

Shankar Sundaram Vs. Amalgamations Ltd.

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Court : Company Law Board CLB

Decided On : Oct-18-2000

Reported in : (2001)104CompCas638

Appellant : Shankar Sundaram

Respondent : Amalgamations Ltd.

Advocate for Def. : Shri. Gopal Subramanian

Judgement :

1. In this order we are examining an important question of law as to whether the affairs of a holding company would include the affairs of its subsidiaries in a petition filed under sections 397/398/402 and 403 of the Companies Act, 1956 ('the Act') and whether by impleading the subsidiaries as respondents, a shareholder of the holding company, without satisfying the provisions of section 399 in respect of the subsidiaries, claim relief in respect of the subsidiaries in terms of section 402.

2. The instant petition has been filed by the petitioner holding 10 per cent shares in the 1st respondent-company (the company). The Company has 38 subsidiaries. Some of the subsidiaries are, in turn, holding companies of other subsidiaries. In this petition filed, the petitioner has arrayed 17 subsidiaries as respondents and he has sought certain reliefs against some of the subsidiaries in terms of section 402. The petitioner, other than holding 10 per cent shares in the company does not hold any shares in any of the subsidiaries except in one.

3. In this background, the company as well as some of the respondent subsidiaries, have questioned the maintainability of this petition against the subsidiaries inasmuch as the petitioner does not fulfil the requirements of section 399 as far as these subsidiaries are concerned.

These respondents have also sought for deciding this issue as a preliminary issue before considering the petition on merits.

4. Shri Anil Divan, Senior Advocate appearing for the company submitted that this preliminary issue should be decided first as it goes to the root of maintainability of the petition in terms of section 399 as far as the subsidiaries are concerned. He pointed out that in *Dipak G.Mehta v. Shri Anupar Chemicals India (P.) Ltd* [1999] 2 CLJ 539, this Board has held that the CLB is bound to examine the maintainability of a petition in terms of section 399 as a preliminary issue. Further, it is more so, in view of a large number of respondents who would have to file their replies if the issue is kept up along with the main petition. If it is ultimately decided that these subsidiaries were not required to be made parties, the exercise of filing replies etc., would be a fruitless exercise. In this connection, he referred to the decision of the Madras High Court in *Saroj Goenka v. Nariman Point Building Services Ltd.* [1995] 5 CLJ 282 wherein the said Court had held that if the pleadings were to be enormous, to avoid unnecessary cost and time, it would be advisable to consider the maintainability in terms of section 399 as a preliminary issue. He submitted that the petition should be dismissed on two main grounds. One is that, whatever allegations have been made in the petition against the company, none of the allegations has been substantiated and secondly the petition cannot be maintained against the subsidiaries as the petitioner is not a shareholder in any of the subsidiaries. According to him, all the subsidiaries are independent entities and, therefore, to invoke the provisions of section 397/398 against these subsidiaries, the petitioner should satisfy the requirements of section 399. In this connection, he referred to the decision of the CLB in *Herbertsons Ltd. v. Kishore Raja Ram Chhabria* (1999 97 Comp. Cas. 429) wherein this Board has held that the shareholders of a holding company cannot file a petition against a subsidiary by virtue of their holding in the holding company. He also referred to Page 2666 of *Companies Act* by A. Ramaiya (14th Edition) wherein the learned author has also

opined in a similar manner. Referring to section 214, he pointed out, that the limited right of shareholders of holding company in respect of its subsidiaries is that they may seek investigation into the affairs of the company in terms of section 235. According to him, the Legislature has consciously has not conferred the right to a member of a holding company to file a petition under section 397/398 in respect of subsidiary. He further pointed out that the shareholders of a holding company, in case they have grievances against subsidiary companies can always seek the assistance of the Central Government in terms of section 401 and as such it is not that there is no remedy available to such shareholders.

He further pointed out that even though the petitioner has arrayed 17 subsidiaries as respondents, yet, there are no allegations against many of these subsidiaries and wherever there are allegations in respect of some subsidiaries, he has not sought for any relief. Wherever he has made allegations and has sought for certain reliefs, they are all motivated and have been made for an ulterior purpose. Accordingly he submitted that the names of all subsidiaries should be removed from the array of parties. He further pointed out that even the allegations in respect of the holding company are all after thought especially relating to the directorial appointments to which the petitioner himself was a party and as such he cannot now question these appointments on account of acquiescence, waiver and estoppel as decided in *Maharani Yogeshwari Kumari v. Lake Shore Palace Hotel (P.) Ltd.* [1995] 3 CLJ 418 (Raj.). He further pointed out that the company was incorporated in 1963 and the petitioner became a shareholder only in 1993 that too by way of devolution of shares. He had never been the part of the management of the company and therefore the question of application of quasi-partnership principles would not arise in this case for the petitioner to seek equitable reliefs. According to him, referring to *Kilpest (P.) Ltd. v. Shekar Mehra* [1999] 2 CLJ 261 (SC), principles of partnership cannot be applied in a 397/398 petition.

Referring to the main prayers in the petition wherein the petitioner has sought for a position of office either in the company or in one of the subsidiaries, he pointed out that this petition has been filed for an oblique motive and not for righting the wrong alleged to have been committed by the company. Such a petition, he pointed out,

relying on *Re Bellador Silk Ltd.* [1965] 1 AER 667, *Palghat Exports (P.) Ltd. v. T.V. Chandran* [1994] 79 Comp. Cas. 213 (Ker.) and *Shrimati Abnash Kaur v. Lord Krishna Sugar Mills Ltd.* [1974] 44 Comp. Cas. 390 (Delhi) should be dismissed. According to him, in view of the above facts, the petition deserves to be dismissed in limine.

5. Shri Gopal Subramanian, Senior Advocate appearing for respondents 4 and 5 submitted that the main object of filing this petition by the petitioner is to tarnish the image and reputation of the company which is one of the most reputed company in the South. Many subsidiaries have been arrayed as parties without any allegations/reliefs. They have been added as parties only for collateral purposes and only in the rejoinder, after seeing the reply, the petitioner has made some allegations against some of these subsidiaries, which cannot be taken cognizance of. Referring to prayer (d) at Page 43 of the petition, he also pointed out, that the main purpose of this petition is to force the company to give him an office of profit in the company. He also pointed out that the petitioner has suppressed certain vital facts more particularly relating to the removal of his father from the position of managing director of the 5th respondent company, by the Central Government and through this petition, the petitioner is trying to get the position reversed. Accordingly, he also prayed for dismissal of the petition.

6. Shri Mookherjee, the Advocate appearing for the petitioner submitted that none of the points taken by the respondents would merit consideration of those issues as preliminary issues warranting issue of an order on those objections. He pointed out that none of the subsidiaries who are respondents have raised any objection in this regard. Referring to *Dipak G. Mehta's case* (supra) and *Maharani Yogeshwari Kumari's case* (supra) relied on by Shri Divan, he pointed out that in both these cases the issue was whether the petition was maintainable in terms of section 399 while in the present case it is not so inasmuch as the petitioner holds 10 per cent shares in the company. In regard to *Nariman Point case*, he pointed out that in that case the petition itself ran to hundreds of pages and the issue in that petition was whether the petitioners were shareholders in the company or not. He also pointed out that the very fact that the petitioner holds 10 per cent shares in the company, the question of dismissing the petition in limine did not arise. Accordingly he urged

that that the matter should be heard on merits and all the objections raised by the respondents could also be considered in the final order.

7. Dealing with the preliminary objections, he pointed out that the company is a family company having only 12 shareholders. Even though this company has a large number of subsidiaries, in fact, they all are a single economic entity and all the decisions relating to these subsidiaries are taken by the Board of the company. Therefore, the entire group is nothing but a domestic and family group controlling a number of subsidiaries, the Board of the company being the apex decision making body for the entire group. This Board takes all major decisions in relation to the affairs of the subsidiaries. Therefore, it is a fit case wherein the corporate veil has to be pierced as held in *Bajrang Prasad Jalan v. Mahabir Prasad Jalan* AIR 1999 Cal. 156 and *LIC of India v. Escorts Ltd.* AIR 1986 SC 1370. Even otherwise, he contended that the affairs of a holding company always include the affairs of the subsidiary companies and since by virtue of his being a member of the holding company, the petitioner has filed this petition against the affairs of the holding company and he has every right to array its subsidiaries as parties and seek relief against them. He also pointed out that it is not correct to say that the petitioner is not a shareholder of any of the subsidiaries. He is a shareholder in the 4th respondent company. Referring to the judgment of this Board in *Herbertson's Lid's* case (supra), he pointed out that in that case the shareholders of the holding company desired to participate in a petition filed against a subsidiary while in the present case, the petitioner has filed this petition against the holding company itself in which he is a shareholder and has impleaded various other subsidiaries. Therefore, the ratio of the decision in that case are not applicable in facts of the present case. He further submitted that even in that judgment, the CLB had very specifically remarked that no case or precedent had been placed before the CLB to take a contrary view.

Now that he is in a position to cite some cases wherein the Courts have held that in a petition under section 397/ 398 of the Act, the affairs of the subsidiaries can also be looked into, the CLB is not bound by its earlier decision as that decision is per incurium, He pointed out that the Division Bench of the Allahabad High Court, has held in *LIC of India v. Hari Das Mundhra* [1966] 36 Camp. Cas. 371 that in a

petition under section 397/398 the affairs of a subsidiary could be treated as the affairs of the holding company. On the same proposition, he relied on 3 unreported Judgments of the Calcutta High Court in Re. Raigarh Jute & Textiles Mills Limited, Re. Debonair Agency Ltd. and Division Bench Judgment in Re: Raigarh Jute & Textile Mills Limited. He drew our attention to the Judgment of Queen's Bench Division in Board of Trade, In re [1964] 2 AER 561 wherein it was held that the term 'affairs of a company' in section 165 of the Companies Act, 1948, includes its control of its subsidiaries. He also referred to Scottish Co-operative Wholesale Society Ltd. v. Meyar [1958] 3 AER 66 to the proposition that in a 397/398 petition, the CLB could examine as to whether, the holding company has fairly dealt with the affairs of its subsidiary, thereby arguing that the affairs of a company includes the affairs of its subsidiary. Therefore, according to the learned counsel, a shareholder of a holding company has every right to challenge the affairs of the subsidiaries of a company against which a petition has been filed.

Referring to the comments of Ramiya, he pointed out that these comments are not supported by the various decisions cited by him. He further referred to the order of this Board in All India Shaw Wallace Employee's Federation v. Shaw Wallace & Co. Ltd. [1996] 5 CLJ 304-CLB, wherein, the CLB had passed certain orders in relation to a subsidiary of Shaw Wallace & Co. Ltd. Referring to certain portions of the petition as well as the rejoinder, the learned counsel pointed out that the petitioner has made certain allegations in the affairs of the subsidiaries also and, therefore, it is incorrect to say that there are no allegations against the subsidiaries.

8. In regard to the allegation of Shri Anil Divan that this petition is a motivated one and as such should be dismissed, the learned counsel pointed out that the cases cited by Shri Divan in this connection - Re.

Bellador's Silk Ltd.'s case (supra), Palghat Exports (P.) Ltd.'s case (supra), Shrimati Abnash Kaur case (supra) have no relevance at this point of time inasmuch as the decisions of the courts in these cases were not at the preliminary stage but after hearing the petition on merits. Therefore, the question of deciding as to whether the petition is a motivated one or not as a preliminary issue does not

arise. In regard to the cases cited by Shri Divan Saroj Goenka's case (supra) and Dipak G. Mehta's case (supra) he pointed out that in both these cases the issue under consideration was as to whether the petitioner had a locus standi to file the petition in terms of section 399. In the present case, he pointed out that the petitioner is a shareholder of the company holding 10 per cent shares thus fulfilling the requirement of section 399.

9. He further urged that the CLB should take a pragmatic view considering the nature of relationship between the parties and the nature of the company. Once it does so, it is obvious that partnership principles could easily be applied in this case notwithstanding the fact that there is no formal agreement or understanding in this regard.

Referring to the decision of this Board in Jaidka Motors [1997] 1 CLJ 268 he pointed out that the CLB had decided that in family companies, the principle of quasi-partnership could be applied. He further pointed out that the CLB had gone one step further to even treat a public listed company as a quasi-partnership in K.N. Bhargava v. Trackparts of India Ltd. [2000] 2 CLJ 275 CLB (Delhi). He also rebutted the argument of Shri Divan that the petition deserves to be dismissed on account of acquiescence, waiver and estoppel on the ground that it is a matter to be decided only after hearing the petition on merits and not as a preliminary issue.

10. Arguing further, the learned counsel submitted that the entire Amalgamation group is nothing but a family group and therefore, even if no case of oppression and mismanagement is made out, with a view to put an end to the disputes between the parties, the Bench has all powers to do justice. He also pointed out to page 74 of the petition, where in the petitioner had made some suggestions as to how the interest of the petitioner could be secured and submitted that the petitioner would be willing to accept any of the alternatives suggested therein. According to him, even the CLB can direct one of the options being implemented as all the options are within the ambit of the powers of the CLB in terms of section 402. On this proposition he relied on Needle Industries India Ltd. v. Needle Industries Newey (India) Holdings Ltd. AIR 1981 SC 1298, Yashovardhan Saboo v. Groz Beckert Saboo Ltd. [1993] 1 CLJ 20 (CLB), Bollon Engg. Co. Ltd. v. T.J.

Graham [1956] 3 AER 624.

11. Summing up his arguments, Shri Mookherjee submitted that the question of dismissing the petition in limine does not arise inasmuch as the petitioner holds 10 per cent shares in Amalgamations Ltd. Since section 397 as well as section 398 refers to the term 'affairs of the company' which would mean that it includes the affairs of subsidiaries.

Since these sections are to protect the interests of the minority shareholders, liberal construction should be adopted as decided in *Scottish Cooperative Wholesale Society Ltd.'s case* (supra) as also in *Needle Industries (India) Ltd. 's case* (supra) by the Supreme Court.

Such just and equitable interpretation is necessary to advance remedy as held in *Margaret Dessor case* [1990] 1 SCC 536. He further submitted that in *Herbertson's Ltd's case* (supra; the CLB has not considered the larger issue as to whether the affairs of the holding company would include the affairs of its subsidiaries. In the present case, none of the shareholders is an original promoter of the company and they all obtained the shares only by inheritance and as such each one will have to have equal rights. Anyway, he submitted that various issues raised by the respondents are not actually preliminary issues that could be decided in isolation of the merits of the case except one, perhaps, relating to the stand of the petitioner that the affairs of a holding company include the affairs of subsidiary companies. Even here, he pointed out that the CLB is bound to follow the decisions of the High Courts which have been cited by him wherein the courts have held that the affairs of a holding company include the affairs of the subsidiary companies.

12. Shri S.N. Mookherjee supplementing the arguments of Shri S.B.Mookherjee pointed out that the CLB having all India jurisdiction is bound by the decision any of the High Courts as long as there are no conflicting decisions of different High Courts. Since all the cases cited in this connection are uniform, the CLB has no option but to follow these decisions notwithstanding the CLB's earlier decision in *Herbertsons Ltd's case* (supra) which is per incurium inasmuch as when the issue was decided, the CLB had not been apprised of the earlier decisions of the High Courts cited earlier and as such can be overruled by the CLB in a later case as

held by the Supreme Court in *A.R. Antulay v. R.S. Nayak* AIR 1988 SC 1531. On the binding nature of the decisions of the High Courts on the CLB, he relied on *East India Commercial Co.*

Ltd. v. Collector of Customs AIR 1962 SC 1893; *CIT v. Smt. Godavari Devi Saraf* [1978] 113 ITR 589 (Bom.) wherein it was held that even if one High Court decides a point of law, then, the same is binding on Tribunals located elsewhere in the country. Referring to *Amruta Babaji Mozar v. Kondabai* (AIR 1994 Bom. 293), he pointed out that the law declared by the High Court, right or wrong, is binding on all courts and Tribunals in the State and since CLB has all India jurisdiction, it is bound by the decisions of the High Court cited earlier. On the same proposition, he also relied on *Saik Girdhira Supply Co. v. Collector of Central Excise* [1987] 28 ELT 438 - Tribunal. He further pointed out that there has been no application from any of the subsidiaries for deleting their names from the array of parties. Further, he pointed out that even the cases cited by Shri S.B. Mookherjee, the issue relating to subsidiary companies was decided only along with the merits of the case and not as a preliminary issue.

13. Shri Divan giving his reply in rejoinder argued that the preliminary issue relating to the subsidiaries is an important question of law in terms of section 399 and as such should be decided at the threshold. He pointed out that if the arguments of the petitioner were to be accepted, then, it would mean that any shareholder of the holding company having qualification shares in that company could question the affairs of the subsidiaries which in the present case number to 38, which proposition can never be accepted. He pointed out that the Legislature was conscious enough to curtail the right of a shareholder of a holding company only to seek investigation in terms of section 235 in section 214. Since all the subsidiaries are separate incorporated entities having their own assets and liabilities, the right to file a petition by a shareholder of the holding company, under section 397/398 should have been specifically provided in the Act and in the absence of such a provision, it would be wrong to construct the words 'affairs of the company' to include the affairs of its subsidiaries. Referring to section 239, he pointed out that if an Inspector is appointed under section 235 or 237 it is for him to decide as to whether investigation is necessary in respect of the subsidiaries

and the court cannot give any directions in this regard.

14. Referring to the cases cited by the learned counsel for the petitioner, in regard to the subsidiaries, Shri Divan pointed out that in case of the Division Bench Judgment in *Hungerford* case, the court had not decided the broader issue as to whether the affairs of a holding company include the affairs of its subsidiaries. Rather, he pointed out that the Single Judge against whose order the appeal was preferred, had examined this very issue elaborately by referring to various provisions of the Act and came to the conclusion that subsidiary companies cannot be added as party respondents in a petition filed against the holding company and that this interpretation given by the Single Judge had not been expressly negated by the Division Bench even though it allowed addition of a few subsidiaries which volunteered to be added as parties. Therefore, reliance of the petitioner on the Division Bench Judgment on the proposition that the affairs of a holding company include the affairs of subsidiary companies has no force. Further, even the Division Bench added these subsidiaries only for the purposes of investigation under section 237.

In view of the fact that the decision of the Single Judge in that case that the affairs of the holding company does not include the affairs of the subsidiary companies had not been disapproved by the Division Bench, the reasoning of the Single Judge which is in line with the decision of this Board in *Herbertsons Ltd.'s* case (*supra*) should be applied in the present case. He also pointed out that the two other unreported judgments of the Calcutta High Court - *Raigarh Jute & Textile Co. Ltd.* and *Debonair Agencies Ltd.* and also *Bajrang Prasad Jalan's* case (*supra*) had also not examined the issue in detail but had only referred to the Division Bench Judgment in *Hungerford Investment Ltd.* Further, even the facts of these cases were completely different as two warring groups controlling both the holding as well as the subsidiaries through same set of Board of Directors tried to oust each other and grab the only immovable property in Calcutta. Even in these cases, the High Court only ordered investigation under section 237.

Insofar as the other case cited by the learned counsel for the petitioner viz *Board of Trade's* case, (*supra*), Shri Divan pointed out that in that case the petition was

for investigation into the affairs of the company in terms of section 165 (a) of the English Companies Act, 1948 wherein it was held that the affairs of a company would include the affairs of its subsidiaries. That petition was not on the allegations of oppression and mismanagement. Dealing with LIC v. Haridas Mundhra's case (supra), the learned counsel pointed out that the Allahabad High Court took in to consideration the fact that the subsidiary was more or less a mere department of the holding company and that the holding company held 100 per cent shares in the subsidiary company and accordingly held that the affairs of a holding included the affairs of subsidiary company in that particular case. In other words, according to him, in facts of that case, such an opinion was formed by the High Court and not as a general proposition of law. Regarding Scottish Co-operative Wholesale Society Ltd's case (supra) Shri Divan contended that the facts of this case are completely different and even otherwise under English law, no qualification has been prescribed unlike section 399. He also drew our attention to Re A Co. ex-parte Nicholson [1991] BCCL 480 wherein it was held that the decision in scotish wholesale co-operative society was specific to that case. In view of all the above submissions, Shri Divan contended that the decision of the CLB in Herbertsons Ltd. 's case (supra) does not warrant any change or modification.

15. He further submitted that if the CLB were to come to the conclusion that the decisions cited by the counsel for the petitioner lay down the law that the affairs of a holding company include the affairs of subsidiaries, the CLB is not bound by the said decisions inasmuch as these decisions have been given by the High Courts which are located beyond the territorial jurisdiction of the Principal Bench of the CLB. Since the Principal Bench is sitting in Delhi, only the decision of the Delhi High Court is binding on the CLB. He pointed out that the decision in Smt. Godavari Devi Saraf's case (supra) that the decision of any High Court on a point of law is binding on Tribunals located anywhere in the country was rendered in 1978. This decision has been disapproved by the same High Court subsequently in CIT v. Thana Electricity Supply Ltd. [1994] 206 ITR 727 (Bom.), Geoffrey Manners & Co. Ltd. v. CIT [1996] 221 ITR 695/89 Taxman 287 (Bom.) and Consolidated Pneumatic Tools Co. India Ltd v. CIT [1994] 209 ITR 277 (Bom.). In all these cases, the decision in Godavari Devi Saraf case was considered and it has been held in these cases that the decision of one High Court is neither binding

precedent for another court nor for courts or Tribunals outside its own territorial jurisdiction. It has also been held in these judgments, that the decision of the High Court will have the force of binding principle only in the same or territories on which the court has jurisdiction. In these decisions, it has also been held that only the decisions of the Supreme Court will be binding on all courts and Tribunals in the country by virtue of article 141. Therefore, Shri Divan contended that the decisions of the Calcutta High Court and the Allahabad High Court on which reliance has been placed by the petitioner are not binding on the CLB sitting in New Delhi. The decision of the Delhi High Court alone is binding on the CLB and there has been no decision of the Delhi High Court on the issue under consideration. As a matter of fact, he pointed out that the Delhi High Court has held in *Taylor Instruments Co. (India) Ltd. v. CIT* [1998] 232 ITR 771/99 Taxman 155 that the decision of one High Court is not a binding precedent for another High Court or for courts or Tribunals outside the territorial jurisdiction of the High Court to which they are subordinates. Referring to the decision of the Madras High Court in *Pioneer Miyati Chemicals Ltd.* [2000] 116 ELT 441 in which the court has followed the decision of Smt. Godavari Devi Saraf, Shri Divan pointed out that the Single Judge of the Madras High Court who has rendered this decision had not referred to subsequent decisions of the Bombay High Court and the Delhi High Court and as such the CLB is not bound by that decision. Accordingly, he urged that the CLB has to follow the decision of the Delhi High Court failing which it would amount to contempt of court as decided by the Supreme Court in *Baradakanta Mishra v. Bhimsen Dixit* AIR 16. Summing up his arguments, Shri Divan argued that the Bench should follow its earlier decision in *Herbertsons* and in case the Bench desires to reconsider that decision on the basis of the judgments of Calcutta and Allahabad High Courts, then, a larger Bench should be constituted since the present Two Member Bench cannot take a contrary decision by a coordinate Bench earlier. On this proposition, he relied on *Roop Lal v. Governor* [2000] 1 SCC 644, *Secretary v. Salata S. Rao* [1999] 3 SCC 444, *Usha Kumar v. Bihar* [1998] 2 SCC 44 and *Paral Laminets v. UOI* [1990] 4 SCC 453.

17. Shri Ganesh, supplementing the arguments of Shri Divan, pointed out that the very purpose of stipulating qualification under section 399 to file a petition under section 397/398 is to prevent frivolous petition being filed by persons who have no

stake in the company and also due to the fact that the CLB exercises wide powers under section 402.

Therefore, the maintainability of the petition against the subsidiaries is a preliminary issue and has to be decided at the threshold as decided by the CLB itself in *S.S. Laxminarayanan v. Mather & Plan India Ltd.* [1997] 4 CLJ 281 CLB. He also supported Shri Divan to say that none of the judgments of the Calcutta or the Allahabad High Courts has directly decided the issue as to whether the affairs of a holding company include the affairs of its subsidiaries. Referring to Black's Law Dictionary, he submitted that only when a law point in a case which determines the judgment would be a ratio decidendi having a binding force. He pointed out that if the contention of the petitioner that the affairs of a holding company would include the affairs of its subsidiaries, it would create an anomalous situation not warranted by the provisions of the Act. Citing an example, he pointed out that in TAPE - Respondent No. 8, a foreign collaborator holds 23.75 per cent shares and does not hold any shares in Amalgamations Ltd. If the proposition as suggested by the learned counsel for the petitioner is approved, then, he pointed out that it would mean that this foreign collaborator would have the right to file a petition not only against Amalgamations but also against all its subsidiaries leading to an absurd situation. He, therefore, pointed out that the qualification in terms of section 399 that only a member of the company as stipulated in section 399 has to be first satisfied in respect of the subsidiary companies also. He also pointed out, referring to the contention of the learned counsel for the petitioner that since there is a prayer in the petition for investigation the petition cannot be dismissed against the subsidiaries, that the petitioner cannot seek investigation against the subsidiaries through a 397/398 petition. He is at liberty to file a petition against the subsidiaries in terms of section 235 read with section 214.

18. Shri Gopal Subramanian appearing for the respondent Nos. 4 and 5 pointed out that in the Act, the Legislature has consciously used the words 'company', 'holding company' and 'subsidiary company' in various places. In respect of each of the words used, there are special provisions in the Act. In section 397 and section 398, the words used are 'affairs of a company' which would mean only the company against which a petition is filed. To file a petition against that company,

the petitioners have to fulfil the requirements of section 399. Since plain words have been used in these sections, no further interpretation on the same is called for. He argued that a statutory right cannot be conferred by interpretation as it can be conferred only by the statute specifically. He pointed out that the entire Chapter VI of the Act talks of a company in singular and therefore the qualification referred to in section 399 will have to be fulfilled in respect of all the companies whether they are holding companies or subsidiary companies to maintain a petition against them. He contended that the qualification prescribed under section 399 is with a purpose that there should be privity of interest for seeking equitable remedy. Therefore, he pointed out that if the law says that something is to be done in a particular manner, it should be done in the said manner and an interpretation of the same by a judicial forum should not create an anomalous situation as has been pointed out by Shri Ganesh. He also supported the arguments of Shri Ganesh to state the reliefs in a 397/398 petition are entirely a different from the one under section 235 in which the only order that could be passed is a direction for investigation. Therefore, by making a prayer in the present petition for investigation, the petitioner cannot convert this petition into a 235 petition on the ground that the members of a holding company could seek investigation into the affairs of its subsidiaries in terms of section 214.

19. We have considered the arguments of the counsel. After the hearing was completed, we suggested to the counsel for the parties that it would be worthwhile to consider resolving the disputes amicably and had also advised them that we would defer releasing of the order for some time to enable the parties to resolve the disputes amicably. Since we have not heard anything from them so far, we are releasing this order.

20. Even though the main issue for our consideration at this stage is whether the affairs of a holding company includes its subsidiaries, other issues were also raised. They are - the binding nature of the decisions of High Courts on the CLB, the difference between an arbiter dicta and ratio decidendi and legality of a division Bench of the CLB differing from an earlier decision of another division bench of the CLB on a point of law. The counsel cited nearly 50 cases in support of their respective submission on all these issues.

21. First we shall decide as to whether the issues raised by the respondents deserve to be considered as preliminary issues meriting a finding without considering the merits of the case. This petition has been filed under section 397/398.

o Section 397 reads: Application to Company Law Board for relief in cases of oppression 'Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section provided such members have a right so to apply in virtue of section 399'.

o Section 398 reads : Application to Company Law Board for relief in cases of mismanagement. (1) "Any members of a company who complain (a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interest of the company; or (b) that a material change (.....) has taken place in the management or control of the company may apply to the Company Law Board for an order under this section provided such members have a right so to apply in virtue of section 399.

398."(1) The following members of a company shall have the right to apply under section 397 or 398:-(a) in case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of members, whichever is less or any member or members holding not less than one-tenth of the issued capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares; (b) in the case of a company not having share capital, not less than one fifth of the total number of its members.

(4) The Central Government may, if in its opinion, circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Company Law Board under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

22. Both sections 397 and 398 stipulate that members of a company alone can file a petition under these sections with further stipulation that such a right can be exercised in virtue of section 399. Section 399 prescribes certain qualifications to exercise such a right. If the persons filing a petition under section 397/398 are not members of the company or who do not fulfil the requirements of section 399, then they have no locus standi to file the petition. In the present petition, the petitioner holds 10 per cent shares in the company while he does not hold any shares in the respondent subsidiaries except in one. The question before us is, whether he could make the subsidiaries of which he is not a member, as parties by arraying them as respondents and seek reliefs against them in terms of section 402. Before we deal with this question, let us examine as to who could be considered as necessary and proper parties in a 397/398 petition. Obviously, the company in whose affairs complaints are made, its directors and majority shareholders are all necessary and proper parties. In addition, any one whose appearance the petitioner considers as necessary can also be made a party if such a party is willing. In case such a party is not willing, it is for the petitioner to establish that such a party is either a necessary or a proper party failing which we cannot compel such a party to be impleaded. If any order is to be passed in terms of section 402(d), (e) or (f), then those against whom such order is to be passed become necessary parties. If the petitioner had impleaded the subsidiaries either as necessary or proper parties for adjudicating the allegations against the holding company, then perhaps, it would not have become a preliminary issue. However, the learned counsel for the petitioner did not advance this argument. Instead, his argument was that the subsidiaries have been made parties on the ground that the affairs of a company include the affairs of its subsidiaries. Normally, a judicial forum is bound to give its finding before getting into the merits of the case, if its jurisdiction or the capacity of the petitioner in terms of statutory provisions is challenged. In the present case, the CLB's jurisdiction to entertain the petition is not challenged. The respondents have challenged the capacity of the petitioner to file the petition in terms of section 399 against the subsidiaries and they have also challenged the petition against the company also on the ground of waiver, estoppel and acquiescence. In regard to the challenge in terms of section 399, it is to be noted that this Board had decided in *V. Shankar v. South Indian Concerns*

Ltd. [1997] 1 CLJ 307 that satisfaction of the provisions of section 399 is a prerequisite to file a petition under section 397/398. This being the case, the maintainability in terms of section 399, as long as it does not entail looking into the facts of the case for such a decision, has to be decided as a preliminary issue. In case, the same cannot be decided, as it happened in Dipak G. Mehta's case (supra), without examining the facts of the case, the same can be decided along with the merits of the case. In the present case, the admitted position is that the petitioner is not a shareholder in any of the subsidiaries (except one as pointed out by the learned counsel for the petitioner) and, therefore, his locus standi in respect of the subsidiaries, being a question of law, has to be decided as a preliminary issue. In regard to the maintainability of the petition against the 1st respondent company, we do not consider it as a preliminary issue as the petitioner does hold 10 per cent shares in the company and whether waiver, estoppel and acquiescence would disentitle him of any relief has to be determined only after considering the merits of the case. Accordingly, the only issue for our consideration now is whether in a 397/398 petition, the affairs of a company includes the affairs of its subsidiaries and whether a person who is not a shareholder of the subsidiaries could seek relief in respect of the subsidiaries by virtue of his being a shareholder of the holding company by arraying them as respondents.

This issue becomes important in as much as section 397/398 prescribes that a petition against a company in terms of section 397/398 could be filed only by a shareholder of that company and section 399 further provides that such members have to satisfy the conditions prescribed in that section.

23. On the main issue before us, both the sides have cited some cases.

Shri Divan cited Herbertsons Ltd's case (supra) and contended that the decision in that case is binding on the CIB and that if we were to differ from the same, a larger Bench has to be constituted. While citing Calcutta and Allahabad cases, Shri Mookherjee contended that the High Court judgments are binding on the CLB and the decision in Herbertson's case (supra) is per incurium. It is an established principle of law that a ratio decidendi of a superior court is binding on a

subordinate court. What is a ratio decidendi has been explained by the Apex Court in a recent judgment in *Amit Das v. State of Bihar* [2000] (4) Scale 515 wherein the Court held 'A decision not expressed, not accompanied by reason, not proceeding on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by article 142 of the Constitution. That which escaped in the judgment is not ratio decidendi This is the rule of sub silentio in the technical sense when a particular point of law was not consciously determined'. Keeping this in view, we have to examine the various decision cited by the counsel to find out whether there is any decision on the question as to whether the affairs of a company include the affairs of its subsidiaries, which could be considered to be a ratio decidendi.

24. First we shall examine the cases cited by the learned counsel for the petitioner in this regard and examine whether this issue as to whether the affairs of a company would include the affairs of its subsidiary companies has been categorically decided as a point of law.

In the judgment of the learned Single Judge in *Hungerford Investment Ltd.'s case* (supra) cited by Shri Divan, the petitioner therein applied for impleading some of the subsidiaries of the respondent-company as parties to the proceedings and these subsidiaries objected to their being added as parties. Therefore, the learned Judge framed an issue as to whether the said petition under section 397/398 was maintainable in the absence of its subsidiary companies and their directors. After examining various provisions of the Act relating to a holding and a subsidiary company, he came to the conclusion in Para 119 as follows: "Section 399 and the right to apply under section 397/398 of the Act are to my mind clear on the point. The extended right given under section 214(2) read with section 235 to a non-member by the express provision contained therein is not given under section 399 to such a non member. To convert a section 397 application of a holding company in to an application against the subsidiaries by adding them as parties is, to my mind, to give a right to persons who are not members within the meaning of sections 397/398 and 399 of the Act and is plainly against the statute". In Para 123, he further observed: "For these reasons I hold that it will be improper and illegal to join the subsidiaries in this application on facts and circumstances of the

case. It will be improper on the merits and facts and it will be illegal under the provisions of law and authorities I have discussed. I hold however that the main application under section 397 of the Act is not demurrable or objectionable in the absence of subsidiary companies and their directors and shareholders and in appropriate case they would come under the expression "affairs of the company" meaning the affairs of the holding company which include, in my judgment of the analysis of different statutory provisions in the Act, the affairs of the subsidiaries, but in that event the subsidiaries do not become ipso facto necessary and proper parties". According to Shri Divan this judgment has categorically settled the issue that by virtue of ones shareholding in a company, a shareholder cannot seek relief against its subsidiaries by adding them as parties.

25. However, Shri Mookherjee contended that this judgment was taken on an appeal to the Division Bench which set aside the judgment of the learned Single Judge and as such, the decision of the learned Judge is no longer a good law. On the other hand, he contended that by directing the addition of the subsidiaries as parties, the Division Bench has held that the affairs of company includes the affairs of its subsidiaries. One of the issue taken up for examination by the Division Bench as is evident from page 13 of the judgment was whether the application was maintainable in the absence of its subsidiaries and their directors and shareholders. By this time, as is evident from the judgment, the circumstances had changed and 3 of the subsidiaries voluntarily agreed to be added as parties as seen from page 27 of the judgment wherein the Court observed:-- "At the further hearing of these appeals, the learned counsel for the appellant did not press the claim to the addition of parties besides those who have expressly stated their willingness to be added, that is, the respondents 15, 16 and 20".

Later in the same page of the judgment, the Division Bench further observed : "Upon considering the facts and circumstances, we are of the view that there should be an investigation of the affairs of the respondent No. 1 and its subsidiaries. For the purpose of an effective investigation we add the respondents 15, 16 and 20 as respondents to the proceedings under section 397/398 of the Companies Act, 1956. We do not think that it would be quite possible for this Court to make an investigation into the affairs of Turner Morrison and its subsidiaries.

Section 237 of the Act authorizes the Central Government to make such investigation by appointing Inspector or Inspectors if an order is made by this Court. In our view, it is desirable that the investigation into the affairs of the company should be made by the Central Government in the manner laid down in sections 237 to 251 of the Companies Act".

Finally the court ordered investigation into the affairs of the company including the subsidiaries being respondents No. 15, 16 and 20 in terms of sections 237 to 251. Thus, from the above, it is clear that there is no express decision on the issue taken up for consideration, and as a matter of fact the Court ordered investigation into the affairs of only those subsidiaries which agreed to be added as respondents. Thus, we do not find that the Division Bench has held that the affairs of company would include the affairs of its subsidiaries as a proposition of law.

26. Another case cited by Shri Mookherjee is the unreported judgment of the Division Bench of the same court dated 24-9-1992 in Bajrang Prasad Jalan's case (supra). In this case, the company against which the said petition under section 397/398 was filed was a subsidiary of the respondent No. 2 viz Raigarh Trading Co. Ltd. which held 99 per cent shares in the first respondent company. The 2nd respondent raised certain preliminary objections on its addition as a respondent on two grounds. One was that the Calcutta High Court had no jurisdiction against it since it was registered in MP and the second was that the petitioner did not have qualification shares in term of section 399 in the 2nd respondent. Accordingly it sought for striking out its name from the petition. The Single Judge dealt with these preliminary objections and held that the petitioners could not seek any reliefs in term of section 397/398 in respect of the 2nd respondent (holding company) as they did not satisfy the requirements of section 399 and accordingly rejected the prayers against this respondent but allowed its addition as a proper and necessary party to adjudicate the allegations in respect of the 1st respondent company. When the matter came up on appeal, the Division Bench examining the provisions of section 397 observed in page 14 of the judgment "The court has to examine the conduct of majority - shareholders to see whether such act of the majority amounts to oppression to the minority. Such enquiry cannot be made in isolation by the Court strictly confining itself to the affairs of the company. Such an enquiry, may,

in facts and circumstances of the case, have to be made into affairs of any other body-corporate, if such body corporate as a majority shareholders or holding company has or is likely to have a dominating control over the affairs of the company so as to cause oppression to a group of shareholders of the company". Finally, relying on the Division Bench decision in Turner Morrison case the Court held that "It therefore, appears that in proceeding under section 397/398, the Court has got wide powers including the power directing investigation not only into the affairs of the company against whom the proceedings has been initiated but also the other entity be it a subsidiary or a holding company". It set aside the judgment of the learned Single Judge rejecting the prayers against the holding company on the ground that such rejection at the preliminary stage without going into the merits of the case was wrong. A reading of this judgment would show that, that the court has opined that in facts of a case, the affairs of a company would include both its holding company as well as its subsidiaries in facts of a particular case, that too in respect of investigation. Thus we do not find that the court has laid down, as a proposition of law the affairs of a company would include the affairs of its holding as well as subsidiary companies, further, we find that this judgment has not examined the provisions of section 399 even though the same was argued in the appeal proceedings.

27. Next case cited by Shri Mookherjee was yet another judgment of a Division Bench the same Court dated 14-10-1999 in Bajrang Prasad Jalan v. Raigarh Jute and Textiles Mills Ltd. (CP No. 72 of 1990) in support of his contention on the issue before us. In this case also the maintainability of the petition in terms of section 399 against the holding company in a petition against a subsidiary was raised. Relying on the judgment as discussed in the earlier paragraph, the Court observed "We are of the considered view that the observation of the Division Bench to the effect that a proceeding under section 397/398, the power of the court includes the power of directing investigation not only into the affairs of the company against whom proceeding has been initiated but also other entity, be it a subsidiary or a holding company would conclude the matter as to the jurisdiction of this court.

Being a Judgment of a co-ordinate jurisdiction of this High Court and the observations having been made in relation to this very proceeding, we are not inclined to take any other or different view of the matter".

Thus, it is seen that the Court has not independently examined the maintainability of the petition under section 399, but followed the earlier decision of a co-ordinate Bench, which we have, in the earlier paragraph observed that the provisions of section 399 had not been examined in that judgment.

28. In Bajrang Prasad Jalan's case (supra), the petition was filed in respect of the holding company and 4 of its subsidiaries claiming various reliefs. From the judgment, we do not find any reference to the provisions of section 399. In paragraph 22 of the Judgment, the court observed "Exercise of right under sections 397 and 398 of the Companies Act comes within the purview of the equitable jurisdiction of the Company's court. There can hardly be any dispute that in view of the structures of shares, the respondent Nos. 2 to 5 in truth and substance and subsidiary companies of Akshay Nidhi Limited which is thus, a holding company and thus in such a situation, the court cannot be a helpless spectator in looking behind the corporate veil so as to disentitle itself from considering as to whether in fact that had been mismanagement or oppression by one group or the other. There is another aspect of the matter. Provisions of sections 397 and 398 are taken recourse to in a piquant situation where two groups running the company are at logger heads so that it is impossible for them to join hands together and run the affairs of the company. Before in such a situation would exercise its equitable jurisdiction and may grant appropriate reliefs". Having observed, the court also in Paragraph 27 observed "It is also a trite law that over the affairs of company in question, its entire affairs including those of the subsidiary companies can also be looked into". Later, in Paragraph 84, relying on Hungerford Investment Ltd.'s case (supra) the court further observed "But there cannot be any doubt whatsoever that for the purpose of considering a matter of oppression, the action on the part of majority shareholders of a holding company may also be applied in the case of the subsidiary companies as holding companies hold majority shares in the subsidiary companies particularly when both holding companies and subsidiaries are family companies and for that limited

purpose the corporate veil can be lifted". From the Judgment, we do not find any indication that any objection was taken in impleading the subsidiaries in terms of section 399. It appears from paragraphs 6 to 11 that perhaps the shareholding of the petitioner was such in the subsidiary also that the question of maintainability against these subsidiaries in terms of section 399 did not arise. Further, as is evident from Paragraphs 27 and 84 of the Judgment that in facts of that particular case, the court had held that corporate veil could be lifted and appropriate reliefs granted in respect of all the companies. The court had not held, as a proposition of law, that the affairs of the company would include the affairs of its subsidiaries.

29. As far as Haridas Mundhra's case (supra) is concerned, the court did raise without advert to the provisions of section 399 as to whether in dealing with the affairs of a company under section 397/398 it is permissible to investigate the affairs of a subsidiary. It observed a holding company and a subsidiary company are separate legal entities. Broadly speaking, their affairs are separate. But the very expression 'holding company' and 'subsidiary company' denote close connection between the affairs of two such companies. For certain purposes, the affairs of a subsidiary have been treated as affairs of the corresponding holding company (See section 214(2), section 318(3)(e) and section 338). It is not necessary to decide the larger question whether in every case brought under sections 397 and 398 of the Act, the court is entitled to make an enquiry into the affairs of the subsidiary company. It will be sufficient to consider whether such a course is permissible in the present case'.

Having observed thus, finding that the subsidiary company in which the holding company held 100 per cent shares and that it was treating the subsidiary company as a department of the holding company the court observed that in that particular case, the affairs of the holding company included the affairs of its subsidiary.

30. As far as the Board of Trade's case (supra) is concerned, as rightly pointed out by Shri Divan, the decision that 'affairs of a company' would include the affairs of its subsidiaries was in relation to sections 165 and 167 of the English Companies Act, 1948 and these sections relate to investigation in the affairs of a company and not relating to oppression and mismanagement. Our Companies Act also, in case

of investigation ordered under section 235/237 provide for investigation into the affairs of its subsidiaries as is evident from section 239. Therefore, the term 'affairs of a company' as used in respect of investigation cannot be *pari materia* to the term 'affairs of a company' as used in section 397/398, for the reasons that in case of investigation it could be ordered even without an application from the shareholders as provided in section 237. However, to invoke the provisions of section 397/398, one has to be a shareholder and has to fulfil the requirements of section 399.

31. In regard to *Scottish Co-operative case* (*supra*) it is to be noted that besides the holding company, there were minority shareholders in the subsidiary and the action was brought in by these minority shareholders against the holding company, being the majority shareholder. The court observed 'The truth is that whenever a subsidiary is formed with an independent minority shareholders, the parent company must, if it engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.' This observation does not seem to have laid down the principle that the affairs of a company would include the affairs of its subsidiary and was made with reference to the facts of that case.

This has been also pointed out in *A Company ex parte Nicholson's case* (*supra*) referred to by Shri Divan.

32. From the above extracts of the various judgments cited by Shri Mookherjee, it is apparently clear that in none of the above judgments, the courts had examined the issue as to whether the affairs of a company would include the affairs of its subsidiaries as a proposition of law but have held, in facts of those cases that the affairs of a company included affairs of its subsidiaries, that too, in most of the cases, for the purposes of investigation. As we have pointed out in respective cases, the provisions of section 399 have also not been examined. In *LIC case*, the court itself kept this larger issue open but in that particular case held that the affairs of the holding company would include the affairs of the subsidiary. Thus, none of the decisions cited by the counsel for the petitioner could be considered to be a *ratio decidendi* having a binding force on the issue before us.

All these decisions only lay down that, in facts of a particular case, the affairs of a company could be considered to include the affairs of its subsidiaries, that too, in respect, of investigation. In view of this, the arguments of the counsel from both the side on the binding nature of the judgments of the High Court have become more of an academic nature and such are we are not examining the same.

33. We shall now consider the decision of this Board in Herbertsons Ltd. 's case (supra). In this case, in a petition filed by the holding company against its wholly owned subsidiary, the shareholders of the holding company desired to participate in the proceedings in support of the subsidiary. When objections were raised for such impleadment, this Board observed as follows : "Both section 397/398 give a right to apply under those sections only to Members of the company against which proceedings are initiated. The same is the position in section 399 also. There is no special provision in the Act regarding the rights of the members of a holding company in the matter of a subsidiary company except in section 214(2) by which the members of a holding company could be treated as members of a subsidiary to exercise the right under section 235, This provision in section 214(2) makes it abundantly clear that the legislature is conscious of the rights of members of a holding company in relation to the affairs of a subsidiary company and that such rights have been restricted only in regard to the provisions of section 235. In other words, the legislature does not seem to have intended to bestow similar rights on the shareholders of a holding company to file a petition under section 397/398 against a subsidiary company. Such being the position it emerges that the shareholders of a holding company cannot file a petition against a subsidiary by virtue of their shareholding in the holding company. No case law or precedents have been placed before us that there are exceptions to this general legal proposition. Thus, the applicant has not convinced us either in law or in facts that its participation in the proceedings is essential and as such we dismiss this application." 34. This decision, according to Shri Divan, lays down the proposition that a shareholder of a company cannot, by virtue of his being a shareholder in a company, file a petition against its subsidiaries and therefore, he cannot also array the subsidiaries in a petition against the holding company. According to Shri Mookerjee, this decision may be applicable if a petition is filed against a subsidiary independently by a shareholder of the holding company, but not in a case when

the subsidiaries are impleaded as respondents in a petition against the holding company. However, he also contended that the decision of this Board in that case is per incurium in view of the various cases cited by him. It is true that in Herbertsons Ltd. 's case (supra) this Board had not discussed the issue as to whether the affairs of a company includes the affairs of its subsidiary as this issue was not before this Board. Its limited examination was, whether a shareholder of a company could file a petition against a subsidiary under section 397 398. As we have observed, in respect of the cases cited by the counsel for the petitioner, that none of those cases has laid down a proposition of law in regard to the issue before us, in Herbertsons Ltd 's case (supra) also this Board has not examined the issue before us in the present proceedings. In view of this there is no need to constitute a larger Bench as urged by Shri Divan. We shall now examine the issue before us taking into consideration the statutory provisions and the arguments of the counsel.

35. In sections 397, 398 and 399, the expression used are 'members of a company'. Section 3 stipulates that the expression 'company' in the Act would mean a company formed and registered under the Act. Section 41 defines a member as one who is a subscriber to the memorandum or who has, in writing, agreed to become a member and whose name is entered in the register of members. These two sections would indicate that the word 'company' in sections 397, 393 and 399 would mean a single company and the word 'member' would mean a member of that company. Therefore it is obvious that both sections 397 and 398 vest the right to invoke the provisions of these sections specifically on the members of the company against which these sections are invoked. In addition, section 399 prescribes certain minimum qualifications even in respect of such members. Therefore, ordinarily, a person who is not a member of a company cannot invoke these provisions against that company. This being the position, can a member of a company, who is not a shareholder of its subsidiary company file a petition against the subsidiary in virtue of his being a member of the holding company? A strict application of the provisions of sections 397 and 398 would indicate that he cannot.

This is what has been decided by this Board in Herbertsons Ltd.'s case (supra) and the counsel for the petitioner fairly admitted that the said position is correct even though he later contended that the decision is per incuriam. But, his argument is that when a petition is filed against a holding company, its subsidiaries could also be made as parties and reliefs can be sought against them, as the affairs of a company would include the affairs of its subsidiaries. Acceptance of this stand would mean allowing someone to do something indirectly what he is not allowed to do directly by law. Section 397 deals with oppression, and it has been held in many cases that the oppression alleged should be in relation to the rights of a member in that company. We may beneficially refer to H.R. Harmer Ltd In re. [1958] 3 AER 689 wherein it was observed "It is to be observed, first that the person permitted to apply to the court under section 210 is 'any members of the company' and he must show that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself)... This indicates that the oppression complained of must be complained of by a member of the company and must be oppression of some part of the members in their capacity as member or members of the company as such.... the victim of the oppressive conduct must be a member or members of the company". In Elder v. Elder ([1952] Scottish Cases 49) it was held that "Oppression involves, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as shareholders". It is to be pointed out that in the English Act there is no qualification prescribed unlike section 399 of the Indian Act for a member to invoke the provision relating to oppression. Therefore, when a person is not a member of a company, his alleging oppression and invoking the provisions of section 397 against that company does not arise. Therefore, a shareholder of a holding company cannot complain of oppression by a subsidiary in which he is not a member as there is no legal relation between him and the subsidiary company. Another aspect we would like to point out is that in a 397 petition, one of the criteria for relief under section 402 is that there should be justification for winding up of the company on just and equitable grounds. If some relief is sought against the subsidiary in a petition against the holding company, the question that would arise as to in respect of which company such justification is to be made out whether holding or subsidiary company or both. We may also look at the

provisions of section 402 in terms which this Board could order purchase of shares of any members either by the company or other members in a proceeding under section 397/398. When a shareholder is not a member of the subsidiary, the question of ordering the purchase of his shares does not arise. Thus, it is clear from the provisions of section 397 that a non-shareholder cannot invoke the provisions of this section and since the same wordings relating to the locus standi of a person have been used in section 398 also, this provision can also not be invoked by a non-member.

36. One of the arguments of the counsel for the petitioner is that the CLB should take a pragmatic view and interpret the law to advance justice. We do agree to this proposition, provided there is scope for such an interpretation. Shri Gopal Subramanian rightly pointed out that that a statutory right cannot be conferred by interpretation as such a right can be conferred only by the statute specifically. It is not that the Legislature is not conscious of the relationship between a holding company and its subsidiaries. In many provisions of the Act, the inter-relationship has been recognized and suitable provisions made.

However, in respect of the rights of shareholders of a holding company in relation to its subsidiaries, there is only one provision in the Act. As pointed out in *Herbertsons Ltd. 's case* (supra), section 214(2) confers the right on the members of a holding company, to exercise the right under section 235 in respect of its subsidiaries, as it they are the shareholders of the subsidiaries. The Act itself has created a legal fiction to treat the members of holding company as members of its subsidiaries only in relation to exercise rights in terms of section 235. Section 235 relates to the investigation of the affairs of a company. Here also the term used in "affairs of a company" which is similar to the expression in sections 397 and 398. If we accept the interpretation of the counsel for the petitioner that the term 'affairs of a company' would include the affairs of its subsidiary, there is no need for the legislature to have specifically enacted section 214(2) conferring the right to seek investigation into the affairs of subsidiaries on the members of the holding company. In the same way, if the term 'affairs of a company' would include the affairs of its subsidiaries, there is no need to specifically provide in section 239 that an inspector appointed to investigate into the affairs of a company shall have the

power to investigate into the affairs of its subsidiary or its holding company. Thus, the Legislature intent is clear that the term 'affairs of a company' would include only one company simpliciter. It is also clear that the Legislature which has thought it fit to confer the right to seek investigation into the affairs of subsidiaries on the members of a holding company, has not conferred such a right in respect of the matters covered in section 397 or 398. Therefore, as a proposition of law, we cannot hold that the term 'affairs of a company' in section 397 or 398 would include the affairs of its subsidiaries. The case of Herbertsons Ltd.'s case (supra) is a pointer to this view. In that case, the holding company - Herbertsons with 99 per cent shares in its subsidiary BDA had to file a petition under section 397/398 against BDA. This would indicate that the affairs of a holding company are different from the affairs of its subsidiaries.

37. While holding that as a proposition of law the affairs of a company cannot be construed to include the affairs of its subsidiaries, yet, if it is established that a subsidiary is either a proper or necessary party, such a subsidiary could be arrayed as a respondent. In what manner or circumstances, a subsidiary becomes a necessary or proper party would depend on the facts of a case. For instance, in *All India Shaw Wallace Employees v. Federation's case* (supra), as cited by the learned counsel for the petitioner, the allegation was that the holding company had diverted its funds to the subsidiaries either for acquisition of shares in those companies, or had lent substantial funds without charging any interest. In such circumstances, these subsidiaries became necessary parties to adjudicate on the allegations against the holding company. It is to be noted that even in such cases, such arraying the subsidiaries as parties, would be only for the purposes of adjudicating the allegations against the holding company and no order in terms of section 402 is envisaged against the subsidiaries. It is not that no petition against a subsidiary under section 397,398 can be filed. In case where it is not a 100 per cent subsidiary, there would be other shareholders, who can definitely file a petition if they satisfy the requirements of section 399 and if not they can apply to the Central Government for relaxation of the provisions of section 399 in terms of section 399(4). Further, the Central Government, itself has the power to move the CLB on its own in terms of section 401. Thus, an overall assessment of the provisions of the Act would indicate that, as a proposition of law, it cannot be held

that the term 'affairs of a company' in section 398/399, would include the affairs of its subsidiaries. In view of this, a shareholder of the holding company cannot, by arraying the subsidiaries as parties, seek relief against the subsidiaries in terms of section 402.

38. Having settled the legal issue, let us examine the present case before us. We have already come to the conclusion that in a petition against a company, its shareholders cannot claim relief against the subsidiaries in terms of section 402 as a proposition of law. However, the learned counsel for the petitioner cited certain cases of Calcutta and Allahabad High Courts wherein in facts of those cases, the High Courts have held that the affairs of the subsidiaries could be included in the affairs of their holding company and vice versa. We shall examine whether there is such a scope in the present case. According to the learned counsel for the petitioner, 'Amalgamations' as a group is a single economic unit controlled by the 2nd respondent and all decisions relating to all the subsidiaries are taken by him. Therefore, according to him, the petitioner, being a shareholder and fulfilling the requirements of section 399 in respect of the holding company is entitled to question the affairs of the subsidiaries also in this petition. The petitioner holds 10 per cent shares in Amalgamations.

This company has 8 direct subsidiaries. One of these subsidiaries viz.

the 4th respondent Simpson Co. Ltd. has 12 direct subsidiaries. Some of these subsidiaries in turn have their own subsidiaries. There are four other companies in which these entities hold shares but these entities are not subsidiaries. Of these companies, in eight companies, there are foreign shareholders by virtue of collaboration agreements. In six of other companies, there are outside shareholders. In all there are 38 companies that come under this group 'Amalgamations'. The petitioner has impleaded 17 of these companies as respondents and has reserved in the petition, the right to implead the remaining 21 companies. The 1st, 5th and the 8th respondents have, in their replies, questioned the impleadment of the subsidiaries, and later a joint affidavit has been filed by the other respondents also challenging the impleadment of the respective subsidiary. In other words, all the subsidiaries impleaded, have objected to their inclusion as

respondents. Of the seventeen companies impleaded in the petition, the petitioner has not made any allegations/averments in respect of respondents 9,10,14,15,17,18 and 19. In respect of those against which allegations/averment have been made, no relief has been sought against any subsidiary except in relation to the Respondent 5, viz. Addisons Paints & Chemicals Ltd. and respondent 8 viz. TAPE in terms of section 402. Arguments were advanced by the counsel from both the sides in respect of these two companies when some interim orders were sought by the petitioner. In Addisons, the company holds 25 per cent shares while, the 4th respondent holds 75 per cent shares. The 8th respondent TAPE is a joint venture with a foreign company which holds 23.75 per cent shares. The foreign company is represented on the Board of TAPE. The main allegation in respect of Addisons, in a nutshell, is that the 2nd respondent who is the chairman of Amalgamations, is giving a step motherly treatment to Addisons, in which the father of the petitioner is the Chief Executive and the relief sought in respect of Addisons is that the two existing directors should be removed and that an independent chairman should be appointed and the father of the petitioner should also be appointed as a director and few other reliefs. In respect of TAPE, the complaint is that it is not placing orders on Addisons for paints during the recent past, even though for a long period of time, substantial orders were being placed on it. Accordingly the relief sought is that all Amalgamation companies should be ordered to purchase their requirements from Addisons. These are the reliefs that have to be granted in terms of section 402, which we have already held, cannot be done in a petition against the holding company. Thus, notwithstanding our finding that the affairs of a company do not include the affairs of its subsidiaries, we find that the petitioner has not even prima facie established that the inclusion of the subsidiaries either as necessary or proper parties to adjudicate his allegations against the holding company. Therefore, we are of the view that the prayer of the respondent subsidiaries and their directors to delete their names from the array of parties should be granted.

39. The counsel for the petitioner drew our attention to the prayer in the petition relating to ordering an investigation into the affairs of the company and its subsidiaries in terms of section 235 and argued that in terms of section 214(2), a shareholder of a holding company could seek investigation into the affairs of its

subsidiaries and as such, it is necessary that the respondent subsidiaries are retained as parties. We have given our serious consideration to this argument. The petition is essentially a petition against the holding company. Without ordering an investigation into its affairs, we cannot order investigation into the affairs of its subsidiaries. In case, we find, after hearing the petition, that an order of investigation has to be made into the affairs of the holding company, then the provisions of section 239 would come into play and it is for the Inspectors to be appointed by the Central Government to decide as to whether the affairs of the subsidiaries have also to be investigated. [Division Bench Judgment in *Hungerford Ltd*, 's case (supra)]. There is no need for a direction from us in this regard. Further, we have already pointed out that in respect of 7 subsidiaries there are no allegations and the question of ordering investigation into their affairs does not arise.

In case, the petitioner desires that there should be a direction from us for investigation into the affairs of any of the subsidiaries, he is at liberty to move a separate petition before us in terms of section 214(2) read with section 235.

40. It was argued by the counsel for the petitioner that the group as a whole is a family group and as such he cited some judgments as to the nature of just and equitable reliefs that could be granted. We are not dealing with the same in detail as the relief to be granted will have to be decided finally after the hearing the petition on merits.

41. In view of the foregoing we direct as follows: The names of all the subsidiaries and their directors be deleted from the array of parties.

The 1st respondent company, which had reserved its right to file a detailed reply, will file its reply on the allegations in the petition including those in respect of its dealing with the subsidiaries, by 1-12-2000. The petitioner will file his rejoinder by 31 -12-2000. The petition will be heard on 11 -1 -2001 and 12-1-2001 at 10.15 A.M. on both the days.