
(2012) 03 CAL CK 0080

In the Calcutta High Court

Case No : A.P.O.T. No. 319 of 2008 and ACO No. 64 of 2008

Ruby General Hospital Limited and Others

APPELLANT

Vs

Sajal Dutta and Others

RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Companies Act, 1956 — Section 166, 166(1), 167, 168, 173
Foreign Exchange Regulation Act, 1973 — Section 19(1)

Citation : (2012) 2 CALLT 331 : (2012) 108 CLA 226 : (2012) 171 CompCas 417

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

Bench : Single Bench

Advocate : S.K. Kapur, with Mr. U. Bose, Mr. D. Basak, Mr. Aniruddha Ray, Mr. Swatarup Banerjee, Mr. S. Roy and Ms. A. Das, for the Appellant; S.N. Mookherjee with Mr. Ratnanko Banerjee and Mr. Tarun Aich, for the Respondent

Final Decision : Allowed

Judgement

I.P. Mukerji, J.

THE BACKGROUND FACTS:

1. Dr. Kamal Kumar Dutta and Mr. Sajal Dutta are two brothers. Kamal is a medical practitioner and permanently resident in the U.S.A. Dr. Binod Prasad Sinha is another doctor permanently resident in the U.S.A. and known to Kamal. These three at one point of time which now seems quite distant, got together and promoted a hospital in Kolkata by incorporating a public company. Its name is Ruby General Hospital Limited. The hospital was named Ruby General Hospital in remembrance of the deceased wife of Kamal. It got started in 1995. The then Chief Minister of West Bengal inaugurated it. This amity did not last long. The brothers fell apart. Proceedings were undertaken before the Company Law Board by Kamal and Binod, in 1997. They had filed an application u/s 397-399 of the Companies Act, 1956 complaining of oppression and mismanagement by Sajal. The order of the Company Law Board dated 29th October, 1999 was to a great

extent favourable for Kamal and Binod, who were together. But both sides, i.e., Kamal and Binod on one side and Sajal on the other side felt aggrieved by the order. An Appeal was filed in this Court against it by each of the sides. Both these appeals were admitted on 14th December, 1999. At the time of admitting the appeals, this Court passed an order that no board meeting of the company should be held.

2. However, in the appeal Kamal and Binod lost. The appeal of Sajal was allowed by this High Court on 31st March, 2005.

3. Kamal filed a SLP before the Supreme Court. The Court admitted it on 13th May, 2005. It was heard as an appeal.

4. Now, the interim order granted by this Court on 14th December, 1999 was continued by the High Court and according to the records was not disturbed by the Supreme Court.

5. On 11th August, 2006 the Supreme Court allowed the appeal. This case is reported in Kamal Kumar Dutta and Another Vs. Ruby General Hospital Ltd. and Others,

FACTS IN DETAIL

6. The disputes between the parties in this appeal cannot be understood unless their starting point or genesis is understood. I have taken great guidance from judgment of the Supreme Court, in understanding the facts.

7. At the time of its incorporation the share capital of the Company was to be Rs. 9 crores. Rs. 8 crores of it was to be contributed by non resident Indians (NRIs). Therefore, 88.88% of the shares were to be held by the NRIs. Dr. Kamal and his collaborator Dr. Binod together held 52.74% of the equity shares. Furthermore, Dr. Kamal had paid Rs. 3.5 crores for the importation of second hand medical equipments for use in the hospital. Dr. Kamal contributed in total Rs. 4.26 crores. Out of this the above equipments were bought for Rs. 3.5 crores from U.S.A. Rs. 1.23 crores were contributed by Sajal. To my mind, the real disputes started after importation of these second hand equipments by Kamal from U.S.A. He claimed their value in terms of shares in the company. The Reserve Bank of India granted such permission on 22nd March, 1997 but it was withdrawn on 20th May, 1998 at the instance of the company. Writ applications were successively filed in this Court, by Sajal and his group, challenging this permission. The third is pending. In the first writ application a consideration order was made by the Court upon the Reserve Bank of India which resulted in a favourable consideration. That was challenged by a second writ in which the same kind of an order was passed and resulted in the same kind of consideration by the Reserve Bank of India. Therefore, the third writ.

8. This dispute was taken to the Company Law Board where the order dated 29th October, 1999 was passed which was challenged in this Court, as stated before. The Supreme Court by its judgment and order delivered on 11th August, 2006,

inter alia, opined the following:

48. Since the issue of granting of equity shares against the medical equipments supplied by Appellant 1 to the tune of Rs. 3.5 crores is pending before the Calcutta high Court in a writ petition, therefore, CLB has not passed any final order but passed a limited order as mentioned above. However, we have examined the matter in detail and we are satisfied that there is full proof case of oppression. But at the same time we do not feel inclined to pass an order for winding up of the Company because it will not be in the interest of the Company nor in the interest of the parties. Therefore, we allow the appeals and set aside the impugned order dated 31.3.2005 passed by the learned Single Judge of the High Court and pass limited direction that all the resolutions which have been passed by the Board of Directors, or in the annual general meeting or extraordinary general meeting with regard to the raising of funds of Rs. 40 lakhs in the meeting of 19.4.1995 and the meeting dated 16.2.1996 whereby Appellant 1 was stripped off his powers as Managing Director, the resolution by which Dr. Binod Prasad Sinha was removed from the office of Director and other resolutions by which the shares were allotted to the subsidiary company of Sajal Dutta or other persons are bad and we restore the position ante 19.4.1995 and direct that a fresh meeting be convened and proper decision be taken in the matter in the interest of the Company. We confirm the order and direction of CLB.

49. Let a Board meeting be convened with 21 days' notice to all the Directors by registered post at their NRI addresses in India as well as USA. The meeting shall be chaired by Dr. Kamal Kumar Dutta, Managing Director. In case any of the NRI Directors is unable to attend the meeting, he will have a right to make nomination. We again make it clear that all the resolutions are set aside with regard to raising of funds dated 19.4.1995, removal of Dr. Binod Prasad Sinha from Board of Directors, outstripping of Dr. Kamal Kumar Dutta from the Managing Directorship, allotment of shares to Sajal Dutta's companies and to others and all other resolutions which adversely affect Dr. Kamal Kumar Dutta and Dr. Binod Prasad Sinha. Let a fresh meeting of the Board of Directors be convened with Dr. K.K. Dutta as Managing Director and proper resolution be passed in the interest of the Company in accordance with law. No order as to costs.

9. The following other findings in the said judgment of the Supreme Court are very important:

44. Now, Adverting to the facts of the present case, we will examine whether there was any case of oppression of the member or attempt to materially change the management or control over the Company to the detriment of the Company. We may recapitulate that this Hospital was floated by Dr. Kamal Kumar Dutta with his brother Sajal Kumar Dutta and the total investment of Dr. K.K. Dutta was Rs. 4.26 crores which includes Rs. 3.5 crores of equipment and Sajal Dutta made a contribution of Rs. 1.23 crores and there was another investment by Dr. Binod Prasad Sinha also. If the share of equipment i.e. Rs 3.5 crores is not taken

into consideration, then the share of Dr. K.K. Dutta is 46.378% and the share of Dr. B.P. Sinha being 6.3650/o, the total share of both of them comes to 52.74% and the share of Sajal Dutta is 46.26%. Thus, the Company was floated by Dr. K.K. Dutta along with his brother for establishing a hospital in the name of his wife, Ruby Dutta. Dr. Dutta and Dr. Sinha both are NRIs. All the equipments worth Rs 3.5 crores were supplied by Dr. Dutta which were installed in the said Hospital, though the equipments were second-hand and this is how the Hospital started functioning in 1995. It seems that it started running well but when it turned the leaf and showed some profitability then the trouble started brewing which led Dr. Dutta and Dr. Sinha to file the petition before CLB under Sections 397 and 398 of the Act in 1997. The seed of discord started with the meeting dated 19-4-1995 when a resolution was passed for infusing some more money in the Company and it appears that the said resolution was passed in which Dr. K.K. Dutta, Mr Sajal Dutta, Wing Cdr. (Retd.) T. Chaudhuri as Directors were present along with special invitee, Dr. Ashok K. Maulik as Director and Mr M.K. Datta was the Financial Controller and Secretary. Dr. Kamal Kumar Dutta took the chair as the Chairman of the meeting. Other resolutions were passed for inauguration of the Hospital on 25-4-1995 at 11.00 a.m. by the Chief Minister of West Bengal, maintenance of books of accounts at a place other than the registered office, progress of project accounts and date of holding the annual general meeting, etc. But the crucial resolution which was passed that gave rise to strained relationship between the two brothers was to issue and allot not exceeding 40,00,000 (forty lakhs) equity shares of Rs. 10 each at par to such persons, corporate bodies, banks, mutual funds or other financial institutions, whether or not they are the existing shareholders of the Company and in such manner as may be decided by the Board. This resolution was alleged to have been fabricated and not passed on the date though it is alleged that Dr. K.K. Dutta was present. According to Dr. K.K. Dutta this resolution was subsequently inserted and he was not made known about such resolution and he came to know about it only on a later date when he was said to be thrown out from the Managing Directorship. Though this aspect according to Mr Nariman was not specifically challenged before CLB but the answer of the learned counsel for the appellants was that in fact these resolutions were not made known to the appellants and they only came to know about them at a later stage when all these resolutions were placed by Respondent 2 Sajal Dutta. It is alleged that objection to this was taken in a rejoinder filed by the appellants before CLB. Though specific challenge was not made but in the rejoinder it was only mentioned as follows:

It is evident from the fact that u/s 81(1-A) resolution by the Company shareholders was passed pursuant to some authorisation purportedly obtained at the meeting held on 19-4-1995 in which Petitioner I was present and the decision to convene the Extraordinary General Meeting and to pass a resolution u/s 81(1-A) was considered and approved. However, no details are furnished of such a decision and the petitioners are more than confident that the old minutes and the resolution was used by the answering respondent to gain illegal and

unlawful majority and the action is being justified by hiding the contents of these resolutions. The answering respondent has deliberately and knowingly not annexed the copies of such minutes. Whereas the answering respondent has given all other resolutions, he has purposely and intentionally not given the copies of the resolution passed on 12-3-1996, 17-2-1996, 19-4-1995, 9-2-1996 and 16-2-1996.

46. CLB has in minute detail discussed with regard to all the resolutions which we have already adverted to. No proper notice was served on Appellant 1 who is a major shareholder of the Company or on Appellant 2. If the Board meeting had been convened without proper service of notice on the appellants by Respondent 2 then such Board meeting cannot be said to be valid. Mr Nariman however tried to explain various meetings and their subsequent confirmation by the next Board meeting to show that once the resolution of the subsequent meeting has confirmed the resolution of earlier meetings then those minutes stand confirmed irrespective of the fact that the appellants had been served or not. We shall highlight some of the instances. We would show that how a subtle attempt was made to show that several notices were given to the major shareholders of the Company at their local addresses in India knowing fully well that both the appellants are NRIs. The outstanding feature is that Appellant 2, Dr. Binod Prasad Sinha has been shown as an NRI but notice to him was sent at the address P0 Hirapur, District Dhanbad, Bihar and those notices have even been sent with very short interval. The meeting was convened on 13-4-1996 and the notice was sent on 8-4-1996. Likewise, another meeting was scheduled to be held on 5-9-1996 and the notice was sent on the very same day i.e. 5-9-1996; the date of meeting was 2-12-1996 and the notice was sent on 28-11-1996; the date of meeting was 12-3-1996 and the notice was sent on 8-3-1996; the meeting was to be held on 27-3-1996 but the notice was sent on 22-3-1996. Apart from this, it was known to the respondent Sajal Dutta who is the brother of Appellant 1 that whenever his brother comes to Calcutta he does not stay in his house yet the notices were sent to Jodhpur Park, Calcutta. This shows lack of probity on the part of Respondent 2 to somehow or the other oust his brother from the majority shareholding. Similarly, on the basis of such resolution, Dr. Binod Prasad Sinha, Appellant 2 was ousted from the Directorship u/s 283(1)(g) of the Act on the ground that he has not attended the meeting and he has no interest whatsoever. Similarly, Appellant 1 was also ousted in the meeting which was held on 7-2-1996 when another meeting was scheduled to be held on 16-2-1996 and it was within the knowledge of Sajal Dutta that his brother was likely to attend the meeting to be held on 16-2-1996. But suddenly the meeting was held on 7-2-1996 and Appellant I was stripped off his chair as the Managing Director of the Company. Hence, Sajal Dutta became the Managing Director in place of Dr. Kamal Kumar Dutta and the minutes of the said meeting dated 7-2-1996 were not brought forward in the meeting of 16-2-1996 in which Dr. K.K. Dutta was present. The IDBI nominee reported to have advised that the draft minutes of the meeting dated 7-2-1996 to be placed before the meeting

dated 16-2-1996 which would correctly reflect Sajal Dutta as the Managing Director but it was not included in the meeting of 16-2-1996. However, Mr Nariman tried to persuade us to show that there was some defect in drafting of minutes of the resolution and, therefore, it was not reflected in the meeting dated 16-2-1996. It does not appeal to us. Be that as it may, when such an important decision was taken in the absence of the main promoter of the Company, to oust him from the Managing Directorship and to instal Sajal Dutta in his place, it is the grossest act of oppression by the Board of Directors. Sometime after dispatching Dr. Dutta from the Managing Directorship most of the shares were cornered by the subsidiary companies of Sajal Dutta so as to acquire the management of the Company and to alter material change in the management of the Company. What can be more unfortunate than this? When a material change is brought about in the management to the detriment of the interest of the main promoter it is squarely covered u/s 398(1)(b) of the Act. The Company which is floated by the elder brother and which has been run by the younger brother in the absence of the elder brother, the younger brother manages the whole Company and that the Managing Director is totally ousted and shares are being cornered substantially so as to have full control of the Company, is oppression being squarely covered by Section 397(1)(b) of the Act.

47. Apart from this, one of the most important feature which has weighed with us is that Dr. Kamal Kumar Dutta brought second-hand equipments, those were cleared by the Customs and permission was granted by RBI. The Hospital started with those second hand equipments and for almost one year no grievance was made and the Hospital was running successfully with these equipments. On 22-3-1997 RBI granted permission for allotment of 30,55,329 equity shares of Rs 10 each to Appellant 1 against supply of second-hand medical equipments on repatriation basis. But Respondent 2 without permission of the Board of Directors filed an application with RBI seeking withdrawal of the permission granted for allotment of 30,55,329 equity shares to Appellant 1. RBI on 2-6-1997 withdrew the permission granted for allotment of 30,55,329 equity shares to Appellant 1. Respondent 2 presented the Directors' report in the annual general meeting along with audited balance sheet for the year ended 31-3-1997 wherein capitalisation of second-hand medical equipments supplied by Appellant 1 was reversed. Then the appellants filed application under Sections 397 and 398 of the Act before CLB. CLB directed the respondent Company, to amend audited balance sheet as on 31-3-1998 and restore capitalisation of second-hand medical equipments supplied by Appellant 1 which was reversed by Respondent 2. RBI restored the approval for allotment of 30,55,329 equity shares to Appellant 1 on 6-3-1999 and directed the Company to issue 30,55,329 equity shares of Rs 10 each u/s 19(1)(d) of FERA, 1973 on non-repatriation basis against import of second-hand medical equipments. This was not enough. This matter was taken up by Respondents 1/2 by filing a writ petition being WP No. 525 of 1999 challenging the order of RBI dated 6-3-1999 in the Calcutta High Court. The Calcutta High Court directed the General Manager, RBI to hear the parties afresh

and pass appropriate order. In compliance with that order, the Executive Director, RBI, Mumbai heard the matter and passed an order on 10-8-1999 confirming their earlier order. Then too Respondents 1/2 did not feel satisfied and again the respondent Company filed a second writ petition being WP No. 1977 of 1999 on 30-8-1999 before the Calcutta High Court. Pursuant to the direction given by the High Court in the aforesaid writ petition, the General Manager, RBI, Calcutta heard both the parties and passed an order reaffirming the earlier order of RBI. Then too the respondents did not feel satisfied and filed a third writ petition on 7-5-2004. No stay order was passed by the High Court. The subtle attempt on the part of Respondent 2 was only to somehow oust Appellant 1 of his majority by nullifying the order passed by RBI so that the shareholding of the appellant is reduced otherwise against the equipments supplied by Appellant 1 to the tune of Rs 3.5 crores, he will have the majority in the shareholding of the Company. Therefore, this persistent effort was made by the respondents by filing one after another writ petition before the High Court to somehow reduce the shareholding of Appellant 1. These attempts speak volumes in the subtle design on the part of Respondent 2 to somehow see that the holding of Appellant I is reduced and the management is passed on to his hands by outstripping Appellant 1 from the office of the Managing Director by purchasing majority of shareholding pursuant to the resolution passed on 19-4-1995; he wanted to control the entire Company. The filing of repeated writ petitions in the Calcutta High Court at the expense of the Company adversely affected the interest of the Company. It is not the oppression of the member u/s 397 and bringing material change in the management u/s 398 then what could be the better case than this. As we fail to understand the view taken by the learned Single Judge of the High Court directing the appellants to file suit for redressal of all grievances, we cannot sustain this order. We are of the opinion that the view taken by the Calcutta High Court cannot be sustained. We are satisfied that this is the case of oppression of the member as well as would amount to bringing about material change in the management of the Company.

10. In 2007 Sajal had filed another application before the Company Law Board inter alia, u/s 397 and 398 of the Companies Act, 1956 complaining of oppression.

11. Now, it appears that because of these disputes between the two brothers and the prolonged litigation, the 7th to 12th annual general meetings of the company could not be held. On 28th May, 2008 the company issued notices for holding these annual general meetings on 27th and 28th June, 2008 at diverse timings specified in the notices.

12. Sajal was aggrieved by issuance of these notices and approached the Company Law Board by filing an application to restrain holding these meetings. The Company Law Board allowed that application on 25th June, 2008. The company and Kamal and his group were restrained from holding these meetings on 27th and 28th June, 2008 further to the notice dated 28th May, 2008.

13. Being aggrieved this appeal was filed.

ARGUMENTS:

APPELLANTS

14. They argued that the parties had to proceed on the basis of status quo ante 19th April, 1995.

15. On that date Kamal and Binod had 52.74% holding in the issued share capital of the appellant company, as against Sajal and his nominees who had 46.26%.

16. The contribution of Sajal to the share capital was shown as Rs. 123.21 lakhs.

17. Since the allotments after 19th April, 1995 had been cancelled the appellant company was required to refund Rs. 82 lakhs to Sajal. The same had been refunded to him by the company but he had refused it.

18. According to the order of the Supreme Court Kamal and his associates were to be in control of the company.

19. No board meetings had been conducted since 14th December, 1999 because of stay orders by the Court. The accounts of the company had not been completed from the financial years 1997-98 onwards for a period of six years.

20. After the Supreme Court judgment a board meeting was held on 16th September, 2006. Sajal was present at the meeting. The minutes of the board meeting were signed by him.

21. The company took steps to complete the accounts. Financial annual accounts of the company for the period between 1997-98 and 2002-03 were approved by the Board on 23rd June, 2007 and forwarded to the statutory auditors for audit. After receiving the audited accounts the directors' report for the concerned years were also prepared. Board meetings were held on 22nd March, 2008, 29th March and 5th April, 2008. In these meetings the representations made by Sajal were noted.

22. The board wanted to issue separate notices for convening the 7th to 12th annual general meetings. Such notices were issued on 28th May, 2008.

23. Meanwhile Sajal had filed new proceedings u/s 397/398 of the Companies Act being C.P. No. 53 of 2007.

24. The company was in default in holding Annual General Meetings of the appellant company for the period of 1997-98 to 2002-03. Sajal was in management during this period of time.

25. The first order of injunction restraining holding of annual general meetings was passed on 14th December, 1999. It was continued till it was discharged on 11th August, 2006. The notices proposed by the new board contained the

agenda for the items of general business contemplated u/s 173 of the Companies Act, 1956:

(a) Approval of audited accounts;

(b) Retirement of directors by rotation in accordance with Section 255 of the Companies Act, 1956 and Article 117 of the Articles of Association and appointment of directors in their place;

(c) Appointment of statutory auditors.

26. The convening of the meetings was in accordance with the Supreme Court order and ought to be held to give effect to it.

27. Other arguments and cases are discussed in the Chapter "Discussion and Findings".

RESPONDENTS:

28. No question of law arises from the impugned order of the Company Law Board.

29. The appellants could not ask this court to convene the 7th to 12th annual general meetings of the company. No such prayer was made before the Company Law Board. The Company Law Board has not prevented any party from applying to the Company Law Board for convening the annual general meetings but has merely restrained convening all these meetings on the basis of the impugned notices. The Company cannot suo motto hold these annual general meetings beyond the time prescribed by statute or beyond a reasonable time after the Supreme Court order dated 11th August, 2006..

30. The case of In Re: Coal Marketing Co. India Private Ltd., . reported in CAL. LT. 1988 (1) H.C. 61 and the unreported case of B.P. Jalan -vs.- Sree Hanuman Properties Ltd. decided by this Court on 11th July, 1994 were cited to argue that the appellants had no power to convene the 7th to 12th annual general meetings of the company over a period of two days, i.e., 27th June, 2008 and 28th June, 2008.

31. Without appointment of auditors for the period from 1st April, 1998 to 31st March, 1999 there could not have been any audited balance sheet. Similarly, for subsequent years there could be no audited balance sheet. Reliance was placed on Section 210, 211, and Section 215(3), 217 and 224 of the Companies Act.

32. The subject matter of C.P. No. 53 of 2007 is the alleged illegal allotment of shares by the appellants in favour of the appellant no. 2, reducing the respondents' shareholding from 47.03% to 12%.

33. The Supreme Court of India has also recognised the investment made by the respondents in the company; yet the appellants in the accounts are purporting to treat such investment as a "disputed liability". The Supreme Court has described its directions as limited directions. It has confirmed the order of the Company

Law Board.

34. What was contemplated by the Supreme Court was a Board Meeting after restoration of status quo ante 19th April, 1995.

35. The Company Law Board also requires status quo with regard to the Board of Directors to be maintained till disposal of the writ proceedings in the Calcutta High Court being W.P. No. 1157 of 2004. Therefore, Sajal Dutta cannot be retired or removed as a director. The Supreme Court did not remove the respondent no. 1 as a director.

36. The Company Law Board by its order dated 29th March, 2010 had restrained holding of an extraordinary general meeting on 3rd April, 2010 further to a notice dated 12th March, 2010, which the appellants have suppressed.

37. The impugned order of the Company Law Board is a discretionary order. No grounds have been made to interfere with such discretion.

38. The following accounting entries are challenged:

a) Treating medical equipment supplied by the appellant no. 2 as a fixed asset. I.T. Returns filed after the appellant no. 2 took over the affairs of the company do not show the same as fixed assets. Several equipments are not being used by the company.

b) Share application money provided by the respondents is being shown as disputed liability. The same cannot be shown as disputed liability. This is contrary to the Supreme Court order which recognised that the respondents had brought Rs. 1.23/1.30 crores. This is inclusive of the sum of Rs. 39.60/- lacs which is attempted to be shown as disputed liability.

c) The appellant no. 2 is trying to treat the value of the equipments supplied by him as share application money. The dispute regarding the value and quality of the equipments is not only the subject matter of C.P. No. 53 of 2007 before the Company Law Board but also of a writ application before this Court.

Other arguments and cases are discussed in the Chapter "Discussion and Findings".

DISCUSSION AND FINDINGS:

39. u/s 166 of the Companies Act, 1956 a company is supposed to hold its annual general meeting once in a year. Not more than 15 months should elapse between the date of one annual general meeting and the next. The first annual general meeting is to be held within 15 months of its incorporation. In that case no annual general meeting is necessary in the year of incorporation of the company or the following year except the first annual general meeting. The Registrar of Companies may, for sufficient reasons, as provided in the proviso to Section 166, extend the time within which the annual general meeting is to be held, by three months. Section 167 provides that if there is default in holding the

annual general meeting u/s 166, the Company Law Board may call a general meeting of the company at the instance of a member which is to be reckoned as the annual general meeting. Section 168 enacts that if there is default in compliance with Section 166 and 167, the company and every officer of the company in default shall be punishable with fine which may extend to Rs. 50,000/- and in case of a continuing default with a further fine which may extend to Rs. 2,500/- for every day of default.

40. In *In Re: Coal Marketing Co. India Private Ltd.*, J held in the opening paragraph of the judgment that the courts in our country did not have the power to call, hold, conduct or control annual general meetings of any company beyond the time appointed by the Companies Act. It was on an application, u/s 633(2) of the Companies Act, by the directors of a company seeking permission of the Court to hold the annual general meetings beyond time. The learned Judge held the following in paragraph 19 of the judgment:

19. ... The annual general meeting therefore, in case of default, can only be called by either the directions of the Registrar within the exemption u/s 166(1) of the Companies Act or by the Central Government u/s 167 of the Act. I am, therefore, disinclined to so interpret section 633 of the Companies Act and sub-section (2) thereof as to whittle down the clear prohibition upon the Court to grant any extension of time with regard to calling, holding and conducting of an annual general meeting. I wish to emphasise again that the language of section 633 of the Companies Act is confined to relieve an "officer" of the company, and not intended to relieve the company from holding its annual general meetings and suspend the operation of the relevant mandatory provisions of the Companies Act and extend time to hold Annual General meetings. The analogy of the English law is misleading on this point.

41. A Division Bench of our Court comprising of Dipak Kumar Sen and Suhas Kumar Sen, JJ in the case of *Ambari Tea Company Limited & Ors. Vs. Manjushree Saha & Ors.* reported in 1988 (1) Cal LT HC 61 held that the company through its Board of Directors could not call an annual general meeting of the company beyond the period of 18 months from the date prescribed by the said sections. Their Lordships stated the following in paragraph 41:

The other point to be considered is whether the defendants Nos. 2 to 8 as directors are entitled to call an Annual general Meeting of the company when the time for calling such meetings have expired and it is not even possible for the Registrar of Companies to extend such time. We have noted the provisions of Sections 166 and 167 of the Companies Act, 1956 earlier. In view of the clear language of the said sections, it appears to us that, prima facie, the plaintiffs are entitled to restrain the company and its management from holding an Annual General Meeting beyond a period of 18 months from the date prescribed by the said sections.

42. This was followed in an unreported judgment of Ruma Pal, J in Suit No. 137

of 1994 Bajrang Prasad Jalan & Ors. Vs. Shree Hanuman Properties & Finance (P) Ltd. & Ors. decided on 11th July, 1994.

43. On the authority of these decisions Mr. S.N. Mookherjee, learned Senior Advocate for the respondents could contend that the Board of Directors of the appellant company had no power to issue the impugned notices calling the annual general meetings.

44. However, Sanjib Banerjee J in the case of Sadhan Kumar Ghosh Vs. Bengal Brick Field Owners' Association and Others, while exercising jurisdiction over a suit, expressed an opinion that a court always had the power to extend the time to convene an annual general meeting, if the facts and circumstances of the case so warranted.

45. The view of the learned judge was as follows:

28. ...Even though it has now to be accepted, in view of the binding authorities on the aspect, that a company may not suo motu convene and hold the annual general meeting beyond the period prescribed by statute, there is no express or implied bar on a civil court, in an appropriate action, to compel the company to discharge the statutory obligation of holding its annual general meeting, notwithstanding the period prescribed therefore having expired. In In Re: Coal Marketing Co. India Private Ltd., the company court opined that it had no authority to extend the time for a company to hold its annual general meeting beyond the prescribed period. That was in the context of the jurisdiction of the company court u/s 633(2) of the Act and the dictum cannot be extended to imply that a civil court in an appropriate action would not have the authority to direct a company to hold its annual general meeting despite the period prescribed by statute having expired.

29. The present suit has been instituted by a member, in effect, for the benefit of the company and, consequently, for the benefit of all members of the company. Advertisements under Order 1, rule 8 of the Code of Civil Procedure, 1908, have been published. Any order passed in the present proceedings will not only bind the company but will also bind all its members. There is no impediment that is apparent to the issuance of a direction to compel this company to hold the annual general meetings for which it is in default. However, the 64th annual general meeting of the company that had been convened by the company itself beyond the period prescribed by statute cannot, in the light of the binding precedents, be regarded as validly convened.

30. Accordingly, the notice and the resolutions relating to the 64th annual general meeting of the first defendant-company convened and held on July 21, 2008, are set aside. The first defendant-company is directed to hold and complete its 64th annual general meeting for the year ended March 32, 2007, within ten weeks from date by complying with the provisions as to issuance of notice and laying of the balance-sheet and profit and loss account of the company for the relevant financial year. Since the first defendant-company is

now also in default in holding its annual general meetings for the financial years ended March 31, 2008 and March 31, 2009 and since there would be no time to hold the annual general meeting for the financial year ended March 31, 2010, the company is directed to hold and complete the annual general meetings for the relevant financial years within eight weeks of the previous annual general meeting. The amended articles of association of the company would apply and the injunction sought in respect of the business transacted at the extraordinary general meeting of August 18, 2007, is declined.

31. G.A. NO. 2281 of 2008 and G.A. No. 4009 of 2008 are disposed of. There will be no order as to costs.

46. On appeal, a Division Bench of our Court (Sadhan Kumar Ghosh Vs. Bengal Brick Field Owners' Association and Others reported in 2011 (3) CHN (Cal) 174) expressed its concurrence with the opinion of the learned Judge but felt that it was bound by the other Division Bench judgment of our Court in the case of Ambari Tea Company Limited & Ors. Vs. Manjushree Saha & Ors. (Supra). It referred the matter to the Hon''ble Chief Justice to constitute a larger bench. I was told at the time of the hearing of this application that such larger bench had so far not been constituted.

47. Paragraphs 13 and 14 of the said judgment are inserted below:

13. With great respect to the Hon''ble Judges of the said Division Bench, we are unable to subscribe to the view taken by Their Lordships regarding interpretation of section 167 of the Act as, in our opinion, it is not the mandate of the law that in case of default u/s 166 of the Act, it is obligatory upon the company or the defaulting Directors to approach the Company Law Board even if they propose to rectify their mistake and by giving penalty prescribed u/s 168 of the Act for the default already committed, decide to call a meeting of the AGM beyond the time prescribed by law. The object of the said provision, in our view, is to give right to a member of the company to approach the Company Law Board if the existing management of the company avoids facing the share holders by not calling any AGM and at the same time, retains the office. But by that provision, the right of the Directors of the company to call AGM beyond the date prescribed u/s 166 of the Act is not taken away.

14. As we intend to take a view which is in conflict with the one taken in the past by another Division Bench of this Court, we propose to refer the matter before the Hon''ble Chief Justice for constituting a larger Bench for deciding the following questions of law before proceeding further:

1) whether after the expiry of the period mentioned in section 166 of the Act, the Directors of the company become incapable of calling an AGM except by taking recourse to section 167 of the Act on the basis of the order passed by the Company Law Board.

2) Whether the provisions contained in section 167 of the Act is merely enabling

one and does not take away the rights of the defaulting Directors to call an AGM of its own without approaching the Company Law Board u/s 167 of the Act without however avoiding their penal liability for the default already committed in terms of section 168 thereof.

48. By detailed reasons in paragraph 10, 11, 12 and 13 of that judgment the Division Bench has departed from the earlier Division Bench judgment but did not put a stamp of finality on its own judgment, by referring it to a larger bench. Nevertheless, it was not a plain and simple reference to a larger bench. The judgment contained reasons why this Court thought Amabri was not correctly decided. Those reasons, being a later decision, are in my opinion binding on me, till the larger bench decides the issue.

49. The Division Bench decision threw considerable cloud on the correctness of Ambari Tea (Supra). Thus, the effect of Ambari Tea is substantially diluted. So are the decisions in In Re Coal Marketing Co. India Private Ltd. and Bajrang Prasad Jalan (Supra).

50. In interpreting the above group of sections, the penal provisions contained in section 168 are most important, in my opinion. It does not say that after expiry of time no annual general meeting can be held or its holding would be an offence. It says that in case of default the company and every officer responsible for it shall be punishable with fine which might extend to Rs. 50,000/-. The next part of the section convinces me that this penal provision does not debar holding of an annual general meeting beyond the prescribed time but enacts that in case of continuing default there would be an additional fine for each day of default.

51. That has to be the position, for, if one looks at the surrounding sections of the statute regarding preparation of accounts at the instance of the Board of Directors, the appointment of an auditor of the company at an annual general meeting, laying of the balance sheet and profit and loss account before the said general body, the appointment of directors, the removal of directors and laying of other affairs of the company before the general body, it would seem that the whole business of the company would come to a standstill, if there was default in holding a single general meeting. The company would lose its power to convene the general meeting. The registrar would lose it after three months. Nobody in the company would have the power to convene it. It would indeed be a very unsatisfactory state of affairs.

52. Therefore, I feel reasonably free from doubt that a company can convene an annual general meeting beyond time but subject to payment of penalty. Furthermore the civil court has, also ample power to extend the time for holding the annual general meeting by a company. In my further opinion, this Court while exercising jurisdiction as a Court of Appeal from a decision of the Company Law Board has the same powers of the Company Law Board u/s 402(a). The Company Law Board has the power to regulate the conduct of the company's affairs which may include setting terms for convening and holding annual general

meetings. The High Court enjoys the same power.

53. It is the submission of the respondents that the Supreme Court directed immediate convening and holding of meetings. The notices for holding the annual general meetings were issued on 28th May, 2008. Since there was this delay the Board of Directors had lost the power given to them by the order of the Supreme Court to convene the annual general meeting. Such a notice would only be issued after obtaining a specific order from the Company Law Board. Hence, the notices were bad and no meeting could be held further to those notices.

54. There can be no dispute that the Supreme Court had directed the company to convene a board meeting and a general meeting for the purpose of taking proper decisions for administration of the company. This board and general meetings were to be held after reverting back to the position prior to 19th April 1995.

55. In my opinion if there is the authority of the Supreme Court to convene and hold board and general meetings, nothing can come in the way of the company convening and holding it pursuant to such directions. But what has happened in this case is that these meetings were convened after substantial passage of time. Even thereafter could the company go ahead convening and holding those meetings?

56. Some facts have to be noticed.

57. The Supreme Court order was made on 11th August, 2006. A Board meeting was held on 16th September, 2006. Sajal was present in this board meeting. The minutes were signed by him. Accounts for the year 1997-1998 to 2002-2003 were finalised and approved by the Board on 23rd June, 2007. Thereafter the accounts were forwarded to the statutory auditors. After receiving the auditor's report the director's report was also prepared. These were discussed at board meetings on 22nd March, 2008 and 29th March, 2008 and 5th April, 2008. The 7th to 12th annual general meetings were convened by a notice dated 28th May, 2008.

58. Although there was substantial delay by the Appellants in acting in terms of the Supreme Court order, I do not think such delay was so fatal that any Court would not be able to condone it. Nor do I think that the Supreme Court order could be nullified by an inferior Court refusing permission to hold the board and general meetings on the ground that there was delay. In fact it should be the endeavour of all courts to enforce a Supreme Court Order. Therefore, all the above powers that are made available to this court should be used to legitimise the convening and holding of the annual general meetings in question by condoning the delay, which I hereby do.

59. Now, the nature and scope of the judgment and order of the Supreme Court pronounced on 11th August, 2006 has to be ascertained with exactitude. The Court had no hesitation in holding that there was a "full proof case of

oppression". Yet it was not inclined to pass an order of winding up of the company as it was neither in the interests of the company nor in the interests of the parties.

60. The appeals were allowed and the judgment and order of this Court made on 31st March, 2005 was set aside.

61. The Supreme Court said that it was passing a limited direction that the resolution which had been passed by the Board of Directors or in the Annual General Meeting or Extraordinary Meeting recording raising funds of Rs. 40,00,000/-, on 19th April 1995 was set aside. The resolution taken in the meeting held on 16th February, 1996 where Kamal Dutta was removed as managing director and where Dr. Binod Prasad Sinha was removed as Director was also set aside.

62. The other resolutions where shares were allowed to the subsidiary companies of Sajal Dutta were also set aside.

63. The Supreme Court restored the position ante 19th April, 1995. It directed that a fresh meeting be convened and a proper decision be taken in the "in the matter and in the interests of the company". The order of the Company Law Board was confirmed.

64. The Supreme Court directed a board meeting to be convened with 21 days" notice to all the directors by registered post at their NRIs addresses in India as well as U.S.A. The meeting was to be chaired by Dr. Kamal Kumar Dutta. Any NRI director, unable to attend, could make a nomination. The Supreme Court went on to reiterate what it said before:

We again make it clear that all the resolutions are set aside with regard to raising of funds dated 19.4.1995, removal of Dr. Binod Prasia Sinha from Board of Directors, outstripping of Dr. Kamal Kumar Dutta from the Managing Directorship, allotment of shares to Sajal Dutta's companies and to others and all other resolutions which adversely effect Dr. Kamal Kumar Dutta and Dr. Binod Prasad Sinha. Let a fresh meeting of the Board of Directors be convened with Dr. K.K. Dutta as Managing Director and proper resolution be passed in the interest of the company in accordance with law. No order as to costs.

65. In my opinion, a reading of paragraphs 48 and 49 of the Supreme Court judgment makes it explicit with all actions taken by Mr. Sajal Kumar Dutta and his associates on and after 19th April, 1995 were adjudged void by the Supreme Court. It has done so by reiterating this view in several parts of this judgment. The Supreme Court wanted a meeting of the Board of Directors on the basis of the status quo ante 19th April, 1995 to be held immediately. It has also opined that a fresh annual general meeting of the company be also convened for proper conduct of the affairs of the company.

66. Whilst allowing the appeals the Supreme Court had added one line in paragraph 48 of the judgment "We confirm the order and direction of CLB.

67. Now, what is this order and direction of the CLB?

68. I set out the operative part of the CLB order dated 29th October, 1999.

...Taking an over all view and the pending proceedings before the Calcutta High Court, we pass the following order:

1. Since we have held that the stand of the company that the petitioner directors had vacated office u/s 283(1) (b) cannot be sustained for various reasons, we declare that these petitioner directors will continue as directors of the company. To avoid any future controversy relating to issue of notices for the Board Meetings, we also stipulate that notices for all Board Meetings will be issued to all the directors by registered post with 21 days notice to the addresses of the NRIs directors at their usual addresses in USA/other countries and to the Indian directors at their addresses in India. WE also stipulate that NRI directors will have the right to appoint alternate directors and if the right is exercised, then, the alternative directors will also be given notices as stipulated above.

2. The shares allotted in the Board meetings on 12.3.90 and 24.7.96 will not have any voting rights till the outcome of the proceedings in Calcutta High Court is known. No further shares will be allotted against the Share application money with the company either in the names of the NRI investors or in the names of the respondent's group.

3. The petitioner/respondent are at liberty to invest more funds in cash in the company towards share capital but the same will be kept as share application money till the disposal of the High Court proceedings and subject to other approvals as may be necessary.

4. Since our object is to maintain the status quo till the date of the matter in the Calcutta High Court, there will be no change in the composition of Board other than that the two petitioner directors will function as directors in addition to the existing directors.

41. Before we part with this order, we feel that we should say few words about the role of IDBI and its nominee director on the Board of the company. Even though we are conscious that neither the IDBI nor the nominee director is a party to the proceedings, yet, since we feel that their positive role could have avoided the disputes, we are mentioning about the same. As far as IDBI is concerned, its stand in the entire controversy seems to be unclear. By a letter dated 4.4.1996, the IDBI indicated its unwillingness to fund second hand equipments even though we find that there is no stipulation in the loan agreement that only new equipments were to be brought. Having expressed its unwillingness to fund second hand equipments, in 1999, the IDBI asked the company to carry out an inspection of the second hand equipments by an authorised second hand equipments. If it is so, it would have been prudent on the part of the IDBI to have carried out the inspection much earlier so that the real condition of the equipments could have been found out. Likewise, the IDBI

objected to the issue of allotments made by the company in 1996, but later without taking any definite stand in this matter, advised the petitioner to take any action, if necessary and thus washed its hand of. We feel that the stake of the IDBI being the highest in the company of Rs. 4.6 crores (excluding interest), it should have played a concrete role to find out some workable solution. It is on record that the company has not been able to pay its dues to the IDBI and that IDBI has initiated legal proceedings. AS far as the role of the IDBI nominee is concerned, he had a major role in the composition of the management of the company. First it was he who proposed appointment of an MD in the meeting held on 9.2.1996 and it was he who expressed his reservation to the dismissal of the 3rd respondent in the meeting on 9.2.1996 and on his insistence the 3rd respondent was reinstated in the Board meeting on 17.2.1996. It was done without consulting the petitioner who was the Chairman and who ad dismissed the 3rd respondent. Thus, his role, instead of being constructive, led to the widening of the differences between the parties. Further, he also seems to have allowed allotment of shares without specific approval form the IDBI as is evident from the letter of IDBI at Annexure-K. Further, when the Board decided to take action to regularise the import of second hand equipment in its meeting on 16.2.1996, he did not seem to have followed upon this decision. Being the nominee of the Institution which had lent a substantial amount of money, his objective should have been to ensure proper functioning of the management which would enable the company to refund the loans but the facts reveal otherwise. We dispose of this petition with the above directions and observations. NO order as to costs.

CONCLUSIONS

69. Now let us see what is the combined effect of the Supreme Court order read with the Company Law Board order.

70. Leaving aside the dispute about allotment of shares of the alleged value of equipments imported by Kamal claimed to be Rs. 3.5 crores, it has been held that the percentage of paid up share capital held by Dr. K.K. Dutta and Dr. B.P. Sinha were 46.378% and 6.365% respectively aggregating to 52.74% and of Mr. Sajal Dutta 46.26%.

71. Now, the Board of Directors of the company immediately ante 19th April, 1995 has first to be reconstituted. Dr. K.K. Dutta and Dr. B.P. Sinha cannot be said to have vacated their offices u/s 283(1)(b) of the Companies Act, 1956 and would be deemed to be members of the board. There would be no change in the composition of the board other than induction of these two persons, as held by the Company Law Board order dated 29th October, 1999 at Vol. 2 pages 1107 to 1109 of the Paper Book.

72. This Board of Directors will be have to call annual general meetings of the shareholders ante 19th April, 1995 in which the shareholding of Dr. K.K. Dutta, Dr. B.P. Sinha and Mr. Sajal Dutta would have the above percentage of paid up

share capital.

73. Composition of the board meetings and of the general body in the annual general meeting has to be as above.

74. Irrespective of the composition of the Board of Directors, Dr. K.K. Dutta and Dr. B.P. Sinha would have a decisive say whilst Sajal Dutta would be entitled to participate in the board meeting, without interfering with the decision making process.

75. In my opinion, in view of the Supreme Court order read with the Company Law Board order and the Companies Act, 1956 Mr. Sajal Dutta would retire by rotation but would be deemed to be re-elected at the general meeting.

76. With regard to the submission of the respondents that the 7th to 12th Annual General meetings cannot be held at such short intervals, in my opinion there is nothing in the Companies Act, 1956 shown to me which prohibits these meetings to be held at such short intervals.

77. In my opinion, the company should constitute a Board of Directors in view of the above observations within 4 weeks from date.

78. This Board of Directors will issue fresh notices for holding all the 7th to 12th annual general meetings of the Appellant Company according to the agenda mentioned in the notices dated 28th May, 2008, subject to the above observations, within 6 weeks of holding the Board Meeting.

79. In the accounts, reports, notes, explanatory statements and other documents care should be taken that no defamatory remarks are made against Sajal and his group and that the notices are issued strictly in accordance with the Companies Act, 1956 read with the above orders of the Supreme Court. Furthermore, acceptable accounting methods and practice have to be followed to show the source and application of funds, as a result of the Supreme Court order. The amount infused by Mr. Sajal Dutta into the company and which, as of now, cannot be received by the company according to the Supreme Court order, cannot be shown as a "disputed liability".

80. In my opinion, the Company Law Board fell into great error in altogether preventing holding meetings as mentioned in the above notices. It ought to have permitted them to be held subject to the above terms.

81. The appeal is allowed to the above extent.

82. Stay application, if any is disposed of. Urgent certified photocopy of this judgment/ order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.