L.MOHAPATRA, J.

COPET NOS.39,40 & 41 OF 2009 (Decided on 22.02.2011)

ORISSA SPONGE IRON & STEEL LTD. & ORS. .....Appellants.

.Vrs.

BHUSHAN ENERGY LTD. & ORS. .....Respondents.

(A) COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – S.10-F.

(Para 7)

(B) COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – S.397.

For Appellants - M/s. P.Chatterji, Satyajit Mohanty, R.R.Swain, S.Patnaik, S.S.Das, R.K.Sahoo, K.C.Mohapatra,R.Agarwal, A.Riya & S.P.Das.

For Respondents - M/s. S.K.Kapur, Pinaki Mishra, S.P.Sarangi, P.P.Mohanty, P.K.Das, B.C.Mohanty, A.Pattnaik, R.K.Tripathy, A.Kanungo, A.K.Kanungo & D.K.Das.

For Appellant - M/s. S.K.Kapur, R.K.Rath, P.Mishra & A.Parija.

For Respondents - M/s. P.Chatterji, Satyajit Mohanty, R.R.Swain & S.S.Das.

L. MOHAPATRA, J. The order dated 6th October, 2009 passed by the Company Law Board, Principal Bench, New Delhi in C.P.No.5 of 2009 is assailed in all the three company petitions, which were taken up together for hearing and disposal.

BNS Steel Trading Pvt. Ltd., who was petitioner no.1 before the Company Law Board, has filed COPET No.40 of 2009 whereas BBN Transportation Pvt. Ltd., who was petitioner no.3 before the Company Law Board, has filed COPET No.41 of 2009. Orissa Sponge Iron and Steel Ltd., who was respondent no.1 before the Company Law Board, has filed COPET No.39 of 2009. Out of three petitioners before the Company Law Board, two have preferred COPET Nos.40 and 41 of 2009 whereas out of eleven respondents, respondent No.1-Orissa Sponge Iron and Steel Ltd., has filed COPET No.39 of 2009. The impugned order was passed on the basis of a petition filed under Sections 397, 398 and 399 read with Section 402 and 403 of the Company Act, 1956.

2. BNS Steel Trading Pvt. Ltd., Bhushan Energy Ltd. and BBN Transportation Pvt. Ltd. jointly filed the said Company Petition for the following reliefs :-

"a) Direct the respondents to maintain the status quo regarding their shareholdings, fixed assets of the company, and not to change the shareholding pattern of the company by transfer or further issue of shares.

b) Direct that any transfer in the facts and circumstances of the case shall be void.

c) Direct the Respondents not to sell its shares held in the Respondent No.1 Company without the prior approval of the shareholders.

d) Direct the investigation in the affairs of the company for its financial mismanagement and huge siphoning of the funds.

e) Reconstitute the board of the Respondent No.1 Company after carrying out the investigation in the affairs of the company for its financial mismanagement and huge siphoning of the funds and declare that affairs are being conducted prejudicial to the public interest the company and/or its members and further declare that the affairs of the company are being or are committed on prejudicial to the company or its members or public at large and oppressive to its members and the present management is conducting its efforts in a manner which is intended to disfraud its members creditors and public at large.

f) Pass such further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

g) Direct the Respondents to transfer the warrants in the name of petitioner No.2."

3. The facts/instances of oppression and mismanagement alleged in the company petition filed by the said three companies are that Orissa Sponge Iron and Steel Ltd. is not only governed under the provisions of Companies Act, 1956 but under the provisions of SEBI Act and Guidelines. It is alleged in the petition that the present management and the promoters holding the controlling stake in the company are trying to dispose of the said unit by way of transferring its shareholding to a 3rd party without the consent and approval of the shareholders. The attitude of the existing promoters to wash their hands of the Company's Management confirms the belief that affairs of the company are being conducted with an intent to defraud its members, creditors and public at large and are oppressive to its members. The circumstances and facts as now emerging or as may emerge fully after investigation would prove beyond doubt that some person other than the existing promoters, who intend to take over management of the Company is influencing the policy of the company. Such action adversely affects the rights of the shareholder at large. It is also alleged that in case of promoters holding the controlling stake handover the company to a party alien to the present line of business, the same would be prejudicial to the interest of the company and consequently the shareholders. It is further alleged that the present management/ directors intend to handover the management of the company to some outsiders to absolve themselves from the liability of the company after siphoning away the huge funds of the company resulting in loss. Such conduct of the present management/directors is an act of oppression, which may ultimately give rise to winding up of the company. It is stated that the company has issued convertible warrants in terms of shareholders resolution dated 15.10.2007 and the same have been pledged to raise funds but such funds have been diverted by the

promoters for their personal use. On this account, it is stated that issuance of such warrants or their conversion may affect capital structure of the company. Some instances of issuance of such warrants and conversion thereof have been narrated in the petitions. It is further stated in the petition that petitioner no.2, Bhushan Energy Ltd. holds 35 lakhs share warrants of the company convertible into equitable shares. After conversion of these warrants, the holding of all the three petitioners would become 27.53 % but the said warrants are not being converted to shares in the name of Bhushan Energy despite of submission of all the requisite documents with the Registrar of Transfer Agent. This conduct of the present management amounts to oppression. The dishonest acts and mala fide intention of the management/ Directors have pushed the company at its financial brink where it is likely to collapse and thus would justify the winding up of the company on just and equitable grounds. Since winding up the company may not be in the interest of the share holders of the company and the company itself, the said petition was filed under the provisions mentioned above and for the relief quoted earlier.

4. With the above background, I proceed to examine the case of the appellants in COPET Nos.40 and 41 of 2009. Admittedly four days after C.P.No.5 of 2009 was filed before the Company Law Board, C.A. No.113 of 2009 was filed by the appellants

(1) For a declaration that 12,00,000 shares in the name of Torsteel Research Foundation in India (Respondent No.10) before the Company Law Board be declared as null and void being contrary to and in violation of the provisions of Section 77 of the Companies Act, 1956.

(2) To declare that 11,88,916 number of shares converted from similar number of warrants of OSIL (Respondent No.1 before the Company Law Board) in the name of Respondent No.10 is null and void.

(3) For a declaration that 14,10,000 equity shares issued by OSIL on preferential basis to Respondent No.10 at Rs.41.14 paise per share amounting to Rs.5.78 crores is null and void.

(4) For a declaration that 40,00,000 warrants of OSIL converted into the equity shares is null and void and for a direction to OSIL and its Directors to transfer 30 lakhs warrants in the name of Bhushan Energy Ltd.

In the said petition, i.e., the case of the appellants is that on inspection of records of Torsteel Research Foundation in India (Respondent No.10 before CLB) and TRFI Investment Private Limited (Respondent No.11 before CLB) from the Registrar of Companies portal of MCA 21, the following facts emerged which constitute the acts of oppression and mismanagement:

(I) In March 2004, Torsteel Research Foundation in India was holding 11% share in OSIL. During the third quarter of 2005, Torsteel Research Foundation in India purchased 12,00,000 shares from Industrial Promotion and Investment Corporation of Orissa Limited which was also a shareholder of OSIL at 58.06 per share amounting to Rs.6.97 crores. Torsteel Research Foundation in India had received Rs.6 crores as a loan from Torsteel Services Limited which is owned

and controlled by the promoters of OSIL and this amount was borrowed by Torsteel Services Limited from UTI Bank on 29.7.2005 against the security of Escrow account of payables from OSIL. A corporate guarantee from Torsteel Research Foundation was also provided. On the same day, a sum of Rs.5.44 crores was transferred to Torsteel Research Foundation in its account in ICICI Bank and the said money was utilized for purchasing the 12,00,000 shares from IPICOL. This transaction is in violation of Section 77 of the Companies Act.

(II) In May 2005, OSIL again allotted 11,88,916 number of share warrants to be converted into equal number of shares at the rate of Rs.68.87 per warrant amounting to Rs.8.18 crores in favour of Torsteel Research Foundation which was convertible into equity shares within 18 months from the date of allotment. A small fraction of the said amount was paid by Torsteel Research Foundation to convert the warrants. OSIL in order to facilitate Torsteel Research Foundation to convert those warrants into equity shares provided an advance of Rs.6 crores to Torsteel Services Limited under the pretext of mining development and in turn Torsteel Services Limited provided the same amount to Torsteel Research Foundation for paying the conversion amount in respect of the said warrants. Torsteel Research Foundation utilized the said amount for converting the warrants into equal number of shares in January, 2006. It is, therefore, evident that OSIL provided financial assistance to Torsteel Research Foundation for acquisition of shares of OSIL in violation of Section 77 of the Act.

(III) In August 2006, OSIL issued 14,10,000 equity shares on preferential basis to Torsteel Research Foundation at Rs.41.14 paise per share amounting to Rs.5.78 crores in the same circuitous manner by providing financial assistance in contravention of Section 77 of the Companies Act.

On these allegations, the above prayers were made in the petition.

OSIL contested the petition by filing a reply and the gist of the reply is that at no point of time OSIL either directly or indirectly rendered any financial assistance to Torsteel Research Foundation for acquisition of shares.

5. The Company Law Board after examination of the documents produced by the parties before it, in paragraph-24 of the impugned order, observed that so far as the alleged tainted transactions are concerned, the admitted fact is that all these transactions took place before Bhushan Group (the present appellants) became shareholders. By these transactions, Bhushan Group has not been affected at all in any manner. From paragraph-27 of the impugned order, the Company Law Board proceeded to examine the allegations relating to the alleged tainted transactions but observed that three transactions had been alleged to be tainted. While for two transactions, details were given, for the third one only an apprehension had been expressed. Therefore, the Company Law Board examined the two alleged tainted transactions and came to the following findings.

The first transaction relates to acquisition of 12 lakh shares by Torsteel Research Foundation and it is admitted that OSIL has not funded these transactions. UTI had sanctioned a loan of Rs.6 crores to Torsteel Services Private Limited which was not a

party to the proceeding for mining development. This loan was taken on the security of receivable from OSIL. This was the primary security provided by Torsteel Services Limited and the loan was guaranteed by Torsteel Research Foundation. The conclusion arrived at by the Company Law Board is that OSIL has not given any financial assistance directly or indirectly. The allegation of tainted transactions was based on a further allegation that Torsteel Services Pvt. Ltd. is not engaged in mine development but its only business is in fisheries and therefore, the transaction is a tainted transaction as OSIL has indirectly provided financial assistance. In response to such allegation, the Company Law Board observed that UTI Bank had given the loan being satisfied that the primary security given by the loanee is adequate and may be the Bank had the confidence of recovery of the loan because of association of Torsteel Services Pvt. Ltd. with OSIL. It further found that from the said transactions, it is crystal clear that OSIL has not given any financial support indirectly except perhaps its reputation to the satisfaction of the Bank. It is also held that the said issue cannot be determined in absence of UTI Bank and Torsteel Services Pvt. Ltd. who are not parties to the proceeding.

So far as the second transaction of conversion of warrants by Torsteel Research Foundation out of loan of Rs.6 crores sanctioned by UTI Bank to OSIL is concerned, referring to the letter of UTI Bank, the Company Law Board held that the said amount had been sanctioned by the Bank in favour of OSIL for a specific purpose of lending it to Torsteel Services Pvt. Ltd. for mine development. Torsteel Services Pvt. Ltd. handed over this amount as a loan to Torsteel Research Foundation which was used for conversion of the warrants. The allegation of the appellants in this regard was that Torsteel Services Pvt. Ltd. does not have any mining development experience and its sole business was in fisheries. In respect of the first transactions, such submission having been rejected by the Company Law Board, in respect of the second transaction, the very same submission was also rejected. While arriving at such findings, the Company Law Board had referred to a decision of the Calcutta High Court in the case of ***Unity Company Private Ltd v. Diamond Sugar Mills and others, reported in AIR 1971 Calcutta 18*** and a decision of the Company Law Board, Principal Bench, in the case of ***Northern Projects Ltd. v. Blue Coast Hotels and Resorts Ltd. and others, reported in (2007) 140 Comp Cas 300 (CLB***).

6. Shri Kapur, the learned Senior Counsel appearing for the appellants in the above two appeals drew attention of the Court to certain documents filed before the Company Law Board to substantiate the case of the appellants that the above two transactions are tainted transactions and OSIL had directly or indirectly rendered financial assistance for the above two transactions. It was contented by Shri Kapur, the learned Senior Counsel for the appellants that so far as the first transaction is concerned, UTI Bank advanced a loan of Rs.6 crores to Torsteel Services Pvt. Ltd. for mine development of OSIL. The primary security provided for the said loan was the OSIL payables from it's Escrow account to Torsteel Services Pvt. Ltd. and the said loan was guaranteed by Torsteel Research Foundation. Torsteel Services Pvt. Ltd. after obtaining loan from UTI advanced the same as loan to Torsteel Research Foundation and in turn Torsteel Research Foundation utilized the said amount for purchasing 12 lakh shares of OSIL from IPICOL. Referring to the copy of the Bank transactions of Torsteel Services Pvt. Ltd., it was contented by Shri Kapur, the learned Senior Counsel for the appellant that all these transactions took place on the very same day.

So far as the second transaction is concerned, it was contended by the learned Senior Counsel that UTI Bank sanctioned a loan of Rs.6 crores to OSIL for mine development by Torsteel Services Pvt. Ltd. and the said amount was provided as advance by OSIL to Torsteel Services Pvt. Ltd. for mine development. In turn Torsteel Services Pvt. Ltd. provided the very same amount to Torsteel Research Foundation as a loan and the said amount was utilized by Torsteel Research Foundation for conversion of 11,88,916 warrants of OSIL. It was also contended by Shri Kapur with reference to the Bank transactions that all these transactions had taken place in one day. According to the learned Senior Counsel appearing for the appellants, all these transactions only establish indirect financial assistance rendered by OSIL either for acquisition of shares from IPICOL or for conversion of warrants into shares. Reference was also made to the letter of UTI Bank dated 26.7.2005 to substantiate the contention that Torsteel Services Pvt. Ltd. for obtaining a term loan of Rs.6 crores had offered exclusive charge of Escrow account of OSIL on payables from OSIL as primary security. It was contended by the learned Senior Counsel appearing for the appellants that the promoters of OSIL are also the owners of Torsteel Services Pvt. Ltd. and Torsteel Research Foundation and therefore, it was easier for them to enter into such transactions for defrauding the shareholders.

Shri P. Chatterji, the learned Senior Counsel appearing for the OSIL does not dispute the transactions but submits that none of the documents produced by the appellants establish that OSIL had either directly or indirectly rendered any financial assistance either for acquisition of shares from IPICOL or for conversion of warrants into shares. Referring to the letter of UTI Bank dated 26.7.2005, it was contended by Shri Chatterji, the learned Senior Counsel appearing for OSIL that while granting a term loan of Rs.6 crores in favour of Torsteel Services Pvt. Ltd., the primary security offer was the Escrow account of OSIL on payables from OSIL. Referring to the same, it was contended that any amount payable from the Escrow account of OSIL in favour of Torsteel Services Pvt. Ltd. is the property of Torsteel Services Pvt. Ltd. which could be offered as security and therefore, there was no financial assistance rendered by OSIL in the said transaction. It was also brought to the notice of the Court that against the said loan, Torsteel Research Foundation stood as corporate guarantee and an exclusive charge in relation to the office of Torsteel Research Foundation in India office area at Nariman Point, Mumbai had been created. This property itself was worth of more than Rs.20.00 crores and therefore, no further security was also necessary against a loan of Rs.6 crores. In respect of the second transaction, Shri Chatterji also contended that the loan of Rs.6 crores had been granted by UTI Bank in favour of OSIL to be utilized for mine development which was undertaken by Torsteel Services Pvt. Ltd. Therefore, the said amount was provided as advance by OSIL to Torsteel Services Pvt. Ltd. for mine development. The conduct of Torsteel Services Pvt. Ltd. in providing a similar amount as loan to Torsteel Research Foundation for conversion of the warrants into shares cannot be said to be a financial assistance rendered by OSIL either directly or indirectly to Torsteel Research Foundation for conversion of warrants into shares.

The learned counsel made the above submissions on facts, alleged in the petition and also cited some decisions in support of their respective submissions. I now proceed to examine the submission of the learned Senior Counsel appearing for both the parties with reference to the documents and the decisions cited at the Bar.

7. A preliminary objection was raised by Shri Chatterji, the learned Senior Counsel appearing for OSIL with reference to Section 10-F of the Companies Act, 1956 and it was submitted that the appellant can only be heard on a question of law and the appellate court cannot reassess the materials placed before the Company Law Board and come to a different conclusion. In response, Shri Kapur, the learned Senior Counsel appearing for the appellants placed reliance on a decision of the Hon'ble Supreme Court in the case of M/s. ***Dale & Carrington Invt. (P) Ltd. and another v. P.K. Prathapan and others, reported in AIR 2005 S.C. 1624***. Para 35 of the said judgment is quoted below:

" Section 10F refers to an appeal being filed on the question of law. The learned counsel for the appellant argued that the High Court could not disturb the findings of fact arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High Court could not go into and therefore the judgment of the High Court is liable to be set aside. We do not agree with the submission made by the learned counsel for appellants. It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has not gone into real issues which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter. As already stated the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujam and whether the allotment of additional shares was an act of oppression of his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan i.e. his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same."

Referring to the above paragraph, Shri Kapur, the learned counsel appearing for the appellants submitted that if the findings arrived at by the Company Law Board is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. Shri Chatterji, the learned Senior Counsel submitted that only when a finding of fact arrived at by the Company Law Board is found to be perverse or based on no evidence, then only the same can be set aside in appeal. But this is a case where the findings of the Company Law Board are based on documents produced by the parties, under no stretch of imagination it can be said that the findings are based on no evidence or that they are perverse.

As stated earlier, the appellants in order to substantiate their claim that the above two transactions were tainted had relied upon certain documents referred to above and the Company Law Board referring to the said documents recorded the findings against the appellants. Therefore, it cannot be said that the findings are based on no evidence. The question as to whether such findings are perverse or not, it is necessary to refer to the very same documents again. So far as the first transaction is concerned, it is clear from the letter of the UTI Bank dated 26.7.2005 that the term loan of Rs.6 crores had been granted in favour of Torsteel Services Pvt. Ltd. on furnishing certain securities. The

primary security is the exclusive charge on Escrow account of payables from OSIL. This clearly shows that whatever amount was payable to Torsteel Services Pvt. Ltd. from the Escrow account of OSIL on account of mining development is furnished as primary security. Therefore, the Company Law Board was right in making any observation that UTI had the confidence of recovering the amount of loan granted in favour of Torsteel Services Pvt. Ltd. because of the business to get from OSIL. There is nothing in the letter to show that OSIL had stood as a guarantor or furnished any security directly or indirectly to the Bank for the purpose of the above loan. On the other hand, it is clear from the said letter that Torsteel Research Foundation stood as a corporate guarantee and an office area of 778 sq.ft. belonging to Torsteel Research Foundation at Bajaj Bhawan, Nariman Point, Mumbai had been furnished as a security. I do not find anything from the letter of the Bank indicating direct or indirect involvement of OSIL in facilitating Torsteel Services Pvt. Ltd. in obtaining loan from UTI by rendering any kind of financial assistance or security. The payables from Escrow account of OSIL to Torteel Services Pvt. Ltd. for the services rendered by it on account of mine development had been only given as primary security and such payables are the properties of Torsteel Services Pvt. Ltd.

So far as the second transaction is concerned, admittedly OSIL had obtained a loan from UTI Bank to the tune of Rs.6 crores for mine development. The mine development work of OSIL had been undertaken by Torsteel Services Pvt. Ltd. and therefore, the said amount was given as advance to Torsteel Services Pvt. Ltd. for mine development. If Torsteel Services Pvt. Ltd. granted a similar amount of money as loan to Torsteel Research Foundation for the purpose of conversion of warrants into shares of OSIL, it cannot be said that OSIL had directly or indirectly rendered financial assistance to Torsteel Research Foundation either for acquisition of shares from IPICOL or for conversion of warrants into shares of OSIL. The Bank transactions might have taken place on the same date but there is nothing on record to show that OSIL either directly or indirectly funded for acquisition of shares or conversion of warrants into shares. The further objection raised by the appellants was that Torsteel Services Pvt. Ltd. was involved in the business of fisheries but there is nothing on record to show that it was not involved in mine development. Though the transactions shown in the balance sheet in the initial years do not indicate that the said Company was running well, there is nothing on record to disprove the claim of OSIL that it had engaged Torsteel Services Pvt. Ltd. for mine development. Under these circumstances, I find absolutely no error in the findings of the Company Law Board with regard to the above two alleged tainted transactions. Accordingly, on facts, I find that the appellants have miserably failed to prove direct or indirect involvement of OSIL in funding Torsteel Research Foundation in either acquiring the shares from IPICOL or converting the warrants into shares of OSIL as alleged by them and consequently there has been no contravention of Section 77 of the Companies Act.

Shri Kapur, the learned Senior Counsel appearing for the appellants placed reliance on a decision of the Hon'ble Supreme Court in the case of ***Claude-Lila Parulekar (Smt.) v. Sakal Papers (P) Ltd. and others, reported in (2005) 11 Supreme Court Cases 73*** to substantiate his submission that the requirements of Section 77 of the Companies Act, 1956 are mandatory and no company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and

sanctioned in pursuance of sections 100 to 104 or of section 402 of the Act. Referring to Section 77 of the Companies Act, it was further submitted by Shri Kapur, the learned Senior Counsel that no public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company subject to certain exceptions. According to the learned Senior Counsel, the above two transactions having taken place in contravention of Section 77 of the Act, all such transactions are void.

No doubt the aforesaid decision with reference to Section 108 of the Companies Act, 1956 held the provisions contained therein are mandatory in nature, but the said decision has lost relevance because of the finding arrived at earlier to the effect that neither of the two transactions contravenes Section 77 of the Companies Act, 1956.

8. One of the findings of the Company Law Board in relation to these two transactions is that Bhushan Group became shareholders only after these transactions were completed and that the Bhushan Group has not been affected by these transactions in any manner. Another finding of the Company Law Board that the facts leading to filing of C.A. No.113 of 2009 could not have been collected within four days from the date of filing of the Company Petition and therefore, the allegations made in the said C.A. No.113 of 2009 should have been incorporated in the main Company Petition or in the alternative the appellants should have sought for amendment of the main Company Petition. Challenging the said finding, Shri Kapur, the learned Senior Counsel appearing for the appellants relied on a decision of the Hon'ble Supreme Court in the case of ***Ramesh B. Desai and others v. Bipin Vadilal Mehta and others, reported in (2006) 5 Supreme Court Cases 638***. In the said decision, the Hon'ble Supreme Court observed that a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained, which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7, Rule 11 (d) of the Code of Civil Procedure.

The appellants in the said reported case had filed a Company Petition for rectification of the register of the Company as provided under Section 155 of the Companies Act. Respondents 1 and 2 therein filed an objection and prayed to dismiss the said Company Petition on the ground that the same was barred by limitation. The application was allowed by the Company Judge and the Company Petition was dismissed on ground of limitation. Division Bench also confirmed the said order of the Hon'ble Single Judge and the matter went to the Hon'ble Supreme Court. On consideration of facts of that case, the matter was remitted back to the High Court for reconsideration. It was contended with reference to the said judgment that long delay in filing the Company Petition was condoned and therefore, delay of four days in filing C.A. No.113 of 2009 could not be a ground for rejecting the petition.

9. On perusal of the impugned order passed by the Company Law Board, I find that the said Company Application No.113 of 2009 was dismissed on merit. Therefore, the above decision cited by Shri Kapur, the learned Senior Counsel appearing for the

appellants may not have much relevance in the facts and circumstances of this case. It is the specific case of the appellants in the said petition that on inspection of the records of the Company Law Board, they became aware of the aforesaid alleged two tainted transactions. The date on which the records in the office of the Registrar of Companies were inspected by the appellants has not been mentioned in the petition. On the other hand, the date on which the said C.A. No.113 of 2009 was filed before the Company Law Board, the appellants came out with an open offer published in the "Business Standard" containing such details which could not have been obtained in four days time. The details mentioned in the open offer must have been obtained from the office of the Registrar of Companies much prior to filing of the Company Petition and therefore, the Company Law Board was justified in holding that it was practically impossible on the part of the appellants to inspect the records of Respondents 10 and 11 in the office of the Registrar of Companies in four days time prior to filing of C.A. No.113 of 2009. I do not find any unreasonableness in such findings of the Company Law Board in the impugned order.

Sub-section (2) of Section 77 of the Companies Act provides that no public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of purchase any shares in the Company. Though such a prohibition is available in Sub-section (2), Sub-section (4) of Section 77 provides that if a company acts in contravention of sub-sections (1) to (3) the company, and every officer of the company who is in default shall be punishable with fine which may extent to ten thousand rupees. Though this point was not argued by the learned counsel for the parties, the Company Law Board has taken note of it in the impugned order and has observed that contravention of the prohibition contained in Sub-section (2) of Section 77 only attracts a penalty under Sub-section (4) of Section 77. Therefore, even assuming for the sake of argument that Shri Kapur, the learned Senior Counsel appearing for the appellants is right in saying that there has been contravention of Sub-section (2) of Section 77, such contravention can only attract a penalty under Sub-section (4) of Section 77.

10. For the reasons stated above, I do not find any merit so far as these two Company Petition Nos. 40 and 41 of 2009 are concerned.

11. With the above allegations made in the Company Petition, now I proceed to examine the case of the appellants in COPET No.39 of 2009.

12. This appeal has been filed by OSIL against the part of the impugned judgment and order passed by the Company Law Board in respect of the directions to OSIL for conversion of 35 lac warrants held by Bhushan Energy Limited into 35 lac equity shares which would constitute approximately 12% of the diluted share capital. Shri P. Chatterji, the learned Senior Counsel appearing on behalf of the OSIL assailed this part of the judgment and order of the Company Law Board on the following grounds:

(a) A company petition for oppression and mismanagement under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for an isolated alleged act of oppression.

(b) A company petition for oppression and mismanagement under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for ulterior and collateral purposes.

(c) An applicant in a petition under Sections 397 and 398 of the Companies Act cannot be allowed to claim reliefs beyond the company petition by way of interim applications which reliefs are not interim in nature but final.

(d) A company petition under Sections 397 and 398 of the Companies Act deserves to be statutorily dismissed by the Company Law Board unless it is averred and proved by the applicant that it was a case for just and equitable winding up of the company and the Company Law Board had come to a conclusion that winding up would unfairly prejudice the interest of the shareholders and the same can be remedied by passing directions in respect of such oppression or mismanagement.

(e) A petition under Sections 397 and 398 of the Companies Act could not be used for the purposes of enforcing a contract between a company and a shareholder or any third party.

(f) No company petition under Sections 397 and 398 could have been filed for seeking conversion of warrants into equity shares which had been transferred without following the mandatory provision of the securities Contract Regulation Act as according to the respondents in this appeal the warrants are marketable securities and thus covered by the Companies Act.

(g) The Company Law Board could not have come to a conclusion that the company was not entitled to hold a general meeting for deciding the fate of warrants issued under Sections 81(1A) of the Companies Act which is a special procedure for issuing shares except to existing shareholders.

THE SUBMISSIONS OF MR. P. CHATTERJI, THE LEARNED SENIOR COUNSEL FOR OSIL

13. So far as ground No.(a) is concerned, with reference to Sections 397 and 398 of the Companies Act, it was contended that under the said provision, a shareholder having more than 10% shares may submit a complaint before the Company Law Board against the acts of mismanagement or oppression provided (a) the complainant proves before the Company Law Board that the act of mismanagement or oppression would lead to winding up of the company which shall be prejudicial to the shareholders (b) the acts of oppression and mismanagement continued up to the date of filing of the petition (c) the alleged acts of mismanagement of the company affects the rights of the complainant as regards his status as a shareholder of the company and in regard to his proprietary rights.

According to the learned Senior Counsel unless the above requirements are satisfied, a derivative action is not maintainable as it is the ante-thesis to the democratic operation of the Company wherein the shareholders appoint the Directors and Directors are entitled to decide for and on behalf of the shareholders such conduct and acts which

are for the benefit of the company. Such a democratic process cannot be interfered with or over-looked by a court unless the above conditions are met at the time of filing of the applications under Sections 397 and 398 of the Companies Act. An isolated or a stray act of the company affecting the rights of a shareholder cannot attract Section 397 and 398 of the Companies Act. In this connection, reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad and others, reported in (2005) 11 Supreme Court Cases 314***. The observation of the Hon'ble Supreme Court in paras 181 and 183 of the judgment relied upon are quoted below:

> "181. The jurisdiction of the court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. (See Bennet Coleman & Co. v. Union of India and Syed Mahomed Ali v. R. Sundaramoorthy). But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analyzing the materials brought on record that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress the minority of the members including the petitioners vis-à-vis the entire body of shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding up of the company but such winding up order would be unfair to the minority members. The interest of the company vis-à-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956.
>
> 183. The remedy under Section 397 of the Companies Act is not an ordinary one. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The acts complained of may either be designed to secure pecuniary advantage to the detriment of the oppressed or be a wrongful usurpation of authority".

Reliance was also placed on a judgment of Kerala High Court in the case of ***V. J. Thomas Vettom v. Kuttanad Rubber Co. Ltd., reported in 1984 (56) Company Cases 284***. The relevant observation of the Hon'ble High Court in the said case is quoted below:

> "Every kind of oppression cannot be remedied by the court. The oppression must be such as to justify the winding up of the company on just and equitable grounds. Since the words used are "are being conducted", the action complained of must be a continuous one and not either an isolated or a stale one. Once the court is satisfied that the complaint is made without bona fides and to settle old scores or with the sole intention of mud-slinging, no orders under s. 397 or s. 398 will be passed. The court must have strong grounds before it to order winding up. An order under s. 397 or s. 398 can be supported only if such grounds are present. The fact that the complaining parties were themselves participants in the alleged activities will be one of the factors to dissuade the court from exercising its powers under the section. Delay and acquiescence in the acts complained of will also be circumstances against the grant of reliefs. The powers of the court under s. 402 are wide. But the courts have always exercised restraint in interfering with the affairs of the company, for the affairs of the company are normally its own concern and the concern of its shareholders. It is only when the facts and evidence before the court are such as to persuade it to hold that interference with the affairs of the company is necessary, that it would exercise its powers".

Referring to the Company Petition, it was contended that the only action against OSIL in the petition filed under Sections 397 and 398 of the Companies Act is non-conversion of 35 lac warrants into equity shares in favour of the Bhushan Group. With reference to the above two judgments, it was contended that an isolated alleged act of oppression or mismanagement cannot attract the provisions of Section 397 and 398 of the Companies Act and such alleged act is neither for loss nor for benefit of the company. It was also contended that non-conversion of warrants into equity shares does neither arise out of the proprietary right of the Bhushan group as a shareholder of the company nor does it arise out of any shareholders rights. Therefore, any alleged action of refusal to covert the warrants into equity shares is outside the ambit of the provisions contained in Sections 397 and 398 of the Companies Act.

14. So far as the ground No.(b) is concerned, it was contended that a petition under Sections 397 and 398 of the Companies Act cannot be used for ulterior or collateral purposes. It is a matter of record that the Bhusan Group who are the petitioners before the Company Law Board seek to take over OSIL through acquisition of shares in OSIL with an intent to change the management. Section 397 and 398 of the Companies Act does not cover an eventuality that the Company's defence to a hostile take over should be seen as an oppressive act on behalf of the company. The intention of the Bhushan Group is disclosed from their public announcement under the SEBI Takeover Code. It was specifically announced that 35 lac equity shares which would arise out of the warrants would be utilized for the purposes of taking over the OSIL in a hostile manner. Therefore, the entire purpose of filing the application under Section 397/398 of the Companies Act is neither to propagate the interest of the company nor is it for the purposes of protecting the right of a shareholder but it is only to seek an increase in voting power through the subterfuge of conversion of warrants into equity shares obtained from an existing shareholder who was well known to the OSIL for the sole purpose of taking over the company. Reliance is placed on the following clauses of the Public Announcement made by the Bhushan Group which according to Shri

Chatterji, the learned Senior Counsel appearing for the OSIL discloses the intention of Bhushan Group. The relevant two clauses are quoted below:

> "3.6 The Acquirer and PACs intend to acquire a majority shareholding in the Target Company accompanies with a change in control of the Target Company. Consequently, this offer is being made in compliance with Regulation 10 and 12 of the Regulations. The Acquirer and/or the PACs may acquire additional equity shares of the Target Company, including from the open market, through negotiation or otherwise, in accordance with the Regulations upto 7 working days prior to closure of the offer. Furthermore, the Acquirer may decide to exercise warrants mentioned under paragraph 1.3 above upto working days prior to closure of the offer. The Acquirer has requested OSIL for registering the warrants in its name".
>
> 7.2 The acquisition of Equity shares will enable the Acquirer (taken together with the shareholding of the PACs in the target company) to get a substantial ownership in the target company. The Bhushan Group has considerable interest in the Indian Steel Industry including the manufacture of valued added auto grade steel products with an increasing presence in the primary steel sector. The acquisition will enable the Bhushan Group to scale up its business operation by further expanding its presence in the primary steel sector, and providing access to upstream iron ore mines. In addition, the acquisition will also result in synergies for the target company, including the sharing of best practices in manufacturing and quality assurance system and processes, enhanced human capital and managerial talent, and potential and financial operational synergies".

In this connection, reliance was placed on the judgment of ***Re Bellador Silk Ltd., reported in (1965) 1 All England Law Reports 667***. The relevant portion of the judgment relied upon by OSIL is quoted below:

> "It became obvious during Moss Simmons' cross-examination that he did not really want the relief for which he was asking in the petition and that its real object was to achieve a collateral purpose, namely, to get some satisfaction in regard to the repayment to Bellador Ltd. or to the Simmons group of companies, of the outstanding loan. Indeed, he made no bones about this in the witness-box. For example, he was asked if he wanted a receiver appointed and he said that of course he did not, and, although he stated that there were some irregularities of which he disapproved, he time and again emphasized that his real concern was to force an agreement with his co-directors for the repayment of the loans to the Simmons group. The urgency of this became apparent when he explained that the money was needed for the purpose of honouring an agreement made with the Inland Revenue in regard to the payment of arrears of tax. If the loan was not repaid, he was, he said, faced with ruin. A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition".

In the case of ***Palghat Exports Pvt. Ltd. v. T.V. Chandran and others, reported in 1994 (79) Company Cases 213***, the Kerala High Court accepted the above view and held as under:

> "We have already referred to what P.W.1 has said as regards the real object of the petition. This real object which is tacitly reflected in the prayers made by the petitioners has been expressly stated in the deposition of P.W.-1. The first prayer is to pass appropriate orders for the purchase of the shares held by the petitioners. We feel that in view of the clear and unambiguous statement by P.W.-1, it is difficult for us to discern a different object which will satisfy section 397 of the Act other than an outside object of section 397 of recovering the amount invested for purchasing the shares. Of course, counsel for the respondents wanted to say that the object of the petition was to take action under section 397 of the Act and the relief the petitioners wanted was recovery of the money they have invested. This explanation, we feel, is not commendable and so we cannot accept it, we feel that we have to follow the dictum laid down in Bellador Silk Ltd., In re [1965] 1 All ER 667 (Ch D). We hold that the petition is liable to be dismissed on this sole ground".

Reliance was also placed on the judgment of ***Re J E Cade & Son Ltd., reported in (1992) BCLC 213***, where it was held that a petition for co-lateral purposes is not maintainable. It was contended on behalf of the appellants that the clear motive of the respondent is to some how take over the appellant company for its iron ore mines by seeking the conversion of warrants acquired by the respondent from existing shareholders to whom such warrants were issued on a clear understanding that it will not result in change in management and control of the appellant Company. The entire purposes of seeking conversion of warrants into equity shares is to increase the shareholding of the respondents in the appellant company in a manner that it would assist the respondent to change management of the appellant company so that the respondents are able to use the mineral and mining leases of the appellant company for their other competitive business of producing steel and sponge iron in the State of Orissa. This being the collateral purpose, the Company Law Board should have dismissed the company petition on that basis alone. A decision cited by the respondent before the Law Board in the case of ***Re Astec (BSR) plc, reported in (1998) 2 BCLC 556*** was also relied upon to substantiate the contention that a petition for oppression cannot be used for exerting pressure for making of a take over bid. The relevant portion of the aforesaid judgment relied upon by Shri Chatterji, the learned Senior Counsel is quoted below:

> "In this connection I should perhaps note that although Emerson's notice of motion seeks to strike out the petition on the alternative basis that it is frivolous and vexatious, that is essentially a matter of form only. <u>There is certainly nothing frivolous about the petition, and if and to the extent that it is vexatious it can only be so because it is an abuse of process in the sense which Plowman J used that expression in Re Bellador Silk Ltd.</u>

> "Returning therefore to the question of abuse of process, in my judgment Mr. Potts's submission is correct. I fully accept that the petitioners genuinely desire the relief claimed, that is to say an order for the buy-out of their own shares. Equally, however, Mr Stoddart makes clear in his affidavit, and Mr Heslop made clear in argument, that they desire that relief not for itself but because they hope that, if granted, it will lead to something else, that something else being something which the court would not order under s 459, namely a takeover bid by Emerson. The petition is, in my judgment, being used for the purposes of exerting pressure in order to achieve a collateral purpose, that is to say, the making of a takeover bid by Emerson.
>
> The petitioners' attempt to use s 459 as, in effect, a tactical ploy to force Emerson to make a takeover bid, though no doubt wholly well-intentioned, is in my judgment misguided as a matter of law. As such it constitutes in my judgment an abuse of process. That in itself would be sufficient ground for striking the petition out.
>
> Mr. Potts also submitted as another ground for striking out the petition that if the petition were allowed to proceed, there is no realistic prospect of the court granting the relief sought. In the circumstances it is unnecessary for me to consider that submission.
>
> In the result, for the reasons which I have attempted to express, I conclude that this petition is plainly and obviously unsustainable, that it is bound to fail, and that it should be struck out. I so order".

15. With reference to above decision, it was contended that the entire purpose of filing the petition under Sections 397 and 398 of the Companies Act is first stopping any change of the shareholding pattern, then seeking to stop the promoters to go away from the Company by selling their shares and force the promoters to sale their shares to the respondents.

16. In relation to Ground No.(c), it was contended on behalf of the appellant that a petition under Sections 397 and 398 of the Companies Act is required to be filed before the Company Law Board in terms of Regulation 14 of the Company Law Board Regulations. The said Regulations prescribe a format for filing such a petition whereas there is no format for filing an interim application under Section 402 of the Companies Act. With reference to the above, it was also contended that the Misc. petition filed under Section 397/398 of the Companies Act did not make out a case of either mismanagement or oppression but by way of Misc. applications, allegations of mis-management and oppression were attempted to be brought in. Reliance was placed on paragraph-135 of the judgment in ***Sangramsingh P. Gaekwad v. Shanta Devi P. Gaekwad*** (supra). The said paragraph is quoted below:

> "135. Despite such categorical admissions in the pleadings, a statement was made across the bar that at the time of filing of the Company Petition the Respondent 1 herein did not have all information which came to light at a much later stage. It was urged that only with a view to obtain complete reliefs, prayers made in the company petition were amended and reliefs had been granted by

the High Court keeping in view the pleadings and affidavits filed by the parties in all the three matters. We have our own doubts how far the procedure adopted was correct when in a case of oppression the court must strictly go by the pleadings made in the application. The provisions of the Civil Procedure Code do not envisage that pleadings in any other case should be the basis for grant of relief, particularly when the pleas taken in both the petitions are contradictory and inconsistent with each other. Before us affidavits from different proceedings made by the same person or by the other supporting or opposing the application have been placed. They have not been cross-examined. Their attention had not been drawn to their earlier statements which could be done only in terms of Section 145 of the Evidence Act. With a view to elicit the truth the court must have before it a clear picture. In this case, unfortunately, the parties herein have not made any efforts to examine themselves in court so as to enable the other side to cross-examine them. Had the parties to the proceedings been examined and cross-examined, they could have been confronted with the earlier statements made by them in another affidavit."

Reliance was also placed on another decision in the case of ***Mohta Bros. (P) Ltd. and others V. Calcutta Landing and Shipping Co. Ltd. and others, reported in (1970) Company Cases Vol.40 page 119***. The relevant portion of the judgment referred to by the appellants is quoted below:

"Full particulars must be given by a petitioner in an application under Sections 397 and 398 of the Act of acts of mismanagement and oppression. Vague and uncertain allegations of mismanagement and oppression, although they may constitute grounds for suspicion, do not entitle a petitioner to ask the court to embark upon an investigation into the affairs of the company, in the hope that in consequence of such investigation, something will turn up which will enable the court to grant relief to the petitioner. It is true that it may not always be possible for one or a group of shareholders to furnish particulars of acts of mismanagement, fraud, oppression, misappropriation or other improper acts, but such inability on the part of shareholders, who have no access to the books of the company, is by no means a ground for directing an investigation into the affairs of the company or for giving any other relief to a petitioner. The petitioner must set out the facts which constitute acts of mismanagement, misappropriation, fraud or oppression and prove, prima facie, at any rate, that on those facts an investigation is called for. If a petitioner fails to set out the facts and produce satisfactory proof in support of those facts no order for investigation into the affairs of the company can be made, nor can any relief be granted to the petitioner. A shareholder has no right of access to the books of the company, but denial of access to such books is not an act of oppression as has been held by this court in a Bench decision, Rajya Lakshmi (Lalita) v. Indian Motor Co. Ltd. If a petitioner cannot make out a case of mismanagement and oppression, because he was unable to collect materials for the purpose, it is not for the court to direct the directors of the company to offer inspection of the company's books and accounts to enable a petitioner to collect materials for the petition under Sections 397 and 398 of the Act, or to direct investigation into the company's affairs and accounts by an independent person to bring out materials for further orders against the company, its directors or shareholders".

Reliance was also placed on the judgment in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd., reported in 1965 (35) Company Cases, Page-351*** and the relevant portion of the judgment relied upon is quoted below:

> "These observations from the four cases referred to above apply to s. 397 also which is almost in the same words as s. 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of s. 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to Section 397".

With reference to the above judgments, it was contended on behalf of the appellants that the facts mentioned in C.A.Nos.113, 161, 213, 258 and 295 of 2009 contained certain allegations which did not find place in the main petition. No amendment was sought for by the respondents for amending the Company Petition and therefore, in view of the above decisions, the interim applications should have been dismissed as being beyond the pleadings of the Company Petition. The Company Law Board in the impugned order allowed C.A.Nos.213, 258 and 295 of 2009 so far as it relates to conversion of warrants into equity shares even though there was no such allegation of oppression in the main petition in relation to the said amendments. The Court's jurisdiction regarding orders to be passed in interim applications was considered in the case of ***Cotton Corporation of India Limited V. United Industrial Bank Limited and others, reported in AIR 1983 Supreme Court 1272*** and the relevant portion of the judgment is quoted below:

> "It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In State of Orissa v. Madan Gopal

Rungta: (1952) SCR 28: (AIR 1952 SC 12) a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank seeks in its suit. The prayer is that the Corporation be restrained by an injunction of the Court from presenting a winding-up petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding-up of the Bank. There is a clear bar in Section 41 (b) against granting this relief. The Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms. The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings."

Relying on the said decision, it was contended on behalf of the appellant that an interim relief can be granted provided it is in the aid of the final relief and there being no nexus between the pleading made in the Company Petition and the pleadings made in the Misc. case, the Court could not have allowed such prayer made in the Misc. application.

17. In relation to Ground No.(d), it was contended that Section 397 and 398 of the Companies Act is an alternative remedy to winding up under Section 433 (f) of the Companies Act. Before the Company Law Board can exercise jurisdiction under Section 397 and 398 of the Companies Act, it has come to a conclusion that the acts of the management are fit to lead the company to winding up. Without such a finding, the Company Law Board cannot exercise jurisdiction under the above two provisions for the purpose of protecting the interest of the Company from winding up. In this connection, reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***Five Minute Car Wash Service Ltd., reported in (1966) Vol.36 Company Cases 566***. Relevant portion relied upon by the learned counsel is quoted below:

"This is not, as I read the petition, relied upon as an act of oppression. The allegations of oppression are to be found in paragraph 13, which I have read. Before considering whether these allegations, if proved-as for the present purpose I assume that they will be amount to oppression within the meaning of section 210, I propose to say something about the scope of that section. To succeed in obtaining relief under the section a member of a company must have established that at the time when his petition was presented, the affairs of the company were being conducted in a manner oppressive of himself, or of a part of the members including himself, and unless a petitioner in his petition alleges facts capable of establishing that the company's affairs are being conducted in

such a manner, the petition will disclose no ground for granting any relief and will be dismissed in limine as being demurrable.

First, the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under section 210.

Secondly, the matters complained of must relate to the conduct of the affairs of the company.

Thirdly, they must be such as not only to make the winding up of the company just and equitable, but also to lead to the conclusion that the affairs of the company are being conducted in a manner which can properly be described as "oppressive" of the petitioner, and, it may be, other members. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. In Scottish Co-operative Wholesale Society Ltd. v. Meyer (a case under section 210) Viscount Simonds L.C. adopted a dictionary definition of the meaning of "oppressive" as "burdensome, harsh and wrongful."

Reference was also made to the following paragraph in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd.*** (supra) by the learned counsel for the appellant which has been quoted earlier.

Reliance was also placed in the case of ***Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao & others, reported in 1956 (26) Company Cases 91 (SC)*** and in the case of ***World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margaret T. Desor and others, reported in 1990 (67) Company Cases 607 (SC***). The relevant part of the judgment in both the cases are quoted below respectively:

" It was next contended that the allegations in the application were not sufficient to support a winding up order under section 162, and that therefore no action could be taken under section 153-C. We agree with the appellant that before taking action under section 153-C, the court must be satisfied that circumstances exist on which an order for winding up could be made under section 162".

" We are of the opinion that the averments which a petitioner would have to make to invoke the jurisdiction of sections 397 and 398 of the Act are not destructive of the averments which are required to be made in a case for winding

> up under section 433(f) on the just and equitable ground, though they may appear to be rather conflicting, if not contradictory. We are in agreement with the High Court that the petition must proceed up to a certain stage which is common to both winding up and invoking the jurisdiction of sections 397 and 398 and though there may be some difference in the procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into".

In the case of ***Needle Industries (India) Ltd. and others V. Needle Industries Newey (India) Holding Ltd. and others, reported in (1981) 3 Supreme Court Cases 333***, the Hon'ble Supreme Court held that in an application under Section 210 of the English Companies Act, as under Section 397 of our Companies Act, before granting relief the court has to satisfy that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. In the case of ***Hanuman Prasad Bagri and others v. Bagress Cereals Pvt. Ltd. and others, reported in (2001) 105 Company Cases 493***, a similar view was expressed. Referring to the above decision, it was contended on behalf of the appellant that in the Company Petition there is no pleading which can lead to winding up of the appellant's company. Unless materials are placed before the Company Law Board to its satisfaction that it is a fit case for winding up, no order on a petition under Section 397/398 of the Companies Act can be passed.

18. In relation to Ground No.(e), it was contended that Section 397 and 398 of the Companies Act cannot be used for the purposes of enforcing a contract between a company and a shareholder or any third party. Referring to C.A. No.295 of 2009 filed before the Company Law Board, it was contended that the respondents have admitted in the said petition that warrants are "option contract". Once it is admitted that warrants are contracts, the same cannot be enforced in an application under Section 397/398 of the Companies Act and reliance was placed on paragraph 185 of the judgment in the case of ***Sangramsingh P. Gaekwad Vs. Shantadevi P. Gaekwad*** (supra). The said paragraph is quoted below:

> "185. It has to be borne in mind that when a complaint is made as regard violation of statutory or contractual rights, the shareholder may initiate a proceeding in a civil court but a proceeding under Section 397 of the Act would be maintainable only when an extraordinary situation is brought to the notice of the court keeping in view the wide and far-reaching power of the court in relation to the affairs of the company. In this situation, it is necessary that the alleged illegality in the conduct of the majority shareholders is pleaded and proved with sufficient clarity and precision. If the pleadings and/or the evidence adduced in the proceedings remains unsatisfactory to arrive at a definite conclusion of oppression or mismanagement, the petition must be rejected."

In the case of ***Incable Net (Andhra) Limited and others v. AP Aksh Broadband Limited and others, reported in (2010) 6 Supreme Court Cases 719***, the Hon'ble Supreme Court held that when there is a breach of contract, the same cannot constitute the ingredients of a complaint under Sections 397, 398, 402 and 403 of the Companies Act, 1956. Such breach could give rise to an action of breach of contract under Section 73 of the Indian Contract Act, 1972. Relying on the above decision, it

was contended on behalf of the appellant that conversion of warrants into equity shares being totally decide the right of a shareholder, could not be brought before the Company Law Board for adjudication.

19. In relation to Ground No.(f), it was contended that Section 397 and 398 of the Companies Act could not have been used for seeking conversion of warrants into equity shares which had been transferred without following the mandatory provision of the securities Contract Regulation Act specially considering the submission of the respondents that warrants are marketable securities and thus covered by the Companies Act. Referring to the cases of ***East Indian Produce Ltd. v. Naresh Acharya Bhaduri and others, reported in 1988 (64) Company Cases 259, B.K. Holdings (P) Ltd. v. Prem Chand Jute Mills and others, reported in 1983 (53) Company Cases 367 and Naresh K. Aggarwala and Company v. Canbank Financial Services Limited and another, reported in (2010) 6 Supreme Court Cases 178***, it was contended that if a warrant is construed to be marketable securities then any transfer of the same has to comply the provision contained in Securities Contracts Regulation Act. In none of the pleadings, the respondents ever took the plea that warrant is a marketable security and being covered by SCRA was enforceable by the Company Law Board.

20. In relation to Ground No.(g), it was submitted that in the facts and circumstances of the case, the Company Law Board could not have come to a conclusion that the Company was not entitled to hold a general meeting for deciding the fate of warrants issued under Section 81 (1A) of the Companies Act which is a special procedure for issuing shares except to existing shareholders. It was further contended that by virtue of Chapter XIII of the SEBI DIP Guidelines, 2000, Section 81 and Section 173 of the Companies Act have been made applicable to the warrants to be used by a company to persons other than existing shareholders. Though under Section 173 of the Companies Act, a limited disclosure is required to be made in the form of an explanatory statement with the proposed Special Resolution, the SEBI Guidelines stipulate that information as required under Section 173 of the Companies Act is required to be provided in the explanatory statement. In the present case, warrants were issued after passing of a special resolution accompanied with an explanatory statement wherein it is clearly stipulated that warrants shall not be used for change in management. Since the respondents sought to misuse the warrants for achieving change in management as per their own public announcement, the appellant sought opinion of legal experts and it was opined that the company must hold another general meeting if the warrant was allowed to be used for change in management of the company. The purpose of an explanatory statement is that the shareholders make up their decision in one way or the other on the basis of the said statement. Therefore, the explanatory statement is required to be given full details otherwise it would amount to misleading the shareholders. Relying on a decision of the Hon'ble Supreme Court in the case of ***Nanalal Zaver and another V. Bombay Life Assurance Co. Ltd. and others, reported in 1950 SCR 391***, it was contended that efforts of a company to avert a takeover which is not liked by the existing shareholders by an outsider, by holding a general meeting to issue further shares cannot be held to be an oppressive act if the company feels that the takeover would not benefit the company. Reference was also made by the learned counsel to the following portion of the judgment in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd.*** (supra) in support of the above contention:

> "We have already said that the public company which came into existence in 1957 was not bound by the agreement of 1954 and could offer shares to such persons as it decided to do in general meeting in accordance with section 81. The mere fact that in the meeting of March 29, 1958, it was decided to offer shares to others and not to the existing shareholders would not therefore necessarily mean oppression of the minority shareholders. The majority shareholders were not bound to accept the view of the minority shareholders that new shares should be allotted only to the existing shareholders. It also appears that the Patnaik group was afraid at the time when the new shares were being issued that as they had no money the appellant group would take up the entire new issue and would thus obtain majority control of the Company. This they wanted to avoid and that is why the new issue was resolved in general meeting to be issued to others and not to the existing shareholders. If this was the reason why new shares were not issued to the existing shareholders, it can hardly be said that the action of the majority shareholders in passing the resolution which they did on March, 29, 1958, was oppressive to the minority shareholders. The matter would have been different if the seven persons to whom shares were eventually allotted in July 1958, were benamidars or stooges of the Patnaik or Loganathan group, for in that case it may be said that these two groups forming the majority in the general meeting had acted fraudulently and unfairly by depriving the appellant of what he would have got under section 81. But there can be no doubt that the seven persons to whom the shares were eventually allotted are respectable persons of independent means. There is nothing to show that they were stooges or benamindars of the Patnaik and Loganathan groups. The action of the majority shareholders in allotting the new shares to outsiders and not to the existing shareholders cannot therefore in the circumstances be said to be oppressive of the appellant and his group.
>
> It is true that by the beginning of 1958 there were differences between the appellant and the Patnaik and Loganathan groups and there was loss of confidence between them. But mere loss of confidence between these groups of shareholders would not come within section 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his proprietary right as a shareholder".

21. Before dealing with the submission of Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group, it is necessary to refer to the submissions made by the learned counsel with regard to acquisition of 35,00,000 warrants by Bhushan Energy Limited, one of the petitioners before the Company Law Board. According to the respondents, in the year 2007, the company was going through an extremely difficult financial situation and it decided to make a further issue of capital on a preferential basis by way of allotment of warrants which would be convertible into shares at a later stage following the mandatory procedures laid down in SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter called "DIP Guidelines") In pursuance of such a decision, on 8.10.2007 a Postal Ballot Notice was given to all the shareholders asking for their consent regarding certain resolutions

passed by the Board. Resolution No.2 proposed to issue 40 lakh warrants to TRFI Investment Private Limited, a promoter group company on preferential basis with each warrant carrying the right to purchase one fully paid up equity share of Rs.10/- each of the company at a price of Rs.225/- per share. The minimum price of such warrants had been fixed in accordance with the SEBI Guidelines and the equity shares to be allotted on conversion were to rank pari passu in all respects with the existing fully paid up equity shares of the company. By the same resolution, it was also decided to issue 20 lakh warrants in favour of one Prakausali Investments (India) Private Limited, an existing shareholder known to the promoters. The consent of the General Body of the shareholders having been obtained, the company issued the warrants to TRFI as well as Prakausali. At a subsequent stage in the Annual General Meeting held on 15.10.2007, the company again resolved to issue 30,00,000 warrants to TRFI and 15,00,000 warrants to Prakausali on the same terms and conditions. Both the resolutions were implemented and consequently TRFI became holder of 70,00,000 warrants whereas Prakausali became holder of 35,00,000 warrants. A condition was imposed that the warrants could not be transferred before 19.12.2008. After the aforesaid lock in period was over on 15.1.2009, Bhushan Energy Ltd. one of the petitioners before the Company Law Board acquired the 35,00,000 warrants which had been issued to Prakausali for valuable consideration and became entitled to get the warrants converted into equity shares. After acquisition of the warrants on 13.2.2009, Bhushan Energy Ltd. wrote to the Registrars of the company to transfer the warrants in its name and it was informed that all related documents have been forwarded to the company for doing the needful. Accordingly the matter was pursued with the company through letters and in the meanwhile on 24.2.2009 the application under Sections 397 and 398 of the Companies Act was filed before the CLB and one of the prayers in the company petition was for a direction to the company to convert 35,00,000 warrants acquired by Bhushan Energy Ltd. into equity shares.

22. Now coming to the reply in relation to the grounds taken by Shri Chatterji, the learned Senior Counsel appearing for the appellant OSIL, the following submissions are made by Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group.

SUBMISSIONS MADE BY SHRI KAPUR, THE LEARNED SENIOR COUNSEL FOR BHUSHAN GROUP

23. In reply to Ground No.(a), it was contended that the mismanagement and misconduct are more than one. On one hand there is illegal refusal of the company to convert 35,00,000 warrants into equivalent number of equity shares and on the other hand there is violation of Section 77 (2) of the Companies Act time and again (on three occasions) and there are also other facts regarding attitude of the promoters and majority shareholders and their collusion and conspiracy with the Monnet group in the domestic forum. This collusion is proved by the public announcement made by the Monnet Group claiming itself to be a new promoter along with original promoters and asserting various rights on the basis of a share purchase agreement dated 24.2.2009 whereby the professed object was to confirm the majority of the management in favour of Monnet Group. Therefore, the acts of mismanagement or oppression alleged are not based on isolated incident but are based on series of incidents. It was also contended that even if the act of mismanagement or oppression alleged in the company petition is

an isolated one, still then, an application under Section 397 and 398 of the Companies Act will be maintainable. The following observation of the Hon'ble Supreme Court in the case of ***Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. and others*** (supra) which is quoted below was relied upon by the learned Senior Counsel:

> "an isolated act which is contrary to law *may* not necessarily and by itself support the inference that the law was violated with a malafide intention or that such violation was burdensome, harsh and wrongful. *But a series of illegal acts following upon one another* can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed."

Referring to the Gaekwad case also it was contended that an isolated incident may not be enough for grant of reliefs which otherwise clearly indicates that there is no such absolute rule and it all depends upon the facts of a particular case.

Reference was made to a decision of Calcutta High Court in the case of ***Ramashankar Prosad and others V. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966 Calcutta 512*** where it was held that if the oppression is of short duration but is of such a lasting character that redress is impossible by calling Board meetings or general meetings of the company, a case for intervention under Section 397 is made out.

It was also contended that Section 397neither contemplates nor requires a continuous course of oppressive wrongful conduct over a period of time. If the Court is satisfied that a single wrongful act is such that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act the Court is entitled to interfere by an appropriate order under Section 397 of the Act.

24. In reply to Ground No.(b), it was contended that in the matter of warrants, the promoter group had allotted 75,00,000 warrants to themselves on preferential basis. They were also quickly converted into equivalent number of shares after the company petition was filed before the CLB. Nobody questioned conversion of these warrants into shares in favour of the promoter group but on the contrary the promoter group though converted the warrants held by TRFI did not do so in the case of Bhushan Energy Ltd. The legitimate request made by Bhushan Energy Ltd. for conversion of warrants was castigated as an attempt to take over the company. The standard applied by the company in case of warrants given to TRFI in contradistinction to the warrants given to Bhushan Energy Limited are discriminatory, arbitrary and unfair. The ground on which conversion of the warrants into shares held by Bhushan Energy Ltd. was refused is that the Bhushan group would take over the management and control of the company. According to the respondents, this argument was factually not correct and the same has also been held by the Company Law Board in the impugned order.

25. In reply to Ground No.(c), it was contended that when the company petition was presented before the CLB, a demand had been made for registration of warrants in the

name of Bhushan Energy Ltd. and the demand had been refused. In paragraph-6(k), the following pleading is available:

> "That the petitioner No.2 is also holder of 35 lakh warrants of respondent company converted into equal number of equity shares of respondent company. After conversion of these warrants, the holding of the petitioners would become 27.53%. However, the respondents have not been transferring the said warrants in the name of petitioner No.2 despite of submission of all the requisite documents with the Registrar of Transfer Agent. This is an act of oppression where the entitlement of petitioner No.2 has been withheld."

It was also contended that in the three subsequent Misc. Petitions (C.As.) a direction was issued by CLB that all those Misc. Petitions and the main application shall be taken up analogously and this direction of the CLB was accepted without protest and the procedure adopted by CLB was not assailed by OSIL at any point of time. Therefore, the conduct of CLB in deciding the main company petition taking the pleadings available in the company applications cannot be now challenged on the ground that the pleadings available in the misc. petitions/company applications cannot be taken as part of the pleading of the main company petition. The decisions relied upon by OSIL were distinguished on facts. On the other hand, reliance was placed in the case of ***Mohta Bros. (P) Ltd. and others V. Calcutta Landing and Shipping Co. Ltd. and others, reported in (1970) Company Cases Vol.40 page 119*** and it was submitted that the petition and the supporting affidavits, if any, may be seen by the Court. It was also contended that in the ***Gaekwad*** case and in the case of ***M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and another, reported in (2008) 6 Supreme Court Cases 750*** it was observed that the Court will have to consider the entire materials on record and take a holistic view of the matter in order to ensure that the interests of the company are sub-served and grant relief to achieve such an object. Reference in this regard was again made to the case of ***Ramashankar Prosad and others V. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966 Calcutta 512*** where the Court held that it is always open to a Court to give an applicant the relief which it deems just and the Court is entitled to look into all the evidences before it and if a case of oppression emerges from the facts disclosed then the Court will not be bound by technicality and will grant the relief warranted by the business realities of the situation without taking a narrow legalistic view. Relying in the case of ***Jai Prakash Gupta vs. Riyaz Ahamad and another, reported in (2009) 10 Supreme Court Cases 197***, it was contended that subsequent development of facts which have a material bearing on the entitlement of the parties to relief or on aspects which bear on moulding of relief may be taken note of at any stage of the proceeding.

26. In reply to Ground No.(e), it was contended that the powers of CLB under Sections 397, 398 and 402 of the Companies Act are limitless and the Court may make any order as it thinks fit, with a view to bringing to an end the matters complained of. The CLB may also make such order as is necessary for the regulation of the conduct of the company's affairs and also make any order which in the opinion of the CLB, it is just and equitable. In the present case, the facts are indisputable, stark and imperative and there is no denying the same. Having issued the warrants and enjoyed the benefits there under it was and is the bounden duty and obligation of the company to execute the undertakings contained in the warrants and as envisaged therein by converting the

warrants into equity shares. There being no disputed questions of facts involved in the case, the argument of OSIL that the Bhushan Group should seek conversion of warrants into shares by filing a suit is misconceived.

27. In reply to Ground No.(f), it was contended that shares and debentures are well known means of raising capital. Similarly, instruments, such as also warrants, are not an unfamiliar species in corporate jurisprudence and is recognized in Sections 114 and 115 as well as other sections of the Act. Warrants fall within the class of securities and such instruments are expressly covered by paragraph 13.0 of Chapter XIII of the SEBI Guidelines for preferential issues and thus come within the parameters of SEBI Act. To say that the issue of warrants was not justifiable before CLB is an untenable contention because warrants are in any event within the ambit of the statutory provisions and therefore, amenable to CLB's jurisdiction. It was also contended that warrants were issued under Section 81 (1A) of the Companies Act as a mode of further issue of capital on a preferential basis and the same being a subject matter under the Act, the CLB manifestly had adequate powers to grant the necessary reliefs regarding compliance and fulfillment of the Company's obligations.

28. Apart from the above contentions, it was also contended that there is a clear cut and broad distinction between the sale and purchase of securities in the open market covered by the SCRA and issues of capital by listed public companies, which stand in a different category altogether. Both the two statutes operate in different fields. It was further contended that where specific provision is made for a particular situation, it will override any general provision and in this connection reliance was placed in the case of ***Ashoka Marketing Ltd. and another V. Punjab National Bank and others, reported in (1990) 4 Supreme Court Cases 406***. It was also submitted that SCRA has no application to the instant case and particularly Section 16 on which reliance was placed by OSIL has no application at all.

CONCLUSIONS

29. Having dealt with the submissions of the learned counsel appearing for the parties at length, I now proceed to examine points raised in this Company Appeal.

(I) The first ground/contention of Shri Chatterji, the learned Senior Counsel appearing for the appellant in this appeal, i.e., OSIL is that a petition under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for an isolated alleged act of oppression and mismanagement. Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group in his submission referred to two instances of mismanagement and oppression and in the note of submission furnished to the Court by the said respondents, there is also mention of those two instances only. The first instance of oppression and mismanagement is that OSIL indirectly by means of a loan/guarantee rendered financial assistance to TRFI for purchasing shares in the Company in contravention of Section 77 of the Companies Act. The second instance of oppression and mismanagement is inaction on the part of OSIL in converting 35,00,000 warrants held by Bhushan Energy Limited into equity shares.

So far as the first instance of oppression and mismanagement is concerned, I have dealt with the same extensively in COPET Nos.40 and 41 of 2009 and having

found no substance in the said allegation, I have already held that there has been no contravention of Section 77 of the Companies Act. Therefore, the second alleged instance of oppression is an isolated alleged act on the part of the Company. Shri P. Chatterji, the learned Senior Counsel appearing for the OSIL had contended that single instance of oppression and management will not be sufficient to maintain a petition under Sections 397 and 398 of the Companies Act whereas it was contended by Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group that depending on facts of the case, a single instance of mismanagement and oppression can attract the provisions contained in Section 397/398 of the Companies Act. It will be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of ***Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad and others*** (supra) where it was held that Section 397 does not provide for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the Court must arrive at a conclusion upon analyzing the materials brought on record that the affairs of the Company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Boards of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The interest of the Company vis-à-vis the shareholders must be upper most in the mind of the Court while granting relief under the said provision. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The Kerala High Court in the case of ***V.J. Thomas Vettom v. Kuttanad Rubber Co. Ltd.*** (supra), held that every kind of oppression cannot be remedied by the Court. The oppression must be such as to justify the winding up of the Company on just and equitable grounds. The action complained of must be a continuous one and not either an isolated or a stale one. In the case of ***Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. & others*** (supra), it was observed that an isolated act which is contrary to law may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. In the case of ***Ramashankar Prasad and others v. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966, Calcutta 512***, it was held that Section 397 neither contemplates nor requires a continuous course of oppressive wrongful conduct over a period of time. If the Court is satisfied that a single wrongful act is such that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, the Court is entitled to interfere by an appropriate order under Section 397 of the Act. It is, therefore, clear the law as settled by Courts is that the remedy under Section 397 of the Companies Act is not an ordinary one and the acts of oppression alleged must be harsh and wrongful and that an isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, therefore, necessary to be proved. Only when an isolated act of oppression has such effect that it may amount to continuous course of oppression and there is no prospect of remedying the situation, the Court may consider an application under Section 397 of the Act. In the present case, as discussed earlier, OSIL in the year 2007 took a decision to make a further issue of

capital on a preferential basis by way of allotment of warrants which would be convertible into shares at a later stage following the mandatory procedures laid down in SEBI (Disclosure and Investor Protection) Guidelines, 2000. In pursuance of such a decision, on 8.10.2007, a Postal Ballot Notice was given to all the shareholders asking for their consent. By Resolution No.2, it was decided to issue 40,00,000 warrants to TRFI Investment Private Limited and 20,00,000 warrants in favour of one Prakausali Investments (India) Private Limited, a third party shareholder. At a subsequent stage it was again decided in the Annual General Meeting held on 15.10.2007 to issue 30,00,000 warrants to TRFI and 15,00,000 warrants to Prakausali on the same terms and conditions. In view of the above, Prakausali became holder of 35,00,000 warrants and these warrants were sold to Bhushan Energy Limited after the lock in period. In turn, Bhushan Energy Ltd. demanded conversion of the above 35,00,000 warrants into equity shares. The denial on the part of the OSIL to convert these 35,00,000 warrants into equity shares is alleged to be an act of oppression and mismanagement.

On reading of Sections 397 and 398 of the Companies Act and on reading of the judgments delivered by the Hon'ble Supreme Court in the cases of ***S.P. Gaekwad and Needle Industries***, it is clear that relief under Section 397 of the Act can only be granted only when the Court on analysis of the materials brought on record comes to a conclusion that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. Section 433 of the Companies Act lays down the circumstances in which Company may be wound up by the Tribunal. Except Section 433 (f), no other circumstance is available in this case to direct winding up of a company in the present case. Section 433 (f) provides that a company may be wound up by the Tribunal if the Tribunal is of the opinion that it is just and equitable that the company should be wound up. The question, therefore, is that whether denial on the part of OSIL to convert 35,00,000 warrants held by Bhushan Energy Limited into equity shares is such an act that it is just and equitable that the company should be wound up. In this connection, reference can be made to the Explanatory statement issued in pursuance of Section 173 (2) of the Companies Act. Undisputedly in total 35,00,000 warrants had been issued in favour of Prakausali. The Explanatory statement clearly stipulates that due to the above preferential allotment of equity shares and/or the warrants and the resultant issue of equity shares, no change in management control is contemplated. It was submitted by Shri Chatterji, the learned Senior Counsel appearing for the OSIL that the demand of Bhushan Energy Limited for conversion of these 35,00,000 warrants into equity shares after purchasing the same from Prakausali is for the purpose of taking control of the company and thereby changing the management. Though such an allegation is denied in the note of submission furnished by respondents Bhushan Group, it is a fact that if conversion of these 35,00,000 warrants into equity shares is allowed, the shareholding of Bhushan Group will increase substantially and therefore, the contention of OSIL that the Bhushan Group can make an attempt to take over the company and bring in change in management is not totally unfounded. The above finding also gets support from the Public Announcement made by Bhushan Group. In para-14 of the judgment I have referred to the relevant portion of the Public Announcement made by Bhushan Group. In paragraph-7.2 of the Public Announcement, it is specifically stated that the acquisition of Equity shares will enable the Acquirer (Bhushan Group) to get a substantial ownership in the target company. The Bhushan Group has considerable interest in the Indian Steel

Industry including the manufacture of value added auto grade steel products with an increasing presence in the primary steel sector. The acquisition will enable the Bhushan Group to scale up its business operation by further expanding its presence in the primary steel sector, and providing access to upstream iron ore mines. The above declaration clearly shows the intention of the Bhushan Group in demanding for conversion of 35,00,000 warrants held by Bhushan Energy Limited into equal number of equity shares. In this regard, a contention was raised by Shri Kapur, the learned Senior Counsel appearing for Bhushan Group that a similar Public Announcement had also been made by the Monnet Group which intends to take over OSIL. On perusal of the Public Announcement made by Monnet Group, I find that the said Group wants to sail with the promoters and the intention of taking over of the Company is not disclosed from the Public Announcement made by the Monnet Group. I am, therefore, of the view that the demand of Bhushan Energy Ltd. for conversion of 35,00,000 warrants into equity shares and inaction on the part of OSIL in allowing such conversion for the reasons stated above, is not an act which could persuade the Tribunal to direct for winding up of the company. If there is no material before the Court to justify winding up a company, no relief under Section 397 of the Act can be granted.

Apart from these two instances, there is no specific pleading anywhere in the Company Petition or in the Company Applications subsequently filed in relation to act of mismanagement or oppression. The rest of the allegations are vague, no specific and also not supported by any material.

(II) The second submission of Shri Chatterji, the learned Senior Counsel appearing for OSIL was that a Company Petition for oppression and mismanagement under Sections 397 and 398 of the companies Act is not maintainable, if it is filed for ulterior and collateral purposes. It was submitted that the Bhushan Group having failed in its attempt to get the warrants converted into equity shares have filed this application under Section 397/398 of the Companies Act for a direction to get the warrants converted into shares. The purpose behind getting the warrants converted into equity shares is to take over the Company and bring in change in the management entirely and utilize the mines belonging to OSIL for other Steel Industries owned by Bhushan Group. Shri Kapur, the learned Senior Counsel appearing on behalf of Bhushan Group submitted that 75,00,000 warrants issued in favour of TRFI could be converted into equity shares immediately and nobody questioned such conversion but an objection is raised when a legitimate claim is made by Bhushan Energy Limited for conversion of 35,00,000 warrants into equity shares. The apprehension of OSIL that by such conversion, the Bhushan Group may take over management and control of the company is factually not correct. Reference in this connection was made to the case of ***Re Bellador Silk Ltd., Palghat Exports Pvt. Ltd. and Re J E Cade & Son Ltd.*** which have already referred to while dealing with submission of Shri Chatterji, the learned Senior Counsel appearing for OSIL. Since I have already held while dealing with the first contention that conversion of 35,00,000 warrants into equity shares in favour of Bhushan Energy Ltd. shall increase the shareholding of the Bhushan Group and an attempt can be made for taking over the Company and bring over change in management is not unfounded, there is no necessity to deal with the aforesaid decisions in details and it may be possible that the said Company Petition was filed for the purpose of getting the 35,00,000 warrants converted into equity shares thereby increasing the shareholding of the Bhushan Group for which it shall be in a position to make such an attempt to take control of the

management of OSIL. Apart from the above, it was contended that SEBI has not extended the validity of the warrants as requested beyond 19th of June, 2009. Therefore, once the period for conversion expires, the warrants cannot be directed to be converted into equal number of equity shares.

(III) So far as Ground Nos.(c) (d) and (e) are concerned, decisions were cited by Shri Chatterji, the learned Senior Counsel for OSIL to substantiate his contention that the original Company Petition filed under Section 397/398 of the Companies Act does not disclose any act of oppression or mismanagement and the alleged acts of mismanagement and oppression have been brought out only in the Misc. Petitions registered as Company Applications and therefore, the alleged act of mismanagement and oppression made in the Misc. Petitions cannot form part of the Company Petition unless amended. There is no dispute that a Company Petition filed under Section 397/398 of the Act must specifically disclose the acts of oppression and mismanagement and such allegations made in the Misc. Petitions cannot be taken into consideration as those allegations do not form part of the main Company Petition. An amendment is required in the Company Petition to incorporate the allegations of oppression and mismanagement. Shri Kapur, the learned Senior Counsel appearing for the Bhushan Group did not oppose to such proposition of law but at the same time it was submitted that orders were passed in the Company Applications to the effect that the said Company Applications shall be heard along with the main Company Petition and accordingly the CLB not only looked into the allegations made in the Company Petition but also the Misc. Petitions registered as Company Applications and there is no illegality in the same. There is no necessity to go into this debate in view of my finding earlier that the petitioners before the Company Law Board have come up with only two alleged acts of oppression and mismanagement and they have failed to prove such alleged act of oppression and mismanagement. Therefore, there is no necessity to go into such a technical question.

30. The refusal of OSIL to convert 35,00,000 warrants held by Bhushan Energy Limited into equal number of equity shares may amount to a breach of contract but such breach of contract cannot constitute the ingredients of a complaint under Sections 397, 398, 402 and 403 of the Companies Act. As decided in the case of ***Incable Net (Andhra) Limited and others v. AP Aksh Broadband Ltd. and others*** (supra), such breach could give rise to an action of breach of contract under Section 73 of the Indian Contract Act, 1972.

31. In view of the above finding that the petitioners before the Company Law Board who are respondents in this appeal have failed to establish mismanagement and oppression on the part of the management and for conversion of warrants into equity shares in an application under Section 397/398 of the Companies Act is not contemplated, it is not necessary to go into the other grounds taken in the appeal. In view of my findings, I allow Company Petition No.39 of 2009 and set aside that part of the order of the CLB impugned in this appeal in which a direction has been issued to the appellant to convert 35,00,000 warrants held by Bhushan Energy Limited into equity shares.

Petitions partly allowed.