

(2010) 03 CAL CK 0058

In the Calcutta High Court

Case No : CA No. 53 of 2010 and CP No. 252 of 1985 and CA No. 40 of 2010
and CP No. 252 of 1985

Subrata Sen and Another

APPELLANT

Vs

Nischintapur Tea Co. Ltd. and Others
Tea Co. Ltd. Vs Ajit Kumar Agarwal

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 21 Rule 100, Order 34 Rule 4(1), 144, 151
Companies Act, 1956 — Section 111A, 156, 237, 397, 398
Constitution of India, 1950 — Article 215

Citation : 114 CWN 449

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : S.B. Mookerjee, Chanchal Kumar De, Pratap Chatterjee, Promit Kr. Roy, Aditya Kundaliya and Anshumala Bansal, for the Appellant; S.N. Mookerjee, Ratnanko Banerjee, S. Agarwal and Z. Rahaman, for the Respondent

Judgement

Sanjib Banerjee, J.—A piquant situation has arisen with the parties claiming that there was an obvious mistake in the order dated April 12, 2007 passed on an application in proceedings under Sections 397 and 398 of the Companies Act; and, another person suggesting that there was neither any mistake in the recording of the order nor should it otherwise be corrected since valuable rights have accrued pursuant thereto. One Amita Sen, since deceased, instituted CP No. 252 of 1985 under Sections 156, 237, 397, 398, 403 and 406 of the Companies Act, 1956 complaining of there being a serious dispute as to the structure of the company's paid-up capital and citing oppression of the shareholders and mismanagement in the affairs of the company. The original petitioner claimed to be entitled to 3472 equity shares amounting to 15.1 per cent of the valid paid-up capital in the company. The original petitioner also claimed to have the support of shareholders making up a further 7.11 per cent of the total paid-up capital in the company.

2. Following the death of the original petitioner, the action was continued in the name of her four sons upon the petition being amended pursuant to orders dated December 21, 2005 and January 24, 2006. The amendments were carried out on or about February 8, 2006.

3. CA No. 302 of 2007 was taken out in April, 2007 by three of the substituted petitioners. The prayers in the Judge's summons dated April 5, 2007 were as follows:

"a) An order should be passed that the aforesaid company petition be treated as withdrawn and all applications connected thereto as not pressed.

"b) Such further and/or other orders be made and directions be given as this Hon'ble Court may seem fit and proper."

4. The affidavit in support of the summons ran into six paragraphs with the first as the introduction and the fifth setting out the prayers from the Judge's summons. The last paragraph claimed the statements in the affidavit to be true to the knowledge of the applicants. The substantive averments in support of the orders sought on the application are found at paragraphs 2, 3 and 4 thereof:

"2. Upon death of the said Mrs. Amita Sen, (1) Mr. SUBRATA SEN, (2) Mr. SUDIPTA SEN, (3) Mr. RANJAN SEN, (4) Mr. SANJOY SEN, have been substituted in said Petition as the Petitioners in place of the said Mrs. Amita Sen.

"3. Subsequently, the Petitioner No. 2 in the company petitioner Mr. Sudipta Sen died on 16.4.2006 but no substitution in his place have been made as yet.

"4. We, do not want to proceed and/or continue with the Company Petition and/or contest the Company Petition any further and as such want to withdraw the said Petition and all applications connected thereto as not pressed."

5. In fact, the cause title running into three pages was longer than the body of the application. It was, however, indicated in the cause title in CA No. 302 of 2007 that the application was for withdrawal of Company Petition No. 282 of 1985 and all connected applications.

6. The application for withdrawal of the Sections 397/398 proceedings appeared on board on April 12, 2007. What transpired at the obviously brief hearing cannot be recounted with any accuracy nearly three years down the line. The order that came to be made upon the hearing is set out;

"The Court:- It is submitted on behalf of the applicants that the matter need not be proceeded with.

Company Application No. 302 of 2007 is dismissed as not pressed.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be made available to the parties concerned upon compliance with all requisite formalities."

7. The applicants in CA No. 53 of 2010 narrate the preliminaries in the first four paragraphs of the affidavit in support of the summons and mention that several orders were passed in the Sections 397/398 proceedings including orders dated June 21, 1985, July 3, 1986 and September 18, 1987. These applicants state that the order of June 21, 1985 "provided for an interim order of status quo to be maintained with regard to the shareholding of the respondent company." Paragraphs 5 to 10 of the application read as follows :

"5. The applicants state that during the pendency of the said proceedings, the applicants had entered into a terms of settlement and a Memorandum of Understanding dated 26th February, 2007 for the purpose of sale of their shares and rights in the respondent company. In terms of such Memorandum of Understanding and terms of settlement, the then petitioners, namely, the three surviving sons of Mrs. Amita Sen including the applicants had abandoned C.P.No.252 of 1985 and all applications thereto. The then petitioners including the applicants had also waived all their rights arising out of the petition and declared that they shall not press for any orders passed in the petition. The then petitioners including the applicants had also agreed to withdraw C.P.No. 252 of 1985 and also cause vacating of all orders with retrospective effect within 30th April, 2007. The then petitioners under the Memorandum of Understanding had received the entire consideration for the transfer of their shares and had given up all their rights in respect of the respondent company. The applicants crave leave to refer to the said terms of settlement and Memorandum of Understanding at the time of hearing of this application, if necessary.

"6. In the aforesaid circumstances, the then petitioners including the applicants had caused an application to be prepared and filed before this Hon"ble Court for withdraw of the company petition being C.P.No.252 of 1985 and all applications connected thereto. This company application was affirmed and filed before this Hon"ble Court on 5th April, 2007. The Judge's Summons was made returnable before the Hon"ble Company Court on 12th April, 2007. A copy of the Judge's Summons along with a copy of the affidavit in support of the Judge's Summons are annexed hereto and collectively marked "A". The petitioners in C.A.No.302 of 2007 had engaged one Mr. Sushil Kumar Saha as the Advocate-on-Record for moving the said application and for withdrawal of C.P.No.252 of 1985 and all applications connected thereto. The intention of the applicants was to withdraw the petition and to have all interim orders vacated so as to give effect to the Memorandum of Understanding as they had no further interest in the said company matter.

"7. We say that an order was passed on the said application on 12th April, 2007. A copy of the said order dated 12th April, 2007 is annexed hereto and marked "B". The applicants after 12th April, 2007 had not given any further attention to the orders and was under the impression that the company petition being C.P.No.252 of 1985 and all applications connected thereto had been dismissed as withdrawn.

"8. We say that all of a sudden, on or about 30th January, 2010 the applicants were contacted by the present directors of the respondent company and the applicants were shocked to know that in connection with another proceeding, it has been contended that C.P.No. 252 of 1985 and the applications in connection thereto has been shown pending in the Case Status Information System of this Hon''ble Court. A copy of the Case Status Information System of this Hon''ble Court is annexed hereto and marked "C".

"9. We say that we are surprised to find out about the pendency of C.P.No.252 of 1985 as prayers have been made before this Hon''ble Court for dismissal of C.P.No.252 of 1985 on 12th April, 2007. Order was also passed on 12th April, 2007 on the application of the applicants. However, after making further enquiries on January, 2010 and after perusal of a copy of the order dated 12th April. 2007, it appears that in the said order due to inadvertence or mistake on the part of the advocates appearing for the applicants as well as the respondent company, it has been recorded that C.A.No.302 of 2007 has been dismissed as "not pressed". We state and submit that the intention of the applicants and the then petitioner was to withdraw C.P.No.252 of 1985 and not have C.A.No.302 of 2007 dismissed. Such mistake is apparent on the face of the record and on the face of the order dated 12th April, 2007. We further state and submit that the mistake on the face of the order had not been noticed earlier by the applicants and the advocates appearing for the applicants also did not point out such obvious mistake.

"10. In the aforesaid facts and circumstances, we have been advised and we have made this application for correcting and/ or rectification of the order dated 12th April, 2007 so as to reflect the dismissed of C.P.No.252 of 1985 and all applications in connection thereto. We state and submit that, in any event, C.P.No.252 of 1985 and all applications in connection thereto should be treated as dismissed as withdrawn on and from 12th April, 2007. The applicants had no interest and have not proceeded with C.P.No.252 of 1985 or any application in connection thereto on and from 12th April, 2007."

8. The applicants claim that the mistake in the order is prejudicial to the interest of the applicants and also to the company and its other shareholders. They assert that they had accepted and acted on the basis that the petition and all applications therein had been dismissed and, consequently, all -"interim orders stood vacated. The applicants say at paragraph 3 of the application that one of the substituted petitioners, Sudipta Sen, had died a bachelor and there was no need for further substitution since his only legal heirs were his three brothers who were already on record. Sudipta Sen had died prior to CA No. 302 of 2007 being made though such application did not specify that his heirs were already on record. Paragraph 13 of the affidavit in support of summons in CA No. 53 of 2010 indicates that a second of the substituted petitioners had died on February 6, 2009 and since he was a bachelor his heirs were his two remaining brothers, the applicants, who were already on record and there was no need for

substitution.

9. In point of time, CA No. 53 of 2010 is the later of the two applications that form the subject matter of this order. CA No. 40 of 2010 has been brought by Ajit Kumar Agarwal seeking to be added as a petitioner to CP No. 252 of 1985 or, in the alternative, to be added as a respondent and be given the carriage of proceedings. The applicant in CA No. 40 of 2010 says that he has instituted proceedings u/s 111A of the Companies Act before the Company Law Board seeking transmission of the shares standing in the name of his father and those gifted to him by his mother and brother. This applicant says that the company had filed an affidavit in the Section 111A proceedings on January 25, 2007 and justified the non-transmission of the shares on the basis of the order dated June 21, 1985 subsisting on CP No. 252 of 1985. The applicant says that he was entitled to shares representing more than 11.9 per cent of the paid-up capital of the company as at January 25, 2007. The applicant says at paragraph 6 of the affidavit in support of the summons that the company had sought to offer a sum of Rs. 1 lakh to the applicant on December 16, 2009 in an attempt to settle the Section 111A proceedings. He says that the company had then claimed that the applicant was entitled to only 0.17 per cent of the shareholding in the company. He says that he caused searches to be made and discovered that CP No. 252 of 1985 remained pending and the order dated June 21, 1985 continued. He contends that the petitioners in the Sections 397/ 398 proceedings may take steps to have the order dated June 21, 1985 vacated and the rationale for the application was to ensure that the petitioners in the Sections 397/398 proceedings did not jettison the petition for extraneous considerations.

10. The applicants in CA No. 53 of 2010 say that there was an obvious mistake in recording on April 12, 2007 that the application would not be pursued since the application itself sought leave to have the Sections 397/398 petition dismissed. They say that though they ought to have noticed that the order had incorrectly recorded what had been submitted and what had transpired, yet the mistake in the order could be rectified at any point of time since this is a court of record and an act of court should not prejudice any person. They suggest that in addition to Section 152 of the CPC which permits clerical and arithmetical errors and other accidental slips to be rectified, the inherent powers of a superior court can be invoked in a situation as this. Though it is not elaborately pleaded in the application, it is suggested by the applicants in CA No. 53 of 2010 that the shareholding composition in the company has undergone a substantial change on the applicants' understanding that CP No. 252 of 1985 stood withdrawn on April 12, 2007 and the interim order subsisting thereon stood vacated.

11. These applicants assert that even if minor prejudice were to be caused to any person, a mistake such as this can be corrected at any stage. They question the locus of the applicant in CA No. 40 of 2010 to oppose the prayer made for rectifying the order. They maintain that the applicant in CA No. 40 of 2010 is neither a shareholder nor entitled to be a shareholder in the company. The

applicants in CA No. 53 of 2010 say that the averments made in the affidavits filed on behalf of the company in the proceedings u/s 111A should be looked into to assess the purported claim of the applicant in CA No. 40 of 2010, particularly since such applicant has referred to the pleadings in the Section 111A proceedings. The applicants in CA No. 53 of 2010 submit that unless it is demonstrated that a person had relied on the mistaken order of April 12, 2007 to irretrievably alter his position to his detriment, the present attempt to correct the order cannot be resisted.

12. The applicant in CA No. 40 of 2010 suggests that the conduct of the applicants in CA No. 53 of 2010 would disentitle them from seeking the extreme indulgence of having an order altered three years after it was made on the ground that it contained a mistake. The applicant in CA No. 40 of 2010 refers to Section 152 of the CPC and says that is the only provision in the Code for correcting a judgment or order or decree and, by necessary implication, any correction that is not envisaged by Section 152 of the Code cannot be sought or made. He argues that since Section 152 covers the field of correcting orders, Section 151 of the Code and the court's inherent powers cannot be invoked to effect any correction in an order.

13. The applicant in CA No. 40 of 2010 claims that the applicants in CA No. 52 of 2010 have not made the fullest disclosure in seeking the extraordinary lenience of changing the purport of an order that has been drawn up, completed and perfected by now. He suggests that, in any event, the order dated April 12, 2007 could not have implied that the petition stood dismissed since the court had to apply its mind and grant leave before a petition under Sections 397/398 of the Companies Act could be dismissed or permitted to be withdrawn. This applicant refers to Rule 88(2) of the Companies (Court) Rules, 1959. These Rules were framed by the Supreme Court and have statutory force. He contends that the surviving substitute : petitioners who had applied by way of CA No. 302 of 2007 had not disclosed in their application that they had given notice to, or, had obtained the consent of, the other shareholders of the company who had supported the original petitioner at the time of the institution of the Sections 397/398 proceedings. He says that the application for dismissal of the Sections 397/398 petition was itself mala fide since it did not contain relevant particulars and did not disclose the purport of the order dated June 21, 1985 or the pendency of the petition u/s 111A where such order had been cited to stymie the claim therein. He submits that it is not inconceivable that after making the application for withdrawal of the Sections 397/ 398petition, the applicants had a second thought or that the circumstances that such applicants anticipated would come about, had not come about.

14. The applicant in CA No. 40 of 2010 has relied on an affidavit affirmed by Sujit Chatterjee on behalf of the company on January 28, 2010 that has been filed before the Company Law Board in the proceedings under Sections 111A of the Act. A copy of such affidavit as forwarded by the company under cover of

advocate's letter of January 28, 2010 has been handed over to Court. The said affidavit professes "to bring on record certain facts and documents which are necessary for the adjudication of all controversies in issue before (the Company Law Board)." After the preliminaries in the first three paragraphs of such affidavit, the company has laboured to demonstrate over the next four extraordinary lenience of changing the purport of an order that has been drawn up, completed and perfected by now. He suggests that, in any event, the order dated April 12, 2007 could not have implied that the petition stood dismissed since the court had to apply its mind and grant leave before a petition under Sections 397/398 of the Companies Act could be dismissed or permitted to be withdrawn. This applicant refers to Rule 88(2) of the Companies (Court) Rules, 1959. These Rules were framed by the Supreme Court and have statutory force. He contends that the surviving substitute petitioners who had applied by way of CA No. 302 of 2007 had not disclosed in their application that they had given notice to, or had obtained the consent of, the other shareholders of the company who had supported the original petitioner at the time of the institution of the Sections 397/398 proceedings. He says that the application for dismissal of the Sections 397/398 petition was itself mala fide since it did not contain relevant particulars and did not disclose the purport of the order dated June 21, 1985 or the pendency of the petition u/s 111 A where such order had been cited to stymie the claim therein. He submits that it is not inconceivable that after making the application for withdrawal of the Sections 397/398 petition, the applicants had a second thought or that the circumstances that such applicants anticipated would come about, had not come about.

15. The applicant in CA No. 40 of 2010 has relied on an affidavit affirmed by Sujit Chatterjee on behalf of the company on January 28, 2010 that has been filed before the Company Law Board in the proceedings under Sections 111A of the Act. A copy of such affidavit as forwarded by the company under cover of advocate's letter of January 28, 2010 has been handed over to Court.. The said affidavit professes "to bring on record certain facts and documents which are necessary for the adjudication of all controversies in issue before (the Company Law Board)." After the preliminaries in the first three paragraphs of such affidavit, the company has laboured to demonstrate over the next four paragraphs that the petitioner in the proceedings u/s 111A of the Act had no right in respect of the shares in the company that he claimed. If the averments as contained in the said affidavit were to be accepted, there may be a serious doubt as to the locus of the applicant in CA No. 40 of 2010 qua the company. But that is not a matter which ought to be conclusively answered here as the petition u/s 111A of the Act is pending adjudication elsewhere. The said affidavit is significant, however, in one aspect as more fully discussed hereinafter.

16. In support of their prayers in CA No. 53 of 2010 the applicants therein have referred to several well-known authorities. These applicants first refer to a judgment reported at 1885 (30) Ch 239 (Mellor vs. Swire). In that case the Court or Appeal construed a Will and the order on the appeal; which was drawn

up, passed and entered, recorded, inter alia, that the "tenants for life were and are entitled to the profits, produce, and proceeds of investments of profits"" of certain collieries which were named in the order. The appellant was represented by his solicitor before the Registrar during the settling of the order, and made objections to its form, but did not state that he was going to apply to the court to vary the minutes. He thereafter served notice of motion to vary the statement of the opinion of the court, so as to make it read, in its material part, that "the tenants for life were and are entitled to the profits and produce of the collieries in which the testator was interested at the time of his death..." The testator at his decease was entitled to shares in two companies. After his death the first company was wound up and the second company added to its business the manufacture of iron. The second company was thereafter amalgamated with other companies that owned collieries. A question was raised whether the interests in the new concerns that the second company had evolved into had not in part been acquired by the investment in them of profits belonging to the tenants for life. The report acknowledges that it was clearly evident from a shorthand note of the judgment of the Court of Appeal that the court did not intend to decide anything but the question arising on the construction of the testator's Will, whether the profits of his collieries were to be treated as income payable to the tenants for life, or were to be capitalised.

17. The usual objections to the notice of motion were taken: that the order had been passed and entered and could not be altered; that a party dissatisfied with an order as drawn up had to move to vary the minutes before it was passed and entered; that the case could not be reheard; and, that one could not apply to vary an order except as regards a clerical error or slip. All three learned Judges on the Bench concurred as to the authority of a court to deal with a mistake in its order, as would be evident from the following excerpts:

"... it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced." (Cotton, L.J. at page 243)

"It appears to me, therefore, that if it is once made out that the order, whether passed or entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not." (Lindley, L.J. at page 246)

"I think the true view is... that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An

order, as it seems to me, even when passed, and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice." (Bowen, L.J. at page 247)

18. The next judgment brought by the applicants in CA No. 53 of 2010 is reported at Jang Singh Vs. Brijlal and Others, The appellant before the Supreme Court in that case filed a suit for preemption of the sale of certain lands against both the vendor and the vendee. A compromise decree was passed in his favour and he was directed to deposit Rs. 5951/- less Rs. 1000/- already deposited by May 1, 1958. The decree recorded that on the plaintiff failing to make the deposit punctually his suit would stand dismissed with costs. In January, 1958 the plaintiff applied to the court for making the deposit of the balance amount of the decree. The clerk of the court, which was also the executing court, prepared a challan wherein the figure of Rs.4950/- was mentioned instead of Rs. 4951/-. The plaintiff made the deposit of the wrong balance on the same day and in May, 1958 he applied for and received an order for possession of the land. It was reported by the Naib Nazir that the entire amount was deposited in court. The original vendee applied to court for payment of the amount lying in deposit and it was then reported by the Naib Nazir that the deposit was short by a rupee. The vendee applied for dismissal of the suit and for recall of the order of possession made in the plaintiffs favour. The court accepted the vendee's application, observing that in preemption cases the court had no power to extend the time fixed by the decree for payment of the price and the preemptor by his failure to deposit the correct amount had incurred the dismissal of the suit under the decree. The plaintiff appealed against the order. The district judge recorded the evidence of the execution clerk, the revenue accountant in the treasury office, the plaintiff and the vendee. The appellate court held that the records of the case revealed that on the day that the suit was compromised and the decree passed, the plaintiff was not present in court and did not know the exact decretal amount. The district judge accepted that it was the duty of the plaintiff to be punctual and to find out the exact amount before he made the deposit. He, however, held that as the plaintiff had approached the court with an application intending to make the deposit and the court's clerk made a mistake by requiring him to deposit an amount which was less by one rupee, the plaintiff was excused inasmuch as the responsibility was shared by the court. The district judge allowed the appeal by holding that "the deposit made was a sufficient compliance with the terms of the decree." The vendee appealed to the High Court which held that the finding that the short deposit was due to an act of court was unsupported by evidence. The district judge's order was set aside. The plaintiff carried the High Court order to Delhi. The Supreme Court relied on the maxim, *actus curiae neminem gravabit*, and agreed with the district judge that "the error, if any, was substantially the making of the Court." The Supreme Court, however, found the district judge to be in error in holding that the decree was substantially complied with and observed that the district judge should have required the

balance sum of Re. 1 to be deposited.

19. The applicants in CA No. 53 of 2010 have only placed paragraph 6 of the report. But these applicants otherwise contend that not only should the mistake in the order dated April 12, 2007 be rectified but the rectification should take effect from the date of the mistake. In such context, these applicants ought to have relied on the following observation at paragraph 8 of the report in the Jang Singh case:

"8.... The mistake committed by the court must be set right. The case must go back to that stage when the mistake was committed by the court and the appellant should be ordered to deposit the additional rupee... In view of the mistake of the court which needs to be righted the parties are relegated to the position they occupied on January 6, 1958 when the error was committed by the court which error is being rectified by us nunc pro tunc."

20. The next judgment cited is reported at AIR 1922 269 (Privy Council) . In that case parties to an action had acted in a particular manner on the basis of an order that was ultimately set aside by the Privy Council in an earlier round of the proceedings. Third party auction-purchasers had parted with their purchase money which was paid into court and such money had been distributed amongst creditors of the judgment-debtor. The Privy Council relied on Section 144 of the CPC and quoted from one of its previous judgments to the effect that the expression "the act of court" in the maxim, "the act of court does no injury to the suitors" implies the court as an institution - from the lower court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case - and not any individual court.

21. A judgment reported a Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, is next cited where the principle in Mellor vs. Swire was accepted and applied. In that case a mortgagee filed a suit claiming a decree for the sum outstanding. The plaint also contained a prayer that on failure to pay the decretal amount within the time fixed by court "the right of the defendants to redeem the mortgage may be annulled and a decree may be passed giving possession of the mortgaged property." The trial court passed a preliminary decree which provided that if the decretal amount together with costs of the suit were not paid by the defendants within six months from the date of the decree, the plaintiff would be at liberty to apply for final decree. Though it was a foreclosure suit, the preliminary decree passed by the trial court was one under Order XXXIV Rule 4(1) of the CPC as it provided that in default of payment the plaintiff would be at liberty to apply for a personal decree against the defendants for the balance. One of the defendants preferred an appeal to the High Court which was dismissed and the suit was sent back to the trial court for passing a final decree. During the pendency of the appeal before the High Court, in an unconnected suit the respondent before the Supreme Court obtained a money decree against the transferee of the mortgaged property who was also a defendant in the first suit. In execution of the decree in the second suit, the interest of the transferee of the

mortgaged property in such property was put Up for sale. The respondent before the Supreme Court was the auction-purchaser and the sale was confirmed but it covered only a part of the mortgaged property. Subsequently, the mortgagee (who was the plaintiff in the first suit) applied for a final decree in the first suit and assigned his right in the decree in favour of the appellants before the Supreme Court. Upon substitution being effected, the court decreed the first suit which provided that if the decretal debt was not paid within the appointed time, the defendant and all persons claiming through them would be "debarred and foreclosed of and from all rights of redemption." The appellants before the Supreme Court thereafter obtained possession of the mortgaged property whereupon the plaintiff in the second suit applied under Order XXI Rule 100 of the Code for restoration of possession to him. This matter ultimately reached the High Court which set aside the final mortgage decree in the first suit, remitted the matter to the trial court and give liberty to the plaintiff in the second suit to participate in the matter. It was such order of the High Court which was called into question before the Supreme Court. The Supreme Court noticed that since the first suit was for foreclosure there was no question of a personal decree being passed against the mortgagors or of a preliminary decree for sale being made. The Supreme Court observed that it was "through an accidental slip or inadvertence" that a mortgage decree for sale was made and opined that the trial court had the power "under Section 151 and Section 152 (of the Code) to correct its own error which had crept in the judgment and the preliminary decree and pass a proper final decree for foreclosure as intended by it." (Paragraph 12 of the report)

22. The applicants in CA No. 53 of 2010 have also relied on a Division Bench judgment of this Court reported at Union of India (UOI) Vs. Kamal Kumar Goswami and Others, . In that case leave had been granted under clause 12 of the Letters Patent as was evident from the endorsement made in such regard and from the recording in the writ of summons served on the defendants. The learned Judge who granting leave under clause 12 of the Letters Patent omitted to put his signature below the endorsement and the Master was also found to have overlooked the mistake. It was in such circumstances that the appellate court invoked the principle that no litigant should suffer due to any mistake or fault of court.

23. Another judgment, reported at Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. and Others,), has been placed to emphasise on the plenary powers of a High Court under the Letters Patent. In the final authority brought by the applicants in CA No. 53 of 2010 to bear on the issue, the Supreme Court in the judgment reported at (2009)5 SCC 791 [Commissioner of Customs and Central Excise vs. Hongo India (P) Ltd] recognised that a High Court, as a court of record as envisaged in Article 215 of the Constitution, had inherent powers to correct the records.

24. The company has also lent its support to the applicants in CA No. 53 of 2010.

The company reiterates the principle enunciated in *Mellor vs. Swire* and asserts that the object of the surviving petitioners' application is not to obtain a new order but to have the order corrected so that it takes effect from the date when it was passed. The company says, without prejudice to its contention that the applicant in CA No. 40 of 2010 is a complete stranger to the issue of the mistaken order since that is a matter between the parties to the action and the court, that the applicant in CA No. 40 of 2010 has not relied on the order to acquire any interest. The company contends that the applicant in CA No. 40 of 2010 cannot resist the prayer for rectification of the order.

25. To buttress the argument that a mistake of the present kind is always subject to correction by court, the company refers to a judgment reported at (1962)1 SCR 206 (*Janakirama Iyer vs. Nilakanta Iyer*) where two appeals were taken to the Supreme Court by two sets of defendants from a suit instituted under Order I Rule 8 of the Code on behalf of the general body of the creditors for administration against the trustees and alienees of the properties which belonged to their debtors. The company relies on paragraph 23 of the report where the Supreme Court approved of the correction in the decree by the High Court (as it was not in consonance with the judgment) notwithstanding the pendency of the appeals before the Supreme Court:

"23.... Thus, there can be no doubt that the decretal order drawn in the High Court through" error introduced the words "mesne profits" and such an error could be corrected by the High Court under Sections 151 and 152 of the Code even though the appeals may have been admitted in this Court before the date of correction."

26. In the other new case cited by the company, a Division Bench in the judgment reported at 28 CWN 873 (*Chandra Kumar Mukhopadhyaya vs. Sudhansu Badani*) construed the word "may" in Section 152 of* the Code and discussed whether there was an element of discretion that the court had despite it being brought to the court's notice the decree did not agree with the judgment. It was held that the word "may" in Section 152 of the Code enlarges the power of the court to make the correction "at any time", implying thereby that "the section simply emphasises that no lapse of time would disentitle the Court to make the correction." The Division Bench found that the intention of the law was to make it obligatory upon the court whenever any such mistake was discovered to correct it and the relevant section merely emphasised that duty by saying that it could be done at any time without limitation. The only exception to that general rule, according to the Division Bench, was where it offended against the principles of equity; as in a case "where the interest of a third party (who may be a bona fide transferee for valuable consideration) may be jeopardised."

27. The applicant in CA No. 40 of 2010 has relied on a judgment reported at *Ram Bali Vs. State of Uttar Pradesh*, for the proposition that if a party thinks that the happenings in court have been erroneously recorded in a judgment, it is incumbent on such party to apply for rectification while the matter is still fresh in

the mind of the court which has rendered the judgment. This applicant contends that there is no assertion in the affidavit in support of the summons in CA No. 53 of 2010 that there was any mistake by court; on the contrary, the assertion in paragraph 9 of the affidavit is that "due to inadvertence or mistake on the part of the advocates appearing for the applicants as well as the respondent company, it has been recorded that CA No. 302 of 2007 has been dismissed as "not pressed"."

28. A judgment reported at (1992) 74 Comp Cas 30 (L. Rm. K. Narayanan vs. Pudhuthotam Estates Ltd) is cited by the applicant in CA No. 40 of 2010 both to resist the rectification as sought and to assert a right to continue the proceedings. The following passage from page 37 of the report has been placed:

"Further it is not incumbent upon the court to dismiss a petition because a proceeding u/s 397 or 398 of the Act is a representative proceeding. Even if the original petitioner does not want to continue the proceedings, the court cannot be compelled to dismiss the action. Even then, it is open to the court to consider the merits of the case without dismissing the petition."

29. To deal with the last point first, it does not appear that the surviving petitioners in CP No. 252 of 1985 assumed that an order of dismissal of the petition under Sections 397/398 of the Act would be made for the asking. It is evident that they were aware of Rule 88(2) of the Companies (Court) Rules and the discretion that the Company Judge had to refuse to dismiss the suit despite the petitioners' bidding. A formal application was taken out by the surviving petitioners with apparent knowledge that dismissal of the proceedings was not a matter of course. If the applicants in CA No. 53 of 2010 had said that they intended to withdraw the petition without having made a formal application for withdrawal, the court may not have lent any credence to such submission. There was, indeed, a formal application for withdrawal of the petition and in its head and body and tail, the application had "leave for withdrawal" written all over.

30. Again, there is no merit in the objection of the applicant in CA No. 40 of 2010 that the affidavit in support of the summons in CA No. 53 of 2010 does not indicate a mistake by court. Paragraphs 9, 11 and 12 imply that a mistake may have been committed by court in recording what it did in the order of April 12, 2007 though, in deference to court or out of sheer politeness, the applicants have not harped on the aspect of the mistake being the court's doing.

31. Yet, for the application of the principles that have been recognised in the high authorities that the surviving petitioners and the company have brought, there has, first, to be a mistake on the part of court before a rectification of the present kind can be sought. In *Mellor vs. Swire* the Court of Appeal did not consider the effect of the change in business of the second company and its amalgamation with another; the Court merely construed the Will. The error that the party seeking rectification complained of was in how the order sounded upon it being drawn up and completed (or "passed and entered" in the parlance of the

Court of Appeal). The principle in *Mellor vs. Swire* is that if the order did not express the adjudication actually made, the court had the authority to set it right. In *Jang Singh* there was again an error of the court (through its execution clerk) in failing to accurately compute the amount that was required to be deposited in terms of the decree in the preemption suit. In *Jai Berham* the court applied the principle of restitution recognised by Section 144 of the Code upon a decree or order having been reversed on appeal. In *Samarendra Nath Sinha* a preliminary decree for sale was mistakenly made in a suit for foreclosure where no personal decree had been claimed against the defendants. In *Kamal Kumar Goswami* the court found, as a matter of fact, that leave had been granted in the suit under clause 12 of the Letters Patent and it had been recorded but the Judge's signature was inadvertently not made under the endorsement. In *Janakirama Iyer* the Supreme Court endorsed the High Court's correction of the expression "mesne profits" to "net profits" as it was an obvious error. In the three other judgments referred to by the applicants in CA No. 53 of 2010 and by the company - *Niyamat Ali Mullah, Hongo India and Chandra Kumar Mukhopadhyaya* - the powers of a High Court as a court of record and the implication of the word "may" in Section 152 have been discussed that generally instruct how a matter of such nature should be approached, but do not throw any light on the core issue herein.

32. There are two possibilities: either the surviving petitioners sought a withdrawal of the petition and submitted accordingly on April 12, 2007 or the applicants in CA No. 302 of 2007 simply sought a dismissal of the application and not the petition. If it is assumed, for the moment, that the surviving petitioners intended to withdraw the Sections 397/398 petition and not merely the application for withdrawal of the petition, there are again two possibilities: there was either a mistake in the submission or there was a mistake on the part of the court in comprehending the submission and recording the order. If there was a mistake in the submission, there were other avenues open to the surviving petitioners and such avenues ought to have; been diligently pursued. Even if there was a mistake on the part of the court in its comprehension of the submission, the surviving petitioners ought to have sought the remedy therefore that the law provides and the present belated attempt may not suffice. But if the court intended to dismiss the petition or permit the withdrawal thereof but made an erroneous recording in the order, there may be a case made out for correcting the order and the fact that the application has been carried after nearly three years of the order would, by itself, not defeat it.

33. Since the present application for rectification of the order has been brought after a long delay, as to what transpired in court on April 12, 2007 cannot honestly be recounted with clarity either by counsel then representing these applicants or by court. It is, thus, that the order has to be seen to assess whether such order can pass off as an order dismissing a petition under Sections 397/398 of the Act or permitting the withdrawal thereof. In recording the submission of the then applicants, the expression used in the order is, "the

matter need not be proceeded with." The word "matter" may have been used in course of oral submission to imply the petition. The word "matter" may have been understood by court to mean the application. If it were so, it would be a case of miscommunication and somewhat of an error, no doubt, on the part of the court but even if it was submitted that the petition was not to be proceeded with, it was incumbent on the part of the petitioners to draw the attention of the court that it was a petition under Sections 397/398 of the Act. It is, indisputably, the duty of the Judge to go through the papers before pronouncing an order and take responsibility therefor. It has also come to pass, undesirable as it may be, in this docket-fatigued system where the sheer number of matters sits heavy on every judicial officer, that upon a prayer for dismissal simpliciter of an action being made, a casual order is made for dismissal.

34. The essence of the matter is as to whether the court intended to dismiss the petition or permit the withdrawal thereof but erroneously recorded the dismissal of the application. If it can be said that the intention was one and the recording another then there would be a mistake that can be rectified at any time, subject to equitable considerations as rights having accrued to others on the basis of the erroneous recording. But if it does not appear that the order intended to dismiss the petition and erroneously recorded the dismissal of the application, it may not call for a correction of the records.

35. Rule 88(2) of the Companies (Court) Rules instructs that a dismissal or a withdrawal of a petition under Sections 397/398 of the Companies Act needs to be made upon application of mind. The order of April 12, 2007 was a run of the mill of order of dismissal that does not reveal any application of the mind to the matter as it ought to have if it were intended to dismiss or permit the withdrawal of proceedings under Sections 397/398 of the Act. The order was immediately available though an application for the certified photocopy thereof appears to have been made only on May 8, 2007. There is no reason why it did not dawn upon the surviving "petitioners that the order was not as had been sought for a period of nearly thirty months from the date of obtaining an authenticated copy thereof. There are other factors that also weigh in this assessment. CA No. 302 of 2007 was a bare-bodied application which did not indicate that the heirs of the deceased substituted petitioner were on record. If it was such application for dismissal that had been pressed on that day, such lacuna would have been discovered in considering whether leave as sought ought to be granted. The agreement for sale of shares that has been detailed at paragraph 5 of the affidavit in support of the summons in CA No. 53 of 2010 had not been pleaded in the affidavit in support of the summons in CA No. 302 of 2007. Paragraph 4 of the withdrawal application merely asserted that the applicants did not wish to proceed or continue with the petition, but gave no reasons therefore. The court would have sought the reasons for withdrawal if the order intended to permit the withdrawal of the petition.

36. There is an assertion in paragraph 6 of the affidavit used by the applicant in

CA No. 40 of 2010 in opposition to CA No. 53 of 2010 that there were transfers of the shares in the company from March 28, 2007. The implication of such assertion is that notwithstanding the subsisting order of status quo in respect of the shareholding in the company, a change had been brought about in the shareholding composition prior to April 12, 2007. The applicants in CA No. 53 of 2010 have glossed over such allegation in paragraph 8 of the affidavit-in-reply. The inescapable corollary is that if the surviving petitioners had changed the shareholding composition in the company even before obtaining the order of April 12, 2007 (which they suggest was an order dismissing the petition and, thereby, vacating the order of status quo in respect of the shareholding), their present stand that the change in the company's shareholding was on their understanding that the order of April 12, 2007 vacated the injunction thereon, cannot be accepted.

37. The applicant in CA No. 40 of 2010 has instituted a suit on the Original Side of this Court in January of this year claiming that notwithstanding the subsisting order of June 21, 1985 in CP No. 252 of 1985 directing status quo to be maintained in respect of the shareholding in the company, transfers of shares had been effected in the company. The company was contemporaneously made aware of the suit. There is no doubt that it was upon the institution of the suit that the applicants brought CA No. 53 of 2010 where the applicants and the company have sung in unison. But neither the company nor the applicants in CA No. 53 of 2010 have brought anything to show that they had asserted elsewhere that it was their understanding that the petition had been dismissed. Even in the affidavit filed by the company in the Section 111A proceedings as recently as in January of this year there is no reference to the order of April 12, 2007 or the dismissal of CP No. 252 of 1985. Since the earlier affidavit of the company in those proceedings had used the subsisting order of June 21, 1985 as a defence, the subsequent affidavit of January 28, 2010 ought to have asserted that such order no longer survived, if the company's present stand that such was its understanding of the order dated April 12, 2007 is to be believed.

38. Finally, it cannot be said with any certainty that it was impossible for the withdrawal application itself to be withdrawn. Corporate intrigues and commercial wheeler-dealing sometimes throw up results that challenge conventional wisdom. It is not altogether impossible that it was the withdrawal application that was not pressed. Paragraph 5 of the affidavit in support of the summons in CA No. 53 of 2010 has a line to the effect that the parties to the memorandum of settlement referred to therein intended to have the subsisting interim order vacated with retrospective effect. If it were so, the withdrawal application ought to have disclosed it and specific attention of the court should have been drawn to it for the unusual order that was necessary to give effect thereto. But the withdrawal application was silent on such aspect and the court's leave was also not sought to condone any transfer of shares in the company that may have taken place during the currency of the injunction. Clearly, the order of April 12, 2007 was not intended to dismiss the petition or allow the withdrawal thereof but was intended

to imply only what is apparent therefrom.

39. An error in a judgment or an order or a decree is quite distinct from an error in judgment of the judicial officer. The approaches to correct either type of errors are also different. Even an error in the judgment may be corrected by the court that passed that judgment if it is demonstrated that it was impossible, in the circumstances, to make the order on the facts as assessed. The judgment in Samarendra Nath Sinha would be an authority for such proposition where the court overlooked that it was a foreclosure suit. In this case, however, it was open to the applicants in CA No. 302 of 2007 to withdraw such application and jettison the prayer for dismissal of the petition.

40. CA No. 53 of 2010 is dismissed but without any order as to costs.

41. Though the applicant in CA No. 40 of 2010 argues that on an application to be impleaded as a party the applicant does not have to conclusively demonstrate a right but a mere assertion of right is enough, since such applicant's locus qua the company is pending adjudication before the Company Law Board in the proceedings u/s 111A of the Act, his prayer has to await the result in the Company Law Board matter. CA No. 40 of 2010 is dismissed with liberty to the applicant to apply afresh if he is found to be entitled to be a shareholder in the company. There will be no order as to costs. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.