Case Citation: (2017) ibclaw.in 1315 SC

PETITIONER:
NEEDLE INDUSTRIES (INDIA) LTD., & ORS.

Vs.

RESPONDENT:
NEEDLE INDUSTRIES NEWEY (INDIA) HOLDING LTD. & ORS.

DATE OF JUDGMENT07/05/1981

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
BHAGWATI, P.N.
VENKATARAMIAH, E.S. (J)

CITATION:
1981 AIR 1298 1981 SCR (3) 698
1981 SCC (3) 333
CITATOR INFO :
MV 1983 SC 75 (61)

ACT:
Companies Act 1956, Ss.3(1)(iii), 43A,45, 81, 299(1), 397(1), 397 and 398 and Foreign Exchange Regulation Act 1973, Ss. 29(1), (2) and 4(a)-Scope and effect of.

Private company becoming a public company by S.43A-Reserve Bank directive that holding of the foreign company should be reduced-Reduction effected by issue of new rights shares-Such shares to be offered to all shareholders Indian as well as the holding company-Shares however allotted to only Indian shareholders-Notice of meeting at which allotment made not properly given to holding company-Holding company whether could renounce the offer in favour of the person of its choice-Allotment to Indian shareholder-Whether amounts to oppression.

'Directly or indirectly, concerned in the contract or arrangement'-Effect of-Relationship of friendliness with Director-Lawyer-client relationship with Director-Whether will disqualify a person from acting as Director.

Public company-Private company-What are-When does a private company become a public company-No exception provided in S.45 in favour of S.43A proviso companies-Need for legislative amendment.

Practice and Procedure Allegation of a mala fide-Examination of-Whether can be on the basis of affidavits and correspondence only.

HEADNOTE:
M/s. Needle Industries (India) Ltd. (NIIL), the appellant was incorporated under the Indian Companies Act 1913 as a Private Company on 20.7.1949 with its Registered office at Madras and at the time of its incorporation it was a wholly owned subsidiary of Needle Industries (India) Ltd., Studley, England (NI-Studley). In 1961, NI-Studley entered into an agreement with Newey Bros. Ltd., Birmingham, England (Newey) to invest in the Indian Company. In 1963, NI-Studley and Newey combined to form the Holding Company in England M/s Needle Industries-Newey (India) Holding Ltd., the respondent. The entire share capital of NIIL held by NI Studley and Newey was transferred to the Holding Company in

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

which NI-Studley and Newey became equal shares.
699

As a result of this arrangement, the Holding Company came to acquire 99.95 per cent of the issued and paid up capital of NIIL. The balance of 0.05 cent, which consisted of six shares being the original nominal shares, was held by Devagnanam the managing director of NIIL.

By virtue of the introduction of section 43A in the Companies Act in 1961, NIIL became a public company, since not less than twenty-five per cent of its paid-up share capital was held by a body corporate, the Holding Company. However, under the first proviso to section 43(1) it had the option to retain its articles relating to matters specified in section 3(1)(iii) of the Companies Act.

NIIL did not alter the relevant provisions of its articles after its became a public company within the meaning of section 43A. By 1971 about 40 per cent of the share capital of NIIL came to be held by the Indian employees of the company and their relatives and the balance of about 60 per cent remained in the hands of the Holding Company NINIH Ltd.

In 1972 Coats Paton Ltd. became an almost 100% owner of NI-Studley. The position at the beginning of the year 1973 was that 60% (to be exact 59.3%) of the share capital of NIIL came to be owned half and half by Coats and NEWEY, the remaining 40% being in the hands of the Indian Group of which 28.5% was held by the Devagnanam's group.

Though NIIL was at one time wholly owned by NI-Studley and later by NI Studley and Newey, the affairs were managed ever since 1956 by an entirely Indian Management with Devagnanam as its Chief Executive and Managing Director with effect from the year 1961. The Holding Company which was formed in 1963 had only one representative on the Board of Directors of NIIL. He was N.T. Sanders, who resided in England and hardly ever attended the Board Meetings. The holding company reposed great confidence in the Indian management which was under the direction and control of Devagnanam

In July 1972 Mr. Devagnanam was offered by the office of Managing Director of group of four companies in Hong Kong and Taiwan and his family began to reside in Hong Kong and he cogitated over resigning from his position in NIIL. Coats, on their part were clear that Devagnanam should relinquish his responsibilities in NIIL. in view of the time his role in Newey's Far Eastern interests was consuming.

The Foreign Exchange Regulation Act 1973, came into force on Junuary 1, 1974. S.29(1) prohibited non-residents, non-citizens and non-banking companies not incorporated under any Indian law or in which the non-resident interest was more than 40 per cent, from carrying on any activity in India of a trading, commercial or Industrial nature except with the general or special permission of the Reserve Bank of India. By section 29(2)(a) if such person was engaged in any such activity at the commencement of the Act, he or it had to apply to the Reserve Bank of India, for permission to carry on that activity, within six months of the commencement of the Act or such further period the Reserve Bank may allow. S. 29 (4) (a) imposed a similar restriction on such person or company from holding shares in India, of any company referred to cause (b) of section 29(1), without the permission of the Reserve Bank. The
700
time for making the application for the requisite permission under section 29 was extended by the Reserve Bank until August 31, 1974.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Since the Holding Company was a non-resident and its interest in NIIL exceeded 40% NIIL had to apply for the permission of the Reserve Bank under S. 29 (1) FERA for continuing to carry on its business. The Holding Company had also to apply for the permission of the Reserve Bank under S. 29 (4) (a) FERA for continuing to hold its shares in NIIL.

NIIL applied to the Reserve Bank for the necessary permission on September 3, 1974. By its letter dated May 11, 1976 the Reserve Bank condoned the delay and allowed the application and imposed conditions on NIIL that it must bring down the non-resident interest from 60% to 40% within one year of the receipt of its letter. The Holding Company applied to the Reserve Bank for a Holding Licence under section 29 (4) (a) of FERA, on September 18, 1974; which application was late by 18 days and was still pending with the Reserve Bank

Devagnanam who was residing in Hong Kong obtained a holding licence dated March 5, 1975 from the Reserve Bank in respect of his shares in NIIL.

On receipt of the letter of the Reserve Bank dated March 11,1976 NIIL's secretary sent a reply on May 18, 1976 to the Bank confirming the acceptance of the various conditions under which permission was granted to NIIL to continue its business. On August 11, 1976 the term of Devagnanam's appointment as the Managing Director of NIIL came to an end but in the meeting dated October 1, 1976 of NIIL's Board of Directors his appointment was renewed for a further period of 5 years. On October 20th and 21st, 1976 a meeting took place between the U.K. shareholders and the Indian shareholders of NIIL. But the meeting ended in a stalemate because whereas the Holding Company wanted a substantial part of the share capital held by it in excess of 40 per cent to be transferred to Madura Coats an Indian company in which the Holding Company had substantial interest as an Indian shareholder. Devagnanam insisted that the existing Indian shareholders of NIIL alone had the right under its Articles of Association to take up the shares which the Holding Company was no longer in a position to hold because of the directives issued by the Reserve Bank pursuant to FERA.

As negotiations were going on between the competing groups regarding the Indianisation of NIIL, on April 4, 1977 NIIL received a reminder letter dated March 30, 1977 from the Reserve Bank which pointed out that the company had not submitted any concrete proposal for reduction of the non-resident interest and asked it to submit its proposal in that behalf without any further delay and that failure to comply with the directive regarding dilution of foreign equity within the stipulated period would be viewed seriously.

A meeting of NIIL's Board of Directors was held on April 6, 1977. All the directors were present in the meeting with Devagnanam in the chair at the commencement of the proceedings. Mr. C. Doraiswamy, solicitor-partner of
701
King and Partridge was one of the directors present at the meeting. He had no interest in the proposal of Indianisation which the meeting was to discuss. In order to complete the quorum of two independent directors, the other directors apart from C. Doraiswamy being interested in the business of the meeting, Silverston an ex-partner of Doraiswamy's firm of solicitors, was appointed to the board as an additional director under article 97 of the Articles of Association. Silverston chaired the meeting after his appointment as

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

additional director.

The meeting resolved that the issued capital of NIIL be increased by a new issue of 16,000 equity shares of Rs. 100 each to be offered as rights shares to the existing shareholders in proportion to the shares held by them. The offer was to be made by a notice specifying the number of shares which each shareholder was entitled to and in case the offer was not accepted within 16 days from the date on which it was made it was to be deemed to have been declined by the concerned shareholder.

In pursuance to the aforesaid resolution a letter of offer dated April 14, 1977 was prepared. The envelope containing Devagnanam's explanatory letter dated April 12 (without the copy of the letter of the Reserve Bank dated March 30, 1977) and the letter of offer dated April 14 were received by the Holding Company on May 2, 1977 in an envelope bearing the Indian postal mark of April 27, 1977. The letter of offer which was sent to one of the Indian shareholders, Manoharan was posted in an envelope which also bore the postal mark of 27th April. The next meeting of the Board was due to be held on May 2, 1977. The Holding Company was thus denied an opportunity to exercise its option whether or not to accept the offer of right shares, assuming that any such option was open to it.

The meeting of the Board of Directors was held an May 2, 1977 as scheduled and in the meeting the whole of the new issue consisting of 16,000 rights share was allotted to the Indian shareholders including members of the Manoharan group. Out of these the Devagnanam group was allotted 11,734 shares. After marking the allotment of shares a letter was sent to the Reserve Bank by NIIL reporting compliance with the requirements of F.E.R.A. by the issue of 16,000 rights shares and the allotment thereof to the Indian shareholders which resulted in the reduction of the foreign holding to approximately 40% and increased that of the Indian shareholders to almost 60%.

The Holding Company filed a company petition in the High Court under section 397 and 398 of the Indian Companies Act, 1956 alleging that the Indian Directors abused their fiduciary position in the Company by deciding in the meeting of April 6 to issue the rights shares at par and by allotting them exclusively to the Indian shareholders in the meeting of 2nd May, 1977. In doing so, they acted mala fide and in order to gain an illegal advantage for themselves. By deciding to issue the rights shares at par, they conferred a tremendous and illegitimate advantage on the Indian shareholders. Devagnanam delayed deliberately the intimation of the proceedings of the 6th April to the Holding Company. By that means and by the late giving of the notice of the
702
meeting of the 2nd May, the Devagnanam group presented a fait uccompli to the Holding Company in order to prevent it from exercising its lawful rights. The conduct of the Indian directors lacked in probity and fair dealing which the Holding Company was entitled to expect.

The acting Chief Justice who tried the Company Petition, found several defects and infirmities in the Board's meeting dated May 2, 1977 and being of the view that the average market value of the rights shares was about Rs. 190 per share on the crucial date and that, since the rights shares were issued at par, the Holding Company was deprived unjustly of a sum Rs. 8,54,550 at the rate of Rs. 90 per share on the 9,495 rights shares to which it was entitled. Exercising the power under section 398 (2) of the Companies Act, the learned Judge directed NIIL to make good that loss

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

which, could have been avoided by adopting a fairer process of communication with the Holding Company and 'a consequential dialogue' with them in the matter of the issue of rights shares at a premium.

The Holding Company being aggrieved by the aforesaid judgment filed an appeal and NIIL filed cross-objections to the decree. The appeal and cross objections were argued before the Division Bench of the High Court on the basis of affidavits, the correspondence that had passed between the parties and certain additional documents which were filed before the Appellate Court. The Division Bench concluded that the affairs of NIIL were being conducted in a manner oppressive, that is to say burdensome, harsh and wrongful to the Holding Company and held that since the action of the Board of Directors of NIIL was taken merely for the purpose of welding the Company into Newey's Far Eastern complex it was just and equitable to wind up the Company. With regard to the cross-objections, the Division Bench held that the injuries suffered by the Holding Company could not be remedied by the award of compensation and, therefore, the action of the Board of Directors in issuing the rights shares had to be quashed. It accordingly allowed the appeal filed by the Holding Company and dismissed the cross-objections of the appellant and directed that the Board of Directors be suspended and an interim Board consisting of nine directors proposed by the Holding Company be constituted and that the rights issue made on 6th April, 1977 and the allotment of shares made on 2nd May, 1977 at the Board Meeting be set aside and the Interim Board be directed to make a fresh issue of shares at a premium to the existing shareholders including the Holding Company which was to have a right of renunciation.

In the appeals to this Court, on the question whether the decisions taken at the meetings of the Boards of Directors of NIIL on April 6 and May 2, 1977 constitute acts of oppression within the meaning of S. 397 of the Companies Act 1956.

Allowing the appeals

^

HELD: 1. The charge of oppression rejected after applying to the conduct of Devagnanam and his group the standard of probity and fairplay, which is expected of partners in a business venture. Not only is the law on his side, but his conduct cannot be characterised as lacking in probity, considering the extremely rigid attitude by Coats. He was driven into a tight corner from which the only escape was to allow the law to have its full play.

[824 B-C; G-H]

703

2. Even though the company petition falls and the appeals succeed on the finding that the Holding Company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same position in which they would have been, if the meeting of 2nd May were held in accordance with law. [824 H-825 A]

3. The willingness of the Indian shareholders to pay a premium on the excess holding or the rights shares is a factor which, to some extent, has gone in their favour on the question of oppression. Having had the benefit of that stance, they must now make it good. Besides, it is only meet and just that the Indian shareholders, who took the rights shares at par when the value of those shares was much above par, should be asked to pay the difference in order to nullify their unjust and unjustifiable enrichment at the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

cost of the Holding Company. The Indian shareholders are not asked to pay the premium as a price of oppression. The plea of oppression having been rejected the course being adopted is intended primarily to set right the course of justice.

[825 F-G]

4. Devagnanam, his group and the other Indian share-holders who took the rights shares offered to the Holding Company shall pay, pro rata, the sum of Rs. 8,54,550 to the Holding Company. The amount shall be paid by them to the holding company from their own funds and not from the funds or assets of NIIL. [827 A-B]

5. As a further measure of neutralisation of the benefit which the Indian shareholders received in the meeting of 2nd May, 1977, it is directed that the 16,000 rights shares which were allotted in that meeting to the Indian shareholders will be treated as not qualifying for the payment of dividend for a period of one year commencing from January 1, 1977 the Company's year being the Calendar year. The interim dividend or any further dividend received by the Indian shareholders on the 16,000 rights shares for the year ending December 31, 1977 shall be repaid by them to NIIL, which shall distribute the same as if the issue and allotment of the rights shares was not made until after December 31, 1977. This direction will not be deemed to affect or ever to have affected the exercise of any other rights by the Indian shareholders in respect of the 16,000 rights shares allotted to them. [827 B-D]

6. In order to ensure the smooth functioning of NIIL and with a view to ensuring that the directions are complied with expeditiously, it is directed that Shri M.M. Sabharwal who was appointed as a Director and Chairman of the Board of Directors under the orders of this Court dated November 6, 1978 will continue to function as such until December 31, 1982. [827 F]

7. The Company will take all effective steps to obtain the sanction or permission of the Reserve Bank of India or the Controller of Capital Issues, as the case may be, if it is necessary to obtain such sanction or permission for giving effect to the directions. [827 G]

8. Devagnanam and his group acted in the best interests of NIIL, in the matter of the issue of rights shares and indeed, the Board of Directors followed in the meeting of the 6th April a course which they had no option but to adopt and in doing which, they were solely actuated by the consideration as to what
704
was in the interest of the company. The shareholder Directors who were interested in the issue of rights shares neither participated in the discussion of that question nor voted upon it. The two Directors who, forming the requisite quorum, received upon the issue of rights shares were Silverston who, was a disinterested Director and Doraiswamy who, unquestionably, was so.

[792 A-C]

9. Disinvestment by the Holding Company, as one of the two courses which could be adopted for reducing the non-resident interest in NIIL to 40% stood ruled out, on account of the rigid attitude of Coats who, during the period between the Ketty meeting of October 20-21, 1976 and the Birmingham discussions of March 29-31, 1977 clung to their self interest, regardless of the pressure of FERA, the directive of the Reserve Bank of India and their transparent impact on the future of NIIL. [792 D-E]

10. Devagnanam and the disinterested Directors, having acted out of legal compulsion precipitated by the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

obstructive attitude of Coats and their action it being in the larger interest of the company, it is impossible to hold that the resolution passed in the meeting of April 6 for the issue of rights shares at par to the existing shareholders of NIIL constituted an act of oppression against the Holding Company. [792 E-F]

11. It puts a severe strain on ones credulity to believe that the letters of offer dated April 14 to the Holding Company, to Raeburn and to Manoharan were posted on the 14th itself but that somehow they rotted in the post office until the 27th on which date they took off simultaneously for their respective destinations. [793 E]

12. The purpose behind the planned delay in posting the letters of offer to Raeburn and to the Holding Company, and in posting the notice of the Board's meeting for May 2 to Sanders, was palpably to ensure that no legal proceeding was taken to injunct the holding of the meeting. The object of withholding these important documents, until it was quite late to act upon them, was to present to the Holding Company a fait accompli in the shape of the Board's decision for allotment of rights shares to the existing Indian shareholders.

[794 C-E]

13. In so far as Devagnanam himself is concerned, there is room enough to suspect that he was the part-author of the late postings of important documents, especially since he was the prime actor in the play of NILL's Indianisation. But even in regard to him, it is difficult to carry the case beyond the realm of suspicion and 'room enough' is not the same thing as 'reason enough'.

[795 B-C]

13A. With regard to the impact on the legality of the offer and the validity of the meeting of May 2,

(i) It is quite clear from the circumstances that the rights shares offered to the Holding Company could not have been allotted to anyone in the meeting of May 2, for the supposed failure of the Holding Company to communicate its acceptance before April 30. The meeting of May 2, of which the main purpose was to consider 'Allotment' of the rights shares must, therefore, be held to be abortive, [796 H-797 A]

705

(ii) The utter inadequacy of the notice to Sanders in terms of time stares in the face and needs no further argument to justify the finding that the holding of the meeting was illegal, at least in so far as the Holding Company is concerned. It is self-evident that Sanders could not possibly have attended the meeting. There is, therefore, no alternative save to hold that the decision taken in the meeting of May 2 cannot, in the normal circumstances, affect the legal rights of the Holding Company or create any legal obligations against it. [797 D-E]

13B. The dilution of the non-resident interest in the equity capital of the Company to a level not exceeding 40% "within a period of 1 (one) year from the date of receipt of" the letter was of the very essence of the matter. The sanction for enforcement of a conditional permission to carry on business, where conditions are breached, is the cessation, ipso facto, of the permission itself on the non-performance of the conditions at the time appointed or agreed. When NIIL wrote to the Bank on February 4, 1976 binding itself to the performance of certain conditions, it

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

could not be heard to say that the permission will remain in force despite its non-performance of the conditions. Having regard to the provisions of section 29 read with sections 49, 56(1) and (3) and section 68 of FERA, the continuance of business after May 17, 1977 by NIIL would have been illegal, unless the condition of dilution of non-resident equity was duly complied with. [799 B; F-H]

14. By reason of the provisions of section 29(1) and (2) of FERA and the conditional permission granted by the RBI by its letter dated May 11, 1976 the offer of rights shares made by NIIL to the Holding Company could not possibly have been accepted by it. [800 B]

The acceptance of the offer of rights shares by the Holding Company would have resulted in a violation of the provisions of FERA and the directive of the Reserve Bank. No grievance can be made by the Holding Company that since it did not receive the offer in time, it was deprived of an opportunity to accept it. [800 D-G]

14A. An offer of shares undoubtedly creates "fresh rights" but, the right which it creates is either to accept the offer or to renounce it; it does not create any interest in the shares in respect of which the offer is made. [801 B]

Mathalone v. Bombay Life Assurance Co. [1954] SCR 117 referred to.

15(i) Before granting relief in an application under section 210 of the English Companies Act as under section 397 of the Indian Companies Act the Court has to satisfy itself 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. The fact that the company is prosperous and makes substantial profits is no obstacle to its being wound up if it is just and equitable to do so. [744 A-B; 775 G]

Scottish Co-op. Wholesale Society Ltd. v. Meyer [1959] A.C. 324, Re Associated Tool Industries Ltd. [1964] Argus Law Reports, 75, Ebrahimi v. Westbourne
706
Galleries LTd. [1973] A. C. 360 (H.L.), Blissett v. Daniel [68] E.R. 1024. Re Yenidge Tobacco Co. [1916] 2 Ch. 426 & Loch v. John Blackwood [1924] A.C. 783 referred to.

(ii) On a true construction of section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as a shareholder. [748 E-G]

(iii) Technicalities cannot be permitted to defeat the exercise of the equitable jurisdiction conferred by section 397 of the Companies Act.

Blissett v. Daniel 68 E.R. 1024 referred to.

16. 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. [746 G-747 A]

17. An isolated order passed by a Judge which is contrary to law will not normally support the inference that

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

he is biased, but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biased and that the party complaining of the orders will not get justice at his hands. [747 B-C]

S.M. Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. [1964] 34 Company Cases 830-31 & Elder v. Elder [1952] S.C. 49 referred to.

18. It is generally unsatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit to cross-examination. Men may lie but documents will not and often, documents speak louder than words. But a total reliance on the written word, when probity and fairness of conduct are in issue, involves the risk that the person accused of wrongful conduct is denied an opportunity to controvert the inferences said to arise from the documents.

[754 E-G]

Re Smith and Fowcett Ltd. [1942} 1 All ER 542, 545; Nana Lal Zaver v. Bombay Life Assurance [1950] SCR 390, 394 Piercy v. Mills [1920] (1) Chancery 77, Hogg v. Cramphorn, [1967] 1, Chancery 254, 260; Mills v. Mills [60] CLR 150, 160, Harlowe's Hominees [121] CLR 483, 485 & Howard Smith v. Amphol [1974] A.C. 821, 831 Punt v. Symons [1903] 2 Ch. 506; Franzer v. Whalley 71 E.R. 361 referred to.

In the instant case the High Court was right in holding that, having taken up a particular attitude, it was not open to Devagnanam and his group to con-
707
end that the allegation of mala fides could not be examined, on the basis of affidavits and the correspondence only. There is ample material on the record in the form of affidavits correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

[755B-C]

These documents and many more documents were placed on the record mostly by consent of parties, as the case progressed from stage to stage. That shows that the parties adopted willingly a mode of trial which they found to be most convenient and satisfactory. [756 A-B]

19. When the dominant motivation is to acquire control of a company, the sparring groups of shareholders try to grab the maximum benefit for themselves. If one decides to stay on in such a company, one must capture its control. If one decides to quit, one must obtain the best price for one's holding, under and over the table, partly in rupees and partly in foreign exchange. Then, the tax laws and the foreign exchange regulations look on helplessly, because law cannot operate in a vacuum and it is notorious that in such cases evidence is not easy to obtain. [761 G-H; 762A]

20. It is difficult to hold that by the issue of rights shares the Directors of NIIL interfered in any manner with the legal rights of the majority. The majority had to disinvest or else to submit to the issue of rights shares in order to comply with the statutory requirements of FERA and the Reserve Bank's directives. Having chosen not to disinvest, an option which was open to them, they did not any longer possess the legal rights to insist that the Directors shall not issue the rights shares. What the Directors did was clearly in the larger interests of the Company and in obedience to their duty to comply with the law of the land. The fact that while discharging that duty they incidentally trenched upon the interests of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

majority cannot invalidate their action. The conversion of the existing majority into a minority was a consequence of what the Directors were obliged lawfully to do. Such conversion was not the motive force of their action. [782 A-E]

Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821, 874, Punt v. Symons [1903] 2 Ch. 506 & Fraser v. Whalley [71] E.R. 361 Piercy v. Mills [1920] 1 Ch. 77, Hogg v. Cramphorn [1967] 1 Ch. 254, 260 referred to

21. (i) The Directors have exercised their power for the purpose of preventing the affairs of the company from being brought to a grinding halt, a consumption devoutly wished for by Coats in the interest of their extensive world-wide business. [784 C]

(ii) The mere circumstance that the Directors derive benefit as shareholders by reasons of the exercise of their fiduciary power to issue shares, will not vitiate the exercise of that power. [785 E]

(iii) The test is whether the issue of shares is simply or solely for the benefit of the Directors. If the shares are issued in the larger interest of the

708

company that decision cannot be struck down on the ground that it has incidentally benefited the Directors in their capacity as share holders, [786 C]

In the instant case the Board of Directors did not abuse its fiduciary power in deciding upon the issue of rights shares. [786 D]

Harlowe's Nominess Pvt. Ltd. v. Woodside (Lakes Entrance) Oil Company No. Liability & Anr. (121) CLR 483, 485, Trek Corporation Ltd. v. Miller et al (33) DLR 3d. 288; Nanalal Zaver & Anr. v. Bombay Life Assurance Co. Ltd. [1950] SCR 390, 419-429; Hirsche v. Sims [1894] A.C. 654, 660-661; Gower in Principles of Modern Company Law, 4th Edn. 578 referred to.

22. Under section 287 (2) of the Companies Act, 1956 the quorum for the meeting of the Board of Director was two. There can be no doubt that a quorum of two directors means a quorum of two directors who are competent to transact and vote on the business before the Board. [786 E]

23. (i) It is wrong to attribute any bias to Silverston for having acted as an adviser to the Indian shareholders in the Ketty meeting. Silverston is by profession a solicitor and legal advisers do not necessarily have a biased attitude to questions on which their advice is sought or tendered. Silverston's alleged personal hostility to Coats cannot, within the meaning of section 300 (1) of the Companies Act, make him person "directly or indirectly, concerned or interested in the contract or arrangement" in the discussion of which he had to participate or upon which he had to vote. [787 E-G]

(ii) The concern or interest of the Director which has to be disclosed at the Board meeting must be in relation to the contract entered or to be entered into by or on behalf of the company. The interest or concern spoken of by sections 299 (1) and 300 (1) cannot be a merely sentimental interest or ideological concern. Therefore, a relationship of friendliness with the Directors who are interested in the contract or arrangement or even the mere fact of a lawyer-client relationship with such

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

directors will not disqualify a person from acting as a Director on the ground of his being, under section 300 (1) as "interested" Director. Howsoever one may stretch the language of section 300 (1) in the interest of purity of company administration, it is next to impossible to bring Silverston's appointment within the framework of that provision. [788 A-C]

The argument that Silverston was an interested Director, that therefore his appointment as an Additional Director was invalid and that consequently the resolution for the issue of rights shares was passed without the necessary quorum of two disinterested Directors has no force. [788 D-E]

709

Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd., [1971] 41 Company Case 377 distinguished.

24. Silverston's appointment as an Additional Director is not open to challenge on the ground of want of agenda on that subject. Section 260 of the Companies Act preserves the power of the Board of Directors to appoint additional Directors if such a power is conferred on the Board by the Articles of Association of the Company. Article 97 of NIIL's Articles of Association confers the requisite power on the Board to appoint additional Directors. The occasion to appoint Silverston as an Additional Director arose only when the picture emerged clearly that the Board would have to consider the only other alternative for reduction of the non-resident holding, namely, the issue of rights shares. It is for this reason that the subject of appointment of an Additional Director could not have, in the state of facts, formed a part of the agenda.

[788 F.G; 789 A-C]

25. (i) The power to issue shares is given primarily to enable capital to be raised when it is required for the purposes of the company but that power is not conditioned by such need. That power can be used for other reasons as for example to create a sufficient number of shareholders to enable the company to exercise statutory powers or to enable it to comply with legal requirements. [789 D-E]

Punt v. Symons and Co., [1903] 2 Ch. 506; Hogg v. Cramphorn, [1967] 1 Ch. 254; Howard Smith v. Amphol, [1974] A.C. 821.

(ii) The minutes of the Ketty meeting of October 20-21, 1976 saying that it was agreed that the rights issues, with the Indian shareholders taking up the U.K. members' rights, would be considered provided it was demonstrated by NIIL that "there is a viable development plan requiring funds that the expected NIIL cash flow cannot meet", cannot also justify the argument that the power of the Company to issue rights shares was, by agreement conditioned by the need to raise additional capital for a development plan. [790 H; 791 A]

(iii) In the instant case the rights shares were issued in order to comply with legal requirements which apart from being obligatory as the only viable course open to the Directors, was for the benefit of the company since, otherwise, its developmental

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

activities would have stood frozen as of December 31, 1973. The shares were not issued as a part of takeover war between the rival groups of shareholders. [790 B-C]

26. It is not true to say, as a statement of law, that Directors have no power to issue shares at par, if their market price is above par. These are primarily matters of policy for the Directors to decide in the exercise of their discretion and no hard and fast rule can be laid down to fetter that discretion. Such discretionary powers in company administration are in the nature of fiduciary powers and must be exercised in faith. Mala fides vitiate the exercise of such discretion. [791 E & G]

Hilder and Others v. Dexter [1902] A.C. 474, 480 referred to.

27. The definition of 'private company' and the manner in which a 'public company' is defined ("public company means a company which is not a private
710
company") bear out the argument that these two categories of companies are mutually exclusive. But it is not true to say that between them, they exhaust the universe of companies. A private company which has become a public company by reason of S. 43A, may continue to retain in its articles, matters which are specified in S. 3(1)(iii) and the number of its members may be or may at any time be reduced below 7. [810 H; 811 A-B]

(i) A section 43A company may include in its articles as part of its structure, provisions relating to restrictions on transfer of shares, limiting the number of its members to 50, and prohibiting an invitation to the public to subscribe for shares, which are typical characteristics of a private company. The expression 'public company' in section 3(i)(iv) cannot therefore be equated with a 'private company' which has become a public company by virtue of section 43A. [811 D-E]

(ii) A section 43A company can still maintain its separate corporate indentity qua debts even if the number of its members is reduced below seven and is not liable to be wound up for that reason. [811 F]

(iii) A section 43A company can never be incorporated and registered as such under the Companies Act. It is registered as a private company and becomes, by operation of law, a public company. [811 G]

(iv) The three contingencies in which a private company becomes a public company by virtue of section 43A (mentioned in sub-sections (1), (1A) and (1B) read with the provisions of sub-section (4) of that section) show that it becomes and continues to be a public company so long as the conditions in sub-sections (1), (1A) or (1B) are applicable. The provisos to each of these sections clarify the legislative intent that such companies may retain their registered corporate shell of a private company but will be subjected to discipline of public companies. When necessary conditions do not obtain, the legislative device in S. 43A is to permit them to go back into their corporate shell and function once again as private companies, with all the privileges and exemptions applicable to private companies. The proviso to each of the sub-sections of S. 43A clearly indicates that although the private company has become a public company by

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

virtue of that section, it is permitted to retain the structural characteristics of its origin, its birthmark.

[811 H-812 A-B]

(v) Section 43A when introduced by Act 65 of 1960 did not adopt the language either of section 43 or of section 44. Under section 43 where default is made in complying with the provisions of section 3(1)(iii) a private company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act shall apply to the company as if it were not a private company. Under section 44 of the Act, where a private company alters its Articles in such manner that they no longer include the provisions, which under section 3(1)(iii) are required to be included in the Articles in order to constitute it a private company, the company "shall as on the date of the alteration cease to be a private company". Neither of the

711

expression, namely, "This Act shall apply to the company as if it were not a private company" (section 43) nor that the company "shall... cease to be a private company (section 44) is used in section 43A. If a section 43-A company were to be equated in all respects with a public company, that is a company which does not have the characteristics of a private company, Parliament would have used language similar to the one in section 43 or section 44, between which two sections, section 43A was inserted. If the intention was that the rest of the Act was to apply to a section 43A company "as if it were not a private company", nothing would have been easier than to adopt that language in section 43A; and if the intention was that a section 43A company would for all purposes "cease to be a private company", nothing would have been easier than to adopt that language in section 43A. [812 E-H; 813 A]

(vi) A private company which becomes a public company by virtue of section 43A is not required to file a prospectus or a statement in lieu of a prospectus. [813 C]

After the Amending Act 65 of 1960 these distinct types of companies occupy a distinct place in the scheme of our Companies Act: (1) private companies (2) public companies and (3) private companies which have become public companies by virtue of section 43A, but which continue to include or retain the three characteristics of a private company. Private companies enjoy certain exemptions and privileges which are peculiar to their constitution and nature. Public companies are subjected severely to the discipline of the Act. Companies of the third kind like NIIL, which become public companies but which continue to include in their articles the three matters mentioned in clauses (a) to (c) of section 3(1)(iii) are also, broadly and generally, subjected to the rigorous discipline of the Act. They cannot claim the privileges and exemptions to which private companies which are outside section 43A are entitled. And yet, there are certain provisions of the Act which would apply to public companies but not to section 43A companies. [813 D; 814 A-C]

There is no difficulty in giving full effect to clauses

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

(a) and (b) of section 81(1) in the case of a company like NIIL, even after it becomes a public company under section 43A. Clause (a) requires that further shares must be offered to the holders of equity shares of the Company in proportion, as nearly as circumstances admit, to the capital paid up on these shares, while clause (b) requires that the offer further shares must be made by a notice specifying the number of shares offered and limiting the time, not being less than fifteen days from the date of the offer, within which the offer, if not accepted will be deemed to have been declined. [815 H; 816 A-B]

The provision contained in clause (c) cannot be construed in a manner which will lead to the negation of the option exercised by the company to retain in its articles the three matters referred to in section 3(1)(iii). Both these are statutory provisions and they are contained in the same statute. They must be harmonised, unless the words of the statute are so plain and unambiguous and the policy of the statute so clear that to harmonise will be doing violence to those words and to that policy. The policy of the statute if any-

712

thing, points in the direction that the integrity and structure of the section 43-A proviso companies should, as far as possible not be broken up. [817 E-F]

Park v. Royalty Syndicates [1912] 1 K.B. 330 and Re Pool Shipping Co. Ltd. [1920] 1 Ch. 251 referred to.

Palmer's Company Law 22nd. Vol. I para 12-18 Gower's Company Law 4th End p. 351 referred to.

27. When section 43A was introduced by Act 65 of 1960, the legislature apparently overlooked the need to exempt companies falling under it, read with its first proviso, from the operation of clause (c) of sec. 81(1). That the legislature has overlooked such a need in regard to other matters, in respect of which there can be no controversy, is clear from the provisions of sections 45 and 433(d) of the Companies Act. Undar section 45, if at any time the number of members of a company is reduced, in the case of a public company below seven, or in the case of a private company below two, every member of the company becomes severally liable, under the stated circumstances, for the payment of the whole debt of the company and can be severally sued therefor. No exception has yet been provided for in section 45 in favour of the section 43A-proviso companies, with the result that a private company having, say, three members which becomes a public company under section 43A and continues to function with the same number of members, will attract the rigour of section 45. Similarly, under section 433(d) such a company would automatically incur the liability of being wound up for the same reason.

[818 A-D]

While construing the opening words of section 81(1)(c) it has to be remembered that section 43A companies are entitled under the proviso to that section to include provision in their Articles relating to matters specified in section 3(1)(iii). The right of renunciation in favour of any other person is wholly inconsistent with the Articles of a private company. If a private company becomes a public company by virtue of section 43A and retains or continues to include in its Articles matters referred to in section 3(1)(iii) it is difficult to say that the Articles do not provide something which is otherwise than what is provided in clause (c). The right of renunciation in favour of any other person is of the essence of clause (c). On the other hand, the absence of that right is of the essence of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

structure of a private company, It must follow, that in all cases in which erstwhile private companies become public companies by virtue of section 43A and retain their old Articles, there would of necessity be a provision in their Articles which is otherwise than what is contained in clause (c). Considered from this point of view, the argument as to whether the word "provide" in the opening words of clause (c) means "provide expressly" loses its significance. [820 B-D]

In the context in which a private company becomes a public company under section 43A and by reason of the option available to it under the proviso the word "provide" must be understood to mean "provide expressly or by necessary implication". The necessary implication of a provision has the same effect and relevance in law as an express provision has, unless the relevance of what is necessarily implied is excluded by the use of clear words. [820 E-F]

713

The right of renunciation is tentamount to an invitation to the public to subscribe for the shares in the company and can violate the provision in regard to the limitation on number of members. Article 11, by reason of its clause (iv) prevails over the provisions of all other Articles if there is inconsistency between it and any other Article. [821 C]

28. Clause (c) of section 81(1) of the Companies Act apart from the consideration arising out of the opening words of that clause, can have no application to private companies which have become public companies by virtue of section 43A and which retain in their Articles the three matters referred to in section 3(1)(iii) of the Act. In so far as the opening words of clause (c) are concerned they do not require an express provision in the Articles of the Company which otherwise than what is provided for in clause (c). It is enough, in order to comply with the opening words of clause (c). that the Articles of the Company contain by necessary implication a provision which is otherwise than what is provided in clause (c). Articles 11 and 50 of NIIL's Articles of Association negate the right of renunciation. [821 D-F]

29. The right to renounce shares in favour of any other person, which is conferred by clause (c) has no application to a company like NIIL and, therefore, its members cannot claim the right to renounce shares offered to them in favour of any other member or members. The Articles of a company may well provide for a right of transfer of shares by one member to another, but that right is very much different from the right of renunciation, properly so called. [821 G-H]

Re Poal Shipping Co. Ltd. [1920] 1 Ch. 251 referred to.

30. A change in the pro rata method of offer of new shares is necessarily violative of the basic characteristics of a private company which becomes a public company by virtue of section 43A. To this limited extent only, but not beyond it, the provisions of sub-section (1A) of section 81 can apply to such companies. [822 F]

31. The following propositions emerge out of the discussions of the provisions of FERA, Sections 43A and 81 of the Companies Act and of the Articles of association of NIIL:

(1) The Holding Company had to part with 20% out of the 60% equity capital held by it in NIIL; [822 H]

(2) The offer of Rights shares made to the Holding Company as a result of the decision taken by Board of Directors in their meeting of April 6, 1977

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

could not have been accepted by the Holding Company;

[822 H; 823 A]

(3) The Holding Company had no right to renounce the Rights shares offered to it in favour of any other person, member or non-member; and [823 B]

(4) Since the offer of Rights Shares could not have been either accepted or renounced by the Holding Company, the former for one reason and

714

the latter for another, the shares offered to it could, under article 50 of the articles of association, be disposed of by the directors, consistently with the articles of NIIL, particularly article 11, in such manner as they thought most beneficial to the Company. [822 B-C]

32. These propositions afford a complete answer to the respondents' contention that what truly constitutes oppression of the Holding Company is not the issue of Rights Shares to the existing Indian shareholders only but the offer of Rights Shares to all existing shareholders and the issue thereof to existing Indian shareholders only. [823 D]

33. It was neither fair nor proper on the part of NIIL's officers not to ensure the timely posting of the notice of the meeting for 2nd May so as to enable Sanders to attend that meeting. But there the matter rests. Even if Sanders were to attend the meeting, he could not have asked either that the Holding Company should be allotted the rights shares or alternatively, that it should be allowed to "renounce" the shares in favour of any other person, including the Manoharan group. The charge of oppression arising out of the central accusation of non-allotment of the rights shares to the Holding Company must, therefore fail. [823 H; 824 A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2139, 2483 and 2484 of 1978.

Appeals by Special Leave from the judgment and order dated the 6th October, 1978 of the Madras High Court in O.S.A. No. 64 of 1978.

F.S. Nariman, A.K. Sen, Dr. Y.S. Chitaley, S.N. Kackar, T. Dalip Singh, K.J. John, Ravinder Narain, A.G. Menses and R. Narain for the Appellants.

H.M. Seervai, Anil B. Divan, A.R. Wadia, S.N. Talwar, I.N. Shroff and H.S. Parihar for Respondent No. 1.

D.N. Gupta for Respondents Nos. 2-7, 10- 12, 15, 16, 18-22, 26 and 28-33.

The Judgment of the Court was delivered by

CHANDRACHUD, C. J. These three appeals by special leave arise out of a judgment of a Division Bench of the High Court of Madras dated October 6, 1978 allowing an appeal against the judgment of a learned Single Judge, dated May 17, 1978 in Company Petition No. 39 of 1977. The main contending parties in these appeals are: (i) the Needle Industries (India) Limited and (ii) the

715

Needle Industries-Newey (Indian Holdings) Limited. These two companies have often been referred to in the proceedings as the Indian Company and the English Company respectively, but it would be convenient for us to refer to the former as 'NIIL' and to the latter as the 'Holding Company'. The Holding Company has been referred to in a part of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

proceedings as 'NINIH'.

In Civil Appeal 2139 of 1978, which was argued as the main appeal, NIIL is appellant No. 1 while one T.A. Devagnanam is appellant No. 2. The latter figures very prominently in these proceedings and is indeed one of the moving spirits of this acrimonious litigation. He was appointed as a Director of NIIL in 1956 and as its Managing Director in 1961. He is referred to in the correspondence as 'TAD' or 'Theo' but we prefer to call him 'Devagnanam'. The Holding Company is Respondent 1 to the main appeal, the other respondents being some of the Directors and shareholders of NIIL. Civil Appeal 2483 of 1978 is filed by some of the shareholders of NIIL while Civil Appeal 2484 of 1978 is filed by some of its directors and officers. The Holding Company is the contesting respondent to these two appeals. We will deal with the main appeal and our judgment therein will dispose of all the three appeals.

The NIIL was incorporated as a Private Company under the Indian Companies Act, 1913 on July 20, 1949 with its Registered Office at Madras. Its factory is situated at Ketty, Nilgiris. At the time of its incorporation, NIIL was a wholly owned subsidiary of Needle Industries (India) Ltd., Studley, England (hereinafter called 'NI-Studley'). The authorised capital of NIIL was Rs. 50,00,000 divided into 50,000 equity shares of Rs. 100 each. Its issued and paid up capital prior to 1961 was Rs. 6,75,600 divided into 6,756 equity shares of Rs. 100 each. The issued and paid up capital was increased to Rs. 11,09,000/- in 1961. In that year, NI-Studley entered into an agreement with NEWEY BROS. LIMITED, Birmingham, England, (hereinafter called NEWEY), under which NEWEY agreed to participate in the equity capital of NIIL to the extent of Rs. 4,33,400/-, consisting of 4,334 equity shares of Rs. 100/- each. Thus, in 1961, the position of the share holding in NIIL was that NI-Studley held approximately 60.85% of the issued capital and NEWEY held the balance of 39.14%. In 1963, NIIL increased its share capital by issuing 2,450 additional shares to NI-Studley, as a result of which the latter became the holder of about 68% shares in NIIL, the rest of the
716
32% belonging to NEWEY. Later in the same year, NI-Studley and NEWEY combined to form the Holding Company, of which the full official name. as stated earlier is the Needle Industries-Newey (Indian Holding) Ltd. The Holding Company was incorporated in the United Kingdom under the English Companies Act, 1948 with its Registered Office at Birmingham, England. The entire share capital of NIIL, held by NI-Studley and NEWEY, was transferred to the Holding Company in which NI-Studley and NEWEY became equal sharers. As a result of this arrangement, the Holding Company came to acquire 99.95% of the issued and paid up capital of NIIL. The balance of 0.05%, which consisted of 6 shares being the original nominal shares, was held by Devagnanam.

The NIIL, it shall have been noticed, was incorporated about two years after India attained independence. As a result of an undertaking given by it to the Government of India at the time of its incorporation and pursuant to the subsequent directives given by the said Government for achieving Indianisation of the share capital of foreign companies, three issues of shares were made by NIIL in the years 1968, 1969 and 1971, all at par. There was also an issue of Bonus shares in 1971. As a result of these issues, about 40% of the share Capital of NIIL came to be held by the Indian employees of the Company and their relatives while the balance of about 60% remained in the hands of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Holding Company. In terms of the number of shares, by 1971-72 the Holding Company owned 18, 990 shares and the Indian shareholders owned 13,010 shares. Out of the latter block of shares, Devagnanam and his relatives held 9,140 shares while the remaining 3,870 shares were held by other employees and their relatives, amongst whom were N. Manoharan and his group who held 900 shares and D.P. Kingsley and his group who held 530 shares. The total share capital of NIIL thus came to consist of 32,000 equity shares of Rs. 100 each.

In or about 1972, a company called Coats Paton Limited, Glasgow, U.K. (hereinafter called 'Coats') became an almost 100% owner of NI-Studley. The position at the beginning of the year 1973 thus was that 60% (to be exact 59.3%) of the share capital of NIIL came to be owned half and half by Coats and NEWEY, the remaining 40% being in the hands of the Indian group. The bulk of this 40% block of shares was held by Devagnanam's group, which came to about 28.5% of the total number of shares.

717

Though NIIL was at one time wholly owned by NI-Studley and later, by NI-Studley and NEWEY, the affairs of NIIL were managed ever since 1956 by an entirely Indian management, with Devagnanam as its Chief Executive and Managing Director with effect from the year 1961. The Holding Company which was formed in 1963, had only one representative on the Board of Directors of NIIL. He was N.T. Sanders. He resided in England and hardly ever attended the Board meetings. The Holding Company reposed great confidence in the Indian management which was under the direction and control of Devagnanam.

But the acquisition of NI-Studley by Coats in 1972 and their consequent entry in NIIL created in its wake a sense of uneasy quiet between the Coats on one hand, which came to own half of the 60% share capital held by the Holding Company, that is to say, 30% of the total share capital of NIIL, and the Devagnanam group on the other hand, which owned 28.5% of that share capital. By the mere size of their almost equal holding in NIIL, Coats and Devagnanam developed competing interests in the affairs of NIIL. Coats were in the same line of business as NIIL, namely, manufacture and sale of needles for various uses, fish-hooks etc., and they had established trading centres far and wide, all over the world. It is plain business, involving no moral turpitude as far as business ethics go, that Coats could not have welcomed competition from NIIL with their world interests. Devagnanam was a man of considerable ability and foresight and in NIIL he saw an opportunity of controlling and dominating as industrial enterprise of enormous potential in a rapidly growing market. The turnover of NIIL had increased from 2.80 lakhs in 1953 to 149.93 lakhs in 1972 and the profits ran as high as 19.4% of the turnover. Implicit confidence in the Indian management which was the order of the day almost till 1974 gradually gave way to an atmosphere of suspicion and distrust between Coats and Devagnanam. NEWEY apparently kept away from the differences which were gradually mounting up between the two but, evidently, they nursed a preference for Devagnanam. Coats are a giant multinational organization. NEWEY, comparatively, are small fish though, they too had their own independent business interests to protect and foster.

NEWEY owned a flourishing business in Malaysia, Hong Kong, Taiwan, Japan and Australia and from 1972 onwards they drew Devagnanam increasingly into the orbit of their Far Eastern

718

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

interests. In July, 1972 he was offered the office of Managing Director of a group of four companies in Hong Kong and Taiwan on a five year contract, with an annual salary of six thousand pounds. He had already been appointed to the Board of the NEWEY joint venture company in Osaka and Japan and acted as the liaison Director for that company. He had also been asked to coordinate sales with NEWEY Brothers, Australia. Willing to accept these manifold responsibilities, Devagnanam became strenuously involved therein. He and his wife began to reside in Hong Kong and he cogitated over resigning from his position in NIIL. Coats, on their part, were clear that Devagnanam should relinquish his responsibilities in NIIL, in view of the time his role in NEWEY's Far Eastern interests was consuming. The question of appointing his successor as Managing Director in NIIL then began to be discussed, the Holding Company wanting to have Manoharan as a substitute. Devagnanam carried the feeling that he was already persona non grata with Coats, because of certain incidents which had taken place some years ago.

The Foreign Exchange Regulation Act, ('FERA'), 46 of 1973, which came into force on January 1, 1974 provided to Coats and Devagnanam a legal matrix for fighting out their differences. The provisions of FERA, which was passed, inter alia, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country are stringent beyond words. Putting it broadly and briefly, section 29 (1) of FERA prohibits non-residents, non-citizens and non-banking companies not incorporated under any Indian Law or in which the non-resident interest is more than 40%, from carrying on any activity in India of a trading, commercial or industrial nature except with the general or special permission of the Reserve Bank of India. By section 29 (2) (a), if such a person or company is engaged in any such activity at the commencement of the Act, he or it has to apply to the Reserve Bank of India, for permission to carry on that activity, within six months of the commencement of the Act or such further period as the Reserve Bank may allow. Since the Holding Company is a non-resident and its interest in NIIL exceeded 40%, NIIL had to apply for the permission of the Reserve Bank for continuing to carry on its business. Section 29 (4) (a) imposes a similar restriction on such person or company from holding shares in India of any company referred to in clause (b) of section 29 (1), without the permission of the Reserve Bank. Therefore, the Holding Company also had to apply for the permission of

719

the Reserve Bank for continuing to hold its shares in NIIL. The time for making application for the requisite permission under section 29 was extended by the Reserve Bank by two months generally, that is to say, until August 31, 1974. The need to comply with the provisions of section 29 of FERA is the pivot round which the whole case revolves.

NIIL applied to the Reserve Bank for the necessary permission through its Director and Secretary, D.P. Kingsley, on September 3, 1974 By its letter dated May 11, 1976, the Reserve Bank allowed that application on certain conditions. NIIL's application was late by three days but the delay was evidently ignored or condoned. One of the conditions imposed by the Reserve Bank on NIIL was that it must bring down the non-resident interest from 60% to 40% within one year of the receipt of its letter. That letter having been received by NIIL on May 17, 1976, the dead-line

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

for reducing the non-resident interest to 40% was May 17, 1977.

The Holding Company applied to the Reserve Bank for a 'Holding Licence' under section 29(4)(a) of FERA, on September 18, 1974. That application which was late by 18 days is, we are informed, still pending with the Reserve Bank. Perhaps, it will be disposed of after the non-resident interest in NIIL is reduced to 40% in terms of section 29 (1) of FERA.

Devagnanam was residing in Hong Kong to fulfil his commitment to NEWEY's far-eastern business interests. FERA had its implications for him too, especially since he could be regarded as a nonresident and did consider himself as such. He obtained a holding licence dated March 4, 1975 from the Reserve Bank in respect of his shares in NIIL. But, his interest in the affairs of NIIL began to flag for one reason or another and he started looking out for a purchaser who would buy his shares on convenient and attractive terms. In a note dated April 29, 1975 which he prepared on "further Indianisation-Needle Industries (India) Ltd." he pointed out that Indianisation should be considered on the footing that the non-resident interest should be reduced to 40% and that, as between the two feasible methods of Indianisation, namely, (1) Going to public and (2) placement of shares, the latter was preferable.

He said:

720

> There can be no question of my becoming in any way involved with Ketti and its future as I am committed to NEWEY. There appears to be no possibility of returning to India in what is left of my working life. I therefore have little choice but to sell my shares.

('Ketty' in Nilgiris, is the place where NIIL's factory is situated and is treated as synonymous with NIIL). Devagnanam referred in his note to an inquiry from a Mr. Khaitan, the head of a powerful group with diverse interests and investment in industry, who was already involved in the manufacture of products allied to NIIL's. Coats were alarmed that Devagnanam was negotiating the sale of his shares "to a Marwari, one Khaitan of Shalimar, a sewing needle competitor to Ketti". In a letter dated August 6, 1975 addressed to Doraiswamy, a partner in a Madras firm of solicitors called 'King and Partridge' who was a Director of NIIL, Sanders, a Director of the Holding Company on NIIL's Board, expressed his grave concern at the proposed deal thus:

> No doubt Mr. Khaitan would pay the earth to acquire NIIL and judging by what Theo (Devagnanam) had said about him in the past, he may be prepared to arrange or facilitate payment abroad, a most attractive possibility from Theo's point of view, since he has said clearly that he intends leaving India for good, finally settling in Australia.

Sanders added that the deal was so dangerous from the point of view of NIIL that the Holding Company "would feel obliged to prevent it by whatever means were open" to it. By his reply dated August 12, 1975, Doraiswamy said that the news of the proposed sale came as no surprise to him and that he had heard that Silverston, a former Solicitor-partner of his, was acting as a "go-between" in Devagnanam's deal with Khaitan.

On September 16, 1975 Devagnanam wrote to M.M.C. NEWEY of NEWEY, Birmingham. pointing out the advantages that would accrue by the sale of the shares to Khaitan. Devagnanam reiterated his total identification with NEWEY's Far Eastern interests and expressed his anxiety to free himself from all

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

commitments to or involvement with NIIL, as early as possible.

On October 22, 1975 an important meeting was held in which Alan Machrael, a Director of the Holding Company, made it clear

721

on behalf of Coats that neither Khaitan nor any other single purchaser would be acceptable to the Holding Company if that meant the acquisition of 30% share holding. The notes of the meeting record that Devagnanam had confirmed that the offer which he had received from Khaitan was at Rs. 360 per share, out of which a substantial proportion (perhaps 50%) would be payable outside India. Mackrael stated at the meeting that the price in rupees could be matched but not the method of payment which was illegal and reiterated that the Holding Company would prevent any attempt by Devagnanam to sell his holding to Khaitan. The notes of the meeting were signed by Mackrael on October 30, 1975. On that date, Sanders wrote a letter to Manoharan stating that the Holding Company was not prepared that 30% of the share capital should get into the hands of any one person, bearing in mind the problems that had arisen in allowing Devagnanam to acquire a holding of nearly that proportion. On November 7, 1975 M.M.C. Newey wrote to Devagnanam making it clear beyond the manner of any doubt that Coats, will not accept Khaitan and that according to Bannatyne of Coats, they were put to considerable trouble in finding Indian residents who would match Khaitan's offer of 3.6 times par. Newey made it clear that in any event, the sale price would have to be paid in India and that they would not be a party to any illicit currency deal. Finding that Coats were determined not to allow him to sell his shares to Khaitan, Devagnanam changed his mind and decided against disposing of his holding in NIIL. On November 13, 1975, he wrote to Newey saying:

> "I do not think any of us want to see Coats dominate Ketti. Hence there can be no question of selling any part of my shares to their nominee. As they in turn will not approve of anyone we choose, there is no way of solving the problem...The best thing to do, therefore, is for me to revert to the original basis and they should have no cause to complain. This will of course include effectively managing the Indian company. Let me however assure you that it will not be at the expense of Newey."

And so did Devagnanam remain in NIIL, with the stage set for a battle between him and Coats for acquisition of control over the affairs of NIIL.

Yet another statutory provision which has an important bearing on the issues arising in these appeals is the one contained

722

in section 43 A of the Indian Companies Act, 1956, which was introduced in 1961 by Act 65 of 1960. NIIL was incorporated as a Private Company in 1949 under the Indian Companies Act, 1913. It was a Private Company as defined in section 3 (1) (iii) of that Act since, by its Articles of Association, it restricted the right to transfer its shares, limited the number of its members to fifty and prohibited any invitation to the public to subscribe to any of its shares or debentures. By section 43 A, it became a Public Company, since not less than twenty-five per cent of its paid-up share capital was held by a body corporate, namely, the Holding Company. But, under the first proviso to section 43A (1), it had the option to retain its Articles relating to matters specified in section 3 (1) (iii) of the Companies

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Act. NIIL did not alter the relevant provisions of its Articles after it became a Public Company within the meaning of section 43A. One of the points in controversy between the parties is whether, in the absence of any positive step taken by NIIL for exercising the option to retain its Articles relating to matters specified in section 3 (1) (iii) of the Companies Act, it can be held that NIIL had in fact exercised the option, which was available to it under the 1st proviso to section 43A, to include provisions relating to those matters in its Articles.

To resume the thread of events, on receipt of the letter of the Reserve Bank dated May 11, 1976 Kingsley, as NIIL's Secretary, sent a reply on May 18, 1976 to the Bank confirming the acceptance of the various conditions under which permission was granted to NIIL to continue its business. On August 11, 1976 the term of Devagnanam's appointment as the Managing Director of NIIL came to an end but in the meeting dated October 1, 1976 of NIIL's Board of Directors, that appointment was renewed for a further period of five years. On being informed of the renewal of Devagnanam's appointment, NEWEY's Chairman, C. Raeburn, who used to attend to the affairs of the Holding Company, did not object as such to the Board's decision ("It may well be that the reappointment in itself is right") but he demurred to the modality by which the decision was taken since, according to him, questions relating to appointments to senior positions in the Company ought to be decided in consultation with the U.K. Shareholders so that they could have an opportunity to express their views. Sanders, it may be mentioned, had received the notice of the meeting duly. On October 20 and 21, 1976, a meeting took place at Ketti between the U.K. shareholders and the Indian shareholders of NIIL. The former were represented by Alan Mackrael, the Managing Director
723
of the Holding Company, and C. Raeburn, the Chairman of NEWEY the latter by Devagnanam and Kingsley. One Martin Henry, the Managing Director of 'Madura Coats', an Indian Company in which the Holding Company had substantial interest, also attended that meeting and took part in its deliberations. Silverston, an Englishman who was practising in India asa Solicitor, attended the meeting as an advisor to the Indian shareholders. C. Raeburn chaired the meeting. Para 2 of the note prepared by him of the discussions held at the meeting says that it was agreed that Indianisation should be brought about by May 1977, as requested by the Government, so as to achieve 40% U.K. and 60% Indian shareholding. But the meeting virtually ended in a stalemate because whereas the Holding Company wanted a substantial part of the share capital held by it in excess of 40% to be transferred to Madura Coats as an Indian shareholder, Devagnanam insisted that the existing Indian share-holders of NIIL alone had the right, under its Articles of Association, to take up the shares which the Holding Company was no longer in a position to hold because of the directives issued by the Reserve Bank pursuant to FERA. Thus, the difference between the two groups who were fast falling out was not, as it could not be, whether the Holding Company had to reduce its share holding in NIIL from 60% to 40%, but as regards the mode by which that reduction was to be brought about. The bone of contention was as to which Indian Party should take up the excess of 20%-the existing Indian shareholders of NIIL or an outside Indian Company, the Madura Coats. Raeburn played the role of a mediator but did not succeed. On the conclusion of the Ketty meeting,

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Silverston wrote a letter to Kingsley conveying his appreciation of the efforts made by Raeburn to bring the parties together and his distress at the attitude of Coats which, according to Silverston, showed that they were trying to circumvent the provisions of FERA. Raeburn too wrote a letter on October 23, 1976 to Devagnanam saying that Coats were not really interested in any independent Indians taking their excess share-holding. On December 11, 1976 Devagnanam wrote to Raeburn expressing the resentment of himself and his group at the attempts made by Coats to maintain their control over NIIL by indirect means. On December 14, Devagnanam offered a package deal under which the existing Indian shareholders would augment their holding to 60%, Mackrael and Raeburn would be on the Board of Directors but not Martin Henry, and even B.T. Lee, a Senior Executive of NI-Studley, could be appointed as a wholetime Director of NIIL to be in charge of its export programme. On January 20, 1977 the Reserve Bank sent a reminder to NIIL asking
724
it to submit at an early date the progress report regarding dilution non-resident interest. By its reply dated February 21, 1977 NIIL confirmed its commitment to achieve the desired Indianisation by the stipulated date, viz., May 17, 1977. On March 9, 1977 Raeburn wrote to Devagnanam, saying that after a discussion with Mackrael and three other high-ranking persons of Coats, it was clear that Coats were not agreeable to allowing the present Indian shareholders to acquire 60% of the equity capital of NIIL, since such a course carried in the long run too great a risk to their world trade. Raeburn made certain fresh proposals by his letter in the hope that they would be acceptable to Coats and invited Devagnanam to come to Birmingham for negotiations.

On March 18, 1977 a notice was issued by NIIL's Secretary, D.P. Kingsley, intimating that a meeting of the Board of Directors will be held on April 6, 1977. One of the items on the agenda of the meeting was shown as "Policy-Indianisation". Sanders received the notice of the meeting duly but did not attend the meeting.

Devagnanam went to Birmingham in the last week of March 1977. Between 29th and 31st March, he held discussions with four out of the six Directors of the Holding Company, namely NEWEY, Jackson, White-house and Raeburn. The other two Directors, Mackrael and Sanders, did not take any part in those discussions. During his visit to Birmingham, Devagnanam expended considerable time in discussing various matters with NEWEY, pertaining to their Far-Eastern business.

On April 4, 1977 NIIL received a reminder letter dated March 30, 1977 from the Reserve Bank which pointed out that the Company had not yet submitted any concrete proposal for reduction of the non-resident interest and asked it to submit its proposal in that behalf without any further delay. The letter warned the Company that if it failed to comply with the directive regarding dilution of foreign equity within the stipulated period, the Bank would be constrained to view the matter seriously.

Raeburn had written a letter to Devagnanam on 4th April on the question of the compromise formula and Devagnanam too had written a letter to Raeburn on the 5th, saying that he would place the formula before his colleagues. These letters evidently crossed each other. The 6th April was then just at hand.
725
The meeting of NIIL's Board of Directors was held on

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

April 6, 1977 as scheduled. Seven Directors were present at the meeting, with Devagnanam in the chair at the commencement of the proceedings. C. Doraiswamy, solicitor-partner of 'King and Partridge', was one of the Directors present at the meeting. He had no interest in the proposal of "Indianisation" which the meeting was to discuss and was, therefore, considered to be an independent Director. In order to complete the quorum of two independent Directors, the other Directors apart from C. Doraiswamy being interested in the business of the meeting, Silverston, an ex-partner of Doraiswamy's firm of solicitors, was appointed to the Board as an additional Director under article 97 of the Articles of Association. Silverston chaired the meeting after his appointment as an additional Director. The meeting resolved that the issued capital of NIIL be increased to Rs. 48,00,000/- by a new issue of 16,000 equity shares of Rs. 100/- each, to be offered as rights shares to the existing shareholders in proportion to the shares held by them. The offer was to be made by a notice specifying the number of shares which each shareholder was entitled to, and in case the offer was not accepted within 16 days from the date on which it was made, it was to be deemed to have been declined by the concerned shareholder. The minutes of the meeting recorded that as a matter of abundant caution, the Directors who were holding shares in NIIL did not take part either in the discussions which took place in the meeting or in the voting on the resolution.

After the aforesaid meeting of the Board dated April 6, 1977, Devagnanam wrote a letter bearing the date April 12 to Raeburn, explaining that every alternative proposal was discussed in the meeting and setting out the compelling circumstances arising out of the requirements of FERA which led to the passing of the particular resolution. It was stated in the letter that a copy of the Reserve Bank's letter of March 30, 1977 to NIIL was enclosed therewith, but in fact it was not so enclosed. The letter of offer dated April 14, 1977 was prepared pursuant to the resolution passed in the meeting of 6th April. The envelope containing Devagnanam's letter dated April 12 (without the copy of the letter of the Reserve Bank dated March 30, 1977) and the letter of offer dated April 14 were received by Raeburn on May 2, 1977 in an envelope bearing the Indian postal mark of April 27, 1977, The letter of offer which was sent to one of the Indian shareholders, Manoharan, was posted in an envelope which also bore the postal mark of 27th April. The next meeting of the Board was due to be
726
held on May 2, 1977 and it is on that date that Raeburn received the letter of offer dated April 14, which evidently, was posted at Madras on April 27, 1977. The Holding Company was thereby denied an opportunity to exercise its option whether or not to accept the offer of rights shares, assuming that any such option was open to it. Whether such an option was open to it and whether, if it could not or did not want to take the rights shares, it could transfer its rights, under NIIL's letter offering the rights shares, to a person of its choice depends upon the provisions of FERA, the necessity to Comply with the directives of the Reserve Bank the terms of NIIL's Articles of Association and the provisions of the Indian Companies Act.

On April 19, 1977 a notice was issued by NIIL's Secretary intimating that a meeting of the Board of Directors will be held on May 2, 1977. One of the items of agenda mentioned in the notice was "Policy-(a)

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Indianisation, (b) Allotment of shares". The notice of the meeting was sent to the Holding Company in an envelope which also bore the Indian postal mark of April 27, 1977. The notice was received by Sanders in England on May 2, 1977 i.e. on the date when the meeting was due to be held in India. Even the fastest and the most modern means of transport could not have enabled Sanders to attend the meeting.

In between, on April 26, 1977 Raeburn had written a letter to Devagnanam at Malacca, following a telex message which said:

HAD HELPFUL DISCUSSIONS COATS YESTERDAY PLEASE MAKE NO DECISIONS RE INDIANISATION PENDING LETTER"

By his letter of 26th April, which is said to have been received by Devagnanam on May 4, 1977, Raeburn stated that Coats were still unwilling to grant majority shareholding control to the existing Indian shareholders, but that they were equally not keen to do any thing which would be regarded as circumventing the proposal for Indianisation or the law bearing on the subject, since that would undermine the position of the Indian shareholders.

A meeting of the Board of Directors was held on May 2, 1977 as scheduled. The minutes of that meeting show that Kingsley, the Secretary of NIIL, pointed out in the meeting that applications for allotment of the rights shares offered as also the amounts payable

727

along with the acceptance of the offer had been received from all the shareholders except the U.K. shareholders and the Manoharan group. The offer to Manoharan was sent at Virudh Nagar but Silverston pointed out to the meeting that Manoharan was working in Jaipur and that therefore, he should be given further time to participate in the rights issue. The Manoharan group was accordingly allowed twenty days' time from the date of the allotment letter for payment of the allotment amount. In the meeting of 2nd May, the whole of the new issue consisting of 16,000 rights shares was allotted to the Indian shareholders, including members of the Manoharan group. Out of these, the Devagnanam group was allotted 11, 734 shares. A dividend of 30%, subject to tax, amounting to Rs. 9,60,000/-was recommended by the Board, and it was resolved that the Annual General meeting of the Company be held on 4th June, 1977. Silverstone was appointed as an additional Director of the Company and his election as such at the Annual General meeting was recommended by the Board. Further, it was resolved that deposits be invited from the public. On the same day i.e. 2nd May, Devagnanam wrote a letter to Raeburn intimating to him that in a meeting held that morning the formalities relating to allotment of shares were completed, bringing the Company under the control of the Indian shareholders. Devagnanam reiterated by his letter the hope of a closer association with the NEWEY group.

Raeburn reacted sharply to Devagnanam's letter of April 12 and to the letter of offer dated April 14. As stated earlier, he had received both of these on May 2 in an envelope which bears the postal mark of Madras dated April, 27. Raeburn sent a telex, message to Devagnanam on 2nd May and another to Kingsley on 3rd May. By the first telex, he complained about the inadequacy of the notice of the meeting and by the second, he conveyed that there was considerable doubt on the question whether the necessary disinterested quorum was available at the meeting of the Directors held on April 6. On receipt of the telex message, Devagnanam wrote a letter to Raeburn on May 4 explaining the pressure of

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

circumstances which compelled the Board to take the decision which it did in the meeting of May 2, 1977. Raeburn followed up his telex messages by a letter to Devagnanam on May 3. While expressing his distress and displeasure at the manner in which the decision regarding the issue of rights shares was taken and the allotment of the shares was made, Raeburn stated in his letter that the rights issue at par, which was considerably less than the fair value
728
of the shares, was most unfair to the shareholders who could not take up the rights issue.

After making the allotment of shares in the meeting of May 2, NIIL sent a letter to the Reserve Bank reporting compliance with the requirements of FERA by the issue of 16,000 rights shares and the allotment thereof the Indian shareholders which resulted in the reduction of the foreign holding to approximately 40% and increased that of the Indian shareholders to almost 60%. Reference was made in the letter to the fact that the allotment money of Rs. 1,10,700/- had yet to be received, which was obviously in reference to the amount due on the 1,107 rights shares which were allotted to the Manoharan group in the meeting of 2nd May. The Manoharan group did not evidence any interest even later in taking up those shares. Manoharan, it may be stated, who was a Director and General Manager of NIIL had resigned his post in April 1976, after serving the Company for nearly 17 years.

Between the 2nd and 9th May, there was an exchange of cables between Mackrael and Doraiswamy which led to the latter writing a letter on the 9th to the former. Doraiswamy stated in that letter that he had thoroughly investigated the position by perusing all available records placed before him by Devagnanam and Kingsley and that he was of the opinion that, in the meeting of the 6th April, there was the required quorum of two disinterested Directors consisting of Silverston and himself and, therefore, there could be no doubt whatsoever about the legality of the resolution passed in that meeting. He admitted that although the time-limit fixed by the Reserve Bank had expired on 17th May, 1977, "it may have been possible for the Company to get further time from the Reserve Bank of India". As regards the decision to issue the additional shares at par, he explained that if the issue had been made at a premium, it would have necessitated an approach to the Controller of Capital Issues, a process which was time-consuming and complicated. He pointed out that the authorities would not have allowed the Company to issue the rights shares at a premium and that even if they were to allow such a course, the premium permissible would have been only nominal. He asserted that the delay caused in the offer of new shares being received by the U.K. shareholders was of little consequence because they would not have been able to take up the shares in any event. He expressed the hope that Mackrael would agree that the decision regarding the issue of rights shares taken at the Board meeting on April 6, 1977 was bona fide and in the best interests
729
of the Company. He concluded his letter by an assurance that as regards the late despatch of the notice of the Board Meeting of 2nd May, further enquiries were being made.

On May 11, Devagnanam wrote to Raeburn apologising for the manner in which the foreign shareholding had been reduced and for good measure, he projected the various advantages which the NEWEY group would enjoy under the new Indian management and control of NIIL. As if to illustrate

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

that it is better late than never, he enclosed with his letter a copy of the Reserve Bank's letter dated 30th March, 1977 which was to have been sent along with the letter dated April 12 but was in fact not so sent.

On May 17, 1977 Mackrael, acting on behalf of the Holding Company, filed a Company Petition in the Madras High Court under sections 397 and 398 of the Indian Companies Act, 1956 out of which the present appeals arise.

It is alleged in the petition that the Indian Directors abused their fiduciary position in the Company by deciding in the meeting of April 6 to issue the rights shares at par and by allotting them exclusively to the Indian shares holders in the meeting of 2nd May, 1977. In so doing, they acted mala fide and in order to gain an illegal advantage for themselves. The Indian Directors, according to the company petition, either knew or ought to have known that the fair value of the shares of the Company was about Rs. 204 per share. By deciding to issue the rights shares at par, they conferred a tremendous and illegitimate advantage on the Indian shareholders. Devagnanam delayed deliberately the intimation of the proceedings of the 6th April to the Holding Company. By that means and by the late giving of the notice of the meeting of the 2nd May, the Devagnanam group presented a fait accompli to the Holding Company in order to prevent it from exercising its lawful rights. Thus, according to the petition the conduct of the Indian Directors lacked in probity and fair dealing which the Holding Company was entitled to expect. By the Petition, the Holding Company asked for the following reliefs:-

(a) That the Board of Directors of the Company be superseded and one or more Administrators be appointed to administer the affairs of the Company or, in the alternative, the Board of Directors be reconstituted so as to ensure that the Holding Company had adequate representation on it;

730

(b) That the proceeding of the meeting of the Board of Directors held on April 6 and May 2, 1977 be declared illegal, void and inoperative;

(c) That Silverston's appointment as an Additional Director of the Company be declared as void and inoperative and he be restrained from functioning as a Director of the Company;

(d) That the purported allotment of 16,000 shares pursuant to the impugned resolution of the Board of May 2, 1977 be declared void;

(e) That the Indian group of shareholders to whom the rights shares were allotted be restrained from exercising any voting rights in regard to any part of those shares;

(f) That the Company be restrained from giving effect to the allotment of the 16,000 rights shares and from making any payment of dividend on those shares;

(g) That the Articles of Association of the Company be amended so as to permit the transfer of the shares to persons other than the existing members of the Company in order to enable the Holding Company to comply with the requirement of disinvestments without prejudice to its interest as a shareholder; and

(h) That a special majority for decisions of the Board be prescribed in regard to all important matters and provision be made for the appointment of Directors by proportional representation.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

The learned Acting Chief Justice who tried the Company Petition, found several defects and infirmities in the Board's meeting dated May 2, 1977 and concluded that appropriate relief should be granted to the Holding Company under section 398 of the Companies Act. The learned Judge was of the view that the average market value of the rights shares was about Rs. 190 per share on the crucial date and that, since the rights shares were issued at par, the Holding Company was deprived unjustly of a sum of Rs, 8,54,550/- at the rate of Rs. 90/- per share on the 9,495 rights shares to which it was
731
entitled. Exercising the power under section 398(2) of the Companies Act, the learned Judge directed NIIL to make good that loss which, according to him, could have been avoided by it "by adopting a fairer process of communication" with the Holding Company and "a consequential dialogue" with them, in the matter of the issue of rights shares at a premium. The learned Judge directed NIIL to pay to the Holding Company the aforesaid sum of Rs. 8,54,550/- as a "solatium" in order to meet the ends of justice.

Being aggrieved by the aforesaid judgment, the Holding Company filed O.S. Appeal No. 64 of 1978 while NIIL filed cross objections to the decree. The appeal and cross-objections were argued before the Division Bench of the High Court on the basis of affidavits, the correspondence that had passed between the parties and certain additional documents which were filed before the Appellate Court by consent of parties. Though the Company Petition was filed under section 397 as also under section 398 of the Companies Act and though the trial court had granted partial relief to the Holding Company under section 398, it was stated in the Appellate Court on its behalf that its entire case was based on section 397 and that it did not want to invoke the provisions of section 398. A similar statement was made before us also.

On a consideration of the matters and material before it, the Division Bench formulated its view in the form of 18 conclusions on various aspects of the case. They may be summed up thus:

(a) As soon as Devagnanam became involved in the far eastern ventures of NEWEY, he decided to sell his share- holding in NIIL to an Indian concern or party from which he expected to receive at least a part of the consideration in a foreign country.

(b) Seeing that Coats were opposed to his receiving any part of the consideration for the sale of his shares in a foreign country, Devagnanam decided not to part with his shares but to obtain the control of the Company.

(c) The directives of the Reserve Bank of India on the question of Indianisation were exploited by Devagnanam for compelling the Holding Company to part with its shares in favour of the Indian shareholders.

732

(d) Coats were willing to carry out the directives of the Reserve Bank but they did not want to transfer their shares to the existing Indian shareholders because thereby, the latter would have acquired a controlling interest in NIIL which Coats wanted to prevent. Coats were willing to part with their excess shares in favour of other Indian residents.

(e) Though Coats originally contemplated the transfer of 15% of their excess 20% shares to Madura Coats,

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

or the incorporation of a company to take over their excess 20% shares, they were ultimately agreeable that the existing Indian shareholders should get 9% out of that 20% so as to have a 49% holding in the share capital of NIIL and that 11% should go to new, independent, Indian Institutional shareholders. The object of Coats was that any one group of shareholders should not have a dominating position in the affairs of NIIL.

(f) At the Ketti meeting held on October 20 and 21, 1976, the issue of rights shares was considered as an alternative to disinvestment, but that was subject to two conditions: one, that it should be shown that there was a viable development plan which required additional funds which the existing cash flow of NIIL could not meet, and two, that the value of the U.K. equity interest required to be transferred would be no less favourable than what would be achieved by a direct sale of that interest.

(g) Though by his letters of December 11 and 14, 1976 Devagananam had informed Raeburn of the decision of the Indian shareholders to acquire 60% shares for themselves, he did not ever say one word about the issue of rights shares in any of the numerous communications which he sent to Raeburn. No reference was made to the issue of rights shares even in the memorandum of discussions which took place during the visit of Devagnanam to U.K. from March 29-31, 1977. Thus, the issue of rights shares was sprung as a surprise on the U.K. shareholders.

733

(h) The notice dated March 13, 1977 for the meeting of the Board of Directors held on April 6, 1977 referred to the main item on the agenda in ambiguous terms as: "Policy-Indianisation". In the context of the discussions which had taken place until then between the parties, N.T. Sanders who represented the Holding Company on the Board had no means or opportunity of knowing that the particular item on the agenda involved the question of the issue of rights shares.

(i) Since every major decision was taken by the Board of Directors in consultation with the Holding Company and since there was no agenda for the appointment of an additional Director under article 97 of Articles of Association of NIIL, the decision taken by the Board in its meeting of April 6 on the issue of rights shares and the appointment of Silverston as an Additional Director constituted a departure from established practice and showed want of good faith and lack of fair play on the part of the Board of Directors of NIIL.

(j) The letter dated April 12, the letter of offer dated April 14 and the notice for meeting of the Board of Directors to be held on May 2, were all got posted by Devagnanam as late as on April 27, 1977 at Madras, so as to ensure that these important documents should not reach the Holding Company in time to enable it to participate in the all important meeting of the 2nd. Davagnanam wanted to present a fait accompli to the Holding Company so as to prevent it from taking any

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

preemptive action.

(k) Whenever NIIL wrote to the Reserve Bank alleging that the Holding Company was not willing to carry out the directives of the Bank or to comply with the provisions of FERA, its object was to prejudice the Bank against the Holding Company by drawing a red-herring across the track.

(l) The directives of the Reserve Bank of India had the provisions of FERA were not concerned with who should be the Indian shareholders of NIIL. All that they were concerned with was that 60% of the share-

734

holding must be with the Indian residents. For the purpose of achieving that result, three courses were available to NIIL: (1) Disinvestment by foreign shareholders in favour of Indian shareholders; (2) Issue of rights shares pursuant to section 81 of the Companies Act, and (3) Action under section 81 (1-A) of the Companies Act for issuing additional shares to Indian residents other than the existing Indian shareholders by passing an appropriate special resolution, or if no special resolution was passed, then, by a majority of the shareholders approving such a course with the consent of the Central Government. The first course was ruled out since Coats had taken a definite stand that they will not allow the existing Indian shareholders to obtain the excess shares. As far as the second alternative was concerned, the Holding Company had the right to renounce shares offered to it in favour of any other person under section 81 (1) (c) of the Companies Act, which right was denied to it because, the letter of offer dated April 14 did not contain a statement regarding renunciation of the right to take shares and also because that letter was not posted in time. As regards the third course, if the Holding Company were given adequate notice of the proposal to issue rights shares, it might have taken appropriate action under section 81 (1-A) of the Companies Act.

(m) The object of the Directors of NIIL in deciding upon the issue of rights shares, and that too in the manner in which they did so, was clearly to obtain control of the Company and to eschew and eliminate the controlling power which the Holding Company had over NIIL. The conversion of the existing minority of Indian shareholders into a majority, far from being a matter of statutory compulsion, was an act of self-aggrandizement on the part of the existing Indian shareholders.

(n) The action taken by the Indian shareholders was against the interest of the Company itself because the rights shares were issued at par which was far below their market price.

(o) The true motivation of the various steps taken by the Devagnanam-NEWEY Combination was the furtherance

735

of the interest of NEWEY's Far-Eastern enterprises, coupled with the personal interest of Devagnanam himself. Devagnanam was receiving Rs. 96,000/- per annum in addition to substantial fringe benefits as the Managing Director of NIIL.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

He was also getting a large salary from NEWEY which was $10,000 in 1075 $11,000 in 1976 and $12,000 for the Year ending July 31, 1977.

(p) The fact that NIIL informed the Holding Company on May 21, 1977 which was after the Company Petition was filed, that the Holding Company could not exercise and will not be allowed to exercise any rights in respect of the whole of 18,990 shares held by it since its application under section 29 (4) of FERA was not granted by the Reserve Bank shows that the object of the Board of Directors in taking the impugned decision was to exclude the Holding Company from all control over NIIL. That is why NIIL advised the Reserve Bank of India by its letter dated May 24, 1977 that no application for holding any shares by a non-resident should be allowed by the Bank without the knowledge and consent of NIIL. That also is the reason why NIIL conveyed to the Reserve Bank by its letter of September 20, 1977 that until such time as the Company Petition was finally disposed of, no licence should be issued to non-resident shareholders and no remittance of dividend out of India should be permitted with out the non-resident share-holders reducing their holding in NIIL to less than 40%.

The two other conclusions are comprehended within the 16 set out above.

On the basis of the aforesaid formulations, the Division Bench concluded that the affairs of NIIL were being conducted in a manner oppressive, that is to say, burdensome, harsh and wrongful to the Holding Company. After referring to certain passages from Palmer's Company Law and Gore-Browne on Companies, and the decisions of the House of Lords, this Privy Council, and our own Courts including the Supreme Court, the Division Bench held that since the action of the Board of Directors of NIIL was not in the interest of the Company but was taken merely for the purpose of
736
welding the Company into NEWEY's Far Eastern complex, it was just and equitable to wind up the Company.

NIIL had filed cross-objections in the High Court appeal contending that, in any event, the learned Acting Chief Justice was in error in directing it to pay the sum of Rs. 8, 54,550/- to the Holding Company. While dealing with the cross-objections, the Division Bench held that the injury suffered by the Holding Company on account of the oppression practised by the Board of Directors of NIIL could not be remedied by the award of compensation and, therefore, the action of the Board of Directors in issuing the rights shares had to be quashed. Having found that the Holding Company was entitled to relief under section 397 of the Companies Act and the award of solatium made by the trial Court was not the appropriate relief to grant, the Division Bench allowed the appeal filed by the Holding Company, dismissed the cross-objections in substance and adjourned the appeal for a fortnight for hearing further arguments on the nature of the relief to be granted in the case.

Eventually, by its order dated October 26, 1978 the Division Bench granted the following reliefs:

(a) Devagnanam was removed forthwith both as the Managing Director and Director of NIIL and was asked to vacate the bungalow occupied by him, by November 1, 1978. He was paid one Year's remuneration as compensation for the termination

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

of his appointment as the Managing Director.

(b) The Board of Directors was superseded and an interim Board consisting of nine directors proposed by the Holding Company was constituted, with Shri M.M. Sabharwal as an independent Chairman.

(c) Harry Bridges, an executive of COATS, was appointed as the Managing Director for a period of four months.

(d) The rights issue made on 6th April, 1977 and the allotment of shares made on 2nd May, 1977 at the Board meetings were set aside and the Interim Board was directed to make a fresh issue of shares at a premium to the existing shareholders, including the Holding Company which was to have a right of renunciation. The new Board was directed to apply to the Controller

737

of Capital Issues for determining the amount of premium.

(e) The Articles of Association were to be altered by appropriate additions and deletions in order to provide for election of Directors by proportional representation; and

(f) Devagnanam was asked to pay to the Holding Company the costs of appeal and cross-objections quantified at Rs. 25,000/-. He was also asked personally to reimburse the expenses incurred by NIIL in the appeal and cross-objections.

These appeals were heard in the first instance by Justice Untwalia and Justice Pathak. In view of the importance of the questions arising therein, on some of which our learned Brothers, it seems, were unable to agree, they desired that the appeals be heard by a larger Bench. That is how the appeals are now before us.

The petition of the Holding Company out of which these appeals arise sought relief under sections 397 and 398 of the Companies Act, 1956. The case under section 398 not having been pressed except before the learned trial Judge, we are only concerned with the question whether the Holding Company is entitled to relief under section 397 which reads thus:

"397(1)-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 Court for an order under this section: provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1) the Court is of the opinion:

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that other-

738

wise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Section 398 provides for relief in cases of mismanagement. Section 399(1) restricts the right to apply under sections 397 and 398 to persons mentioned in clauses (a) and (b) of sub-section (1)

It is necessary to refer briefly to the relevant part of the pleadings before examining the charge of oppression made by the Holding Company against a group of the minority shareholders of NIIL After tracing the history of formation and composition of NIIL, the company petition states that the management of NIIL was in the hands of the Board of Directors in which the Indian group had a large majority. The Holding Company had implicit trust in them and was content to leave the management in their hands. After referring to the impact of section 43A of the Companies Act, the company petition says that in the wake of FERA, discussions and negotiations were held between the representatives of the Holding Company and the Management of NIIL amongst themselves as well as with the Reserve Bank of India, in order to enable NIIL to obtain the requisite permission for carrying on its business. Paragraph 13 of the company petition states that the Reserve Bank of India by its letter dated May 11, 1976 granted to NIIL the necessary permission subject to the condition, inter alia, that it reduced non-resident shareholding to 40 per cent on or before May 17, 1977. The case of the Holding Company in regard to its own attitude is stated succinctly in paragraph 14 of the company petition which may with advantage be reproduced:

> "Discussions were thereafter held on a number of occasions between the petitioner and the management of the Company to effectuate the aforesaid condition imposed by the Reserve Bank of India which the petitioner was at all times ready and willing to comply with. The petitioner did not, however, desire to dilute its holding of shares in the company by a further issue of capital and preferred to effectuate the said intention by disinvesting or selling 20% of its holding in the company. The Reserve Bank of India was agreeable to such dilution taking place by the petitioner selling a part of its holding to an Indian resident or Indian residents. The Reserve Bank had indicated that
>
> 739
>
> they would be willing for such dilution taking place by a further issue of shares provided that additional capital was required for purposes of expansion. The petitioner was not willing to sell a part of its holding to the Indian group as such a sale would result in the Indian group acquiring an absolute majority interest. Further more under the Articles of Association of the Company the consent of the existing shareholders would be required (apart from the approval of the Reserve Bank) before the petitioner sold any of its shares to an Indian party, other than to a member."

According to the Holding Company, the various steps which culminated in the allotment of rights shares to the existing Indian shareholders were vitiated by mala fide, their dominant object being to convert an existing minority into a majority. The decision taken in the meeting of the Board on April 6, 1977 was taken deliberately in haste and hurry in order to pre-empt any action by the Holding Company to restrain the Board from taking the desired decision. The Reserve Bank, according to the company petition, would not have been so unreasonable as not to extend the time for complying with its directive, especially since the Holding Company had agreed in principle to dilute its holding and

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

the only difference between the parties was as regards the method by which such dilution was to be effected. In Paragraph 27 of the company petition it is stated that the Devagnanam group decided to issue the rights shares with a view to securing an illegal and unjust advantage for itself, for improving its own position in the Company and in order to deprive the Holding Company of its lawful rights as majority shareholders. In this behalf, reliance is placed on the following facts and circumstances, inter alia:

(a) The Holding Company was never informed of any specific proposal to make the rights issue.

(b) The notice of the Board meeting of April 6, 1977 did not refer to the said proposal.

(c) The notice offering rights shares to the Holding Company was not prepared till April 14 and was not posted till April 27, 1977. By the time the notice was received by the Holding Company, the Board of NIIL had met to allot the rights shares.

740

(d) The time given in the notice was much less than was customary.

(e) The notice did not contain a statement relating to the right of the shareholders to renounce the rights shares.

(f) The notice of the Board meeting of May 2, although dated 19th April 1977, was posted to Sanders on 27.4.1977, thereby ensuring that it would reach him only after the date of the meeting.

(g) By issuing shares at par, though their value was much higher than Rs. 100/- per share, existing Indian share holders were enabled to acquire the shares at a gross undervalue and the Company was put to a heavy loss.

(i) The Reserve Bank of India had indicated that dilution of the foreign holding by a rights issue could be considered if the Company required further capital for expansion. At the discussions and negotiations held between the Holding Company and the Indian group it was inter alia agreed that the rights issue would be made only if there was a viable development plan requiring further funds. The rights issue was made even though no such need for expansion or development existed or was referred to.

(j) Though the Reserve Bank had inter alia stipulated that the said dilution should be effectuated on or before 17th May, 1977, the time-schedule is never strictly insisted upon. There have been numerous instances when the Reserve Bank has granted reasonable extension of time to comply with such conditions. The Board of NIIL never requested the Reserve Bank to grant further time. C. Doraiswamy, the 8th respondent stated in his letter dated 9.5.1977 to Mackrael, a Director of the Holding Company, that it would have been possible for the Company to get further time from the Reserve Bank of India.

The Holding Company contends further that M.J. Silverston was not a disinterested person, that his vote on the resolution for the

741

issue of rights shares had therefore to be ignored in which case there was no quorum of two disinterested directors and that his appointment as an Additional Director was not valid since the notice for the meeting of the Board of Directors

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

to be held on 6.4.1977 did not contain in the agenda any subject regarding appointment of an additional Director under Article 97 of the Company's Articles of Association.

In answer to these contentions, Devagnanam filed an elaborate counter-affidavit on his behalf as well as on behalf of NIIL. In that counter-affidavit, every one of the material contentions put forward by the Holding Company has been denied or disputed. Devagnanam contends that it was the Holding Company which wanted to retain its control over NIIL contrary to the directive of the Reserve Bank of India, the national policy of the Central Government and the provisions of FERA. According to Devagnanam, every action taken in the Board meetings of 6.4.1977 and 2.5.77 was in accordance with law, that Sanders never used to attend the meetings of the Board, being a non-resident he was not entitled to have notice of the Board meetings, that there was no violation of section 81 of the Companies Act at all, that section 81 (c) of the Companies Act did not apply to the present case and that, in view of the attitude adopted by Coats, NIIL, in order to comply with the restrictions imposed by the Reserve Bank and to carry out its directive, had no option but to decide upon the issue of rights shares to bring about the reduction in the non-resident shareholding. Devagnanam repudiates emphatically the charge of mala fides or of conduct in breach of the fiduciary duty of NIIL's Board of Directors.

Having regard to these pleadings, the main question for consideration is whether the decisions taken in the meetings of the Board of Directors of NIIL on April 6 and May 2, 1977 constitute acts of oppression within the meaning of section 397 of Companies Act, 1956. The High Court has answered this question in the affirmative and has issued consequential directions in regard to the management of NIIL's affairs. The findings recorded by the High Court in appeal have been challenged before us with vehemence and ability in an equal measure, matched equally in both respects on either side. Learned counsel who led the arguments on the rival sides, Shri F.S. Nariman for the appellants and Shri H.M. Seervai for the respondents, have drawn our attention in copious details to
742
the correspondence that transpired between the parties, the correspondence with the Reserve Bank of India, the discussions at Ketty and Birmingham which preceded the impugned decisions, the conduct of Devagnanam as a man and a Managing Director, the attitude of Coats stated to arise out of their world-wide business interests and the predicament of NEWEY which was willing to strike but was afraid to wound its partner Coats. We have also been taken through several decisions and texts bearing particularly on:

(a) The meaning of 'oppression' of the members of a Company within the terms of section 397 and the circumstances in which a Company can be wound up under the just and equitable clause under section 433 (f) of the Companies Act, 1956;

(b) The approach which the court should adopt in cases wherein mala fides and abuse of power on the part of Directors are alleged but no oral evidence is led;

(c) The fiduciary powers of Directors in issuing shares;

(d) The impact of the provisions of the Foreign Exchange Regulation Act, 1973 with particular reference to section 2 (p), (q) and (u) and section 29;

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

(e) The question as to whether it is necessary to issue a prospectus under section 81 (1) (c) of the Companies Act;

(f) The constraints on public and private companies under the Companies Act, and their duties and obligations, with particular reference to sections 2 (35), 2(37), 3 (1) (iii) and (iv) and sections 43A and 81 of the Companies Act;

(g) The relationship of partnership between the Indian shareholders, Coats and NEWEY who owned respectively 40%, 30%, and 30% of the shareholding in NIIL;

(h) The question whether Silverston was an 'interested' Director within the meaning of section 300 of the Companies Act; and

(i) Whether Silverston's appointment as an Additional Director in the meeting of the Board held on April 6, 1977 was, in the circumstances, valid.

743

Coming to the law as to the concept of 'oppression' section 397 of our Companies Act follows closely the language of section 210 of the English Companies Act of 1948. Since the decisions on section 210 have been followed by our Court, the English decisions may be considered first. The leading case on 'oppression' under section 210 is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer. (1) Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant society could justly be described as having behaved towards the minority shareholders in an 'oppressive' manner, that is to say, in a manner "burdensome, harsh and wrongful". The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that section 210 "warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view". Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, "which is common to partnership, that there should be the utmost good faith between the constituent members". Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of section 210 (page 344 per Lord Keith; pages 368-369 per Lord Denning).

In Meyer (supra) above referred to, the House of Lords was dealing with a case in which the appellant company was accused of having committed acts of oppression against its subsidiary. In that context it was held that the parent company must, if it is 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. In Re Associated Tool Industries Ltd. (2) of which judgment a photographic copy was supplied to us, Joske J. held that the rule in Meyer (supra) involved the consequence that the subsidiary companies must also exercise good faith to the holding company and not merely that the latter should so act to the former.

744

In an application under section 210 of the English Companies Act, as under section 397 of our Companies Act,

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

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. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in Meyer, (supra) received further and closer consideration in Ebrahim v. Westbourne Galleries Ltd.,(1) wherein Lord Wilberforce considered the scope, nature and extent of the 'just and equitable' principle as a ground for winding up a company. The business of the respondent company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order under section 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words 'just and equitable' which occur in section 222 (f) of the English Act, corresponding to our section 433 (f), were not to be construed ejusdem generis with clauses (a) to (e) of section 222 corresponding to our clauses (a) to (e) of section 433. Lord Wilberforce observed that the 'words' just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure:

> "The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way". (p 379)

745

Observing that the description of companies as "quasi-partnerships" or "in substance partnerships" is confusing, though convenient, Lord Wilberforce said:

> "company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in". (p 380)

Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another context:

> "Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances." (pp 374-375)

In his judgment in Re Westbourne Galleries (supra) Lord Wilberforce has referred at two places to the decision in Blissett v. Daniel, (1) which is recognised as the leading authority in the Law of Partnership on the duty of utmost good faith which partners owe to one another. Lindley on Partnership (14th Edition, pages 194-95) cites Blissett v. Daniel (1) as an authority for the proposition that:

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

> "The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour".

The fact that the company is prosperous and makes substantial profits is no obstacle to its being wound up if it is just and equitable to do so. This position was accepted in the decision of the Court of Appeal in Re Yenidge Tobacco Co. (2) and of the Privy Council in Loch v. John Blackwood (3).

746

The question sometimes arises as to whether an action in contravention of law is per se oppressive. It is said, as was done by one of us, N.H. Bhagwati J. in a decision of the Gujarat High Court in S.M. Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co., (1) that "a resolution passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company". On this question, Lord President Cooper observed in Elder v. Elder (2):

> "The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the 'just and equitable' jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the 'just and equitable' jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy".

Neither the judgment of Bhagwati J. nor the observations in Elder are capable of the construction that every illegality is per se oppressive or that the illegality of an action does not bear upon its oppressiveness. In Elder a complaint was made that Elder had not received the notice of the Board meeting. It was held that since it was not shown that any prejudice was occasioned thereby or that Elder could have bought the shares had he been present, no complaint of oppression could be entertained merely on the ground that the failure to give notice of the Board meeting was an act of illegality. The true position is 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

747

the object is to cause or commit the oppression of persons against whom those acts are directed. This may usefully be illustrated by reference to a familiar jurisdiction in which a litigant asks for the transfer of his case from one Judge to another. An isolated order passed by a Judge which is contrary to law will not normally support the inference that

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

he is biassed; but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biassed and that the party complaining of the orders will not get justice at his hands.

In England, after the decision of the House of Lords in Meyer, (supra) a restricted interpretation has been given to section 210 by the Court of Appeal in re Jermyn St. Turkish Baths,(1) which has adversely criticised by writers on Company Law (see Palmer's Company Law, 22nd ed., page 613, paras 57-06, 57-07; Gore Brown on Companies, 43rd ed., para 28-12). In India, this restrictive development has no place, for, in S.P. Jain v. Kalinga Tubes, (2) Wanchoo J. accepted the broad and liberal interpretation given to the Court's powers in Meyer.

In Kalinga Tubes, Wanchoo J. referred to certain decisions under section 210 of the English Companies Act including Meyer (supra) and observed:

> "These observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each is whether the conduct of the affairs of the 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 section 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,
>
> 748
>
> continuing upto 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 of 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.....with reference to section 397".
>
> (page 737)

At pages 734-735 of the judgment in Kalinga Tubes, Wanchoo J. has reproduced from the judgment in Meyer, the five points which were stressed in Elder. The fifth point reads thus:

> "The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order".

It is clear from these various decisions that on a true construction of section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had suggested the substitution of the word 'Oppression' in section 210 of the English Act by the words 'unfairly prejudicial' in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see Gower's Company Law, 4th edn., page 668). But that recommendation was not accepted and the English Law remains the same as in Meyer and in Re H.R.
749
Harmer Ltd., (1) as modified in Re Jermyn St. Turkish Baths. (supra) We have not adopted that modification in India.

Having seen the legal position which obtains in cases where a member or members of a company complain under section 397 of the Companies Act that the affairs of the company are being conducted in a manner oppressive to him or them, we can proceed to consider the catena of facts and circumstances on which reliance is placed by the Holding Company in support of its case that the conduct of the Board of Directors of NIIL constitutes an act of oppression against it. There is, however, one matter which has to be dealt with before adverting to facts, namely, the provisions of FERA their impact on the working of NIIL and on the right of the Holding Company to continue to hold its shares in NIIL. This we consider necessary to discuss before an appraisal of the factual situation since, without a proper understanding of the working of FERA, it would be impossible to appreciate the turn of intertwined events. It is in the setting of FERA that the significance of the various happenings can properly be seen.

The Foreign Exchange Regulation Act, 46 of 1973, is "An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country". It repealed the earlier Act, namely, The Foreign Exchange Regulation Act, 1947, and came into force on January 1, 1974.

"Person resident in India" is defined in clause (p) of section 2 to mean:

(i) a citizen of India, who has, at any time after the 25th day of March 1947, been staying in India, but does not include a citizen of India who has gone out of, or stays outside, India, in either case-
  (a) for or on taking up employment outside India, or
  (b) for carrying on outside India a business or vocation outside India, or
750
  (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(ii) a citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of sub clause (i) to be resident in India, returns to or stays in India, in either case-
  (a) for or on taking up employment in India, or
  (b) for carrying on in India a business or vocation in India, or

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

"Person resident outside India" according to clause (q) means "a person who is not resident in India". Under clause (u) "security" means "shares, stocks, bonds," etc.

Section 19 (1) provides:

"Notwithstanding anything contained in section 81 of the Companies Act, 1956, no person shall, except with the general or special permission of the Reserve Bank.

... ...

(a) take or send any security to any place outside India;

(b) transfer any security, or create or transfer any interest in a security, to or in favour of a person resident outside India;

(d) issue, whether in India or elsewhere, any security which is registered or to be registered in India, to a person resident outside India;"

Section 29 which is directly relevant for our purpose reads thus:

751

"29. (1) Without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent, or any branch of such company, shall not, except with the general or special permission of the Reserve Bank,-

(a) carry on in India, or establish in India a branch, office or other or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under section 28; or

(2) (a) where any person or company (including its branch) referred to in sub-section (1) carries on any activity referred to in clause(a) of that sub-section at the commencement of this Act or has established a branch, office or other place of business for the carrying on of such activity at such commencement, then, such person or company (including its branch) may make an application to the Reserve Bank within a period of six months from such commencement or such further period as the Reserve Bank may allow in this behalf for permission to continue to carry on such activity or to continue the establishment of the branch, office or other place of business for the carrying on of such activity, as the case may be.

(b) Every application made under clause (a) shall be in such form and contain such particulars as may be specified by the Reserve Bank.

(c) Where any application has been made under clause (a), the Reserve Bank may, after making such inquiry as it may deem fit, either allow the application subject to such

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

conditions, if any, as

752

the Reserve Bank may think fit to impose or reject the application:

... ...

(4) (a) Where at the commencement of this Act any person or company (including its branch) referred to in sub-section (1) holds any shares in India of any company referred to in clause (b) of that sub-section, then, such person or company (including its branch) shall not be entitled to continue to hold such shares unless before the expiry of a period of six months from such commencement or such further period as the Reserve Bank may allow in this behalf such person or company (including its branch) has made an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank for permission to continue to hold such shares.

(b) Where an application has been made under clause (a) the Reserve Bank may, after making such inquiry as it may deem fit, either allow the application subject to such conditions, if any, as the Reserve Bank may think fit to impose or reject the application :"

It is clear from these provisions that NIIL, being a Company in which the non-resident interest of the Holding Company was more than 40%, could not carry on its business in India except with the permission of Reserve Bank of India. An application for permission to continue to carry on such business had to be filed within a period of six months from the commencement of the Act or such further period as the Reserve Bank may allow. The time for filing the application was extended in all cases by two months and, therefore, it could be filed by August 31, 1974, NIIL filed its application three days late on September 3, 1974, and the application was granted by the Reserve Bank on certain conditions, by its letter dated May 10, 1976. Under the terms and conditions imposed by the Reserve Bank, the non-resident interest of the Holding Company, which came to about 60%, had to be brought down to 40% within one year of the receipt of the letter dated May 10, 1976, that is to say before May 17, 1977.

753

By reason of section 29 (4) of FERA, the Holding Company too had to apply for permission to hold its shares in NIIL. It applied to the Reserve Bank for a Holding licence on September 18, 1974. The application which was filed late by 18 days is still pending with the Reserve Bank and is likely to be disposed of after the non-resident interest of the Holding Company in NIIL is reduced to 40%.

There is a sharp controversy between the parties on the question as to whether May 17, 1977 was a rigid dead-line by which the reduction of the non-resident interest had to be achieved or whether NIIL could have applied to the Reserve Bank before that date for extension of time to comply with the Bank's directive, in which case, it is urged, no penal consequences would have flown. We will deal later with this aspect of the matter, including the question of business prudence involved in applying to the Reserve Bank for such an extension of time.

Shri Nariman raised at the outset an objection to a finding of mala fides or abuse of the fiduciary position of Directors being recorded on the basis merely of affidavits and the correspondence, against the NIIL'S Board of

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Directors or against Devagnanam and his group. He contends. Under the Company Court Rules framed by this Court, petitions, including petitions under section 397, are to be heard in the open court (Rules 11 (12) and Rule 12 (1), and the practice and procedure of the Court and of the Civil Procedure Code are applicable to such petitions (Rule 6). Under Order XIX Rule 2 of the Code, it is open to a party to request the Court that the deponent of an affidavit should be asked to submit to cross-examination. No such request was made in the Trial Court for the cross-examination of Devagnanam who, amongst all those who filed their affidavits, was the only person having personal knowledge of everything that happened at every stage. Why he did or did not do certain things and what was his attitude of mind on crucial issues ought to have been elicited in cross-examination. It is not permissible to rely argumentively on inferences said to arise from statements made in the correspondence, unless such inferences arise irresistibly from admitted or virtually admitted facts. The verification clause of Mackrael's affidavit shows that he had no personal knowledge on most of the material points. Raeburn who, according to Mackrael, was the Chief negotiator on behalf of the Holding Company in the Birmingham meeting did not file any affidavit at all. Whitehouse, the Secretary
754
of the Holding Company and N.T. Sanders who was the sole representative of the Holding Company on NIIL's Board of Directors, did file affidavits but they are restricted to the question of the late receipt of the letter of offer of shares and the notice for the Board meeting of May 2, 1977. Their affidavits being studiously silent on all other important points and the affidavit filed on behalf of the Holding Company being utterly inadequate to support the charge of mala fides or abuse of the Directors' fiduciary powers, it was absolutely essential for the Holding Company to adduce oral evidence in support of its case or at least to ask that Devagnanam should submit himself for cross-examination. This, according to Shri Nariman, is a fundamental infirmity from which the case of the Holding Company suffers and therefore, this Court ought not to record a finding of mala fides or of abuse of powers, especially when such findings are likely to involve grave consequences, moral and material, to Devagnanam and jeopardise the very functioning of NIIL itself.

In support of his submission, Shri Nariman has relied upon many a case to show that issues of mala fides and abuse of fiduciary powers are almost always decided not on the basis of affidavits but on oral evidence. Some of the cases relied upon in this connection are: Re. Smith & Fawcett Ltd.,(1) Nanalal Zaver v. Bombay Life Assurance,(2) Plexcy v. Mills,(3) Hogg v. Cramphorn(4) Mills v. Mills,(5) Harlowe's Nominees(6) and Howard Smith v. Amphol.(7)

We appreciate that it is generally unsatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit to cross-examination. It is true that men may lie but documents will not and often, documents speak louder than words. But a total reliance on the written word, when probity and fairness of conduct are in issue, involves the risk that the person accused of wrongful conduct is denied an opportunity to controvert the inferences said to arise from the documents. But then, Shri Nariman's objection seems to us a belated attempt to avoid an inquiry into the
755
conduct and motives of Devagnanam. The Company Petition was

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

argued both in the Trial Court and in the Appellate Court on the basis of affidavits filed by the parties, the correspondence and the documents. The learned Appellate Judges of the High Court have observed in their judgment that it was admitted, that before the learned trial Judge, both sides had agreed to proceed with the matter on the basis of affidavits and correspondence only and neither party asked for a trial in the sense of examination of witnesses. In these circumstances, the High Court was right in holding that, having taken up the particular attitude, it was not open to Devagnanam and his group to contend that the allegation of mala fides could not be examined, on the basis of affidavits and the correspondence only. There is ample material on the record of this case in the form of affidavits, correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

Besides, the cases on which counsel relies do not all support his submission that from mere affidavits or correspondence, mala fides or breach of fiduciary power ought not to be inferred. In Re Smith & Fawcett Ltd., (supra) Lord Greene, after stating that he strongly disliked being asked on affidavit evidence alone to draw up inferences as to the bona fides or mala fides of the actors, added that this did not mean that it is illegitimate in a proper case to draw inferences as to bona fides or mala fides in cases, where there is on the face of the affidavits, sufficient justification for doing so. In Nanalal Zaver, (supra) the judgment of Kania C.J. contains a statement at page 394 that 'Considerable evidence was led in the trial Court on the question of hona fides' but it is not clear what kind of evidence was so led and besides, the fact that oral evidence was led in some cases does not mean that it must be led in all cases or that without it, the matter in issue cannot be found upon. We may mention that in Punt v. Symons,(1) Fraser v. Whalley(2) and Hogg v. Cramphorn, (supra) the breach of fiduciary duty was inferred from affidavit evidence.

We have therefore no hesitation in rejecting the submission that we ought not to record a finding of mala fides or abuse of fiduciary power on the basis of the affidavits, correspondence and the
756
other documents which are on the record of the case. May it be said that these are on the record by consent of parties. Not merely that, but more documents were placed on the record, mostly by consent of parties, as the case progressed from stage to stage. A very important document, namely, Devagnanam's telex to Raeburn dated May 25, 1977 was put on the record for the first time before us since Shri Nariman himself desired it to be produced, waiving the protection of the caveat "without prejudice". That shows that the parties adopted willingly a mode of trial which they found to be most convenient and satisfactory.

That takes us to the question as to whether on the basis of the material which is on the record of the case, it can be said that the decision taken by NIIL's Board of Directors in their meetings of April 6 and May 2, 1977 constitute acts of oppression as against the Holding Company. The case of the Holding Company as put forward by Shri Seervai is like this:

(i) Devagnanam kept Raeburn and Coats under the impression that negotiations were still going on and were not to be treated as concluded while, in reality, he had made up his mind to treat the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

matter as at an end.

(ii) He kept the Holding Company in total ignorance of the steps which he was taking in behalf of the issuance and allotment of the rights shares. The copy of the letter of the Reserve Bank dated March 30, 1977 which is said to have spurred the decision taken in the meetings of April 6 was not sent to the Holding Company though Devagnanam had stated in his letters dated April 12 to Raeburn that the said copy was being enclosed along with that letter. Deliberately and designedly, the letter of offer dated April 14, 1977 meant for the Holding Company in England was not posted until April 27. Similarly, the notice calling a meeting of the Board on May 2 was not posted till April 27. The notice to Manoharan too was posted as late as on April 27, since he was believed to be siding with Coats. The letter of offer and the notice of meeting of May 2 which were posted at Madras on April 27 were received by the Holding Company on May 2, after the Board's meeting for allotment of rights shares was held.

757

(iii) The Reserve Bank of India was not informed of the proposal to issue right shares to the existing shareholders although it was the most obvious thing to do, in response to its letter dated March 30, 1977, calling upon NIIL to submit its proposal for reducing its non-resident interest without delay.

(iv) No application was made to the Controller of Capital Issues for fixing the premium on rights shares, not withstanding that the Reserve Bank had informed NIIL, that if necessary, an application to that effect may be made to the Controller of Capital Issues.

(v) The whole idea was to cut off all sources of information from Raeburn and Coats and to confront them with the fait accompli of the allotment of rights shares to the Indian shareholders, including the shares formally offered to the Holding Company which were not allotted to it on the ground of its non-compliance with the letter of offer.

(vi) The agenda of the meetings of April 6 and May 2, 1977 was purposely expressed in vague terms: 'Policy- Indianisation', in order that the Holding Company should not know that the reduction of the non-resident interest was proposed to be effected by the issue of rights shares. By suppressing from the knowledge of the Holding Company what was its right to know, and what was the duty of the Board's Secretary to convey to it, Devagnanam succeeded in achieving his purpose on the sly and pre-empted any action by the Holding Company to restrain the holding of the meeting, the issue of rights shares and the allotment thereof exclusively to the existing shareholders (barring Manoharan).

(vii) Silverston was appointed as an additional Director in the meeting of April 6 to make up the quorum of two "disinterested" directors even though he was in the true sense not a disinterested person in the decision taken in that meeting. The appointment of additional directors was not even

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

an item on the agenda of the meeting.

758

(viii) Devagnanam was emboldened to take this course because he believed that no matter how wrongful his conduct, he could count upon the support of NEWEY to see that he was not brought to book in a court of justice for his wrongful conduct. He even attempted to thwart the Company Petition and render it infructuous by persuading NEWEY to withdraw the power of attorney executed by them, authorizing the filing of the petition.

(ix) In these machinations, Devagnanam was actuated by the sole desire to acquire the control of NIIL for his personal benefit, by ousting the Holding Company from its control over the affairs of NIIL.

(x) In fact, the rights shares were issued at par, though their market value was far greater, as a measure of personal aggrandisement in the supposition and forethought that such shares will inevitable go to Devagnanam and his group. This was blatantly in breach of the fiduciary obligation of the Directors.

(xi) By these means and methods, which totally lacked in probity, Devagnanam succeeded in converting the existing majority into a minority and the minority into a majority, a conduct which is burdensome, harsh and unlawful, qua the existing majority.

According to Shri Seervai, the question before the Court is not whether the issue of rights shares to the existing Indian shareholders only, amounted to oppression but whether, the offer of rights shares to all existing shareholders of NIIL but the issue of rights shares to existing Indian shareholders only, constituted oppression of the Holding Company on the facts and circumstances disclosed in the case. This argument raises questions regarding the interpretation of sections 43A and 81 of the Companies Act, 1956.

These contentions of the Holding Company have been controverted by Shri Nariman, according to whom, the appellate Court has taken a one-sided view of the matter which is against the weight of evidence on the record. Counsel contends that Devagnanam had done all that lay in his power to persuade the Holding Company to disinvest so as to reduce its holding in NIIL to 40%, that the Direc-

759

tors of NIIL were left with no option save to decide upon the issue of rights shares, since disinvestment was a matter of the Holding Company's volition, that the wording of the agenda of the meetings of April 6 and May 2 conveyed all that there was to say on the subject since, in the background of the negotiations which had taken place between the parties, it was clear that what was meant by 'Policy-Indianization' and 'Allotment of Shares' was the allotment of rights shares in order to effectuate the policy of the Reserve Bank that the Indianization of the Company should be achieved by the reduction of the non-resident holding to 40% that Coats refused persistently, both actively and passively, either to disinvest or to consider the only other alternative of the issue of rights shares, and that the impugned decisions were taken by the Board of Directors objectively in the larger interests of the Company. According to Shri Nariman, Coats left no doubt by their attitude that their real interest lay in their worldwide business and they wanted to bring the working of NIIL to a grinding halt with a view to eliminating an established

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

competitor from their business. It is denied by counsel that important facts or circumstances were deliberately suppressed from the Holding Company or that the letter of offer and the notice of the Board's meeting of May 2 were deliberately posted late on April 27. It is contended that neither by the issue of rights shares nor by the failure to give the right of renunciation to the Holding Company was any injury caused to its proprietary rights as a shareholder in NIIL. As a result of the operation of FERA, the directives issued by the Reserve Bank thereunder and because of the fact that NIIL had retained its old Articles after becoming a public company under section 43A of the Companies Act, the Holding Company could neither have participated in the issue of rights shares nor could it have renounced the rights shares offered to it in favour of an outsider, not even in favour of a resident Indian Company like Madura Coats. It is denied that Silverston was not a disinterested Director or that his appointment as an additional Director was otherwise invalid. Counsel sums up his argument by saying that the Board of Directors of NIIL had in no manner abused its fiduciary position and that far from their conduct being burdensome, harsh and wrongful, it was the attitude of Coats which was unfair, unjust and obstructive. Coats having come into an equitable jurisdiction with unclean hands, contends Shri Nariman, no relief should be granted to them assuming for the sake of argument that Devagnanam from the position of Managing Director, are characterised by counsel as wholly uncalled for, transcending the exigencies of the situation.
760

It seems to us unquestionable that Devagnanam played a key role in the negotiations with the Holding Company and ultimately master-minded the issue of rights shares. He occupied a pivotal position in NIIL, having been its Director for over twenty years and a Managing Director over fifteen years, in which capacity he held an undisputed sway over the affairs of NIIL. The Holding Company had nominated only one Director on the Board of NIIL, namely, N.T. Sanders, who resided in England and hardly ever attended the Board's meetings. Devagnanam was thus a little monarch of all that he surveyed in Ketty. He had a large personal stake in NIIL's future since he and his group held nearly 30% shares in it, the other Indian shareholders owning a mere 10%. In the 60% share capital owned by the Holding Company, Coats and NEWEY were equal sharers with the result that Coats, NEWEY and Devagnanam each held an approximately 30% share capital in NIIL. This equal holding created tensions and rivalries between Coats and Devagnanam, NEWEY preferring to side with the latter in a silent, unspoken manner. Eventually. after the filing of the Company Petition, Coats bought over NEWEY's interest in NIIL sometime in July 1977.

The picture which Devagnanam has drawn of himself as a person deeply committed to Ketty, and as having built up the business with scrupulous regard to the observance of Foreign Exchange Regulations and Indian Laws in contradistinction to Coats who, he alleged, wanted to contravene the Foreign Exchange Regulations of our country is not borne out by the correspondence. In fact, the letter which he wrote to Shread of Newey-Goodman Ltd. on August 11, 1973 (which was filed by consent in the Appeal Court) shows that he wanted to dispose of his shares at a large premium by officially receiving the par value in Rupees in India and obtaining the balance in foreign currency outside India. Nevertheless, he stated on oath in para 13 of his rejoinder affidavit that "it is not true that in selling my shares, I wanted a part of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

consideration in foreign exchange". The said letter discloses that over and above proposing to make a large profit in contravention of the Foreign Exchange Regulations and the tax laws of India by receiving money outside India, Devagnanam proposed to take away from Ketty its "select key personnel and technicians" to Malacca and to manufacture competitively, products which were then manufactured by Needle Industries, U.K. The foot note to the letter to Shread asked him to keep these matters secret from Coats till the shares had been sold, and till the deed had been done.

761

There is another aspect of Devagnanam's conduct to which reference must be made. The statement made by him in para 15 of his reply affidavit denying that he was a non-resident is not entirely true because at least between August 26, 1974 and June 9, 1976 he was a non-resident within the meaning of section 2 (p) (i) (a) of FERA. By his letter dated August 26, 1974 to the Reserve Bank, he asked, though out of abundant caution, for permission under section 29 (4) of FERA to hold his shares in NIIL. He referred in that letter to his contract with Newey and Taylor under which he was to be a full-time Managing Director of that Company for five years from August 1, 1974 to July 31, 1979 and asked the Reserve Bank to determine his status. On September 3, 1975 he wrote to the Reserve Bank contending that he was a 'resident', referring this time not to his contract with Newey-Taylor but to the agreement between NILL and Newey Goodman Ltd., a Company about to be formed, under which he was to be on deputation with it as an employee of NIIL.

Devagnanam's letter dated August 11, 1973 to Shread of Newey-Goodman, the gloss which he put on his status as a resident in his letters to the Reserve Bank dated August 26, 1974 and September 3, 1975 and the clever manner in which he had his status determined as a resident, cast a cloud on his conduct and credibility. And though, as contended by Shri Seervai, we do not propose to apply to Devagnanam's affidavit-evidence the rule of 'corroboration in material particulars' which is generally applied in criminal law to accomplice evidence, we shall have to submit Devagnanam's conduct to the closet scrutiny and statements made by him, from time to time, to the most careful examination. We shall have to look to something beyond his own assertion in order to accept his claim or contention.

Shri Nariman attacked the conduct of Coats almost as plausibly as Shri Seervai attacked that of Devagnanam, though in terms of a saying in a local language we may say that 'a brick is softer than a stone', Coats being the brick. Coats, as will presently appear, are not to be outdone by Devagnanam in the matter of lack of business ethics. But that is no wonder because when the dominant motivation is to acquire control of a company, the sparring groups of shareholders try to grab the maximum benefit for themselves. If one decides to stay on in a company, one must capture its control. If one decides to quit, one must obtain the best price for one's

762

holding, under and over the table, partly in rupees and partly in foreign exchange. Then, the tax laws and the foreign exchange regulations look on helplessly, because law cannot operate in a vacuum and it is notorious that in such cases evidence is not easy to obtain.

Alan Mackrael says in paragraph 20 of his reply affidavit in the Company Petition that it was made clear to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Devagnanam that neither Coats nor the Needle Industries (U.K.) would ever be a party to any transaction which was illegal under the Indian law. In a letter dated May 24, 1976 to Devagnanam, A.D. Jackson of NEWEY has this to say:-

> "In broad terms the proposition is that Alan Mackrael, Martin Henry and myself should meet with you in Malacca during September to discuss arrangements whereby an Indian gentleman known to Coats would purchase both your shares and our own share of the NINTH holding in the manner which I outlined to you on the telephone. In order to provide a base for the calculations, Kingsley is to be asked to obtain the government approved price but, of course, the basis of our discussions has been that the actual payment will be higher than this".

In the same letter Jackson, after warning that Coats/Needle Industries (U.K.) are "certainly not going to relinquish control of Ketty without a major struggle", proceeds to describe the helpless condition of NEWEY by saying that in the financial position in which they found themselves, they were "in no state to do battle with this particular giant". Leaving aside the determination of Coats to engage in a major struggle with NIIL's Board of Directors, Jackson's letter leaves no doubt that Coats were willing to be a party to the arrangement whereby the shares of Devagnanam and NEWEY would be sold to an 'Indian gentleman', under which the actual payment would be higher than the government approved price ascertained by Kingsley, the Secretary of NIIL. This is doubtful ethics which justifies Shri Nariman's argument that he who comes into equity must come with clean hands; if he does not, he cannot ask for relief on the ground that the other man's hands are unclean. The "Notes on further Indianization" made by Devagnanam on April 29, 1975, at a time when the relations between the parties were not under a strain, show that N.T. Sanders who was nominated by the Holding Company as a Director of NIIL was "aware of an inquiry from a Mr. Khaitan". This shows that Devagnanam was not trying

763

to dispose of his shares secretly to Khaitan and Coats were aware of that move.

In para 20 of his reply affidavit, Alan Mackrael says that none of the proposals put forward by the Holding Company for achieving Indianization to comply with the requirements of FERA would have given the control of NIIL to the Holding Company. This is falsified by Raeburn's letter dated October 25, 1976 to Devagnanam, in which he says that the idea of an outside independent party holding 15% of the share capital of NIIL was raised, but this did not appear to be acceptable to Coats since "they want to achieve not only that the present Indian shareholders hold a minority but that they (Coats) hold and influence a substantial block, thereby hoping to influence NEWEY to their views". Thus, there is a wide difference between what Coats practised earlier and pleaded later. Towards the end of paragraph 21, Mackrael asserts that the shareholders of the Holding Company, namely, Coats and NEWEY, were unanimous in the filing of the Company Petition and the prosecution of the proceedings following upon it, which is said to be clear from the fact that two powers of attorney were attested by the Directors of the Holding Company, both of whom were Directors of NEWEY also. The fact that Coats and NEWEY were not of one mind is writ large on the face of these proceedings and, in fact, the charge against NEWEY is that because of their Far-Eastern interests in which Devananam

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

was a great asset to them, they were supporting Devagnanam. We may in this connection draw attention to a letter dated June 8, 1977 by Raeburn to Mackrael, saying that the insistence of Coats ('Glasgow') to hold on to the 60% shareholding in NIIL or at least to ensure that 60% did not get into the hands of the Indian shareholders will involve a long and costly legal battle. Raeburn proceeds to say:

> "We, as Neweys, have neither the will nor the means to participate in that battle, nor do we think it right to do so bearing in mind the legal position regarding Indianisation, the provision in the Articles and the fact that substantially the modern business of N.I.I.L. has been built up by the efforts of the present Indian shareholders".

In paragraph 5 of the aforesaid letter, Raeburn clarifies the attitude of NEWEY by saying that if Coats were unable to agree to the arrangement suggested by NEWEY, then, NEWEY will be compelled to notify to those concerned in India that they can no longer be parties to the power of attorney granted by the Holding Company

764

to Mackrael or to any other proceedings in the Indian Courts. In spite of this letter of Raeburn (dated June 8, 1977), Mackrael had the temerity in his reply affidavit dated July 8, 1977, to say that Coats and NEWEY were unanimous in the prosecution of the proceedings consequent upon the filing of the Company Petition. There was no agreement between Coats and NEWEY either in regard to Indianisation of NIIL or in regard to the legal proceedings instituted to challenge the issue of rights shares.

There are many other contradictions on material points between the actual state of affairs and what Coats represented them to be, but we consider it unnecessary to cover the whole of that field. We will refer to one of these only, in order to show how difficult it is to choose between Coats and Devagnanam. In paragraph 19 of the Company Petition, which is sworn by Mackrael, it is stated that Devagnanam was in U.K. sometime towards the end of March 1977 and that he held several discussions with the representatives of the Holding Company. In paragraph 40 of his reply affidavit, Mackrael says that as to the contents of paragraph 19 of the Company Petition, he himself was not present at such meeting, since it was a meeting between Devagnanam and the officials of NEWEY for the purpose of discussing matters concerning NEWEY's Far-Eastern interests. The verification clause of Mackrael's affidavit in support of the Company Petition shows that the contents of paragraph 19 are based on information which he believed to be true. A clearer contradiction between the parent petition and the reply affidavit is difficult to imagine. It would appear that it was not until quite late that Coats realised that they had to plead all ignorance of the discussions which were held in U.K. towards the end of March 1977 between Devagnanam and the representatives of the Holding Company.

We will now shift our attention to another scene in order to show how unethical the Coats are. Coats' subsidiary called the Central Agency Ltd., who were sole-selling agents of NIIL's products in various markets in the world, ceased to be so after NIIL put an end to the agreement with them. The Central Agency never applied during the time that they were sole-selling agents of NIIL's products for registration of the Indian Company's Trade Marks as a protective measure. The learned Trial Judge, Ramaprasada Rao, Acting C.J., delivered the judgment in the Company's Petition on May 17, 1978. Immediately thereafter, Application No. 34991 of 1978

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

was filed by the Japanese Trade Marks Agents of Needle Industries,
765
U.K., for registration of the Trade Marks 'Pony' and 'Rathna', which were the registered Indian Trade Marks of NIIL. That application was made under the authority of a Power of Attorney signed by Alan Marckrael. In June 1978, Application No. 102987 was filed in Thailand on behalf of the Needle Industries U.K. as owners of the Trade Mark 'Pony' which is clear from the Trade Mark Attorney's letter dated January 22, 1979. In October 1978, Coats Patons, Hong Kong, got the Indian Company's Trade Mark 'Pony' registered. In November 1978, the Trade Mark Agents and Solicitors of NIIL in Hong Kong had to give a notice to Coats Patons, Hong Kong, that the latter had registered the 'Pony' Trade Mark in Hong Kong with the full knowledge that NIIL was the legal owner of that Trade Mark and threatening legal action. As a result of that notice, the Indian Company's Trade Mark 'Pony' which was registered by Coats Patons in Hong Kong as their own Trade Mark, was assigned to the Indian Company on December 21, 1978 for a nominal sum of 10 dollars. Items 7 and 8 of the minutes dated March 28, 1979 of the meeting of the interim Board of Directors of NIIL refer to the registration in Hong Kong by Coats Patons of the Indian Trade Mark of NIIL and subsequent assignment thereof to NIIL when legal action was threatened. Harry Bridges, who was appointed as a temporary Managing Director by the High Court, has stated in his counter affidavit dated March 27, 1980 that the application for registration of the 'Pony' Trade Mark was made in Hong Kong and other places in order to protect that Trade Mark from its improper use by other traders. This is a lame explanation of an act of near piracy. Were this explanation true, the application for registration of the Trade Mark would have mentioned that it was being filed on behalf of NIIL, and that 'Pony' was in fact the Trade Mark of NIIL. It is quite amazing that any one should claim that the registration of the Trade Mark was being sought as a protective measure when a battle royal was raging between the Holding Company and NIIL and after the Trial Court had delivered its judgment. We may mention that by a letter dated June 15, 1977 Mackrael had informed Devagnanam that he was removed from the Board of Directors of the Holding Company and M.D.P. Whiteford was appointed in the vacancy. The fact that Needle Industries, U.K., had surreptitiously made an application for the registration of NIIL s Trade Mark 'Pony' came to light fortuitously in January 1979 when NIIL applied for the registration of the 'Pony' Trade Mark in Thailand and Japan. NIIL's Trade Mark Agents there found, on inspection of the registers, that certain
766
applications made by Needle Industries, U.K., claiming the same mark as their own pending consideration.

The decision, in appeal, of the High Court appointing Harry Bridges as a Managing Director for 4 months was pronounced on October 26, 1978. As a Managing Director appointed by the Court, Bridges called a Board meeting of their members of the Board appointed by the Appellate Court, for November 2, 1978. Bridges took away many files, documents and statements from the NIIL's factory at Ketty on October 28, 1978, his explanation being that he wanted to carry these documents to Madras where the Board meeting was to be held. A little before Bridges left Ketty for Madras, he was informed that this Court had passed an interim order on November 1, 1978. Consequently, the meeting of the 2nd

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

November did not take place. Bridges says that when it became clear that he was no longer required to act as a Managing Director of NIIL, he took the earliest opportunity of returning the documents which he had taken from the office of the factory at Ketty.

It is understandable that Bridges wanted to take with him certain documents to help him perform his functions as a Managing Director in the meeting of November 2, 1978. But it is surprising that, in addition to the documents which Bridges returned on November 8, he had taken with him several other documents which he returned when pressed to do so. He took away with him (1) Design drawing (2) Statistical Returns (3) the Master Budget summary, 1978 (4) Cash forecast for 1978-79 (5) Detailed Project Report with cash flow forecast (6) Details of Project Investment (7) Note on activity upto October 1978 and one or two other documents. These were eventually returned by the Holding Company's Advocate, Shri Raghavan. When NIIL wrote on November 21, 1978 to Shri Raghavan asking him to call upon Bridges to confirm that he had not retained copies of any of the documents which he had removed from Ketty, Bridges replied by his letter dated November 29, 1978 that he had taken copies of such documents which he considered relevant and that he proposed to retain such copies since "as director of the Company, I am entitled to peruse and take copies of whatever records I choose". This is a wee bit high and mighty. The Design drawing is not the drawing of a bungalow (with a swimming pool) which was being built for Devagnanam but it is a 'Ring spring fastener tool design'. The other documents which Bridges had taken away and of which he got copies made in assertion of his Directorial right, contain important matters like details
767
of production, sales and exports of NIIL's products, orders outstanding and sales, the proposed additional turnover and the working capital requirements, etc. The fact of Harry Bridges's taking away these documents and making copies thereof for his own use leaves not the slightest doubt that the motivation of Coats at all times was to advance their own world interests at the expense of NIIL. In the background of such conduct, it becomes difficult to appreciate the Holding Company's contention, so strongly pressed upon us, that Coats, NEWEY and Devagnanam being in the position of partners, the greatest good faith and probity were expected to be displayed by them. The contention, as a bald proposition of law is sound. The snag is: who should harp upon it ? Not Devagnanam, we agree. But, not Coats either, we think.

We have said, while discussing the conduct of Devagnanam, that it would be difficult to accept his word unless there is support forthcoming to it from other circumstances on the record. We feel the same about Coats. It would be equally unsafe to accept their word unless it finds support from the other facts and circumstances on the record of the case. It is true that in saying this, we have partly taken into account facts which came into existence after the Company Petition was filed. But those facts do not reflect a new trend or a new thinking on the part of Coats, generated by success in the litigation. Finding that they had succeeded in the High Court, Coats took courage to pursue relentlessly their old attitude with the added vigour which success brings.

On the question of oppression, there is a large mass of correspondence and other documentary evidence on the record before us. We shall have to concentrate on the essentials by

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

separating the chaff from the grain. In the earlier part of this judgment we have already referred to the course of events generally, which culminated in the meetings of NIIL's Board of Directors, held on April 6 and May 2, 1977. We propose now to refer to these events selectively.

FERA having come into force on January 1, 1974, D.P. Kingsley, the Secretary-Director of NIIL, applied on September 3, 1974 to the Reserve Bank for the necessary permission under section 29 (2) of that Act. The Reserve Bank intimated to NIIL by its letter dated November 5, 1975 that permission would be accorded to NIIL under section 29 (2) (a) read with section 29 (2) (c) of FERA to carry on its activities in India subject to the conditions enumerated

768

in paragraph 2 of the letter. One of the conditions mentioned in the aforesaid paragraph was that the non-resident interest in the equity capital must be reduced to a level not exceeding 40%, within a period of one year from the date of receipt of the letter. The Reserve Bank asked NIIL to submit a scheme within a period of three months, showing how it proposed to achieve the required reduction in the non-resident interest: "(a) whether by disinvestment by non-resident shareholders, or (b) whether by issue of additional equity capital to Indian residents to the extent necessary to finance any scheme of expansion diversification, or (c) by both". Kingsley wrote a letter to Mackrael on November 19, 1975, enclosing therewith a copy of the letter of the Reserve Bank dated November 5. On February 4, 1976 Kingsley wrote to the Reserve Bank that NIIL was prepared to agree to reduce the non-resident interest in the equity capital to a level not exceeding 40% and that the Company was proposing to bring this about by disinvestment though, depending upon future developments, the Company reserved its right to reduce the non-resident interest by issue of additional equity capital to Indian shareholders. Kingsley requested the Bank to extend the stipulated time one year in case NIIL was not able to comply with the Bank's directive by reason of circumstances beyond its control. A copy of this letter dated February 4, 1976 was sent by Kingsley to Whitehouse, the Secretary of the Holding Company. It is significant that there was no response as such to this communication, from the Holding Company. On May 11, 1976 the Reserve Bank of India sent a letter to NIIL granting permission to it under FERA to carry on its business on certain conditions, one of them being that the non-resident interest in the equity capital had to be reduced to a level not exceeding 40% within a period of one year from the date of receipt of the letter. The Reserve Bank stated in the aforesaid letter that until such time as the non-resident interest was not reduced to 40%, the manufacturing activity of the Company shall not exceed such capacity as was validly approved or recognised by the appropriate authority on December 31, 1973 and that the Company shall not expand its manufacturing activities beyond the level so approved or recognised. It is clear from this letter that all developmental activities of NIIL stood frozen as of the date December 31, 1973, until the non-resident interest was reduced to 40%. The Reserve Bank stated further in the letter that NIIL should submit quarterly reports to it indicating the progress made in implementing the reduction of the non-resident interest and that the transfer of shares from non-residents to Indian residents would be required to be confirmed by the Reserve Bank under section 19 (5) of FERA.

769

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

The letter of the Reserve Bank was received by NIIL on May 17, 1976, which meant that the reduction of the non-resident interest had to be achieved by May 17, 1977.

It shall have been seen that by the time the permission was granted by the Reserve Bank to NIIL in May 1976, FERA had been in force for a period of about 2 1/2 years. A period of one year and eight months had gone by since the filing by NIIL of the application for dilution of the non-resident interest. Over and above that, the Reserve Bank had granted a long period of one year for bringing about the dilution of the non-resident interest. It is true that public authorities are not generally averse, in the proper exercise of their discretion, to extending the time limit fixed by them, as and when necessary. But an elementary sense of business prudence would dictate that the time schedule fixed by the Reserve Bank had to be complied with. The firm tone of the Reserve Bank's letter conveyed that it would not be easy to obtain an extension of time for complying with its directive, while the stringent conditions imposed by it, particularly in regard to future developmental activities, dictated an early compliance with the directive.

Kingsley sent a letter to the Reserve Bank on May 18, 1976, confirming the acceptance of the various conditions under which permission was granted to NIIL to carry on its business. Kingsley pointed out a difficulty in implenting one of the conditions regarding the sale of petroleum products, but the Reserve Bank by its letter dated May 29, 1976 informed him that after a careful consideration of the request, the Bank regretted its inability to enhance the ceiling on the turnover from the Company's trading activity, as stipulated in the letter dated May 11, 1976.

In the meeting of the Board held on October 1, 1976, Devagnanam's appointment as Managing Director was renewed for a further period of five years. Raeburn, Chairman of NEWEY who was looking after the affairs of the Holding Company, wrote to Devagnanam on October 4, 1976, complaining that it was necessary that the Holding Company should be kept informed in ample time of the Board's meetings on important organisational matters.

Raeburn and Mackrael came to India to discuss the question of dilution of the non-resident holding in NIIL. A meeting was held at Ketty on October 20 and 21, 1976 in which the U.K. shareholders were represented by Mackrael and Raeburn and the Indian shareholders by Devagnanam and Kingsley. Silverston took part

770

in the meeting as an adviser to the Indian shareholders. Martin Henry, the Managing Director of Madura Coats which is an Indian company in which the Needle Industries (U.K.) and Cotas have substantial interest, attended the meeting and took part in the discussions. A note of the discussions which took place at Ketty on October 20 and 21 was prepared by Raeburn and forwarded along with a letter dated November 10, 1976 to Devagnanam, with copies to Mackrael, Newey, Jackson and Whitehouse. Paragraph 2 of this note, which is important, says:

> "It was agreed that Indianization should be brought about by May, 1977, as requested by Government, so as to achieve a 40% U.K. and 60% Indian shareholding".

The main features of the discussions which took place in the Ketty meeting are these:

(1) Mackrael and Martin Henry suggested acceptability of Madura Cotas as holding part of the 60% of the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

equity to be held by Indian shareholders. The latter "saw no reason to give up the right which the Indianization legislation, combined with the Company's Articles, conferred upon them and, therefore they insisted on taking up the whole of their entitlement to 60% of the equity". Silverston who was an Englishman by nationality and a Solicitor by profession in India and was acting as an Adviser to the Indian shareholders in the Ketty meeting plainly and rightly pointed out that Government's approval of a holding by Madura Coats of 15% of NIIL shares would be unlikely, because by that method Coats would indirectly and effectively with NEWEY hold over 40%, approximately 46%, share in NIIL. It is apparent that this would have been a clear violation of FERA.

(2) To allay the concern of U.K. shareholders when they became in minority by the Indian shareholders coming to hold 60%, some safeguards were suggested which, amongst others, were, (i) the Articles of the Company could be altered only by a special resolution which requires a 75% majority of the members voting in person or by proxy. Thus, either group of the shareholders could prevent the sale of shares to any one not

771

approved, (ii) the Board could be reconstructed as mentioned in para 4.3 of the note to give U.K. shareholders sufficient safeguards and hand in the management of the Indian Company.

(3) The preferred method of transferring 20% of the equity to Indian shareholders was thought to be by sale by U.K. members of the appropriate number of shares at the price to be determined by the Government and the advice to be taken from Price Waterhouse in this regard. As an alternative it was suggested that a rights issue, with the Indian shareholders taking up the U.K. Members' rights would also be considered, provided it was demonstrated by Ketty that there was a viable development plan requiring funds that the expected NIIL cash flow could not meet. The value of the U.K. equity interest thus transferred was not to be less favourable than by a direct sale of shares.

(4) Approval was given in principle to the renewal of contract of Devagnanam as Managing Director of NIIL. Devagnanam agreed to devote adequate time to the affairs of Ketty and was authorised to continue to supervise the NEWEY affairs in Hong Kong and Malacca.

At the resumed discussion on October 21, 1976, both sides stuck to their stand. Devagnanam was insistent that he will "not accept on behalf of the Indian shareholders anything less than the full entitlement of 60% of the shares", while Mackrael, equally insistent, "could not accept on behalf of NI/Coats that the full 60% be held by the present Indian shareholders, even with the safeguards and assurances discussed previously".

The Ketty meeting thus ended in a stalemate, both sides insisting on what, what they considered to be their right and entitlement. Raeburn attempted to play the role of a mediator but failed. In this situation, the parties decided to give further consideration to the matter and to adhere to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

the following time-table:

"Mid-December

TAD (Devagnanam) to submit to the U.K. shareholders

772

both the decisions reached by the Indian shareholders as regards the 60% and the case, if any, for a Rights Issue.

Mid-January

U.K. shareholders to decide on their reaction to the Indian shareholders' decision".

Silverston conveyed to Kingsley his regret that the Ketty meeting could product no outcome because of the attitude of Coats who wanted to put pressure on the Directors of NIIL by giving 15% of the shareholding to Madura Coats and thereby avoiding the provisions of FERA. This reaction of Silverston finds support in the reaction of Raeburn himself, which he described in his letter dated October 23, 1976 to Devagnanam. Raeburn says in that letter that he had learnt from Martin Henry that Coats were keen to introduce Prym technology in India in their Madura Coats factory. It may be mentioned that the Prym technology when introduced in Madura Coats would have created a direct competition between it and NIIL. It would also appear from Devagnanam's letter of October 21, 1976 to Jackson that Coats were intending to start an Engineering Division at Bangalore for the manufacture of Dynecast and Prym products with an investment of the tune of Rs. 3,00,00,000 (Rupees three crores). Compared with that, the interest of Coats in NIIL was just about Rs. 10 lakhs, even if the shares of NIIL were to be valued at Rs. 190/- per share.

Devagnanam wrote a letter dated December 11, 1976 to Raeburn, informing him that they had just closed the Board's meeting in which the principal subject of discussion was "Indianization". Devagnanam expressed resentment of himself and his colleagues that after they had faithfully served the Holding Company for almost the whole of their working lives, the Holding Company should be unwilling to accept them as partners, especially when they were legally entitled to be so considered. Devagnanam made it clear in this letter that any attempt by Coats to retain an indirect control in the management of NIIL will not be acceptable to the Indian shareholders.

Then comes the important letter of December 14, 1976, which was written by Devagnanam to Raeburn. Devagnanam informed Raeburn by that letter that he had further discussions with his colleagues and was able to persuade them to agree to a kind of Package deal. The terms of the deal so suggested were: "(1)

773

Indianization should take place with the existing Indian shareholders acquiring 60% of the stock; (2) Mackrael and Raeburn should be taken on NIIL's Board as Directors, but in no event Martin Henry who was connected with Madura Coats which had a powerful plan of development of Prym technology; (3) the Indian shareholders were prepared to take B.T. Lee, a senior executive of Needle Industries/Coats, Studley, as a permanent whole time Director of NIIL to be put specifically in charge of exports". Some other suggestions were made by Devagnanam to show the bona fides of the Indian shareholders and to alleviate the apprehensions in the minds of the U.K. shareholders. Devagnanam asked Raeburn to convey his reactions in the matter. This letter has been gravely commented upon by the Holding Company on the ground that it did not contemplate the issue of rights shares. We are unable to see the validity of this criticism. There is not

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

the slightest doubt that the Indian shareholders were insisting all along that they should become the owners of 60% of the equity capital of NIIL. A simple method of bringing this about was the transfer by the Holding Company of 20% of its shareholding to the existing Indian shareholders. It was only when this plain method of bringing about reduction in the equity holding failed and the deadline fixed by the Reserve Bank was drawing nearer, that the Board of NIIL decided upon the issue of rights shares, which was the only other alternative that could be conceived of for reducing the non-resident interest. The issuance of rights shares, after all, was not like a bolt from the blue. In any event, it was mentioned in the Ketty meeting.

On December 20, 1976 Silverston wrote a letter to Raeburn saying that he would be proceeding to U.K. early in January in connection with his personal matters and that he would then visit Raeburn also. Silverston stated candidly in the letter that the situation which was developing between the U.K. and the Indian shareholders, if allowed to continue, could do much damage to the British interests and "as one who is still concerned with the interests of British industry, I feel I cannot sit by and allow matters to deteriorate to their detriment, without making some attempt towards bringing the issues between the parties to a fair conclusion." Raeburn wrote to Kingsley on January 14,1977 stating that he had a discussion with Silverston a couple of days back, during which Silverston had stated clearly the legal position and given his advice upon it. In the last paragraph of this letter, Raeburn said:

774

> "We have now put our views quite clearly to Mr. Makrael and we are awaiting the reaction of Needle Industries and Coats. Therefore, I am hoping but I cannot be sure of this, to be able to let you know fairly soon what the formal decision of the U.K. shareholders is.

It needs to be emphasised, especially since its importance was not fully appreciated by the Appellate Bench of the High Court, that the Indian point of view was communicated with the greatest clarity to Raeburn in Devagnanam's letter dated December 14, 1976, which was within the time schedule which was agreed to be adhered to in the Ketty meeting. The views of the U.K. shareholders were most certainly not communicated to the Indian shareholders by the middle of January 1977 as was clearly agreed upon in the Ketty meeting. In fact, they were never communicated.

On January 20, 1977, the Reserve Bank sent a reminder to NIIL. After referring to the letter of May 11, 1976, the Reserve Bank asked NIIL to submit at an early date the progress report regarding dilution of the non-resident interest. In reply, a letter dated February 21, 1977 was sent by NIIL to the Bank, stating:

> "We confirm that we are following up the matter regarding dilution of non-resident interest and we confirm our commitment to achieve the desired Indianization by the stipulated date, i.e. 17th May, 1977."

It is very important to note that a copy of this letter was forwarded both to Whitehouse and Sanders. They must at least be assumed to know that not only was Indianization to be achieved by May 17, 1977, but that NIIL had committed itself to do so by that date.

It is contended by Shri Seervai that the negotiations with Coats had in fact not come to an end and that Coats

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

were never told that the compromise talks will be regarded as having failed. It is urged that Coats were all along labouring under the impression, and rightly, that the compromise proposals which were discussed with Raeburn in the meeting of March 29-31, 1977 in U.K. would be placed by Devagnanam before the Indian shareholders, and the
775
U.K. shareholders apprised whether or not the proposals were acceptable.

Shri Seervai relies strongly on a letter dated March 9, 1977 written by Raeburn to Devagnanam. After saying that on the Friday preceding the 9th March, he had discussions with Mackrael and three high-ranking personnel of Coats, Raeburn says in that letter that Coats had refused to agree that the Indian shareholders should acquire a 60% shareholding in NIIL that this had created a new situation and that he was appending to the letter an outline of what he believed, but could not be sure, would be agreeable to Coats/Needle Industries. Raeburn stated further in that letter:

> "I know that all this will be difficult for you and your fellow Indian shareholders, but I urge you to support this view and get their acceptance, and to come here to be able to negotiate. If these or similar principles can be agreed during your visit, I have no doubt that the detailed method can be quickly arranged."

Raeburn stated that the proposal annexed to the letter had not been agreed with Coats but he, on his own part, believed that Coats could be persuaded to agree to it. Stated briefly, the proposal annexed by Raeburn to his letter aforesaid involved (i) the existing Indian shareholders holding 49% of the shares, (ii) new Indian independent institutional shareholders holding 11% of the shares, and (iii) the existing U.K. shareholders, either directly or indirectly, holding 40% of the shares. The proposed Board of Directors was to consist of representatives of the shareholders appointed by them thus:

> "Existing Indian shareholders 3, New independent Indian shareholders 1, existing U.K. shareholders 2, and an independent Indian Chairman acceptable to all parties."

It is contended by Shri Seervai that these proposals are crucial for more than one reason since, in the first place, the proposal to increase the holding of the existing Indian shareholders to 49% and the offer of 11% to new Indian independent institutional shareholders was inconsistent with the charge that Coats wanted to retain control over NIIL, directly or indirectly. The second reason why it is said that the proposal is crucial is that Raeburn's letter of
776
March 9 must have been received by Devagnanam before March 14 since it was replied to on the 14th. Therefore, contends Shri Seervai, the negotiations between the parties were still not at an end. Counsel says that it was open to Devagnanam to refuse to negotiate on the terms suggested and insist that the Indian shareholders must have 60% of the shares. Instead of conveying his reactions to the proposal Devagnanam, it is contended, went to the United Kingdom to discuss the question. The minutes of discussions which took place in U.K., Mackrael and Sanders not taking any part therein, show that NEWEY continued to plead that the Indian shareholders and Coats should consider the compromise formula and that Devagnanam undertook to put to the Indian shareholders further proposals for compromise and to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

consider what other proposals or safeguards they might suggest. Reliance is also placed by counsel on a letter which Devagnanam wrote to Raeburn on April 5, in support of the submission that the negotiations were still not at an end. The last but one paragraph of that letter reads thus:

> "As undertaken, I shall place the compromise formula, very kindly suggested by you, before my colleagues later today. We shall discuss it fully at the Board Meeting tomorrow and I shall communicate the outcome to you shortly thereafter."

We are unable to agree that the proposal annexed to Raeburn's letter of March 9 1977 was either a proposal by or on behalf of Coats or one made with their knowledge and approval. Were it so, it is difficult to understand how Raeburn could write to Mackrael on June 8, 1977 that Coats were still insistent on the entire 20% of the excess equity holding not going to the existing Indian shareholders. There is also no explanation as to why, if the proposal annexed to Raeburn's letter of March 9 was a proposal by or on behalf of Coats, Raeburn said at the U.K. meeting of March 29-31, 1977 that it was better to 'let Coats declare their hand'. It is indeed impossible to understand why Coats, on their own part, did not at time communicate any compromise proposal of theirs to the Indian shareholders directly. They now seem to take shelter behind the proposal made by Raeburn in his letter of March 9 adopting it as their own. Even in the letter which Crawford Bayley & Co., wrote on June 21, 1977 on behalf of Sanders to the Reserve Bank of India, no reference was at all made to any proposal by or on behalf of Coats to the Indian shareholders. The vague statement
777
made in that letter is that 'certain proposals' were being considered and would be submitted 'shortly' before the authorities. No such proposals were ever made by the Solicitor or their client to anyone.

These letters and events leave no doubt in our mind that the negotiations between the parties were at an end that there were no concrete proposals by or on behalf of Coats which remained outstanding to be discussed by the Indian shareholders. To repeat, Devagnanam declared his hand in his letter of December 14,1976 by reiterating, beyond the manner of doubt, that nothing less than 60% share in the equity capital of NIIL would be acceptable to the Indian shareholders. Coats never replied to that letter nor indeed did they convey their reaction to it in any other form or manner at any time. In fact, it would be more true to say that Coats themselves treated the matter as at an end since, they were wholly opposed to the stand of the Indian shareholders that they must have 60% share in the equity capital of NIIL. What happened in the meeting of April 6, 1977 has to be approached in the light of the finding that the negotiations between the parties had fallen through, that Coats had refused to declare their hand and that all that could be inferred from their attitude with a fair amount of certainty was that they were unwilling to disinvest.

On March 18, 1977 NIIL's Secretary gave a notice of the Board meeting for April 6, 1977. The notice was admittedly received by Sanders in U.K., well in time but did not attend the meeting. The explanation for his failure to attend the meeting is said to be that the item on the agenda of the meeting, 'Policy-Indianisation' was vague and did not convey that any matter of importance was going to be discussed in the meeting, like for example, the issue of rights shares.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

We find it quite difficult to accept this explanation. Just as a notice to quit in landlord-tenant matters cannot be allowed to split on a straw, notices of Board meetings of companies have to be construed reasonably, by considering what they mean to those to whom they are given. To a stranger, 'Policy-Indianisation' may not convey much but to Sanders and the U.K. shareholders it would speak volumes. By the time that Sanders received the notice, the warring camps were clearly drawn on two sides of the battle-line, the Indian group insisting that they will have nothing less than a 60% share in the equity capital of NIIL and the U.K. shareholders insisting with equal determination that they will not allow the existing Indian
778
shareholders to have anything more than 49%. In pursuance of a resolution passed by the Board, a letter had already been written to the Reserve Bank confirming the commitment of NIIL to achieve the required Indianisation by May 17, 1977. A copy of NIIL's letter to the Reserve Bank was sent to Sanders and Whitehouse. In view of the fact that to the common knowledge of the two sides there were only two methods by which the desired Indianisation could be achieved, namely, either disinvestment by the Holding Company in favour of the existing Indian shareholders or a rights issue, the particular item on the agenda should have left no doubt in the mind of the U.K. shareholders as to what the Board was likely to discuss and decide in the meeting of the 6th. Disinvestment stood ruled out of consideration, a fact which was within the special knowledge of the Holding Company, since whether to disinvest or not was a matter of their volition.

After the despatch of the notice dated March 18,1977 two important events happend. Firstly, Devagnanam went to Birmingham, where discus ions were held from March 29-31, 1977 in which Indianisation of NIIL was discussed, as shown by the minutes of that discussion. NEWEY were willing to accept Indianisation, by the existing Indian shareholders acquiring a 60% interest in the share capital of NIIL while "COATS were adamantly opposed" to that view. It is surprising that during the time that Devagnanam was in Birmingham, Sanders did not meet him to seek an explanation of what the particular item on the agenda of the meeting of April 6 meant Sanders had received the notice of March 18 before the Birmingham discussions took place, and significantly he has made no affidavit at all on the question as to why he did not meet Devagnanam in Birmingham, or why he did not attend the meeting of April 6 or what the particular item on the agenda meant to him.

The second important event which happened after the notice of March 18 was issued was that on April 4, 1977 NIIL received a letter dated March 30, 1977 from the Reserve Bank. The letter which was in the nature of a stern reminder left no option to NIIL's Board except to honour the commitment which it had made to the Reserve Bank. By the letter the Reserve Bank warned NIIL: "Please note that if you fail to comply with our directive regarding dilution of foreign equity within the stipulated period, we shall be constrained to view the matter seriously."
779

We do not see any substance in the contention of the Holding Company that despite the commitment which NIIL had made to the Reserve Bank, the long time which had elapsed in the meanwhile and the virtual freezing of its developmental activities as of December 31, 1973, NIIL should have asked for an extension of time from the Reserve Bank. In the first

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

place, it could not be assumed or predicated that the Bank would grant extension, and secondly, it was not in the interest of NIIL to ask for such an extension.

The Board meeting was held as scheduled on April 6, 1977. The minutes of the meeting show that two directors, Sanders and M.S.P. Rajes, asked for leave of absence which was granted to them. Sanders, as representing the U.K. shareholders on NIIL's Board, did not make a request for the adjournment of the meeting on the ground that negotiations for a compromise had not yet come to an end or that the Indian shareholders had not yet conveyed their response to the "Coats' compromise formula". Nor did he communicate to the Board his views on 'Policy-Indianisation', whatever it may have meant to him. Seven Directors were present in the meeting, with Devagnanam in the chair at the commencement of the meeting. C. Doraiswamy, a Solicitor by profession and admittedly an independent Director, was amongst the seven. In order to complete the quorum of two "independent" directors, other directors being interested in the issue of rights shares, Silverston was appointed to the Board as an Additional Director under article 97 of NIIL's Articles of Association. Silverston then chaired the meeting, which resolved that the issued capital of the Company be increased to Rs. 48,00,000/- by the issue of 16,000 equity shares of Rs. 100/- each to be offered as rights shares to the existing shareholders in proportion to the shares held by them. The offer was decided to be made by a notice specifying the number of shares which each shareholders was entitled to, and in case the offer was not accepted within 16 days from the date of the offer, it was to be deemed to have been declined by the shareholder concerned.

The aforesaid resolution of the Board raises three important questions, inter alia, which have been passed upon us by Shri Seervai on behalf of the Holding Company: (1) Whether the Directors of NIIL, in issuing the rights shares, abused the fiduciary power which they possessed as directors to issue shares; (2) Whether Silverston was a 'disinterested Director'; and (3) Whether Silverston's appointment was otherwise invalid, since there was no item on the agenda
780
of the meeting for the appointment of an Additional Director. If Silverston's appointment as an Additional Director is bad either because he was not a disinterested director or because there was no item on the agenda under which his appointment could be made, the resolution for the issue of rights shares which was passed in the Board's meeting of April 6 must fall because then, the necessary quorum of two disinterested directors would be lacking.

On the first of these three questions, it is contended by Shri Seervai that notwithstanding that the issues of shares is intra vires the Directors, the Directors' power is a fiduciary power, and although an exercise of such power may be formally valid, it may be attacked on the ground that it was not exercised for the purpose for which it was granted. It is urged that the issue of shares by Directors which is directed to affect the right of the majority of the shareholders or to defeat that majority and convert it into a minority is unconstitutional, void and in breach of the fiduciary duty of Directors, though in certain situations it may be ratified by the Company in the General Meeting. Any reference by the Company to a general meeting in the present case, it is said, would have been futile since, without the impugned issue of rights shares, the majority was against the issue. It was finally argued that good faith and honest belief that in fact the course proposed by the Directors was

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

for the benefit of the shareholders or was bona fide believed to be for their benefit is irrelevant because, it is for the majority of the shareholders to decide as to what is for their benefit, so long as the majority does not act oppressively or illegally. Counsel relies in support of these and allied contentions on the decision of the Privy Council in Howard Smith Ltd. and of the English Courts in Fraser, Punt, Piercy and Hogg. (supra)

In Punt v. Symons, (supra) which applied the principle of Fraser v. Whallcy, (supra) it was held that:

> Where shares had been issued by the Directors. not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power, they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.

But Byrne J. stated:

781

> There may be occasions when Directors may fairly and properly issue shares in the case of a Company constituted like the present for other reasons. For instance it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised.

In the instant case, the issue of rights shares was made by the Directors for the purpose of complying with the requirements of FERA and the directives issued by the Reserve Bank under that Act. The Reserve Bank had fixed a deadline and NIIL. had committed itself to complying with the Bank's directive before that deadline.

Peterson J. applied the principle enunciated in Fraser and in Punt in the case of Piercy v. S. Mills & (Company Ltd. (supra) The learned Judge observed at page 84:

> "The basis of both cases is, as I understand, that Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders."

The fact that by the issue of shares the Directors succeed, also or incidentally, in maintaining their control over the Company or in newly acquiring it, does not amount to an abuse of their fiduciary power. What is considered objectionable is the use of such powers merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the Company.

In Hogg v. Cramphorn Ltd., (supra) it was held that if the power to issue shares was exercised from an improper motive, the issue was liable to be set aside and it was immaterial that the issue was made in a bona fide belief that it was in the interest of the Company. Buckley J. reiterated the principle in Punt and in Piercy, (Supra) and observed:

> "Unless a majority in a company is acting oppressively towards the minority, this Court should not and will not itself interfere with the exercise by the majority of its constitutional rights or embark upon an inquiry into the respective merits of the views held or policies

782

> favoured by the majority and the minority. Nor

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

> will this Court permit directors to exercise powers, which have been delegated to them by the company in circumstances which put the directors in a fiduciary position when exercising those powers, in such a way as to interfere with the exercise by the majority of its constitutional rights; and in a case of this kind also, in my judgment, the court should not investigate the rival merits of the views or policies of the parties." (p. 268)

Applying this principle, it seems to us difficult to hold that by the issue of rights shares the Directors of NIIL interfered in any manner with the legal rights of the majority. The majority had to disinvest or else to submit to the issue of rights shares in order to comply with the statutory requirement of FERA and the Reserve Bank's directives. Having chosen not to disinvest, an option which was open to them, they did not any longer possess the legal right to insist that the Directors shall not issue the rights shares. What the Directors did was clearly in the larger interests of the Company and in obedience to their duty to comply with the law of the land. The fact that while discharging that duty they incidentally trenched upon the interests of the majority cannot invalidate their action. The conversion of the existing majority into a majority was a consequence of what the Directors were obliged lawfully to do. Such conversion was not the motive force of their action.

Before we advert to the decision of the Privy Chuncil in Howard Smith Ltd. v. Ampol Petroleum Ltd., (supra) we would like to refer to the decision of the High Court of Australia in Harlowe's Nominees Pty. Ltd v. Woodside (Lakes Entrance) oil Company No Liability and another, (supra) and to the Canadian decision of Berger J. of the Supreme Court of British Columbia, in the case of Teck Corporation Ltd. v. Miller et al(1), both of which were considered by Lord Wilberfore in Howard Smith. On a consideration of the English decisions, including those in Punt and Plercy, Barwick C.J. said in Harlowe's Nominees (supra):

> "The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a

783

> purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An inquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or the invalidity of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company." (p. 493)

We agree with the principle so stated by the Australian High Court and, in our opinion, it applies with great force to the situation in the present case. In Teck Corporation, (supra) the Court examined several decisions of the English Courts and of other Courts, including the one in Hogg. (supra) The last headnote of the report at page 289 reads thus:

> "Where directors of a company seek, by entering

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

into an agreement to issue new shares, to prevent a majority shareholder from exercising control of the company, they will not be held to have failed in their fiduciary duty to the company if they act in good faith in what they believe. on reasonable grounds, to be the interests of the company. If the directors' primary purpose is to act in the interests of the company, they are acting in good faith even though they also benefit as a result".

In Howard Smith, no new principle was evolved by Lord Wilberforce who, distinguishing the decisions in Teck Corporation and Harlowe's Nominees, (supra) said:

"By contrast to the cases of Harlowe and Teck, the present case, on the evidence, does not, on the findings of the trial judge, involve any consideration of management, within the proper sphere of the directors. The purpose found by the judge is simply and solely to dilute the majority voting power held by Ampol and Bulkships so as to enable a then minority of shareholders to sell their shares more advantageously. So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned". (page 837)

784

The dictum of Byrne J. in Punt (supra) that "there may be reasons other than to raise capital for which shares may be issued" was approved at page 836 and it was observed at page 837

"Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (Automatic Self Cleansing Filter Syndicate Co. Ltd. v. Cuninghams, (1906) 2 Ch. 34), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers. If there is added, moreover, to this immediate purpose, an ulterior purpose to enable an offer for shares to proceed which the existing majority was in a position to block, the departure from the legitimate use of the fiduciary power becomes not less, but all the greater. The right to dispose of shares at a given price is essentially an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail".

In our judgment, the decision of the Privy Council in Howard Smith, (supra) instead of helping the Holding Company goes a long way in favour of the appellants. The Directors in the instant case did not exercise their fiduciary powers over the shares merely or solely for the purpose of destroying an existing majority or for creating a new majority which did not previously exist. The expressions 'merely', 'purely', 'simply' and 'solely' virtually lie strewn all over page 837 of the report in Howard Smith. The Directors here exercised their power for the purpose of preventing the affairs of the Company from being brought to a grinding halt, a consummation devoutly wished for by Coats in the interest of their extensive world-wide business.

In Nanalala Zaver and another v. Bombay Life Assurnnce

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Co. Ltd., (supra) Das J., in his separate but concurring judgment deduced the following principle on the basis of the English decisions:

785

> "It is well established that directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement and to the detriment of the company, the Court will interfere and prevent the directors from doing so. The very basis of the Court's interference in such a case is the existence of the relationship of a trustee and of cestui que trust as between the directors and the company".
>
> (pp. 419-420)

It is true that Das J. held that Singhanias were complete strangers to the company and consequently the Directors owed no duty, much less a fiduciary duty, to them. But we are unable to agree with the contention that the observations extracted above from the judgment of Das J. are obiter. The learned Judge has set forth the plaintiffs' contentions under three sub-heads at page 415. At the bottom of page 419 he finished discussion of the 2nd sub-head and said: "This leads me to a consideration of the third sub-head on the assumption that..... the additional motive was a bad motive". The question was thus argued before the Court and was squarely dealt with.

Before we leave this topic, we would like to mention that the mere circumstance that the Directors derive benefit as shareholders by reason of the exercise of their fiduciary power to issue shares, will not vitiate the exercise of that power. As observed by Gower in Principles of Modern Company Law, 4th edn., p. 578:

> "As it was happily put in an Australian case they are 'not required by the law to live in an unreal region of detached altruism and to act in a vague mood of ideal abstraction from obvious facts which must be present to the mind of any honest and intelligent man when he exercises his power as a director".

The Australian case referred to above by the learned author is Mills v. Mills, (supra) which was specifically approved by Lord Wilberforce in Howard Smith. In Manala Zaver (supra) too, Das J. stated at page 425 that the true principle was laid down by the Judicial Committee of the Privy Council in Hirsche v. Sims(1), thus:

786

> "If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company they are not chargeable with dolus malus or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because the afterwards sold shares at prices which gave them large profits".

Whether one looks at the matter from the point of view expressed by this Court in Nanala Zaver or from the point of view expressed by the Privy Council in Howard Smith, (supra) the test is the same, namely, whether the issue of shares is simply or solely for the benefit of the Directors. If the shares are issued in the larger interest of the Company, the decision to issue shares cannot be struck down on the ground that it has incidentally benefited the Directors in their capacity as shareholders. We must, therefore, reject Shri

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Seervai's argument that in the instant case, the Board of Directors abused its fiduciary power in deciding upon the issue of rights shares.

The second of the three questions arising out of the proceedings of the Board's meeting dated April 6, 1977 concerns the validity of the appointment of Silverston as an Additional Director. Under section 287(2) of the Companies Act, 1956 the quorum for the said meeting of Directors was two. There can be no doubt that a quorum of two Directors means a quorum of two directors who are competent to transact and vote on the business before the Board. (see Greymouth v. Greymouth and Palmer's Company Precedents.(1) 17th Edn.: p. 579, f.n.3). The contention of the Holding Company is that Silverston was a Director "directly or indirectly concerned or interested" in the arrangement or contract arising from the resolutions to offer and allot rights shares and consequently, the resolutions were invalid: firstly on the ground that they were passed by a vote of an interested director without which there would be no quorum and secondly because, Silverston's appointment as an Additional Director was for the purpose of enabling the said resolution to be passed for the benefit of interested directors. Relying upon a decision of the Bombay High Court in Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Ltd.,(2) Shri Seervai contends that section 300 of the Companies Act embodies the general rule of equity that no person who has to discharge duties on behalf of a corporate body shall be

787

allowed to enter into engagements in which he has a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.

The reason why it is said that Silverston was interested in or concerned with the allotment of the rights shares to the existing shareholders is, firstly because at the Ketty meeting held in October 1976 he had acted as an 'Advisor to the Indian shareholders' and secondly, because on October 25, 1976 he had written a letter to Kingsley purporting to convey his advice to the Board of Directors. That letter contains allegations against the Needle Industries, U.K. and of Coats. In other words, it is contended, Silverston was hostile to Needle Industries, U.K., and to Coats, and no person in his position could possibly bring to bear an unbiased or disinterested judgment on the question which arose between the Holding Company and the Indian shareholders as regards the issue of rights shares. It is also said that certain other aspects of Silverston's conduct, including his attitude in the meeting of the 6th April, show that he was an interested director.

We are unable to accept the contention that Silverston is an 'interested' director within the meaning of section 300 of the Companies Act. In the first place, it is wrong to attribute any bias to Silverston for having acted as an adviser to the Indian shareholders in the Ketty meeting. Silverston is by profession a solicitor and we suppose that legal advisers do not necessarily have a biassed attitude to questions on which their advice is sought or tendered. The fact that Silverston was received cordially in U.K. both by Raeburn and Mackrael when he went there in January 1977 shows that even after he had acted as an adviser to the Indian shareholders it was not thought that he was in any sense biassed in their favour. Silverston's alleged personal hostility to Coats cannot, within the meaning of section 300(1) of the Companies Act, make him a person "directly or indirectly, concerned or interested in the contract or

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

arrangement" in the discussion of which he had to participate or upon which he had to vote. Section 300(1) disqualifies a Director from taking part in the discussion of or voting on any contract or arrangement entered into or on behalf of the company, if he is in any way concerned or interested in that contract or arrangement. Under section 299(1) of the Companies Act, "Every director of a Company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company, shall disclose the nature of his concern or interest at a meeting of the Board
788
of Directors." The concern or interest of the Director which has to be disclosed at the Board meeting must be in relation to the contract or arrangement entered into or to be entered into by or on behalf of the company. The interest or concern spoken of by sections 299(1) and 300(1) cannot be a merely sentimental interest or ideological concern. Therefore, a relationship of friendliness with the Directors who are interested in the contract or arrangement or even the mere fact of a lawyer-client relationship with such directors will not disqualify a person from acting as a Director on the ground of his being, under section 300(1), an "interested" Director. Thus, howsoever one may stretch the language of section 300(1) in the interest of purity of company administration, it is next to impossible to bring Silverston's appointment within the framework of that provision. In the Firestone (supra) the Solicitor-Director was held to be concerned or interested in the agreement for the appointment of Kilachands as selling agents, as he had a substantial shareholding in a private limited company of Kilachands. Besides, he was also a shareholder director in various other concerns of Kilachands.

We must, accordingly, reject the argument that Silverston was an interested director, therefore his appointment as a Additional Director was invalid and that consequently, the resolution for the issue of rights shares was passed without the necessary quorum of two disinterested directors. We have already held that the resolution was not passed for the benefit of the Directors. There is therefore no question of Silverston's appointment having been made for the purpose of enabling such a resolution to be passed.

The third contention, arising out of the proceedings of the meeting of 6th April, to the effect that Silverston's appointment as an Additional Director is invalid since there was no item on the agenda of the meeting for the appointment of an Additional Director is equally without substance. Section 260 of the Companies Act preserves the power of the Board of Directors to appoint additional Directors if such a power is conferred on the Board by the Articles of Association of the Company. We are not concerned with the other conditions laid down in the section, to which the appointment is subject. It is sufficient to state that Article 97 of NIIL's Articles of Association confers the requisite power on the Board to appoint additional Directors.

We do not see how the appointment of an additional Director could have been foreseen before the 6th April, on which date the meeting of the Board was due to be held. The occasion to
789
appoint Silverston as an Additional Director arose when the Board met on 6th April, with Devagnanam in chair. Sanders was absent and no communication was received from or on

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

behalf of the Holding Company that they had decided finally not to disinvest. They always had the right to such a locus penitentia. Were they to intimate that they were ready to disinvest, there would have been no occasion to appoint an additional Director. That occasion arose only when the picture emerged clearly that the Board would have to consider the only other alternative for reduction of the non-resident holding, namely, the issue of rights shares. It is for this reason that the subject of appointment of an additional Director could not have, in the then state of facts, formed a part of the Agenda. Silverston's appointment is, therefore, not open to challenge on the ground of want of agenda on that subject.

It is necessary to clear a misunderstanding in regard to the Directors to issue shares. It is not the law that the power to shares can be used only if there is need to raise additional capital. It is true that the power to issue shares is given primarily to enable capital to be raised when it is required for the purposes of the company but that power is not conditioned by such need. That power can be used for other reasons as, for example, to create a sufficient number of share-holders to enable the company to exercise statutory powers (Punt v. Symons and Co.), (Supra) or to enable it to comply with legal requirements as in the instant case. In Hogg v. Cramphorn (supra). Buckley J. (p 267) agreed with the law of Byrne J. in Punt And so did Lord Wilberforce (pp 835-836) in Howard Smith (supra) where he said:

> "It is, in their Lordships' opinion, too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the company. The discretion is not in terms limited in this way: the law should not impose such a limitation on Directors' powers. To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of different types of Company in different situations cannot be anticipated".

The Australian decision in Harlowe Nominees (supra) took the same view of the directors' power to issue shares. It was said therein:

> "The principle is that although primarily the power is given to enable capital to be raised when required for the
>
> 790
>
> purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hand of the directors themselves or their friends".

We have already expressed our view that the rights share were issued in the instant case in order to comply with the legal requirements, which, apart from being obligatory as the only viable course open to the Directors, was for the benefit of the company since, otherwise, its developmental activities would have stood frozen as of December 31, 1973. The shares were not issued as a part of takeover war between the rival groups of shareholders.

The decision to issue rights shares was assailed on the ground also that the company did not, as required by the Reserve Bank's letter dated May 11, 1975 submit any scheme indicating whether the reduction in the non-resident

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

interest was proposed to be brought about by issue of additional equity capital to Indian residents to the extent necessary to finance any scheme of expansion or diversification. It is true that by the aforesaid letter, the Reserve Bank had asked NIIL to report to it as to how the Company proposed to reduce the non-resident interest: whether by disinvestment by non-resident shareholders, or by issue of additional equity capital to Indian residents to the extent necessary to finance any scheme of expansion/diversification, or by both. We are, however, unable to read the Bank's letter as requiring or asking the Company not to issue the additional capital unless it was necessary to do so for financing a scheme of expansion or diversification. The Reserve Bank could not have intended to impose any such condition by way of a general direction in face of the legal position, which we have set out above, that the power of the Directors to issue shares is not conditioned by the need for additional capital. We are not suggesting that the Reserve Bank, in the exercise of its statutory functions, cannot ever impose such conditions as it deems appropriate, subject to which alone a new issue may be made. But neither the wording of the Bank's letter nor the true legal position justifies the stand of the Holding Company. The minutes of the Ketty meeting of October 20-21, 1976 saying that it was agreed that the rights issue, with the Indian share-holders taking up the U.K. members' rights, would be considered provided it was demonstrated by NIIL that "there is a viable development plan requiring funds that the expected NIIL cash flow
791
cannot meet", cannot also justify the argument that the power of the company to issue rights shares was, by agreement, conditioned by the need to raise additional capital for a development plan. In fact, the occasion for consideration by the Holding Company of NIIL's proposal to issue rights shares did not arise, since the Holding Company virtually boycotted the meeting of April 6. Assuming for the sake of argument that there was any such understanding between the parties, the minutes of the meeting of April 6 show that the Company needed additional capital for its expansion. The minutes say:

> "As per the final budget for the year 1977, the working capital requirements amounted to nearly Rs. 100 lakhs and even after tapping the facilities that we will be entitled to obtain from the Banking sector, we will be left with a gap of about Rs. 25 lakhs which can be met by only increasing equity capital and attracting deposits from public".

There is no reason to believe that this statement does not accord with the economic realities of the situation as assessed by the Directors of the Company.

Finally, it is also not true to say, as a statement of law, that Directors have no power to issue shares at par, if their market price is above par. These are primarily matters of policy for the Directors to decide in the exercise of their discretion and no hard and fast rule can be laid down to fetter that discretion. As observed by Lord Davey in Hilder and others v. Dexter(1).

> "I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide".

What is necessary to bear in mind is that such discretionary

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

powers in company administration are in the nature of fiduciary powers and must, for that reason, be exercised in good faith. Mala fides vitiate the exercise of such discretion. We may mention that in the past, whenever the need for additional capital was felt, or for other reasons, NIIL issued shares to its members at par.
792

We are therefore of the opinion that Devagnanam and his group acted in the best interests of NIIL in the matter of the issue of rights shares and indeed, the Board of Directors followed in the meeting of the 6th April a course which they had no option but to adopt and in doing which, they were solely actuated by the consideration as to what was in the interest of the company. The shareholder-Directors who were interested in the issue of rights shares neither participated in the discussion of that question nor voted upon it. The two Directors who, forming the requisite quorum, resolved upon the issue of rights shares were Silverston who, in our opinion, was a disinterested Director and Doraiswamy, who unquestionably was a disinterested Director. The latter has been referred to in the company petition, Mackrael's reply affidavit and in the Holding Company's Memorandum of Appeal in the High Court as "uninterested", "disinterested" and "independent". At a crucial time when Devagnanam was proposing to dispose of his shares to Khaitan, Sanders asked for Doraiswamy's advice by his letter dated August 6, 1975 in which he expressed "complete confidence" in Doraisway in the knowledge that the Holding Company could count on his guidance. Disinvestment by the Holding Company, as one of the two courses which could be adopted for reducing the non-resident interest in NIIL to 40% stood ruled out, on account of the rigid attitude of Coats who, during the period between the Ketty meeting of October 20-21, 1976 and the Birmingham discussions of March 29-31, 1977 clung to their self-interest, regardless of the pressure of FERA, the directive of the Reserve Bank of India and their transparent impact on the future of NIIL. Devagnanam and the disinterested Directors, having acted out of legal compulsion precipitated by the obstructive attitude of Coats and their action being in the larger interests of the company, it is impossible to hold that the resolution passed in the meeting of April 6 for the issue of rights shares at par to the existing shareholders of NIIL constituted an act of oppression against the Holding Company. That cannot, however, mark the end of the case because 2nd May has still to come and Shri Seervai's argument is that the true question before the Court is whether the offer of rights shares to all existing shareholders of NIIL but the issue of rights shares to existing Indian shareholders only, constitutes oppression of the Holding Company.

That takes us to the significant, and if we may so call them, sordid, happenings between April 6 and May 2, 1977. Devagnanam wrote a letter to Raeburn on April 12, 1977 stating that a copy of
793
the Reserve Bank's letter dated March 30, 1977 was enclosed therewith. It was in fact not enclosed. Pursuant to the decision taken in the Board's meeting of April 6, a letter of offer dated April 14 was prepared by NIIL. Devagnanam's letter to Raeburn dated April 12, (without a copy of the Reserve Bank's letter dated March 30) and the letter of offer dated April 14 were received by Raeburn on May 2, 1977 in an envelope bearing the postal mark of Madras dated April 27, 1977. The letter of offer which was posted to the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Holding Company also bore the postal mark of Madras dated April 27, 1977 and that to was received in Birmingham on May 2, 1977. The letter of offer which was posted to one of the Indian shareholders, Manoharan, who was siding with Coats, was also posted in an envelope which bore the postal mark of Madras dated April 27, 1977. On April 19, 1977, a notice of the Board's meeting for May 2, 1977 was prepared. One of the items on the Agenda of the meeting was stated in the notice as "Policy-(a) Indianisation (b) Allotment of shares". The notice dated April 19 of the Board's meeting for May 2 was posted to Sanders in an envelope which bore the postal mark of Madras dated April 27, 1977 and was received by him in Birmingham on May 2, 1977, after the Board's meeting fixed for that date had already taken place.

It puts a severe strain on one's credulity to believe that the letters of offer dated April 14 to the Holding Company, to Raeburn and to Manoharan were posted on the 14thitse If but that somehow they rotted in the post office until the 27th, on which date they took off simultaneously for their respective destinations. The affidavit of Selvaraj, NIIL's senior clerk in the despatch Department and the relevant entry in the outward register are quite difficult to accept on this point since they do not accord with the ordinary course of human affairs. Not only the three letters of offer above said, but even the notice dated April 19, of the Board meeting for May 2, was received by Sanders at Birmingham in an envelope bearing the Madras postal mark of April 27. Selvaraj's affidavit, apparently supported by an entry in the outward register, that the envelope addressed to Sanders containing the notice of 19th April was posted on the 22nd is also difficult to accept. It takes all kinds to make the world and we do not know whether the NIIL's staff was advised astrologically that 27th April was an auspicious date for posting letters. But if only they had sought a little legal advice which, at least from Doraiswamy and Silverston, was readily available to them, they would have seen the folly of indulging in such behaviour. Add to that the circumstance that Devagnanam's letter to Raeburn dated April 12 was put in the same envelope in which the letter of

794

offer dated April 14 was enclosed and the envelope containing these two important documents bore the postal mark of Madras dated 27th April. These coincidences are too tell-tale to admit of any doubt that someone or the other, not necessarily Devagnanam, unduly solicitous of the interest of NIIL and of the Indian shareholders manipulated to delay the posting of the letters of offer and the notice of the Board meeting for 2nd May, until the 27th April. What is naively sought to be explained as a mere coincidence reminds one of the 'Brides in the Bath Tub' case: The death of the first bride in the bath tub may pass off as an accident and of the second as suicider but when, in identical circumstances, the third bride dies of asphyxia in the bath tub, the conclusion becomes compelling, even applying the rule of circumstantial evidence, that she died a homicidal death.

The purpose behind the planned delay in posting the letters of offer to Raeburn and to the Holding Company, and in posting the notice of the Board's meeting for May 2 to Sanders, was palpably to ensure that no legal proceeding was taken to injunct the holding of the meeting. The object of withholding these important documents, until it was quite late to act upon them, was to present to the Holding Company a fait accompli in the shape of the Board's decision for

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

allotment of rights shares to the existing Indian shareholders.

We are, however, unable to share the view expressed in the '12th Conclusion' in the appellate judgment of the High Court that Devagnanam and "his colleagues in the Board of Directors" arranged to ensure the late posting of the letters of offer and the notice of the meeting. We do not accept Shri Nariman's argument that Devagnanam must be exonerated from all responsibility in this behalf because he was away in Malacca from April 13 to 26. In the first place, to be in a place on two dates is not necessarily to be there all along between those dates and therefore we cannot infer that Devagnanam was in Malacca from 13th to 26th since he was there on the 13th and the 26th. Besides, it was easy for a man of Devagnanam's importance and ability to pull the strings from a distance and his physical presence was not necessary to achieve the desired result. That is how puppets are moved. But there is no evidence, at least not enough, to justify the categorical finding recorded by the appellate Bench of the High Court. The fact that Devagnanam stood to gain by the machination is a relevant factor to be taken into account but even that is not the whole truth: NIIL, not Devangnanam was the real beneficiary, a thesis
795
which we have expounded over the last many pages. And the involvement of the other Directors by calling them Devagnanam's colleagues is less than just to them. There is not a shred of evidence to justify the grave charge that they were willing tools in Devagnanam's hands and lent their help to concoct evidence. We clear their conduct, expressly and categorically.

In so far as Devagnanam himself is concerned, there is room enough to suspect that he was the part-author of the late postings of important documents, especially since he was the prime actor in the play of NIIL's Indiansation. But even in regard to him, it is difficult to carry the case beyond the realm of suspicion and 'room enough' is not the same thing as 'reason enough'. Section 15 of the Evidence Act which carries the famous illustration of a person obtaining insurance money on his houses which caught fire successively, the question being whether the fire was accidental or intentional or whether the act was done with a particular knowledge or intention, will not help to fasten the blame on Devagnanam because, it is not shown that he was instrumental or concerned in any of the late postings complained of. Were his complicity shown in any of these, it would have been easy to implicate him in all of them.

On the contrary, there is an admitted act, described as a lapse, on Devagnanam's part which shows that he failed to do what was to his advantage to do. It may be recalled that in his letter dated April 12 to Raeburn, Devagnanam stated that he was enclosing therewith a copy of the Reserve Bank's letter dated March 30, 1977 but that was not enclosed. Nothing was to be gained by suppressing the Reserve Bank's letter from Raeburn who was always sympathetic to the Indian shareholders. If anything, there was something to gain by apprising Raeburn of the urgency of the matter in view of the Reserve Bank's letter. The strongest point in favour of the Indian shareholders was the last para of the Reserve Bank's letter which they would have liked the U.K. shareholders to know. Raeburn's response of 2nd May to Devagnanam's letter of 12 April and the letter of offer was without the knowledge of Reserve Bank's letter of March 30. When the Bank's letter was sent to Racburn along with Devagnanam's letter of May 11, Raeburn categorially

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

supported the stand of the Indian shareholders, as is clear from paragraph 4 of the letter dated June 8, 1977 by Raeburn to Mackrael, a copy of which was sent by Raeburn to Devagnanam along with his letter dated June 17, 1977.
796

The inferences arising from the late posting of the letter of offer to the Holding Company as also of the notice of meeting for May 2 to Sanders and the impact of inferences on the conduct and intentions of Devagnanam are one thing: we have already dealt with that aspect of the matter. Their impact on the legality of the offer and the validity of the meeting of May 2 is quite another matter, which we propose now to examine. In doing this, we will keep out of consideration all questions relating to the personal involvement of Devagnanam and his group in the delay caused in sending the letters of offer and the notice of meeting for May 2.

First, as to the letter of offer: The letter of offer dated April 14, 1977 sent to the Holding Company at Birmingham, like all other letters of offer, mentions, inter alia that it was resolved in the meeting of April 6 to increase the issued capital of the company from 32,000 shares of Rs. 100 each to 48,000 shares of Rs. 100 each by issuing Rights Shares to the existing shareholders on the five conditions mentioned in the letter. The second condition reads thus: "If the offer is not accepted within 16 days from the date of offer, it shall be deemed to have been declined by the shareholder". The Holding Company was informed by the last paragraph of the letter of offer that in respect of its holding of 18,990 shares, it was entitled to 9495 rights shares and that its acceptance of the offer together with the application money (at Rs. 50/- per share) should be forwarded so as to reach the registered office of NIIL on or before April 30, 1977. A postal communication by air between U.K. and Madras, which is the normal mode of communication, generally takes five days to reach its destination. If the letter of offer were to be posted on the 14th itself in Mardas, it would have reached the Holding Company in Birimingham, say, on the 19th. Even assuming that the 16 days' period allowed for communicating the acceptance of offer is to be counted from the 14th and not from the 19th, it would expire on 30th April, To that has to be added the period of five days which the Holding Company's letter would take to reach Madras. That means that the Holding Company would be within its rights if its acceptance reached NIIL on or before May 5, 1977. The Board of Directors had, however, met in Madras three days before that and had allotted the entire issue of the rights shares to the Indian shareholders, on the ground that Holding Company had not applied for the allotment of the shares due to it. In these circumstances, it is quite clear that the rights shares offered to the Holding Company could not have been allotted to anyone in the meeting of May 2, for the supposed failure of the Holding Company to communicate its acceptance before April 30. The meeting of May 2, of which the
797
main purpose was to consider 'Allotment' of the rights shares must, therefore, be held to be abortive which could produce no tangible result. The matter would be worse if April 27, and much worse if May 2, were to be taken as the starting point for counting the period of 16 days. Except for circumstances, hereinafter appearing the allotment to Indian shareholders of the rights shares which were offered to the Holding Company would have been difficult to accept and act upon.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

The objection arising out of the late posting of the notice dated April 19 for the meeting of 2nd May goes to the very root of the matter. That notice is alleged to have been posted to N.T. Sanders, Studley, Warwickshire, U.K. on April 22. But we have already held that in view of the fact that the envelope in which the notice was sent bears the postal mark of Madras dated April 27, 1977, this latter date must be taken to be the date on which the notice was posted. The notice was received by Sanders on May 2, on which date the Board's meeting for allotment of rights shares was due to be held and was, in fact, held. The utter inadequacy of the notice to Sanders in terms of time stares in the face and needs no further argument to justify the finding that the holding of the meeting was illegal, at least in so far as the Holding Company is concerned. It is self-evident that Sanders could not possibly have attended the meeting. There is, therefore, no alternative save to hold that the decision taken in the meeting of May 2 cannot, in the normal circumstances, affect the legal rights of the Holding Company or create any legal obligations against it.

The next question, and a very important one at that on which there is a sharp controversy between the parties, is as to what is the consequence of the finding which we have recorded that the objection arising out of the late position of the notice of the meeting for 2nd May goes to the root of the matter. The answer to this question depends upon whether the Holding Company could have accepted the offer of the rights shares and if, either for reasons of volition or of legal compulsion, it could not have accepted the offer, whether it could have at least renounced its right under the offer to a resident Indian, other than the existing Indian shareholders. The decision of this question depends upon the true construction of the provisions of FERA and of sections 43A and 81 of the Companies Act, 1956.

We have already reproduced the relevant provisions of FERA, namely, section 2(p), (q) and (u); section 19(1)(a), (b) and (d);
798
section 29(1)(a); section 29(2)(a), (b) and (c); and section 29(4)(a) and (b). Section 29(1) provides that:

> ... notwithstanding anything contained in the provisions of the Companies Act, 1956 a company which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent shall not, except with the general or special permission of the Reserve Bank carry on in India any trading, commercial or industrial activity other than the one for which permission of the Reserve Bank has been obtained under section 28.

The other provisions are of ancillary and consequential nature, following upon the main provision summarised above.

NIIL had applied for the necessary permission, since the non resident interest therein was more than 40% the Holding Company owing nearly 60% of its share capital. That permission was accorded by the Reserve Bank on certain conditions which, inter alia, stipulated that the reduction in the non-resident holding must be brought down to 40% within one year of the receipt of its letter, that is, before May 17, 1977 and that until then, the manufacturing and business activities of the Company shall not be extended beyond the approved level as of December 31, 1973.

It is contended by Shri Seervai that non-compliance with the condition regarding the dilution of non-resident interest within the stipulated period could not have resulted in the RBI directing NIIL to close down its

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

business or not to carry on its business. It is also argued that noncompliance with the conditions imposed for permission to carry on its business would not have exposed the Indian directors to any penalties or liabilities and that, in the absence of a power to revoke the permission already granted (as in other sections like sections 6 and 32), the RBI had no power to revoke the permission granted to NIIL even if the conditions subject to which the permission was granted were breached. According to counsel, closing down a business which the RBI had allowed to be continued by granting permission would have such grave consequences-public and private-that the power to direct the business to be discontinued was advisably not conferred, even if the conditions are breached. Section 29(4)(c), it is urged, which enables the RBI to direct non residents to sell their shares or cause them to be sold where an application under section 29(4)(a), for permission to continue to
799
hold shares, was rejected is the only power given to the Reserve Bank where a condition imposed under section 29(2) is breached.

We are unable to accept these contentions. The Reserve Bank granted permission to NIIL to carry on its business, "subject to the conditions" mentioned in the letter of May 11, 1976. It may be that each of those conditions is not of the same rigour or importance as e.g. the condition regarding the progress made in implementing the other conditions, which could reasonably be relaxed by condonation of the late filing of any particular quarterly report. But the dilution of the non-resident interest in the equity capital of the Company to a level not exceeding 40% "within 'a period of 1(one) year from the date of the receipt of" the letter was of the very essence of the matter. A permission granted subject to the condition that such dilution shall be effected would cease automatically on the non-compliance with the condition at the end of the stipulated period or the extended period, as the case may be. The argument of the Holding Company would make the granting of a conditional permission an empty ritual since, whether or not the company performs the conditions, it would be free to carry on its business, the only sanction available to the Bank being, as argued, that it can compel or cause the sale of the excess non-resident interest in the equity holding of the Company, under section 29(4)(c) of FERA. This particular provision, in our opinion, is not a sanction for the enforcement of conditions imposed on a Company under clause (c) of section 29(2). Section 29(4)(c) provides for a situation in which an application for holding shares in a Company is not made or is rejected. The sanction for enforcement of a conditional permission to carry on business, where conditions are breached, is the cessation, ipso facto, of the permission itself on the non-performance of the conditions at the time appointed or agreed. This involves no element of surprise or of unjustness because permission is granted, as was done here, only after the applicant agrees to perform the conditions within the stipulated period. When NIIL wrote to the Bank on February 4, 1976 binding itself to the performance of certain conditions, it could not be heard to say that the permission will remain in force despite its non-performance of the conditions. Having regard to the provisions of section 29 read with sections 49, 56(1) and (3) and section 68 of FERA, the continuance of business after May 17, 1977 by NIIL would have been illegal, unless the condition of dilution of non-resident equity was duly complied with. It is needless, once

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

again, to dwell upon the impracticability of NIIL applying for extension of the period of one year allowed to it by the
800
Bank. Coats could be optimistic about such an extension being granted especially, since thereby they could postpone the evil day. For NIIL, the wise thing to do, and the only course open to it, was to comply with the obligation imposed upon it by law, without delay or demur.

It seems to us quite clear, that by reason of the provisions of section 29(1) and (2) of FERA and the conditional permission granted by the RBI by its letter dated May 11, 1976, the offer of rights shares made by NIIL to the Holding Company could not possibly have been accepted by it. The object of section 29, inter alia, is to ensure that a company (other than a banking company) in which the non-resident interest is more than 40% must reduce its to a level not exceeding 40%. The RBI allowed NIIL to carry on its business subject to the express condition that it shall reduce its non-resident holding to a level not exceeding 40%. The offer of rights shares was made to the existing shareholders, including the Holding Company, in proportion to the shares held by them. Since the issued capital of the Company which consisted of 32,000 shares was increased by the issue of 16,000 rights shares, the Holding Company which held 18,990 shares was offered 9495 shares. The acceptance of the offer of rights shares by the Holding Company would have resulted in a violation of the provisions of FERA and the directive of the Reserve Bank. Were the Holding Company to accept the offer of rights shares, it would have continued to hold 60% share capital in NIIL and the Indian shareholders would have continued to hold their 40% share capital in the Company. It would indeed be ironical that the measure which was taken by NIIL's Board of Directors for the purpose of reducing the non-resident holding to a level not exceeding 40% should itself become an instrument of perpetuating the ownership by the Holding Company of 60% of the equity capital of NIIL. We are not suggesting that the offer of rights shares need not have been made to the Holding Company at all. But the question is whether the offer when made could have been accepted by it. Since the answer to this question has to be in the negative, no grievance can be made by the Holding Company that, since it did not receive the offer in time, it was deprived of an opportunity to accept it.

We see no substance in Shri Nariman's contention that the letter of offer could not have been sent to the Holding Company without first obtaining the RBI s approval under section 19 of FERA. Counsel contends that under section 19(1)(b), notwithstanding anything contained in section 81 of the Companies Act, no person can, except with
801
the general or special permission of the Reserve Bank, create 'any interest in a security' in favour of a person resident outside India. The word "security" is defined by section 2(u) to shares, stocks, bonds, etc. We are unable to appreciate how an offer of shares by itself creates any interest in the shares in favour of the person to whom the offer is made. An offer of shares undoubtedly creates "fresh rights" as said by this Court in Mathalone v. Bombay Life Assurance Co.(1) but, the right which it creates is either to accept the offer or to renounce it, it does not create any interest in the shares in respect of which the offer is made.

But though it could not have been possible for the Holding Company to accept the offer of rights shares made to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

it, the question still remains whether it had the right to renounce the offer in favour of any resident Indian person or company of its choice, be it an existing shareholder like Manoharan or an outsider like Madura Coats. The answer to this question depends on the effect of section 43A and 81 of the Companies Act, 1956.

We will first notice the relevant parts of sections 3, 43A and 81 of the Companies Act. Section 3(1)(iii) defines a "private company" thus :

> "private company" means a company which, by its articles :-
>
> (a) restricts the right to transfer its shares, if any;
>
> (b) limits the number of its members to fifty and
>
> (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company.

Clause (iv) of section 3(1) define a "public company" to mean a company which is not a private company.

Section 43A of the Companies Act, which was inserted by Act 65 of 1960, reads thus :

> 43A. (1) Save as otherwise provided in this section, where not less than twenty-five per cent of the paid-up share capital of a private company having a share capital, is held by one or more bodies corporate, the private, company shall.....

802

> become by virtue of this section a public company :
>
> Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matter specified in clause (iii) of sub-section (1) of section 3 and the number of its members may be, or may at any time be reduced, below seven :
>
> (2) Within three months from the date on which a private company becomes a public company by virtue of this section, the company shall inform the Registrar that it has become a public company as aforesaid, and thereupon the Registrar shall delete the word "Private" before the word "Limited" in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association.
>
> ... ...
>
> (4) A private company which has become a public company by virtue of this section shall continue to be a public company until it has, with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company.

Section 81 of the Companies Act reads thus :

> 81. (1) Where ..... it is proposed to increase the subscribed capital of the company by allotment of further shares, then,
>
> (a) such further shares, shall be offered to the persons who at the date of the offer, are holders of the equity shares of the company in proportion, as nearly as circumstances admit, to the capital paid up on those shares at that date ;

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

803

(b) the offer aforesaid shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days from the date of the offer within which the offer, if not accepted, will be deemed to have been declined ;

(c) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person, and the notice referred to in clause (b) shall contain a statement of this right ;

(d) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of directors may dispose of them in such manner as they think most beneficial to the company.

... ...

(1A) Notwithstanding anything contained in sub-section (1) the further shares aforesaid may be offered to any persons (whether or not those persons include the persons referred to in clause (a) of sub-section (1)) in any manner whatsoever-

(a) if a special resolution to that effect is passed by the company in general meeting, or

(b) where no such special resolution is passed if the votes cast.....in favour of the proposal ..... exceed the votes, if any, cast against the proposal ..... and the Central Government is satisfied, on an application made by the Board of directors in this behalf that the proposal is most beneficial to the company.

... ...

(3) Nothing in this section shall apply -

(a) to a private company.

... ...

804

While interpreting these and allied provisions of the Companies Act, it would be necessary to have regard to the relevant Articles of Association of NIIL, especially since Section 81(1)(c) of that Act, which is extracted above, is subject to the qualification : "Unless the articles of the Company otherwise provide". The relevant Articles are Articles 11, 32, 38 and 50 and they read thus :

Article 11: In order that the Company may be a private Company within the meaning of the Indian Companies Act, 1913, the following provisions shall have effect, namely :-

(i) No invitation shall be issued to the public to subscribe for any shares, debentures, or debenture stock of the Company.

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

(ii) The number of the members of the Company (Exclusive of persons in the employment of the Company) shall be limited to fifty, provided that for the purposes of this Article where two or more persons hold one or more shares in the Company jointly, they shall be treated as a single member.

(iii) The right to transfer shares of the Company is restricted in manner hereinafter provided.

(iv) If there shall be any inconsistency between the provisions of this Article and the provisions of any other Article the provisions of this Article shall prevail.

Article 32 : A share may subject to article 38 be transferred by a member or other person entitled to transfer to any member selected by the transferor; but, save as aforesaid, no share shall be transferred to a person who is not a member so long as any member is willing to purchase the same at the fair value. Such value to be ascertained in manner hereinafter mentioned.

Article 38 : The Directors may refuse to register any transfer of a share (a) where the Company has a lien on the share, or (b) in case of shares not fully paid-up, where it is not proved to their satisfaction

805

that the proposed transferee is a responsible person, or (c) where the Directors are of opinion that the proposed transferee (not being already a member) is not a desirable person to admit to membership, or (d) where the result of such registration would be to make the number of members exceed the above mentioned limit. But clauses (b) and (c) of this Article shall not apply where the proposed transferee is already a member.

Article 50 : When the Directors decide to increase the capital of the Company by the issue of new shares such shares shall be offered to the shareholders in proportion to the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered and limiting a time within which the offer, if not accepted, will be deemed to be declined and after the expiration of such time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the Directors may dispose of the same in such manner as they think most beneficial to the Company. The Directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to the shares held by persons entitled to an offer of new shares) cannot, in the opinion of the Directors, be conveniently offered under this Article.

It is contended by Shri Nariman that by reason of the articles of the Company and on a true interpretation of section 81, the right of renunciation of the shares offered

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

by NIIL was not available to the Holding Company since NIIL was not a full-fledged public company in the sense of being incorporated as a public company but had become a public company under section 43A(1) and had, under the first proviso to that section, retained its articles relating to matters specified in section 3(1) (iii). According to Shri Nariman, section 81(1A) can have no application to a 'section 43A (1) proviso company' (for short, the 'proviso company') because it contemplates issue of shares to the public and to persons other than members of the company, which cannot be done in the case of a company which falls under the proviso to section 43A(1).

806

Section 81(1A), it is urged, is complementary to section 81 and since the latter cannot apply to the 'proviso company', the former too cannot apply to it. In any event, according to counsel, section 81 (1) (c) cannot apply in the instant case since the articles of NIIL provide, by necessary implication at any rate, that the members of company shall have no right to renounce the shares in favour of "any" other person, because such a right would include the right to renounce in favour of persons who are not members of the company, and NIIL had retained its articles under which, shares could not be transferred or renounced in favour of outsiders.

Shri Seervai has refuted these contentions, his main argument being that the definitions of 'public company' and 'private company' are mutually exclusive and, between them, are exhaustive of all categories of companies. There is, according to the learned counsel no third category of companies recognised by the Companies Act, like the 'proviso company'. Shri Seervai further contends :

(a) The right of renunciation is not a 'transfer' and therefore the directors' power to refuse to register the shares under the articles does not extend to renunciation ;

(b) Before considering Section 43A, which was inserted for the first time in the Act of 1956 by the amending Act of 1960, it should be noted that Section 81 as enacted in the Act of 1956 contained three sub-sections (1), 2 and 3, and sub-section 3 provided that "nothing in this section shall apply to a private company". The opening words of Section 81, as they now stand, were substituted by the Amending Act of 1960, and sub-section (1A) was inserted by the said Amending Act, and sub-section (3) was substituted by the Amending Act of 1963. But subsection 3 (a) reproduced sub-section (3) of the Act of 1956, namely, "nothing in this section shall apply to a private company". It is clear therefore that the rights conferred by Section 81 (1) and (2) do not apply to a private company, and this provision in the Act of 1956 was not connected with the insertion Section 43A for the first time in 1960.

(c) The provisos to Section 43A (1), (1A) and (1B) are very important in connection with Section 81 of the

807

Act of 1956. Just as the crucial words in Section 27(3) are "shall contain", the crucial words in the provisos are "may include" (or may retain). The words "shall contain" are mandatory and go to the constitution of a private company. The words "may include" are permissive and they do not go to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

the constitution of a company which has become a public company by virtue of Section 43A because whether the articles include (or retain) those requirements or do not include those requirements, the constitution of the company as a public company remains unaffected;

(d) No statutory consequence follows, as to the company being a public company, on the retention of the three requirements or one or more of them, or in not complying with those requirements. But in the case of a private company which does not comply with the requirements of Section 3 (1)(iii) serious consequences follow under Section 43, and in the case of a private company altering its articles so as not to include all the matters referred to in Section 3 (1) (iii) serious consequences follow under Section 43, and in the case of a private company altering its articles so as not to include all the matters referred to in Section 3 (1) (iii) serious consequences follow under Section 44. In short, the inclusion, or retention, of all the matters referred to in Section 3(1) (iii) has a radically different part of function in a private company which becomes a public company by virtue of Section 43A from that which it has in a private company. More particularly the non-compliance with the three requirements of Section 3 (1)(iii) included, or retained, in the articles of a private company which has become a public company by virtue of Section 43A, involves no statutory consequences or disabilities, since such a company is a public company and Section 43 is not attracted.

(e) It is wrong to contend that the whole of Section 81(1) does not apply to a 'proviso company' because it is a private company entitled to the protection of subsection 3 (a). Section 81(3) (a) applies to a private

808

company; a 'proviso company' is one which has become, and continues to remain, a public company;

(f) Section 81 (1) (c) applies to all companies other than private companies. The articles of a public company may include all of the matters referred to in Section 3 (1) (iii), or may include one or two of the matters referred to therein without ceasing to be a public company. A public company which has become such by virtue of Section 43A can delete all the matters referred to in Section 3 (1) (iii) or may delete one or two of them or may include (or retains) all the three matters referred to in Section 3 (1) (iii). The retention of the three matters mentioned in Section 3(1) (iii) does not in any way affect the constitution of the company because it has become and continues to be a public company ;

(g) Section 81 when enacted in 1956 consisted of 3 subsections. The need to exempt private companies arose from Section 81(c), for the right to renounce in favour of any person might, (not must), conflict with the limitation on the number of members to 50 and since that was one of the matters which went to the constitution of a company as a private company, private companies were expressly exempted. No such exemption was

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

necessary in the case of a 'proviso company' which retains in its articles all the three matters referred to in Section 3(1) (iii), because an increase in the number of its members above 50 will not affect the constitution of the company which remains that of a public company;

(h) Section 81 as enacted in 1956 did not contain subsection (1A) which was inserted for the first time by the Amending Act of 1960, which Amending Act also inserted Section 43A. After the insertion of subsection (1A) the effect of the exemption of private companies from the operation of section 81 became even more necessary for the provisions of sub-section (1A) (a) and (b) override the whole of Section 81 (1) and shares need not be offered to existing shareholders. Section 81 (1A) also overrides Article 50 of NIIL;

809

(i) The Articles of NIIL provide for the transfer of shares, and Article 38 sets out the circumstances under which the directors may refuse to transfer the shares. However, since renunciation of shares is not a transfer, the restriction in Article 11(iii) is not violated by an existing member of NIIL renouncing his share in favour of any other person;

(j) The opening words of Sections 81 (1) (c) are "unless the articles of the company otherwise provide". Section 81 (1) (c) contains no reference to "expressly provide" or "expressly or by necessary implication provide". According to the plain meaning of the words "other wise provide", there must be a provision in the Articles which says that the offer of shares to existing members does not entitle them to renounce the shares in favour of any person. Article 11 of NIIL merely states the matters necessary to constitute a company a private company. Such companies are exempt from Section 81 and so, the questions of its 'otherwise providing' does not arise. Article 50 refers to the rights shares but it makes no other provision with regard to the right of renunciation than is made in Section 81(1)(c). Unless such other provision is made, the opening words of Section 81(1)(c) are not attracted. Secondly, Section 81(1)(c) provides that unless the articles otherwise provide "the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any person". The right conferred by the deeming clause can be taken away only by making a provision in the Articles to prevent the deeming provision from taking effect. The deeming provision cannot be avoided by implications; and

(k) The Holding Company could have renounced the rights shares offered to it at least in favour of the Manoharan group and the fact that after the shares were allotted, the Manoharans stated that they were not interested in subscribing to the shares offered does not affect the question of the legal right. Besides, it was one thing to refuse to subscribe to the shares offered; it was another thing to accept the renunciation of merely 6,190 shares

Case Citation: (2017) ibclaw.in 1315 SC

810

which would have given the Manoharans a substantial stake in the affairs of the company.

Shri Seervai relies upon many a text and authority in support of the proposition that the classification of companies into private and public is mutually exclusive and collectively exhaustive. He relies upon a decision in Park v. Royalty Syndicates(1) in which Hamilton J. (later Lord Summer) observed that a public company is simply one which is not a private company and that there is no "intermediate state or terbium quid". In support of the proposition that the right to renunciation of shares is not a transfer, counsel relies upon a decision in Re Pool Shipping Co. Ltd.(2). Reliance is also placed in this behalf on the statement of law in Halsbury (Vol. 7, 4th edition, p. 218), Palmer's Company Law Vol. 1, 22nd edition p. 393), Palmer's Company Precedents (Part 1, 17th edition, p. 688), Gore-Brown on Companies (43rd edition, para 16.3) and Buckley on Companies Act (13th edition, p. 815). While indicating his own reasons as to why the legislature enacted identical provisos to sub-sections (1),(1A) and (1B) of section 43A, counsel mentioned that no light is thrown for enacting these provisos, either by the Shastri Committee Report which led to the Companies (Amendment) Act, 1960 or by the Notes on clauses, or by the Report of the Joint Select Committee. In regard to the opening words of section 81 (1)(c); "Unless the articles of the company otherwise provide", counsel cited the Collins English Dictionary, the Random House Dictionary and the Oxford English Dictionary. An interesting instance of the use of the word "provide' is to be found in the Random House Dictionary, 1967, p. 1157, to this effect : "The Mayor's wife of the city provided in her will that she would be buried without any pomp or noise".

It shall have been noticed that the entire superstructure of Shri Seervai's argument rests on the foundation that the definitions of 'public company' and 'private company' are mutually exclusive and collectively exhaustive of all categories of companies, that is to say, that there is no third kind of company recognised by the Companies Act, 1956. The argument merits close examinations since it finds support, to an appreciable extent, from the very text of the Companies Act. The definition of 'private company' and the manner in which a 'public company' is defined ("public company means a company which is not a private company") bear out the argument that these

811

two categories of companies are mutually exclusive. If it is this it cannot be that and if it is that it cannot be this. But, it is not true to say that between them, they exhaust the universe of companies. A private company which has become a public company by reason of section 43A, may include, that is to say, may continue to retain in its articles, matters which are specified in section 3 (1)(ii), and the number of its members may at any time be reduced below 7. This provision itself highlights the basic distinction between, on one hand, a company which is incorporated as a public company or a private company which is converted into a public company under section 44, and on the other hand, a private company which has become a public company by reason of the operation of section 43A.

In the first place, a section-43A company may include in its articles, as part of its structure, provisions relating to restrictions on transfer of shares, limiting the number of its members to 50, and prohibiting an invitation to the public to subscribe for shares, which are typical

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

characteristics of a private company. A public company cannot possibly do so because, by the very definition, it is that which is not a private company, that is to say, which is not a company which by its articles contains the restrictions mentioned in section 3 (1)(iii). Therefore, the expression 'public company' in section 3(1) (iv) cannot be equated with a 'private company which has become a public company by virtue of section 43A'.

Secondly, the number of members of a public company cannot fall below 7 without attracting the serious consequences provided for by section 45 (personal liability of members for the company's debts) and section 433(d) (winding up in case the number of its members falls below 7). A section 43A company can still maintain its separate corporate identity qua debts even if the number of its members is reduced below seven and is not liable to be wound up for that reason.

Thirdly, a section 43A, company can never be incorporated and registered as such under the Companies Act. It is registered as a private company and becomes, by operation of law, a public company.

Fourthly, the three contingencies in which a private company becomes a public company by virtue of section 43A (mentioned in sub-sections (1), (1A) and (1B) read with the provisions of subsection (4) of the section) show that it becomes and continues to be a public company so long as the conditions in sub-sections (1), (1A) or (1B) are applicable. The provisos to each of these sub-sections
812
clarify the legislative intent that companies may retain their registered corporate shell of a private company but will be subjected to the discipline of public companies. When the necessary conditions do not obtain, the legislative device in section 43A is to permit them to go back into their corporate shell and function once again as private companies, with all the privileges and exemptions applicable to private companies. The proviso to each of the subsections of section 43A clearly indicates that although the private company has become a public company by virtue of that section, it is permitted to retain the structural characteristics of its origin, its birth marks, so to say. Any provision of the Companies Act which would endanger the corporate shell of a 'proviso company' cannot be applied to it because, that would constitute an infraction of one or more of the characteristics of the 'proviso company' which are statutorily allowed to be preserved and retained under each of the three provisos to the three sub-sections of section 43A. A right of renunciation in favour of any other person, as a statutory term of an offer of rights shares, would be repugnant to the integrity of the Company and the continued retention by it of the basic characteristics under section 3(1)(iii).

Fifthly, section 43A, when introduced by Act 65 of 1960, did not adopt the language either of section 43 or of section 44. Under section 43 where default is made in complying with the provisions of section 3(1)(iii), a private company "shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act shall apply to the company as if it were not a private company". Under section 44 of the Act, where a private company alters its Articles in such a manner that they no longer include the provisions which under, section 3(1)(iii) are required to be included in the Articles in order to constitute it a private company, the company "shall as on the date of the alteration cease to be

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

a private company". Neither of the expressions, namely, "This Act shall apply to the company as if it were not a private company" (section 43) or that the company "shall ... cease to be a private company (section 44) is used in section 43A. If a section 43A company were to be equated in all respects with a public company, that is a company which does not have the characteristics of private company, Parliament would have used language similar to the one in section 43 or section 44, between which two sections, section 43A was inserted. If the intention was that the rest of the Act was to apply to a section 43A company "as if it were not a private company" nothing would have been easier
813
than to adopt that language in section 43A, and if the intention was that a section 43A company would for all purposes "cease to be a private company", nothing would have been easier than to adopt that language in section 43A.

Sixthly, the fact that a private company which becomes a public company by virtue of section 43A does not cease to be for all purposes a "private company" becomes clear when one compares and contrasts the provisions of section 43A with section 44 : when the Articles of a private company no longer include matters under section 3(1)(iii), such a company shall as on the date of the alteration cease to be a private company (section 44(1)(a)). It has then to file with the Registrar a prospectus or a statement in lieu of prospectus under section 44(2). A private company which becomes a public company by virtue of section 43A is not required to file a prospectus or a statement in lieu of a prospectus.

These considerations show that, after the Amending Act 65 of 1960, three distinct types of companies occupy a distinct place in the scheme of our Companies Act : (1) private companies (2) public companies and (3) private companies which have become public companies by virtue of section 43A, but which continue to include or retain the three characteristics of a private company. Sections 174 and 252 of the Companies Act which deal respectively with quorum for meetings and minimum number of directors, recognise expressly, by their parenthetical clauses, the separate existence of public companies which have become such by virtue of section 43A. We may also mention that while making an amendment in sub-clause (ix) of Rule 2 of the Companies (Acceptance of Deposits) Rules, 1975, the Amendment Rules, 1978 added the expression : "Any amount received..... by a private company which has become a public company under section 43A of the Act and continues to include in its Articles of Association provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3 of the Act", in order to bring deposits received by such companies within the Rules.

The various points discussed above will facilitate a clearer perception of the position that under the Companies Act, there are three kinds of companies whose rights and obligations fall for consideration, namely, private companies, public companies and companies which have become public companies under section 43(1) but which retain, under the first proviso to that section, the three characteristics of private companies mentioned in section 3(1)(iii)
814
of the Act, private companies enjoy certain exemptions and privileges which are peculiar to their constitution and nature. Public companies are subjected severely to the discipline of the Act. Companies of the third kind like NIIL, which become public companies but which continue to

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

include in their articles the three matters mentioned in clauses (a) to (c) of section 3(1)(iii) are also, broadly and generally, subjected to the rigorous discipline of the Act. They cannot claim the privileges and exemptions to which private companies which are outside section 43A are entitled. And yet, there are certain provisions of the Act which would apply to public companies but not to section 43A companies. Is section 81 of the Companies Act one such provision ? and if so, does the whole of it not apply to a section 43A company or only some particular part of it ? These are the questions which we have now to consider.

On these two questions, both the learned counsel have taken up extreme positions which, if accepted, may create confusion and avoidable inconvenience in the administration of section 43A companies like NIIL. Shri Nariman contends that a section 43A company becomes a public company qua the outside world, as e.g. in matters of remuneration of directors, disclosure, commencement of business, information to be supplied but it remains a private company qua its own shareholders. Therefore, says counsel, no provision of the Companies Act can apply to such companies, which is inconsistent with or destructive of the retention of the three essential features of private companies as mentioned in section 3(1)(iii). Section 81, it is said, is one such provision and in so far as private companies go, it can apply only to (a) such companies which become public companies under section 43A but which do not retain the three essential features and to (b) private companies which are duly converted into public companies. It is urged that even assuming that the expression "private company" occurring in the various provisions of the Companies Act (including section 81(3)(a)) does not include a section 43A proviso Company, that does mean that section 81 would be applicable to a 43A Proviso Company, because : (a) The proviso to section 43A(1) and section 81 are both substantive provisions and neither is subordinate to the other ; in fact section 43A was introduced later in 1960; and (b) An offer of rights shares to a member in a section 43A proviso company cannot include a right to renounce the shares in favour of any other person, because such a right would be inconsistent with the article of the company limiting the number of its members to 50 and with the article prohibiting invitation to the public to subscribe for shares in the company. The fact that the statute overrides the
815
articles is not a sufficient ground for rendering the provisions of section 81 applicable to a section 43A(1) proviso company since the right to continue to include provisions in its articles specified in section 3(1)(iii) is itself a statutory right. Counsel says that in these circumstances-and this is without taking the assistance of the words "unless the articles of the company otherwise provide" in section 81(1)(c)-the provision regarding the right of renunciation cannot apply to section 43A proviso company.

The answer of Shri Seervai to this contention flows from what truly is the sheet anchor of his argument, namely, that the definitions of ‘public company’ and ‘private company’ are mutually exclusive and between them, they are exhaustive of all categoric of companies. Counsel contends that section 81(1A) overrides section 81(1); that by reason of sub-section (3) of section 81, section 81 is not applicable to a "private company" but NIIL is not a "private company’ since it became a public company by virtue of

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

section 43A; and that, therefore, the offer of rights shares made by NIIL can be renounced by the offerees in favour of any other person.

Neither of the two extreme positions for which the counsel contend commends itself to us. The acceptance of Shri Nariman's argument involves tinkering with clause (a) of section 81(3), which shall have to be read as saying that "Nothing in section 81 shall apply to a 'private company' and to a company which becomes a public company by virtue of section 43A and whose Articles of Association include provisions relating to the matters specified in clause (iii) of sub-section (1) of section 3". Section 81(1) does not contain a non obstante clause. But, if Shri Nariman is right, there would be no alternative save to exclude the applicability of all of its provisions to a company like NIIL, by reading into it an overriding provision which alone can achieve such result. On the other hand, to accept wholesale the argument of Shri Seervai would render the first proviso to section 43A(1) nugatory. The right to retain in the Articles the provision regarding the restriction on the right to transfer shares, the limitation on the number of members to fifty and the prohibition of any invitation to the public to subscribe for the shares or debentures of the Company will then be washed off. The truth seems to us to lie in between the extreme stands of the learned counsel for the two sides.

There is no difficulty in giving full effect to clauses (a) and (b) of section 81 (1) in the case of a company like NIIL, even after it

816

becomes a public company under section 43A. Clause (a) requires that further shares must be offered to the holders of equity shares of the Company in proporation, as nearly as circumstances admit, to the capital paid up on those shares, while clause (b) requires that the offer of further shares must be made by a notice specifying the number of shares offered and limiting the time, not being less than fifteen days from the date of the offer, within which the offer, if not accepted, will be deemed to have been declined. The real difficulty arises when one reaches clause (c) according to which, the offer shall be deemed to include the right of renunciation of shares or any of them in favour of any other person. We will keep aside for the time being the opening words of clause (c) : "unless the articles of the company otherwise provide". Clause (c) further requires that the notice referred to in clause (b) must contain a statement as to the right of renunciation provided for by clause (c). Having given to the matter our most anxious consideration, we are of the opinion that clause (c) of section 81(1) cannot apply to the earth while private companies which have become public companies under section 43A and which include, that is to say which retain or continue to include, in their articles of association the matters specified in section 3(1)(iii) of the Act, as specified in the first proviso to section 43A. If clause (c) were to apply to the section 43A-proviso companies, it would be open to the offerees to renounce the shares offered to them in favour of any other person or persons. That may result directly in the infringement of the article relating to the matter specified in section 3(1)(iii) (b) because, under clause (c) of section 81(1), the offeree is entitled to spilt the offer and renounce the shares in favour of as many persons as he chooses, depending partly on the number of shares offered by the company to him. The right to renounce the shares in favour of any other person is also bound to result in the

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

infringement of the article relating to the matter specified in section 3(1)(iii)(c), because an offer which gives to the offeree the right to renounce the shares in favour of a non-member is, in truth and substance, an invitation to the public to subscribe for the shares in the company. As stated in Palmer's Company Law (22nd Ed., Vol. I, para 21-18) :

> "Where the Company issues renounceable letters of allotment the circle of original allottees can easily be broken by renunciation of those rights and complete strangers may become the allottees; here the offer will normally be held to be made to the public."

There is statement to the same effect in Gower's Company Law 4th Ed., page 351) :

817

> "It is therefore clear that an invitation by or on behalf of a private company to a few of the promoter's friends and relations will not be deemed to be an offer to the public. Nor, generally, will an offer which can only be accepted by the shareholder of a particular company. On the other hand it is equally clear that an offer of securities in a public company even to a handful people may be an offer to the public if it is calculated (which presumably means "Likely" rather than "intended") to lead to the securities being subscribed (i.e. applied for on original allotment) or purchased (i.e. bought after original allotment) by persons other than those receiving the initial offer. In particular, if securities to be issued under renounceable allotment letter or letter of right the invitation to take them up must be deemed to be made to the public, since these securities are obviously liable to be subscribed or purchased by others."

The learned author says at page 430 that in the case of a private placing-an issue by a private company-allotment letters will probably be dispensed with, "in any case they cannot be freely renounceable". In foot-note (22) the author points out that the real danger is that if renounceable allotment letters are issued, the company may be regarded as having made an offer to the public. We cannot construe the provision contained in clause (c) in a manner which will lead to the negation of the option exercised by the company to retain in its articles the matters referred to in section 3 (1)(iii). Both these are statutory provisions and they are contained in the same statute. We must harmonise them, unless the words of the statute are so plain and unambiguous and the policy of the statute so clear that to harmonise will be doing violence to those words and to that policy. Words of the statute, we have dealt with. Its policy, if anything, points in the direction that the integrity and structure of the section 43A provisio companies should, as far as possible, not be broken up.

The exemption in favour of private companies would appear to have been inserted in section 81(3)(a) because of the right of renunciation conferred by section 81(1)(c). Section 105C of the Companies Act 1973 which contained substantially all the provisions that are to be found in section 81(1)(a), (b) and (d) applied to all companies. The right of renunciation in favour of any other person was conferred for the first time by the Act of 1956. That led to the insertion of the exception in favour of private companies since, a right of renunciation in favour of other persons is wholly inconsistent

818

with the structure of a private company, which has to contain the three characteristics mentioned in section

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

3(1)(iii). When section 43A was introduced by Act 65 of 1960, the legislature apparently overlooked the need to exempt companies falling under it, read with its first proviso, from the operation of clause (c) of section 81(1). That the legislature has overlooked such a need in regard to other matters, in respect of which there can be no controversy, is clear from the provisions of sections 45, and 433 (d) of the Companies Act. Under section 45, if at any time the number of members of a company is reduced, in the case of a public Company below seven, or in the case of a Private Company below two, every member of the company becomes severally liable, under the stated circumstances, for the payment of the whole debt of the company and can be severally sued therefor. No exception has yet been provided for in section 45 in favour of the section 43A-proviso companies, with the result that a private company having, say, three members which becomes a public company under section 43A and continues to function with the same number of members, will attract the rigour of section 45. Similarly, under section 433(d), such a company would automatically incur the liability of being wound up for the same reason. If and when these provisions fall for consideration, due regard may have to be given to the principle of harmonious construction, in order to exclude section 43A proviso companies from the application of those provisions. We hope that before such and occasion arises, the Legislature will make appropriate amendments in the relevant provisions of the Companies Act. Such amendments have been made in sections 174(1), clause (iii) of the second proviso to sub-section (1) of section 220, and section 252(1) in order to accord separate treatment to private companies which become public companies by virtue of section 43A, as distinguished from public companies of the general kind.

In coming to the conclusion that clause (c) of section 81(1) cannot apply to section 43A-proviso companies, we have not taken into consideration the impact of the opening words of clause (c) : "Unless the articles of the company otherwise provide". The effect of these words is to subordinate the provisions of clause (c) to the provisions of the articles of association of the company. In other words, the provisions that the offer of further shares shall be deemed to include the right of renunciation in favour of any other person will not apply if the articles of the company "otherwise provide". Similarly the requirement that the notice of offer must contain a statement of the right of renunciation will not apply if the articles of

819

the company otherwise provide. The question which we have to consider under this head is whether the articles of association of NIIL provide otherwise than what is provided by clause (c) of section 81(1). We have already extracted the relevant articles, namely, articles 11, 32, 38 and 50. To recapitulate, article 11, which has an important bearing on the subject now under discussion, provides that in order that the company may be a private company, (i) no invitation shall be issued to the public to subscribe for any shares, debentures, etc; (ii) the number of members of the company shall be limited to 50; and (iii) the right to transfer shares of the company will be restricted in the manner provided in the articles. By article 32, a share may be transferred, subject to article 38, by a member to any member selected by the transferor but no share shall otherwise be transferred to a person who is not a member so long as any member is willing to purchase the same at a fair

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

value. Article 38 confers upon the directors the power to refuse to register the transfer of a share for four reasons, the last of which is that the transfer will make the number of members exceed the limit of 50. Article 50, which also, is important, provides that the offer of new shares shall be made by a notice specifying the number of shares offered and limiting the time within which the offer, if not accepted, will be deemed to have been declined. If the offer is declined or is not accepted, before the expiration of the time fixed for its acceptance, the directors have power to dispose of the shares in such manner as they think most beneficial to the company.

It is urged by Shri Seervai that none of the articles of the company provides otherwise than what is provided in clause (c) of section 81(1) and therefore, clause (c) must have its full play in the case of NIIL. On the other hand, it is contended by Shri Nariman that the opening words, of clause (c) do not require or postulate that the articles of the company must contain an "express" provision, contrary to what is contained in clause (c). The contention, in other words, is that if the articles of a company contain a provision which, by necessary implication, is otherwise than what is provided in clause (c); that clause can have no application. In view of our finding that keeping aside the opening words of clause (c), the provisions of that clause cannot apply to section 43A-proviso companies, it is academic to consider whether the word "provide" in the opening part of clause (c) postulates an express provision on the subject of renunciation or whether it is sufficient compliance with the opening words, if the articles contain by necessary implication a provision which is otherwise than what is provided in clause
820
(c). We would, however, like to express our considered conclusion on this point since the point has been argued fully by both the counsel and needs to be examined, as it is likely to arise in other cases.

In the first place, while construing the opening words of section 81(1)(c), it has to be remembered that section 43A companies are entitled under the proviso to that section to include provisions in their Articles relating to matters specified in section 3(1)(iii). The right of renunciation in favour of any other person is wholly inconsistent with the Articles of a private company. If a private company becomes a public company by virtue of section 43A and retains or continues to include in its Articles matters referred to in section 3(1)(iii), it is difficult to say that the Articles do not provide something which is otherwise than what is provided in clause (c). The right of renunciation in favour of any other person is of the essence of clause (c). On the other hand, the absence of that right is of the essence of the structure of a private company. It must follow, that in all cases in which erstwhile private companies become public companies by virtue of section 43A and retain their old Articles, there would of necessity be a provision in their Articles which is otherwise than what is contained in clause (c). Considered from this point of view, argument as to whether the word "provide" in the opening words of clause (c) means "provide expressly" loses its significance.

On the question whether the word "provide" means "provide expressly", we are unable to accept Shri Seervai's submission that the Articles must contain a provision which is expressly otherwise than what is provided in clause (c). In the context in which a private company becomes a public company under section 43A and by reason of the option

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

available to it under the proviso, the word "provide" must be understood to mean "provide expressly or by necessary implication". The necessary implication of a provision has the same effect and relevance in law as an express provision has, unless the relevance of what is necessarily implied is excluded by the use of clear words. Considering the matter from all reasonable points of view, particularly the genesis of section 43A-proviso companies, we are of the opinion that in order to attract the opening words of clause (c) of section 81(1), it is not necessary that the Articles of the Company must contain an express provision otherwise than what is contained in clause (c).

We do not think it necessary to consider the decision of the Privy Council in Shanmugam v. Commissioner for Registration,
821
cited by Shri Nariman, which says that to be an "express provision" with regard to something it is not necessary that the thing should be specially mentioned; it is sufficient that it is directly covered by the language, however broad the language may be which covers it, so long as the applicability arises directly from the language used and not by inference therefrom. We may only mention that though Articles of NIIL do not contain an express provision that there shall be no right of renunciation, the right is wholly inconsistent with the Articles. We have already stated above that the right of renunciation is tantamount to an invitation to the public to subscribe for the shares in the company and can violate the provision in regard to the limitation on the number of members. Article 11, by reason of its clause (iv), prevails over the provisions of all other Articles if there is inconsistency between it and any other Article.

For these reasons we are of the opinion that clause (c) of section 81(1) of the Companies Act, apart from the consideration arising out of the opening words of that clause, can have no application to private companies which have become public companies by virtue of section 43A and which retain in their Articles the three matters referred to in section 3(1)(iii) of the Act. In so for as the opening words of clause(c) are concerned, we are of the opinion that they do not require an express provision in the Articles of the Company which is otherwise than what is provided for in clause (c). It is enough, in order to comply with the opening words of clause (c), that the Articles of the Company contain by necessary implication a provision which is otherwise than what is provided in clause (c). Articles 11 and 50 of NIIL's Articles of Association negate the right of renunciation.

The question immediately arises, which is of great practical importance in this case, as to whether members of a section 43A-proviso company have a limited right of renunciation, under which they can renounce the shares offered to them in favour of any other member or members of the company. Consistently with the view which we have taken of clause (c) of section 81(1) our answer to this question has to be in the negative. The right to renounce shares in favour of any other person, which is conferred by clause (c) has no application to a company like NIIL and therefore, its members cannot claim the right to renounce shares offered to them in favour of any other member or members. The Articles of a company may well provide for a right of transfer of shares by one member to another, but that right is very much different from the right or
822

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

renunciation, properly so called. In fact, learned counsel for the Holding Company has cited the decision in Re Pool Shipping Co. Ltd., (supra) in which it was held that the right of renunciation is not the same as the right of transfer of shares.

Coming to sub-section (1A) of section 81, it provides, stated briefly, that notwithstanding anything contained in sub-section (1), the further shares may be offered to any persons in any manner whatsoever, whether or not those persons include a person referred to in clause (a) of sub-section (1). That can be done under clause (a) of sub-section (1A) by passing a special resolution in the General Meeting of the company or under clause (b), where no such special resolution is passed, if the votes cast in favour of the proposal exceed the votes cast against it and the Central Government is satisfied that the proposal is most beneficial to the company. For reasons similar to those which we have come to the conclusion that clause (c) of section 81 cannot apply to a section 43A-proviso company, we must hold that sub-section (1A) can also have no application to such companies. To permit the further shares to be offered to the persons who are not members of the company will be clearly contrary to the Articles of Association of a section 43A-proviso company, in regard to the three matters which bear on the structure of such companies. At the highest, the method provided for in clauses (a) and (b) of sub-section (1A) may be resorted to by a section 43A-proviso company for the limited purpose of offering the net shares to its members otherwise than in proportion to the capital paid up on the equity shares of the company. That course may be open for the reason that sub-section (1A) permits the further shares to be offered "in any manner whatsoever". A change in the pro rata method of offer of new shares is not necessarily violative of the basic characteristics of a private company which becomes a public company by virtue of section 43A. To this limited extent only, but not beyond it, the provisions of sub-section (1A) of section 81 can apply to such companies.

The following proposition emerge out of the discussion of the provisions of FERA, sections 43A and 81 of the Companies Act and of the articles of association of NIIL:

(1) The Holding Company had to part with 20% out of the 60% equity capital held by it in NIIL;

(2) The offer of Rights Shares made to the Holding Company as a result of the decision taken by Board of

823

Directors in their meeting of April 6, 1977 could not have been accepted by the Holding Company;

(3) The Holding Company had no right to renounce the Right Shares offered to it in favour of any other person, member or non-member; and

(4) Since the offer of Rights Shares could not have been either accepted or renounced by the Holding Company, the former for one reason and the latter for another, the shares offered to it could, under article SO of the articles of association, be disposed of by the directors, consistently with the articles of NIIL, particularly article 11, in such manner as they thought most beneficial to the Company.

These proposition afford a complete answer to Shri Seervai's contention that what truly constitutes oppression of the Holding Company is not the issue of Rights Shares to the existing Indian shareholders only but the offer of Rights

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Shares to all existing shareholders and the issue thereof to existing Indian shareholders only.

The meeting of 2nd May, 1977 was unquestionably illegal for reasons already stated. It must follow that the decision taken by the Board of Directors in that meeting could not, in the normal circumstances, create mutual rights and obligations between the parties. But we will not treat that decision as non-est because a point of preponderating Importance is that the issue of Rights Shares to existing Indian shareholders only and the non-allotment thereof to the Holding Company did not cause any injury to the proprietary rights of the Holding Company as shareholders, for the simple reason that they could not have possibly accepted the offer of rights shares because of the provisions of FERA and the conditions imposed by the Reserve Bank in its letter dated May 11, 1976, nor indeed could they have renounced the shares offered to them in favour of any other person at all because section 81(1)(c) has no application to companies like NIIL which were once private companies but which become public companies by virtue of section 43A and retain in their articles the three matters referred to in section 3(1)(iii) of the Act.

It was neither fair nor proper on the part of NIIL's officers not to ensure the timely posting of the notice of the meeting for 2nd May so as to enable Sanders to attend that meeting. But there the
824
matter rests. Even if Sanders were to attend the meeting, he could not have asked either that the Holding Company should be allotted the rights shares or alternatively, that it should be allowed to "renounce" the shares in favour of any other person, including the Manoharan group. The charge of oppression arising out of the central accusation of non-allotment of the rights shares to the Holding Company must, therefore, fail.

We must mention that we have rejected the charge of oppression after applying to the conduct of Devagnanam and his group the standard of probity and fairplay which is expected of partners in a business venture. And this we have done without being influenced by the consideration pressed upon us by Shri Nariman that Coats and NEWEY, who were two of the three main partners, were not of one mind and that NEWEY never complained of oppression. They may or they may not. That is beside the point. Such technicalities cannot be permitted to defeat the exercise of the equitable jurisdiction conferred by section 397 of the Companies Act. Shri Seervai drew our attention to the decision in Blissett v. Daniel (supra) the facts of which as they appear at pp 1036-37, bear, according to him, great resemblance to the facts before us. The following observations in that case are of striking relevance;

> "As has been well observed during the course of the argument, the view taken by this Court with regard to morality of conduct amongst all parties-most especially amongst those who are bound by the ties of partnership is one of the highest degree. The standard by which parties are tried here, either as trustees or as co-partners, or in various other relations which may be suggested, is a standard, I am thankful to say so, far higher than the standard of the world; and, tried by the standard, I hold it to be impossible to sanction the removal of this gentleman under these circumstances". (p 1040)

Not only is the law on the side of Devagnanam but his conduct cannot be characterised as lacking in probity,

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

considering the extremely rigid attitude adopted by Coats. They drove him into a tight corner from which the only escape was to allow the law to have its full play.

Even though the company petition fails and the appeals succeed on the finding that the Holding Company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same
825
position in which they would have been, if the meeting of 2nd May were held in accordance with law. The notice of the meeting was received by Sanders in U.K. On the 2nd May when everything was over, bar the post-meeting recriminations which eventually led to this expensive litigation. If the notice of the meeting had reached the Holding Company in time, it is reasonable to suppose that they would have attended the meeting, since one of the items on the Agenda was "Policy-(a) Indianisation, (b) allotment of shares". Devagnanam and his group were always ready and willing to buy the excess shares of the Holding Company at a fair price as clear from the correspondence to which our attention has been drawn. In the affidavit dated May 25, 1977, Devagnanam stated categorically that the Indian shareholders were always ready and willing to purchase one-third of the shareholding of the non-resident shareholders, at a price to be fixed in accordance with the articles of Association by the Reserve Bank of India. On May 27, he sent a cable, though 'without prejudice', offering to pay premium if the Holding Company were to adopt disinvestment as a method of dilution of their interest. In the Trial Court, counsel for the Indian shareholders to whom the rights shares were allotted offered to pay premium on the 16,000 rights shares. The cable and the offer were mentioned before us by Shri Nariman and were not disputed by Shri Seervai. There is no reason why we should not call upon the Indian shareholders to do what they were always willing to do, namely, to pay to the Holding Company a fair premium on the shares which were offered to it, which it could neither take nor renounce and which were taken up by the Indian shareholders in the enforced absence of the Holding Company. The willingness of the Indian shareholders to pay a premium on the excess holding or the rights shares is a factor which, to some extent, has gone in their favour on the question of oppression. Having had the benefit of that stance, they must now make it good. Besides, it is only meet and just that the Indian shareholders, who took the rights shares at par when the value of those shares was much above par, should be asked to pay the difference in order to nullify unjust unjustifiable enrichment at the cost of the Holding Company. We must make it clear that we are not asking the Indian shareholders to pay the premium as a price of oppression. We have rejected the plea of oppression and the course which we are now adopting is intended primarily to set right the course of justice, in so far as we may.

The question then is as to what should be taken to be the reasonable value of the shares which were offered to the Holding Company but taken over by the bulk of the Indian shareholders. In
826
his letter dated December 17, 1975 to M.M.C. Newey, D.P. Kingsley, the Secretary of NIIL, had assessed the value of NIIL's shares at Rs. 175 per share. That value was arrived at by averaging the break-up value, the yield and the average market price in the case of quoted shares. Citing a paragraph from a book on the Foreign Exchange Regulation

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

Act, Kingsley says in his letter that the method which was adopted by him far valuing the shares was also followed by the Controller of Capital Issues. Copies of Kingsley's letter were sent to Alan Mackrael and Devagnanam. On June 9, 1976 Price Waterhouse, Peat & Co., Chartered Accountants, Calcutta wrote a letter to Mackrael in response to the latter's cable, valuing the shares of NIIL at Rs. 204 per share. That letter shows that while valuing the shares, they had taken into account various factors including "the average of the net asset value and the earnings basis", which, according to them, are considered as relevant factors by the Controller of Capital Issues while valuing the shares of companies. The Chartered Accountants applied "the CCI formula" and after making necessary adjustments to the fixed assets, the proposed dividend and the gratuity liabilities for 1975, they valued NIIL's business, on a net asset basis, at Rs. 50 lakhs. On an earnings basis, the valuation of the Company based on the past three years' net profits capitalized at 15% was Rs. 80 lakhs. That gives an average valuation of Rs. 65 lakhs for the business or Rs. 204 per share. The purported offer to Devagnanam by Khaitan "a sewing needle competitor to Ketti", at 3.6 times par, cannot afford any criterion for valuing NIIL's shares. Khaitan, purportedly, had competitive business interests and was therefore prepared to "pay the earth to acquire NIIL".

According to the learned trial Judge, one thing which appeared to be certain was that the market value of the shares of NIIL at or about the time when disputes arose between the parties, and particularly during the period when the controversial meetings of the Board of Directors were held, ranged between Rs. 175 and Rs. 204. We agree with the learned Judge and hold that it would be just and reasonable to take the average market value of the rights shares on the crucial date at Rs. 190 per share. The learned trial Judge awarded a sum of Rs. 90 per share on 9495 shares to the Holding Company by way of "solatium", which, with respect, is not an accurate description of the award and is likely to confuse the basis and reasons for directing the payment to be made. Since the average market price of NIIL's shares in April-May 1977 can be taken to be Rs. 190 per share, the Holding Company, which was offered 9495 rights shares, will be entitled to receive from the Indian shareholders
827
an amount equivalent to that by which they unjustifiably enriched themselves, namely, Rs. 90x9495 which comes to Rs. 8,54,550. We direct that Devagnanam, his group and the other Indian shareholders who took the rights shares offered to the Holding Company shall pay, pro rata, the sum of Rs. 8,54,550 to the Holding Company. The amount shall be paid by them to the Holding Company from their own funds and not from the funds or assets of NIIL.

As a further measure of neutralisation of the benefit which the Indian shareholders received in the meeting of 2nd May, 1977, we direct that the 16,000 rights shares which were allotted in that meeting to the Indian shareholders will be treated as not qualifying for the payment of dividend for a period of one year commencing from January 1, 1977, the Company's year being the Calendar year. The interim dividend or any further dividend received by the Indian shareholders on the 16,000 rights shares for the year ending December 31, 1977 shall be repaid by them to NIIL, which shall distribute the same as if the issue and allotment of the rights shares was not made until after December 31, 1977. This direction will not be deemed to affect or ever to have affected the exercise of any other

IBC Laws | www.ibclaw.in

Case Citation: (2017) ibclaw.in 1315 SC

rights by the Indian shareholders in respect of the 16,000 rights shares allotted to them.

We have not considered the possibility of Manoharans taking up the rights shares offered to them because, by a letter dated May 11, 1977 to NIIL's Secretary, N. Manoharan had declined the offer on the ground that he was "not in a position to take those shares".

Finally, in order to ensure the smooth functioning of NIIL, and with a view to ensuring that our directions are complied with expeditiously, we direct that Shri M.M. Sabharwal who was appointed as a Director and Chairman of the Board of Directors under the orders of this Court dated November 6, 1978 will continue to function as such until December 31, 1982.

The Company will take all effective steps to obtain the sanction or permission of the Reserve Bank of India or the Controller of Capital Issues, as the case may be; if it is necessary to obtain such sanction or permission for giving effect to the directions given by us in this judgment.

In the result, the appeals are allowed with the directions above mentioned and the judgments of the learned single Judge and of the Division Bench of the High Court are set aside. We make no order as to costs since both the sides are, more or less, equally to
828
blame, one for creating an impasse and the other for its unjust enrichment. All parties shall bear their own costs throughout.

The interim orders passed by this Court are vacated.

The amount of Rs. 8,54,550 which the Indian shareholders have been directed to pay to the Holding Company shall be paid in two instalments, the first of which shall be paid before August 31, 1981 and the second before November 30, 1981.

The interim Board of Directors shall forthwith hand over charge to the Board which was superseded, but with Shri M.M. Sabharwal as a Director and Chairman of the Board of Directors. After taking the charge from the interim Board, the Board of Directors will take expeditious steps for convening an Annual General Meeting for the year 1976-77 and the years thereafter for the purpose of passing the accounts, declaring dividends electing all Directors and for dealing with other necessary or incidental matters.

N.V.K. Appeals allowed.
829

IBC Laws | www.ibclaw.in