot but be in the negative. A fair company administration must have a fair dealing and in the absence of which the law Court would be justified in interfering in an application under Sections 397-398 of the Companies Act. There cannot possibly be any cessation of office of a Director except in accordance with the provision of law. Section 283(1)(g) has been taken recourse to but there is no factual support. Does that mean and imply that the petitioner continued to be in office, in my view, the answer cannot but to be in the affirmative.

56. On the factual score, I have no hesitation to record that the petitioner no. 1 has been deliberately kept out of the affairs of the company and eventually was not allowed to continue in office as Director of the Company. There is no definite evidence as to the service of notices of the Board Meetings and the allegations, thus, remain uncontroverted excepting a bare denial without any factual support.

57. Apart therefrom, various allegations have been levelled by the petitioner in

support of the contention that there is total oppression of the minority shareholders. But considering the facts, as noted above, in my view, one need not go in for all the tiny, little allegations but a petition, if it has to succeed, it must succeed on the broad based allegation and the totality of the situation shall have to be assessed but not by way of assessment of the minutest details. To rely on minutest details may be a dangerous proposition when the totality of the situation demands otherwise. On the other hand, it may not be possible for the oppressed group to furnish particulars and materials in the petition under Sections 397-398 of the Act, in the absence of which, it cannot be said that the application ought to be dismissed. Though there are certain decisions to that effect, but I am afraid, I cannot subscribe to such a view. As noted above, the totality of the situation shall have to be assessed to see whether there is any departure from the original business norms and commercial morality thereby violating the principles of equity, fairplay, good conscience and justice. The Court shall have to be satisfied whether there has been a fair company administration or not. In the event, on the totality of the situation, such a departure comes to light there ought not to be any hesitation to render possible justice by appropriate orders. Detailed evidence of charges of mismanagement, oppression, mis-appropriation or mis-handling of the funds may not be possible and sometimes it is a near impossibility for the petitioner to furnish such details. I respectfully record my concurrence with the view expressed by S.K. Roychowdhury J. in the matter of Cosmos Steel (P) Limited and Others (Company Petition No. 85 of 1975). The observation of Roychowdhury J. as detailed below in regard to the above, seems to be very opposite in this context.

Roychowdhury, J. observed:-

In a proceeding under sections 397-398 etc., of the Companies Act, 1956, the Court is to proceed on the basis of the totality of the facts disclosed in the pleadings by both the parties and disclosure made either in the records of the Court or in the statutory records, as for example, returns, balance-sheets etc. filed before the Registrar of Companies under the Companies Act, and Rules made thereunder. After all pleadings are not games of chess, but intended to furnish the materials on which an application or a case is based and evidence in support of such case by affidavits, disclosure or documents and in some cases by trial on evidence, if necessary, the said charges are proved before the Court and thereby enabling the Court to grant relief according to the circumstances of a particular case as made out and proved before it....

But in my view, in all the cases which comes up before the Court, the first thing the Court is to see whether the essential elements to constitute charges under Sections 397-398 of the Companies Act, 1956 has been satisfied or not and whether there is satisfactory evidence adduced from the material before the Court either from the pleadings and its annexures or from the statutory records and admissible documents to support the case of the petitioner before the Court. The technical rules of pleading should not stand in the way of the Court when the

basic facts and materials emerge from the entire pleading of the parties and from the records produced before the Court. After all procedure is but the handmaiden of justice and not its mistress. The paramount consideration for the Court is to see whether any ground which is sufficient for granting of any relief under Sections 397-398 has been pleaded in substance and proved according to law of evidence. The form of the pleading or the nature of the proof are of immaterial consideration when there are pleadings with material particulars and satisfactory proof according to law. Therefore, I propose to deal with the matter without going into the minute details."

58. On the factual backdrop, as noted above, it appears that the petitioner's grievance in regards to ouster from the management of the company and running of the administration contrary to the normal practice is not only legitimate but justified. Admittedly, Shri M.L. Bagri has manoeuvred things in such a fashion that the petitioner no. 1 is ousted from the company and there is total deprivation so far as the petitioner is concerned. Though, dealt with earlier in detail but from a cursory glance if one recapitulates some such incidents, viz, shifting of the registered office from one place to another and then again shifting it back or sale of the roller boxes or the loan or sale of wheat quota it leaves no manner of doubt that there is total ipse dixit of one group in the company's administration. Books, papers and documents also appear to be maintained in such a way that a plain scrutiny would leave no room for doubt about the efforts of one group to act in a manner prejudicial to the other group. The accounts produced, in my view, require investigation by experts as there are various infirmities and irregularities and Mr. Nag's submission and criticism on the accounts find ample justification. Loans have been shown to have been given to M.L. Bagri to the extent of Rs. 4,10,355,81 to J.P. Bagri to the extent of Rs. 4,55,465,30 to Gita Devi Bagri, being the wife of M.L. Bagri to the extent of Rs. 5,31,041,00, to M. 1. Bagri Charity Trust to the extent of Rs. 305,000,00 and loan to Howrah Flour Mills to the extent of Rs, 17,06,699.72p This loan to Howrah Flour Mills, which is admittedly under the control of M.L. Bagri, has been shown by way of transfer of wheat quota. How can the wheat quota be transferred ? Under what circumstances these loans were granted ? These are matters which requires thorough and detailed investigation and inquiry for the purpose of ascertaining the real financial position of the company : The allegation of manipulation of accounts and fictitious nature of the accounts seems to be justified in the facts and circumstances of the case particularly having regard to the conduct of the respondent and the method and manner of keeping accounts holding Board Meetings and dealing with the company's affairs to the exclusion of the petitioner. On an analysis of the further factual score, it appears, the removal of the petitioner no. 1 by reason of non-attendance of three consecutive meetings does not have any factual support. The documentary evidence produced in court goes not to show the manner and method of company's administration and the attempt to oust the petitioner cannot be said to be in accordance with law. This is a deliberate move and law Courts would not permit a

situation of the nature as detailed above to continue, and will come to the aid of the person who seeks to remedy the wrong. In my view, it is just and equitable that the company should be wound up which is a sine-qua-non granting relief under Sections 397 and 398 of the Companies Act.

59. Incidentally it is to be noted that Mr. Sen, appearing for the company submitted that there are no particulars whatsoever and no fresh material can be relied on by the petitioner at the time of hearing which does not find place in the petition. I have not been able to appreciate the contention of Mr. Sen. The documents produced before the Court during the course of hearing from the custody of the statutory authorities ought to be looked into and the Court cannot turn a blind eye to the documents and a deaf ear to the submissions made in that regard. In this context the observation of S.K. Roychowdhury, J, in the matter of Cosmos Steel (P) Limited (Company Petition No. 85 of 1975) (surpa) seems to be also very apposite.

60. It was argued on behalf of the respondents that there is no material in the petition under Sections 397-398 of the Companies Act, 1956, and as such, the application should be dismissed. Further, it was contended that no fresh material can be relied on by the petitioner at the time of hearing which has not been alleged in the petition to make out ground for grant of relief in this application. I am unable to accept both the said contentions as those are not only unsound and untenable both in fact and in law but seems to be a stock defence to all applications under Sections 397-398 of the Companies Act, 1956.

61. Incidentally it is to be noted that the interest of the company is of prime consideration and the law Courts have a duty to do complete justice in the matter in issue and while so doing the entire set of pleading together with the documentary evidence, as is available on records, ought to be looked into otherwise technicality would be given a preferential treatment rather than the concept of justice. It is now a well settled principle of law that technicality ought not to outweigh the course of justice and law Courts cannot but look into the entire set of facts so as to give effect to the intent of the law makers as provided under Sections 397 and 398 of the Act. 1956. The oft-cited decision of this Court in Ramashankar Prosad and Others Vs. Sindri Iron Foundry (P) Ltd. and Others, lends support to the view expressed above.

62. There cannot be any manner of doubt that the petitioners were oppressed by the respondent, who formed the majority group in the company. No hard and fast rule can be laid down as to what will amount to oppression. Oppression cannot be defined but the same depends upon the facts and circumstances of each case. It shall have to be dealt with as a whole and it is the bounden duty of the Law Courts to see for itself as to whether any oppression or mismanagement has been committed or taken place within the meaning of Sections 397 and 398 of the Companies Act. In the event, the Court comes to a conclusion in the affirmative, upon consideration of the same, there ought not to be any hesitation in the matter of passing appropriate orders so that the matters complained of are

brought to an end and justice is done between the parties.

63. Various other authorities have been cited from the Bar, but in my view, whether oppression or mis-management have taken place shall have to be ascertained from the facts and circumstances of each and as such, I need not dilate much on that score.

64. In that view of the matter this petition succeeds and the same is disposed of in the manner following. The Board of the Company is superseded. Mr. Ashim Ghosh, a senior member of the Bar, is appointed Administrator to take possession of the statutory books, papers and documents lying at the registered office at 207, Maharshi Debendra Road, Calcutta as also at 33A, Chowringhee Road, Calcutta -15 and Canal East Road, Calcutta as also at the other offices of the companies. The Administrator shall run the day to day business of the company until the time mentioned hereinafter with the assistance of an Advisory Committee consisting of Shri. J.P. Bagri and Shri. H.P. Bagri. The Administrator would be entitled to a monthly remuneration of Rs. 3,000/- and he would be at liberty to appoint a clerk at a remuneration not more than Rs. 300/- Mr. S.P. Basu, C/o, M/s. P.M. Mukherjee & Co., 11, Old Post Office Street, a Chartered Accountant and Auditor in the panel of this Court is hereby appointed to investigate into the accounts of the company and to value the shares of the company. The remuneration of the Auditor shall be fixed by the Administrator and is to be paid from out of the funds of the company. The remunerations of the Administrator and his clerk shall also come out of the funds of the company. The audit and the valuation be made as expeditiously as possible. There shall also be a declaration that the petitioner no. 1 continues to act as Executive Director of the Company and is entitled to the remuneration as also money equivalent of the perquisites as is available to a Director as of date. The Administrator is also directed to pay the same. It is further ordered that upon investigation of accounts, adjustment of accounts be effected and in the event of any sum found due and payable by one of the Directors, the same be paid. The Auditor upon consideration of the accounts shall prepare a valuation report so far as the shares are concerned as of the date of presentation of this appeal and upon adjustment of accounts the petitioner no. 1 is directed to sell his shares to the respondents together with the shares of the petitioner no. 1's group members. It is only upon payment of the value of shares by the respondents to the petitioner that the Administrator shall stand discharged. Each party to pay and bear its own costs. The Administrator, auditor and all parties are to act on a signed copy of the operative portion of the minutes of this order on the petitioner's undertaking to draw up, complete and file this order.