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(1958) 07 CAL CK 0016

Calcutta High Court

Case No: None

In Re: Albert David Ltd. APPELLANT

Vs

RESPONDENT

Date of Decision: July 14, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 3, 141
- Companies Act, 1956 - Section 105, 397, 398, 398(b), 399

Citation: 68 CWN 163

Hon'ble Judges: Mallick, J

Bench: Single Bench

Advocate: S. Chaudhury, Subimal C. Roy, S.K. Mukherjee, M.K. Banerji, Mr. and Mrs. Judah, Ranadeb Chaudhuri, S.K. Acharya, S.C. Sen and Mr. D.N. Bhattacharya, for the Appellant;E. Meyer, S. Roy and A. Mukherjee, for the Respondent

Judgement

Mallick, J.

In the Matter of Albert David Ltd., two Notices have been taken out under sections 397 and 398 of the Indian Companies Act, 1956, complaining against the persons in control and management of the company. The first Notice was taken out on December 17, 1956, by Albert Judah and his wife Moselle Judah. The second Notice has been taken out on March 8, 1958, by Debendra Nath Bhattacharyya. The reliefs claimed in both the applications are practically the same. In or about the time the first. Notice was taken out, Albert Judah Judah instituted a suit in this court being suit No. 487 of 1956, to establish his title in a bunch of 26752 ordinary shares of the company. This bunch of shares originally belonged to Judah but sold on January 24, 1956, to one Ramapada Gupta. The sale was challenged in the suit. The suit and the Notice, dated December 17, 1956, came before me and the suit was heard first. In the first week of March, 1958, I delivered judgment upholding the claim of Judah in that bunch of 26752 shares. Against the judgment and decree an appeal has been

taken and the same is pending. After the disposal of the suit, the second Notice was taken out by Debendra Nath Bhattacharyya, another shareholder holding another big bunch of shares, preferring substantially the same complaint--against the persons who are in control and management of the company. These two applications have come up now to be heard and as they relate to the same subject matter, claiming more or less the identical reliefs, they were heard together and are covered by this judgment. In 1938 Judah promoted the above company as a private company which was converted into a public company in 1948. Judah and his wife owned more than 90 per cent, of the ordinary shares of the company. Judah was the largest holder of Preference Shares as well. Under the Articles Judah was the Managing Director of the company. In 1939 Dr. Sudhir Lal Mukherjee, a very able chemist, was taken in and put in charge of the manufacture of medicines. Shortly thereafter he was made a Director. Under the Articles, a Director need not be a share-holder. In 1948 Dr. B.P. Neogy was admitted into the company. Shortly thereafter he was appointed a Director as well. The company attained phenomenal success and the annual sale of the product rose to more than Rs. 50 lakhs from 1952 onward. This success was attributable to Dr. Mukherjee who was in charge of manufacturing side and to Judah who was a super-salesman. Judah as the promoter and owner of practically all the shares was No. 1 in the company while Dr. Mukherjee was the No. 2. Things went on smoothly till the middle of 1954. Thereafter there was friction between Judah on the one side and Dr. Mukherjee and Dr. Neogy on the other. On September, 10, 1954 a general meeting was convened to increase the share capital of the company from Rs. 19 lacs to Rs. 25 lacs. According to Judah, this meeting ended in nothing as a result of the difference of opinion as to the manner in which the share capital was to be increased. Judah was of opinion that it should be increased by issue of preference shares which carried no voting right, while Dr. Mukherjee and Dr. Neogy intended that it should be increased by the issue of ordinary shares. Dr. Mukherjee''s group do not agree that the meeting ended in nothing. They contended that the meeting was held and the meeting unanimously agreed to the increase of share capital by the issue of ordinary shares. There is a minute to that effect in the Minute Book of the company. On the same date Judah was completely ousted from the company and Dr. Mukherjee and Dr. Neogy took complete control and management. A spate of litigation followed and ultimately on March 24, 1956, Dr. Mukherjee and Dr. Neogy purporting to act as directors sold the whole bunch of 26752 ordinary shares belonging to Judah to Ramapada Gupta in enforcement of a lien for a debt of over Rs. 4 lacs alleged to be due by Judah to the company. Thereupon Judah instituted the suit No. 487 of 1956 challenging the sale as wrongful and to establish his title in the shares. He also took out the present notice complaining that the affairs of the company are being conducted in a manner oppressive to him and his group and also prejudicial to the interest of the company and asking the court to interfere in the matter and pass suitable orders. Originally in the notice taken out by the petitioners in their first application dated December, 17, 1957, the company was not named as a party and a

copy of the notice was not served on the company. After the hearing of the Suit No. 487 of 1956 was concluded but before judgment was delivered, it was realised that the company was necessary party in this application and that the application could not be heard in the absence of the company. Thereupon, the petitioners took out summons on February 28, 1958, for an order that the company be added a party and that liberty be given to the petitioners to serve a copy of the notice on the company. The grounds made was that through inadvertence the company was left out. The application was opposed. I allowed the application. Both the parties agreed before me that the company was a necessary party. If that be so, the proceeding could not be heard in the absence of the company. Had the application been moved in the absence of the company, I would not have dismissed the application on the ground of nonjoinder but would have adjourned the matter after directing the notice to be served on the company. Save that this application for addition is delayed, no other ground is urged. Some sort of explanation for delay has been given by the petitioners. I felt that the proper order would be to allow the application but directing the petitioners to pay the costs to the opposing party and I made an order accordingly. Thereupon the notice was amended and a copy of the notice was served on the company.

2. The petition being the ground of the notice is long. It sets out the history of the company having been promoted by Judah and in which on September 10, 1954, Judah and his wife owned more than 90 per cent, of the ordinary shares and all but few preference shares. At that date Dr. Mukherjee who was brought in by Judah was holding only 1000 shares and that again as a gift from Judah. Dr. Neogy was the other man also brought in by Judah. Both Dr. Mukherjee and Dr. Neogy were made directors by Judah. The petition recites in detail how these two gentlemen improperly and illegally first ousted Judah from the Board of Directors on the plea that Judah was a debtor and how by force and fraud physically ousted Judah and his group from the management of the company. It is alleged that at the General meeting held on September 10, 1954, though actually no resolution was passed raising the share capital to s. 25 Lacs by the issue of 60000 additional ordinary shares, such a resolution was fraudulently incorporated in the minute book and on the basis of this resolution shares were allotted to Dr. Mukherjee and Dr. Neogy themselves, their friends and nominees, without making any offer to Judah and his wife, in direct violation of section 105 of the Indian Companies Act. One of such friends of Dr. Mukherjee''s group was Mr. D.N. Bhattacharyya who came to acquire 32000 shares being the largest block of new shares. This resulted in a number of litigations challenging inter alia the legality of the issue and allotment of additional shares. Ultimately, Judah in the interest of the company, to avoid protracted litigation, came to a settlement with D.N. Bhattacharyya, the holder of the largest block of new shares, so that Judah''s group along with Bhattacharyya, together were the owners of the overwhelming majority of shares. All suits instituted by Judah and his group were withdrawn. The nominees of the majority were however unable to

get the management by reason of the improper acts of the present directors who are alleged to have usurped the management. The most important of such acts was the sale of 26752 shares belonging to Judah to Ramapada Gupta. The ostensible reason of sale was in enforcement of lien for a debt of over Its. 4 lacs alleged to be due by Judah to the company. The real reason was to drive away Judah from the company and deprive him of his voting power. This act of the Mukherjee group who are in control of the company has been characterised as illegal and malafide and the immediate cause of this application and the suit No. 487 of 1956 previously referred to. It is contended that the Judah''s group who represent the majority of the share-holders have been kept out of the company by the present management illegally. The tractics adopted are, as indicated before, the wrongful sale of all the ordinary shares of Judah, failure to call proper meetings for election of directors, keeping themselves in office with full knowledge of its illegality, causing false minutes to be entered in the minute book, causing false entries to be made in the accounts and balance sheets of the company and have them passed in general meetings which are iillegal. It is alleged that a deadlock has been created in the management of the company and two rival sets claim to be directors. In opposition to the claim of Dr. Mukherjee''s group, two other gentlemen claim to have been elected directors in the general meeting held on October 8, 1956. Allegations of misappropriation of the company''s funds and of maintaining 200 hired goondas to maintain the present management in office has been made in the petition. Allegations of falsifying and fabricating books and records have also been made in paragraphs 41 and 42 of the petition. It is contended that the affairs of the company are being conducted (1) in a manner oppressive to Judah and his group and (2) prejudicial to the interest of the company. It is alleged that the present management have gone to the extent of disobeying the orders of the court.

3. In the affidavit-in-opposition the allegations in the petition are denied. It is alleged that the present management is carrying on the affairs of the company with greater ability than when Judah was at the helm of affairs. It is contended that no case for interference under sections 397 and 398 of the Companies Act has been made out in the petition.

4. The petition of Debendra Nath Bhattacharyya having been made after judgment was delivered by me in suit No. 487 of 1956 the petitioner relies mostly on my findings in the judgment in support of the case for interference under sections 397 and 398 of the Companies Act. The material allegations are verified as being based on informations partly derived from the records of the company, partly derived from the records of the suits and proceedings in court and partly derived from different people and believed to be true. In the affidavit in opposition the facts are disputed. It is contended in this matter, as was contended in the other matter, that no case for interference under sections 397 and 398 of the Companies Act has been made out in the petition. Mr. Meyer submitted that in any event Bhattacharjee''s application is not in order and should be dismissed in limine. It is argued that under Order 19,

Rule 3 affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except in interlocutory applications, on which statements of his beliefs may be admitted; provided the grounds thereof are stated. The present petition is not an interlocutory application but is an original matter and here only facts of which the deponent has personal knowledge can be stated in the affidavits. In the instant case all the material facts in the petition are not within the personal knowledge of the petitioner and hence has been verified as being based on information believed to be true. Hence the petition is not properly verified and should be dismissed in limine. An interlocutory matter-application and an order thereon is one made or given during the progress of an action but which does not finally dispose of the rights of the parties. That is how Wharton in his Law Lexicon defines ''interlocutory'' and cites by way of example an application for the appointment of Receiver and order passed thereon. Mr. S.K. Acharyya appearing for Debendranath Bhattacharyya, submitted that the word ''interlocutory'' is also used in a broader sense to cover even original petitions in company matters. An order in a petition for winding up for example is treated as an interlocutory order and an appeal therefrom is an appeal from an interlocutory order see (1903) W.N. 120 (1). An application for winding up or an application under ss. 397 and 398 of the Indian Companies Act is no doubt an original proceeding. Such an original proceeding is initiated by a petition, and the petition requires to be verified. Under Or. 6, r. 15, read with section 141 of the Code, a person verifying a petition shall specify what he verifies of his own knowledge and what he verifies upon information received and believed to be true. This verification must be on affidavit. If a petition is required to be verified as provided by Or. 6, r. 15 then facts based on information must be stated as such, though on affidavit. In my judgment Or. 19, r. 3 applies to affidavits simpliciter which can be used as evidence in a suit. Unless the averments in the affidavit are true to knowledge they can not be treated as evidence being hit by the hearsay rule. The position is different in the case of a petition, even if the petition initiates a proceeding. It must be verified as laid down in Or. 6, r. 15. If Or. 19, r. 3 is to be applied to a petition, then ''interlocutory matters'' in Or. 19, r. 3 must be given a very extended meaning, so as to cover not only what is commonly understood as interlocutory application in a suit but also original proceedings which are initiated by a petition. Such an original petition is required to be verified under the Code as indicated in Or. 6, R. 15. To construe it otherwise would lead to impossible result. Suppose the entire cause of action for interference u/s 397 is a resolution illegally forfeiting the shares of a share-holder, the shareholder can only allege this fact as being based on information derived from an inspection of the records of the company and he cannot state this as being true to his knowledge. According to Mr. Meyer''s proposition such a petition is not in order because of the allegation in the petition being contrary to the provisions of Or. 19, r. 3. In other words, the share-holder is debarred from presenting a petition for relief. This is, on the face of it, absurd. I am unable to agree with Mr. Meyer that because the material facts in the petition are verified as being true to information, the petition is not in order and

must be dismissed in limine.

5. Right to apply to prevent oppression and mismanagement of a company has been given to the share-holders and powers have been given to the courts and the Central Government to give appropriate relief under the new Act, Chapter VII. Powers given are very great--the powers of the court being much greater than the powers of the Central Government. While formerly in matters of company management, the court acting on the principle of ''hands off'' left the indoor management to the company, i.e., the share-holders and directors, except in very exceptional cases, it is recognised in the new Act that under conditions prevailing at present in the matter of company management a good deal of interference by the court and the Central Government has become imperative in the interest of the company, share-holders and the public. It is argued by Mr. Mookerjee that though the powers of interference by the court given by the Act is great, the; court should exercise that power in a sparing manner and unless it is absolutely imperative the power should not be exercised. He pointed out that in England though more or less similar powers have been given to the court under sec. 210 of the new Act, not a single case is to be found in the reported cases. In our country, except in the Mundra group of companies and in the case of Muir Mills, there has not been any case under sections 397 and 398 of the Indian Companies Act. The court, however, never exercises its power, unless the exercise of that power is called for in the circumstances of each case. But if a case for interference is made out, it is the duty of the court to exercise the power, and failure to exercise the power would amount to a grave dereliction of duty. Recognising the necessity of interference by court with the affairs of the company, the legislature has enacted these new sections and it is the duty of the court to apply them and not to shirk responsibility by invoking the doctrine of ''hands off'' and on the basis of observations made in old decisions. These old decisions must be treated as absolute in the new set up.

6. u/s 399, the right to apply u/s 397 and section 398 is given, inter alia, to members "holding not less than one tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares". First point to be decided in the instant case is whether the applicants satisfy this requirement of section 399 of the Act. Share structure of the company on the date of the two applications may now be noted. Total share capital is as follows:--

40,000 ordinary shares of Rs. 10/- each fully subscribed and paid up. In 1954, the share capital was increased by another 60,000 ordinary share of Rs. 10/- each. Out of these 60,000 new shares 50,000 have been subscribed and 25 per cent, of the face value called and paid up.

7. There are 10,000, 5 per cent, preference shares of Rs. 100/- each out of which 7,435 shares have been subscribed and fully paid up. There are 5000, 7 per cent, preference shares of Rs. 100/- each, out of which 1515 have been subscribed and

fully paid up. The petitioners in the first application, Mr. and Mrs. Judah, own 26,720 and 11,444 fully paid up ordinary shares of Rs. 10/- each. Judah also owns 906, 5 per cent, preference shares of Rs. 100/- each. D. N. Bhattacharjee owns 32,000 new ordinary shares.

8. It is argued that so far as the first application is concerned 26,720 shares originally belonging to Judah and sold off subsequently to Ramapada Gupta, should not be taken into account even though Judah''s title to the shares has been declared in the decree passed by me in Suit No. 487 of 1956, having regard to the fact that the decree is under appeal and the order of the appeal court to be considered later. If this bunch of 26,720 shares of Judah is left out of consideration, then the total capital of the petitioners in the first application amounts to this 2 per cent.

Mrs. Judah: 11,444 ordinary shares of Rs. 10/- each.	Rs. 1,14,440/-
Mr. Judah: 986 preference shares of Rs. 100/- each	Rs. 98,600/-
Total	Rs. 2,13,040/-

9. It is contended that the total issued capital is Rs. 25 lacs. One tenth of this would be Rs. 21/2 lakhs. Mr. and Mrs. Judah as the holder of shares to the total value of Rs. 2,13.040/-. therefore, hold less than the statutory requirement. It is to be noticed that in the above calculation to total issued capital the following shares not actually subscribed and paid for, have been taken into account:--

10,000 new ordinary shares	Rs. 1,00,000/-
2,5655 per cent, preference shares.	2,56,500/-
3,4847 per cent, preference shares	3,40,500/-
Total	Rs. 7,05,000/-

10. If these shares to the value of Rs. 7,05,000/- which have not been subscribed and paid for, are left out of calculation from the total share capital, then Mr. and Mrs. Judah must be held to hold more than one tenth of the issued share capital of the company and as such they are competent to apply under sections 397 and 398 of the Indian Companies Act. The point is, therefore, whether shares not actually

issued, i.e., subscribed and paid for, are to be considered ''issued share capital'' within the meaning of section 399 of the Act. It is argued that there is a distinction between authorised capital, issued capital and subscribed capital. When a resolution is passed by the Board of Directors that a portion of the authorised capital is to be issued, that becomes the ''Issued capital'' whether it is actually subscribed and paid for or not. Such ''issued capital'' when subscribed becomes the ''subscribed capital'' which may be fully or partly paid up. This argument has absolutely no substance. Unless the shares are subscribed and paid for, they cannot be ''issued capital''. To say that ''capital to be issued'' is the same as ''capital issued'' is, on the face of it, absurd. The former represents nothing more than an intention of the Board to issue capital, while the latter represents an accomplished fact of the shares having been issued, that is subscribed. No distinction can be made between, ''issued capital'' and ''subscribed capital'' in section 399 of the Indian Companies Act. Mr. Chowdhuri has drawn my attention to the language of section 81 of the Companies Act, which deals with the further issue of share capital, observation in Buckley''s Companies Act, 12th edition, page 157, Halsbury (Simonds Edition), Volume 6, Art. 286 in support of his argument that unless the shares are subscribed, they cannot be called ''issued capital''. I have no hesitation in accepting this argument. The contrary argument to the effect that immediately a resolution is passed by the Board of Directors to issue additional capital, the ''shares are issued'', whether they are actually subscribed or not, is not acceptable to me. I, therefore, hold that the petitioners in the first application have established their right to apply under sections 397 and 398 of the Companies Act, even if the bunch of 26,720 shares in which Judah''s title has been declared by me in suit No. 487 of 1956 is left out of calculation. I am, however, of opinion that there is no reason why this bunch of 26,720 shares should not be taken into account and I do not agree that the order of the Appeal Court operates as a bar to the taking of these shares into account for the purpose of the present application. It is not disputed that D. N. Bhattacharjee holds 32,000 shares, that is, more than one tenth of the issued share capital of the company. D.N. Bhattacherjee''s right to apply under sections 397 and 398 of the Act has not been seriously challenged.

11. In order that the court may make an order u/s 397 of the Act, the court must be satisfied, firstly, that the company''s affairs are being conducted in a manner oppressive to any member or members, secondly, that the facts would justify the making of a winding up order, on the ground that it was just and equitable that the company should be wound up and, thirdly, that a winding up order would unfairly prejudice the applicant or applicants.

12. That the affairs of the company are being conducted from September 10, 1954, in a manner oppressive to Judah can hardly be disputed. It is alleged in the petition that 26,720 shares belonging to Judah were sold illegally in a highhanded manner by the present management in enforcement of a lien of a fictitious indebtedness of Judah to the company. Such sale is alleged to have been made mala fide to deprive Judah of his voting rights and to keep the present management in Office. This

question was gone into by me in suit No. 487 of 1956. After a very careful consideration of all facts, I have held in my judgment that the debt for which the shares were sold was mostly fictitious nad unreal, that the sale was illegal, that there was no power of sale under the Articles and that the object of sale was to deprive Judah of his voting power, so that the present management may keep themselves in office. On the materials placed before me in the present proceedings, I have come to the same conclusions. On the facts proved, I have no hesitation in holding that the company''s affair are being conducted in manner oppressive to Judah.

13. The second point to consider is whether on the facts of this case the court would be justified in making an order for winding up on just and equitable ground. The broad fact established in this case is that ever since September, 1954, the persons in management do not represent the majority of share-holders. This is a unique case in which the affairs of a company are being carried on by men who represent a very small minority of share-holders. Till the new shares were issued in September, 1954, Judah and his wife were holding more than 90 per cent, of the ordinary shares which carried the voting right. Even after the issue and allotment of new shares, Judah and his wife continued to hold the majority of shares, if the bunch of 32,000/- shares of D.N. Bhattacherjee is left out of account. Bhattacherjee, though originally belonged to the Mukherjee group, subsequently settled with Judah and joined hands with him, so that ever since again the Judah group constituted the overwhelming majority. To prevent the majority from taking up the management through their own representatives, as directors, and to maintain themselves in office, the Mukherjee group acted in a very high-handed manner in selling the entire bunch of 26,752 ordinary shares belonging to Judah to Ramapada Gupta, Mukherjee''s nominee. I am satisfied that this sale was wrongful and the sole motive of sale was to deprive Judah of his voting right and themselves getting the voting right with respect to the shares to offset the effect of Bhattacherjee''s shares. This is the only way in which the Mukherjee group could maintain themselves in Office. This arbitrary and high-handed action on the part of Dr. Mukherjee and Mr. Neogy led to the present application and the suit by Judah previously referred to. No proper election of directors could take place, because of the dispute as to the title to this big bunch of 26,752 shares. Whichever of the two groups would get the votes with respect to this big bunch of shares would constitute the majority. After Judah''s title to these shares has been declared, the Judah group constitute a clear majority. The Judah group would also be the majority even if this bunch of 26,752 shares is nutralised, that is, neither group get the votes in respect of these shares. It is a recognition of this basic fact that prompted the Mukherjee group to strenuously oppose the proposal to call a meeting of the company for electing directors in which neither Ramapada nor Judah would be entitled to vote in respect of these shares. Their contention is that if ultimately the shares are declared by the Court of Appeal to belong to Ramapada, election of directors now in a meeting with Ramapada left

out would mean great injustice to Mukherjee Group. As matters stand, however, Ramapada''s right in the shares has been negatived after trial and there is an adjudication against him. Speaking personally, I do not see any reason why Judah, who has been wrongly deprived of these shares in 1956, should not be entitled to claim all rights and privileges in respect of the shares. After his title has been declared in a long-drawn litigation, merely because an appeal has been filed against the decree declaring his title. Situation before and after adjudication, is entirely different and the reasoning that prevented Judah from exercising his right with respect to these votes does not hold good after adjudication. Be that as it may, according to the Mukherjee group, no meeting should be directed to elect a new Board of Directors in the peculiar circumstances of this case. If the situation is such that no proper election of Directors can take place, then in my judgment a deadlock is created in the management of the company and a case is made out for winding up, on the ground that it is just and equitable to do so. It is against the fundamental principles of company law that the minority should carry on the management without any election, as provided for in the Act and the majority of shareholders should be kept out of management. Such an unnatural state of affairs is continuing in the company ever since September, 1954 and to keep this unnatural state of affairs continuing, the acts done in the name of the company by the present management are liable to be challenged and in fact have been challenged as illegal. Meetings are held by rival parties and different sets of Directors are declared to be elected in the different meetings. The legality of the present Board of Directors has been challenged with good reason and the company is being involved in ruinous litigations. On the facts of this case, I hold that the company is liable to be wound up on the ground that it is just and equitable to do so.

14. It is not, however, in the interest of the petitioners that the company should be wound up. The company is prosperous and it is clearly against the interest of the petitioners, who are holders of a large number of shares, that such a company should cease to function. In my view, the petitioners in the first application Mr. and Mrs. Judah have made out a case u/s 397 of the Act for the intervention of the court.

15. It is also urged on behalf of the petitioners that a case for intervention of the court has been made out u/s 398 of the Act. It is argued that the affairs of the company are being conducted in a proper manner prejudicial to the interest of the company. It is to the interest of the company that it should be run by a Board of Directors properly appointed under the Indian Companies Act. The present Board, for reasons previously noticed, are not interested in having a board duly elected. General meetings for election of Directors are not held and whatever meetings are held are packed by the supporters of the present management, leaving out their opponents. Reversely, the meetings that can only be held by the other group are requisition-meetings which are attended by the supporters of Judah''s group and not by the supporters of the present management. In such a state of affairs, notices of meetings are liable not to be properly served and validity of every meeting held

by one group is liable to be and is challenged by the other group. A state of affairs in which no proper general meeting, generally acceptable, can be held is certainly not in the interest of the company. Again, drastic action has to be taken by one party against the other to maintain its respective position which would inevitably result in litigation in which the company must necessarily be impleaded as a party. It is clear that the sale of Judah''s 26,252 shares was a party necessity which inevitably resulted in a number of suits. The suit No. 487 of 1956 in which the company was a party was a long-drawn litigation and the company, in the interest of the present management, was made to incur heavy costs. This is clearly not in the interest of the company. In my judgment, conditions that prevent the proper functioning of the company, according to the provisions of the Indian Companies Act, the uncertainty as to the de jure character of the present Board and difficulty of having this state of affairs rectified in the usual way, the patent fact that the company is being run by the present Board in their own interest overriding the wishes and interest of the majority of share-holders which inevitably involves the company in costly litigations are facts from which I am bound to conclude that the affairs of the company are being conducted in the interest of a group and certainly not in the interest of the company. These acts do bring the instant case within section 398 of the Indian Companies Act. By reason of the change in management after September, 1954, the affairs of the company have been proved to have been conducted in a manner prejudicial to the interest of the company. Again, to satisfy the requirements of section 398(b) it is enough to establish that there was a likelihood of the affairs of the company being conducted in a manner prejudicial to the interest of the company. This has been proved in the instant case. I leave completely out of account all disputed facts and hold, on the perspective of proved facts of this case, that ever since 1954 the affairs of the company are conducted in a manner prejudicial to the interest of the majority of the share-holders and the company.

16. Mr. Mukherjee has argued that in order to attract section 398 of the Act, it must be proved that under the new management the company has commercially suffered, that is, either there has been loss of assets of the company or reduction of profit attributable directly to the dishonesty or mismanagement on the part of the present management. In the instant case, it has not been proved that the present management is guilty either of dishonesty or of mismanagement. On the contrary, the company is better off under the present management of Mukherjee and Neogy than under the management of Judah. Hence no case has been made out for intervention u/s 398. I agree with Mr. Mukherjee that on the facts contained in the petition, it has not been established that the present management is guilty either of misfeasance or even of mismanagement. On the other hand, I cannot shut my eyes to the facts, the costs the company must have incurred in the litigations previously referred to. When the first notice was taken out, Suit No. 487 of 1956 was not heard. The second notice taken out by Bhattacherjee was immediately after the judgment was delivered. In none of these petitions the costs incurred by the company have

been or could have been stated. In the affidavits in opposition there is no indication as to how much expense the company has incurred. From the array of Counsel employed on behalf of the company, number of hearing days and the documents tendered, I can well imagine the huge costs the company had to incur on account of this litigation. This suit was the inevitable consequence of the act of the new management in selling Judah''s shares to tilt the voting power in their favour. This certainly has a bearing in the determination of the question whether the affairs of the company were being conducted in the interest of the company or in a manner prejudicial to the interest of the company. But apart from this, I do not agree with Mr. Mukherjee that the test to be applied is whether or not the management is guilty of misfeasance or inefficiency, and in case it is found in favour of the management, the court is not entitled to make an order u/s 398 of the Indian Companies Act. In my judgment, the legislature has not invested the court with such limited power as contended by Mr. Mukherjee. The power of the court is wide and whenever it is proved that the affairs of the company cannot be conducted by a properly appointed Board of Directors in accordance with the provisions of the Indian Companies Act, General meetings to elect Directors cannot be convened, and the legality of the Directors acting as such is open to serious question resulting in a spate of litigations in which the company is necessarily involved, a case of interference u/s 398 of the Indian Companies Act is made out. I disagree with Mr. Mukherjee that the case is not covered by section 398 of the Companies Act and the grievance of the aggrieved- party must be adjudicated in a properly instituted suit. According to Mr. Mukherjee a shareholder is given the right to apply under sections 397 and 398, when his right as a share-holder is affected. If his right qua Director is affected, that is, if he is improperly removed from the Board or prevented from being appointed a Director, this infringement of a shareholder''s right cannot be the foundation of an application under sections 397 and 398 of the Act. I am unable to agree with Mr. Mukherjee. The right to appoint a Director is a very valuable right of a share-holder and when this right is infringed, his right qua share-holder is also affected. The share-holder in such a case is entitled to apply u/s 397 of the Act, complaining that the affairs of the company are being conducted in the manner oppressive to himself. Such an act may also be prejudicial to the interest of the company. In the facts, of this case, I am bound to hold that the petitioners have a right to apply under sections 397 and 398 of the Indian Companies Act, that a case for intervention by the court has been made out under the said two sections. The only point that has caused me a good deal of anxiety is, what order I should make to end the mischief complained of. Powers of the court are very wide, but this power must be exercised with adequate caution.

17. The mischief in the instant case lies in allowing a Board of Directors to continue, the legality of whose appointment is open to serious question and who, in any event, do not represent his majority of shares. As stated before, the petitioners'' group represent the majority of shares. Even if the bunch of 26,752 shares

belonging to Judah is left out of account, the petitioners'' group represent the majority. D.N. Bhattacherjee and Mrs. Judah together own 43,444 ordinary shares out of 90,000 ordinary shares issued, i.e., a little less than half. If to this is added Judah''s 26,752 shares, the petitioners'' group will command a clear majority. The other three big share-holders are Dr. S.L. Mukherjee owning 6004 shares, Dr. Neogy owning 4052 shares and P.K. Kar owning 8630 shares. These three share-holders belong to the other group headed by Dr. Mukherjee owning collectively 18, 686 shares. It is only if 26,752 shares originally belonging to Judah and subsequently sold to Ramapada Gupta, are taken into account that Mukherjee group would become the majority. Indeed with this end in view this bunch of 26,752 shares belonging to Judah was sold to Ramapada Gupta, Mukherjee''s man. It is argued by Mr. Mukherjee, that though Judah''s title in this bunch of 26,752 shares has been declared in suit No. 487 of 1956, the judgment is under appeal and if the judgment is reversed in appeal and Ramapada''s title is declared in these shares ultimately then the present management must be taken to represent the majority and it would be unjust to remove the present directors and instal a board representing the petitioner''s group who would in that context be only a minority. It is therefore urged by Mr. Mukherjee that till the disposal of the appeal, neither the present directors should be removed, nor any general meeting should be held to elect a board in the peculiar circumstances of this case. In the court of Appeal while asking for an injunction against Judah from claiming the shares during the pendency of the appeal Mr. Meyer appearing for Ramapada Gupta raised the question of management of the company during the pendency of the appeal against the judgment in suit No. 487 of 1956. The appeal court issued an injunction against both Judah and Ramapada. The result of this order was that in any general meeting to be held this big bunch of 26752 shares will go unrepresented. Mr. Meyer expressed the same apprehension as expressed by Mr. Mukherjee before me and submitted before the Appeal Court, that any resolution that may be passed in such general meeting should not be given effect to, during the pendency of the appeal. Their lordships however felt unable to consider the question having regard to the frame and scope of the suit No. 487 of 1956 and necessarily the scope of the appeal. Their lordships felt that the question should properly be gone into in the present applications under sections 397 and 398 of the Companies act pending before me with the following observation:--

We, therefore, leave those matters to be dealt with by Mallick, J. in the application or applications which he has before him. We desire to make it clear that our refusal to entertain argument with respect to those matters has been solely due to the limitations of the appeal before us and that the fact that certain arguments were addressed to us and not given effect to does not and will not mean that we are rejecting them on the merits. It will be for Mallick, J. to consider them, if repeated in the course of the hearing of the application is disposed of will be no bar whatsoever in the way of either of the parties raising those questions of the learned Judge

deciding them and he will have complete liberty to deal with the applications before him in accordance with law.

18. It is clear from the above order that the appeal court far from giving any direction as to management, has indicated in clear and unambiguous terms: that the question of management is to be decided in these applications and this court will have complete liberty to deal with the applications in accordance with law. The effect of the order freezing the big bunch of 26752 shares has however to be given proper consideration in making an order on these applications before me. The facts must not be lost sight of that even though the title of Ramapada in these shares has been negatived by me in the suit, his title may nevertheless be affirmed in appeal and in such contingency the Mukherjee group would cease to be the minority group. Mr. Mukherjee in this context is entitled to argue as he did, that no order should be passed that would result in completely ousting the Mukherjee group from management during the pendency of the appeal against the judgment and decree in Suit No. 487 of 1956. A general meeting elect a new Board of Directors in the present context would inevitably lead to such a result and hence Mr. Mukherjee strenuously argued that no such meeting should be convened and if convened the Directors appointed in such meeting should not be allowed to function during the pendency of this appeal.

19. Mr. Sachin Choudhuri and Mr. Ranadev Chaudhuri, appearing for the petitioners, submitted that the petitioners'' group constitute the majority even if the 26752 shares declared to be Judah''s are not taken into account, that they have been kept out of the management from 1954 upto to day improperly and that there is no reason why they should be kept out any longer from management. It is strongly urged that the share-holders should not be prevented from exercising their legitimate right to elect their own directors and the proper way of solving the problem created by the wrongful act of the Mukherjee group and of doing justice to the Judah group of share-holders is to direct a General meeting of shareholders to elect a new Board of Directors according to the provisions of the Indian Companies Act. It is further argued that while the establishment of Ramapada''s title to the shares is a mere possibility, the title of Judah in the shares has been declared after a prolonged trial and the highest that the other party is entitled to claim is that during the pendency of the appeal, Judah would not be entitled to the votes attached to these shares. In asmuchas in the instant case the petitioners'' group owned much more than twice the shares held by the Mukherjee group and only a little less than half the total of 90,000 issued shares, the petitioner''s group representing the majority should be allowed to elect their own directors.

20. The best solution of the question would be to allow both groups to share in the management and not to exclude either. Judah is the prompter and builder of the company. He is now associated with D.N. Bhattacharjee, the holder of more than one third of the ordinary shares. As maters stand, this, Judah group represent the

majority of share-holders. Mukherjee group who is in management cannot obviously be allowed to continue in sole management to the exclusion of Judah''s group. On the other hand, it is a fact that Dr. Mukherjee shared with Judah in building up the company. While Judah was the super-salesman, Dr. Mukherjee was the able manufacturer of quality products which quickly established a great reputation in the market. During the period Dr. Mukherjee''s group is in exclusive management, the company has not commercially suffered. It would be unwise, if not, unjust to deprive this group altogether from management. Yet, if I direct a general meeting to elect a new Board, the result will be the complete exclusion of Mukherjee group from management. I suggested this solution to the parties that pending the hearing of the appeal which will decide the title of 26,752 shares let the management be carried on by an equal number of directors from each group with an independent Chairman to be appointed by me. In the present state of feelings between the two groups, even with the assistance of the counsel of the respective parties, no settlement on the above basis could be effected. This plan of allowing both groups to share equally in the management is therefore outside the range of practical politics for the present. It would lead to friction at every point.

21. After very careful consideration of the arguments advanced by the parties, I do not think that for the present, I should pass a final order in this application. It is not however proper that I should allow the present directors to continue. Nor is it desirable, in my judgment, to replace the present board representing Mukherjee group by a new board representing Judah''s group. Judah''s group will immediately capture the management if I direct a General Meeting to appoint a new board. I do not consider it desirable to adopt the useless procedure taken recourse to in the past of directing election of directors in a general meeting and of preventing them from functioning till the ''disposal of the appeal. For reasons stated before, it is not feasible either to vest management in a board consisting of equal number from either party with an independent Chairman. In the present state of feeling between the two groups this is not desirable either. In my judgment, in the interest of the company for the present both the groups should be deprived of the power of management and the management of the company should be vested in an independent administrator. This independent outsider must be a man of experience. He will be assisted by an advisory committee consisting of two members from each group. Dr. Mukherjee and Dr. Neogy of the Mukherjee group are not mere directors but they work in the company as well. They have been associated with the company from almost the inception of the company. They should be on the advisory committee. Mr. Judah as the founder and the main pillar of the company till September, 1954 and D.N. Bhattacherjee, the holder of the largest number of ordinary shares, should also be on the advisory committee. The administrator would be the Chairman of this advisory committee. The administrator is normally to carry on with the advice of the Committee, but it is left to his sole discretion on what matters he should be advised. I make it clear that the advisory committee will have

no power to do any act, nor will the Administrator be bound to act in the manner he is directed to do by the committee. The function of the committee is purely advisory. The Administrator will have complete power to manage the company and all powers of the Board of Directors must vest in him. He is to operate on the accounts of the company with the banks. The Administrator however is directed not to affect the position and emolument of Dr. Mukherjee, Dr. Neogy and other members of the staff without an order from the court. Two of the members of the advisory committee are already getting money from the company''s funds. Two others viz. Mr. Judah and D. N. Bhattacherjee should also get some remuneration which I shall fix later. Sri Abani Bandhu Gupta, B.Sc, LL.B. A.C.A., is a Chartered Accountant of England and Wales and partner of Messrs. Gupta & Mitra of P.14, Mission Row Extension. He is a Chartered Accountant of more than 25 years standing. I consider him to be a fit man to be appointed as Administrator and I appoint him as such on a remuneration of Rs. 1500/- per month for the present. He will take charge on a signed copy of the minutes being served on him. The directors are removed from the management of the company and are restrained from interfering with the management of the company by the Administrator appointed by this order.

22. Six months after, the matter will appear in my list for final disposal. I hope by then the parties will have more accommodating spirit and it would be possible for me to pass an order agreed to by both groups. If such an agreement is not possible even then, what suitable order should be passed I will then consider. In the meantime parties will have liberty to apply. The Administrator will have all the powers of the Board of Directors, and carry on the administration of the company as indicated above. After taking up the administration if he needs any direction or order he may come to court.

23. Costs of all parties to come out of the assets of the company and will be paid by the Administrator. I certify for two counsel.

24. Mr. Deb and Mr. Mukherjee asked me to stay the operation of this order for a fortnight to enable their clients to consider the position. I do not think it would be proper for me to stay the operation of the order but in order to accommodate Mr. Mukherjee and Mr. Deb''s clients, I am prepared to make this order in their favour that though the Administrator will take possession, except taking full charge of the finance he will not disturb the management of the affairs by Dr. Mukherjee and Dr. Neogy for a fortnight only. All parties including the Administrator to act on a signed copy of the minutes.