
(2001) 08 CAL CK 0050

In the Calcutta High Court

Case No : C.A. No. 160 of 1990 and C.P. No. 290 of 1998

Bhagirath Agarwala and Others

APPELLANT

Vs

Tara Properties Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 06-08-2001

Acts Referred:

Companies Act, 1956 — Section 286, 397, 398, 399

Citation : (2002) 111 CompCas 597

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Advocate : Pratap Chatterjee, S.B. Mukherjee, for the Appellant; Bimal Chatterjee, for respondents Nos. 1, 4, 5 and 6, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This is an application filed by the petitioner Bhagirath Agarwal and others against company Tara Properties Pvt. Ltd. being Petition No. 290 of 1990, inter alia, praying for an order :

(a) A declaration that the purported issue and allotment of 1,960 shares of and in the company to respondents Nos. 2 (deceased) and 4 as specified in the petition is illegal, null and void and of no effect whatsoever ;

(b) A declaration that the purported Form No. 2 filed on October 23, 1989, and the purported Form No. 32 filed on October 23, 1989 and November 27, 1989 are illegal, null, void, and not binding on the petitioners ;

(c) Form No. 2 and Form No. 32 referred to in prayers (a) and (b) above be delivered up to this hon''ble court so that the same may be cancelled and adjudged void by this hon''ble court;

(d) The purported notice relating to issue and allotment of the said 1960 shares of and in the company in favour of respondents Nos. 2 (deceased) and 4 in the register of members of the company be delivered up to this hon''ble court so that the same may be cancelled and adjudged void by this hon''ble court ;

(e) Injunction restraining the respondents and each one of them from giving any effect or further effect to the purported issue and allotment of the said 1960 shares of and in the company in favour of respondents Nos. 2 (deceased) to 4 and all the purported registration thereof in the register of members of the company in any manner whatsoever ;

(f) Injunction restraining the respondents and each one of them from giving any effect to the said Form No. 2 and Form No. 32 referred to in prayers (a) and (b) above in any manner whatsoever ;

(g) An order of injunction be made directing the respondents and in particular respondents Nos. 2 (deceased) to 5 and the company to rectify the register of members of the company by deleting the names of respondents Nos. 2 (deceased) to 4 therefrom in respect of the said 1960 shares of and in the company;

(h) An order of injunction be made directing respondents Nos. 2 (deceased), 3 and 4 be removed from their position as directors of the company ;

(i) An injunction restraining respondents Nos. 2 (deceased) to 6 and each one of them from in any manner interfering with or intermeddling with the affairs of the company ;

(j) An injunction restraining respondents Nos. 2 (deceased) to 4 from in any manner representing or holding themselves out as directors of the company ;

(k) Supersession of the board of directors of the company ;

(l) Special officer/administrator/receiver be appointed to carry on the affairs and management of the company ;

(m) The special officer/administrator/receiver be appointed herein be directed by this hon''ble court to take charge of the statutory books, records and documents of the company including the directors'' minutes book, shareholders'' minutes book, register of members, share transfer register, cash book, journal, ledger and books of account of the company and also the assets of the company ;

(n) The special officer/administrator/receiver be appointed herein be directed to collect the rental income of the company from the tenants of the company in the building built by the company at 13, Camac Street, Calcutta- 700017 and to deposit the said money in accordance with the direction that may be given by this hon''ble court as it may deem fit and proper ;

(o) The special officer/administrator/receiver be appointed herein be directed to initial and make inventory of all books, records and documents of the company and also to take inventory of the assets of the company ;

(p) The special officer/administrator/receiver be directed to carry on the management and business of the company and in this regard all necessary directions as this hon''ble court may deem fit and proper be given ;

(q) An injunction restraining the respondents and each one of them, their servants, agents and nominees from doing and disbursing the expenditure of this litigation and other related proceedings from the funds of the company on behalf of any party whatsoever ;

(r) Injunction restraining the respondents and each one of them, from transferring any funds of the company or from applying any moneys of the company;

(s) An injunction restraining the respondents from distributing and/or allotting and/or altering the shareholding position and/or authorised share capital of the company in any manner whatsoever;

(t) An injunction restraining the respondents from dealing with, disposing of, encumbering, transferring the assets and properties of the company in any manner whatsoever ;

(u) An injunction restraining respondents Nos. 2 (deceased) and 4 from exercising any rights or receiving any benefits in respect of the said 1,960 shares of and in the company ;

(v) An order be made directing an investigation into the affairs of the company and of respondents Nos. 2 (deceased) to 6 in particular u/s 406 of the Companies Act, 1956, and Schedule XI thereto and all consequential orders be made upon such enquiry as this hon''ble court may deem fit and proper under the provisions of the Companies Act, 1956 ;

(w) A scheme be framed for future management of the company ;

(x) An order be made directing convening and holding of an extraordinary general meeting of the shareholders of the company for the purpose of electing a lawful and valid board of directors after proper rectification of the register of members as prayed for hereinabove ;

(y) A direction be given by this hon''ble court to the respondents and each one of them to render a true and faithful account of all secret profits and illegal gains made by the said respondents as stated hereinabove and this hon''ble court may give directions with regard thereto as it may deem fit and proper;

(z) An injunction restraining the holding of any board meeting or general meeting of the company except with the leave of this hon''ble court;

(aa) An injunction restraining the respondents and each one of them from operating the bank account of the company ;

(bb) The respondents be directed to make full disclosure in relation to the moneys of the company diverted to Bhura Private Ltd., and the moneys transferred and paid out of the banking account of the company purported to be maintained by the respondents with Vysya Bank, 77, Netaji Subhas Road, Calcutta ;

(cc) The respondents be directed forthwith to give inspection of all statutory books, records and documents of the company including in particular the directors' minutes book, the shareholders' minutes book, register of members, share transfer register, books of account, cash book, journal and ledger and to allow the petitioners to make copies of the same ;

(dd) The special officer/administrator/receiver be appointed herein be directed to visit the office premises of Hindusthan Tea Co. on the second floor of the building Raj Kamal situated in premises No. 13, Camac Street, Calcutta, where the books, records and documents of the company have been removed by the respondents for the purposes of taking custody control and possession of the same in terms of prayers made hereinabove ;

(ee) Ad interim order in terms of prayers above ;

(ff) Costs of and incidental to this application be paid by the respondents.

2. The facts of the case briefly are as follows :

The company was incorporated on December 25, 1962. The authorised shareholding of the company was 5,000 shares of Rs. 100 each. Of the 5,000 shares, 3,040 shares were issued and subscribed for. The shareholding as in 1962 was as follows :

Tarachand Agarwal - 10 shares

Dhanka Devi (his wife) - 3,010 shares

Respondents Nos. 1 to 5 herein - 10 shares

Respondents Nos. 1, 3, 4 - 10 shares

3,040 shares.

3. On June 28, 1974, a return was filed before the Registrar of Companies by respondent No. 1, viz., Bhagirath. That return showed that Dhanka, the mother, had transferred 750 shares of her shareholding to Bhagirath and 600 shares to Chandra Prakash. As a result the shareholding pattern in the company in 1974 was as follows :

Tarachand - 10 shares

Bhagirath 10 + 750 - 760 shares

Dhanka - 1,660 shares

Chandra Prakash and group 10 + 600 - 610 shares

3,040 shares.

4. On June 28, 1983, a return was submitted to the Registrar of Companies by Bhagirath" which showed that a further transfer of shares by Dhanka Devi to Bhagirath and his group and the shareholding in 1983 was as follows :

Tarachand - 10 shares

Dhanka - 510 shares

Bhagirath and group 760 + 1150 - 1,910 shares

Chandra Prakash - 610 shares

3,040 shares.

5. On June 15, 1984, Bhagirath filed a return with the Registrar of Companies in respect of the shareholding of the company. The 1984 position showed that Dhanka Devi transferred a further 500 shares to Bhagirath so that the shareholding in 1984 was recorded as follows :

Tarachand - 10 shares

Dhanka - 10 shares

Bhagirath and group 1910 + 500 - 2,410 shares

Chandra Prakash - 610 shares

3,040 shares.

6. On October 20, 1989, Tarachand filed a return before the Registrar of Companies. The following shareholding pattern was recorded :

Tarachand 10 + 1500 - 1, 510 shares

Dhanka - 10 shares

Bhagirath and Group - 2,410 shares

Chandra Prakash and group 610 + 460 - 1,070 shares

5,000 shares.

7. The additional shares of 1,500 as far as Tarachand is concerned and 460 shares as far as Chandra Prakash and his group were by virtue of a board meeting alleged to have been held on October 20, 1989, for issuance of the unsubscribed shares.

8. On November 6, 1989, Dhanka filed a suit being Suit No. 874 of 1989 in this hon'ble court against the company, Bhagirath and others in which she claimed that in 1983 and 1984 transfer of shares alleged to have been made by her in favour of Bhagirath were as a result of forgery and fraud. Dhanka Devi prayed in the suit inter alia for the following reliefs :

(a) Declaration that the plaintiff is the sole and absolute owner of 1,660 shares in defendant No. 1-company ;

(b) Declaration that the purported, transfer of shares referred to in paragraph 15 above and elsewhere in favour of defendants Nos. 2 and 3 is null and void and

without any effect;

(c) A decree for delivery up and cancellation of relevant share transfer forms in connection with the alleged transfer of shares referred to in paragraph 15 above and elsewhere in the plaint;

(d) A decree for Rs. 1,01,000 as claimed in paragraph 25 above ; alternatively, an enquiry into damages and a decree for such sum as may be found due and payable upon such enquiry against defendants Nos. 2 and 3 ;

(e) Perpetual injunction restraining the defendants, their servants, agents and assigns from dealing with or transferring further the said 1,660 shares ;

(f) Perpetual injunction in restraining defendants Nos. 2 and 3 from exercising any right in respect of the said 1,660 shares.

9. An interim order of injunction was obtained in the suit on November 6, 1989, restraining Bhagirath and his group from dealing with the shares which were the subject matter of the transfers reflected in the 1983 and 1984 returns filed with the Registrar of Companies and from exercising voting rights in respect to the 1,650 transferred shares of Dhanka.

10. On June 8, 1990 Bhagirath filed an application under Sections 397 and 398 of the Companies Act (C. P. No. 290 of 1990) against the company, Tarachand, Dhanka, Chandra Prakash and his wife and daughter and his sister Gita. The application was admitted ex parte on June 18, 1990, and an interim order was passed by His Lordship Umesh Chandra Banerjee J., directing status quo and also directing that no board meeting should be held.

11. On July 11, 1990, Tarachand filed an affidavit to the application in which he sought to represent himself, Chandra Prakash as well as Dhanka. The proceeding initially culminated in an order dated March 20, 1992, which according to the appellants was passed by way of settlement of the disputes between the parties. Bhagirath preferred an appeal from the order dated March 20, 1992. The appeal was allowed on March 27, 1996, and the order dated March 20, 1992 was set aside and the matter remanded back to the trial court for being reconsidered.

12. In these circumstances, the matter has been taken up by me.

13. According to the petitioner, the dispute arose between the parties in connection with a negotiation held by respondent No. 2 (deceased) with one Otto India Pvt. Limited in respect of a tenancy at the said premises and thereafter the matter in relation to the said dispute in accordance with the said resolution of the directors of the said company held on November 6, 1989, whereby respondent No. 2 (deceased) was constituted as a true and lawful attorney of the company for the purpose of executing the lease deed in favour of Otto India Pvt. Limited and petitioner No. 1 and respondent No. 4 were authorised to execute and register the power of attorney in favour of respondent No. 2 (deceased). According to the petitioner, in spite of such authority respondent No. 2

(deceased) failed and neglected to take any step in relation to creation of such tenancy and further denied access to the petitioners and their group to the statutory books, records and documents of the company and further denied the petitioners any participation as shareholders and its directors in the management and affairs of the said company and respondents Nos. 2 (deceased), 3 and 4 purported to negotiate with various other persons in respect of the building constructed by the company at the said premises. Further, they sought to open a new banking account of the company with Vysya Bank Limited to divert the funds of the company into the said banking account and designated themselves as the only signatories to the said banking with an intention to siphon off the funds of the company and the rents collected by the company from the various tenants of the said building.

14. Respondents Nos. 2 (deceased) to 4 purported to transfer various sums of money belonging to the company to one Bura Brothers Private Limited and further purported to enter into various settlements with unauthorised occupiers of the said building and sought to make illegal and wrongful gain out of such negotiations to the detriment of the company and its bona fide shareholders.

15. In these circumstances, the petitioner through its advocate-on-record caused a notice to the respondents on the said wrongful and illegal activities on the part of the said respondents. The said letter dated November 28, 1989, was replied by the respondents through their advocates-on-record whereby the said respondents illegally and wrongfully contended that the petitioners were minority shareholders of the company and further the petitioners are illegally and wrongfully not co-operating with the other members of "the board of directors of the company. In these circumstances, the petitioners were constrained to publish an advertisement in the Telegraph dated December 11, 1989 and further by a letter dated December 19, 1989, sought inspection of the statutory books and records of the company from the respondents. The said inspection was denied by the respondents and further they are not allowed access to the office of the company and the petitioner further came to learn from a letter dated December 7, 1989, addressed by the Registrar of Companies, West Bengal, wherefrom it appears that two sets of Form No. 32 had been filed on October 25, 1989, and November 27, 1989, by and on behalf of the company and the said forms were not in compliance with Section 303(2) of the Companies Act, 1956. Thereafter, the petitioners caused enquiries into the matter and informed the Registrar of Companies, West Bengal, that none of the petitioners filed any Form No. 32 and further informed that no further appointment of directors of the company could take place as the maximum number of directors of the company as envisaged in the articles of association of the company were five and further the petitioners did not receive any notice or special notice for removal or appointment of any director of the company and as such there is no question of alteration in the composition of the board of directors of the company.

16. The petitioners further contended that they were the majority shareholders

of the company. The petitioner further stated that no extraordinary general meeting was held. The petitioner also submitted that in spite of the request made by the petitioner, no inspection of the books, records and documents of the company were allowed to be inspected by them. Thereafter, the petitioners further caused enquiry into the matter and on May 11, 1990, came to learn that a Form No. 32 had been filed on October 23, 1989, by respondent No. 4 by issuing a further 1,960 equity shares of Rs. 100 each had been issued and allotted in favour of respondent No. 2 (deceased) and 3 whereby the respondents have purported to alter the shareholding pattern of the company with an "intention to reduce the petitioners to a minority in the shareholding of the said company. According to the petitioner, the said allotment and issue of the shares of the said company is illegal, null and void, inter alia, on the reasons that no board meeting of the company was convened for the purpose of sanctioning the issue and allotment of shares in favour of respondents Nos. 2 (deceased) and 4. No notice of any board meeting was given to petitioners Nos. 1 and 2 for the purpose of issuing an allotment. No general meeting of the company was convened for such purpose. No notice of any general meeting of the company was given to the shareholders including the petitioners. No application was filed by the respondents for allotment of any further shares of and in the company and such issues and allotments were made without the consent and approval of the petitioners with an intention to reduce the petitioners to minority shareholders and with an object to "grab control of the company and its assets and properties by the respondents and further the said issue and allotment purported to have been made by the respondents denying the petitioners" legitimate rights as majority shareholders of and in the company. Such issue and allotment was in violation and in breach of all principles in respect of the management and affairs of the company.

17. In these circumstances, the petitioners contended that the acts and conduct of the respondents prejudicially affect the carrying on the business of the company and further the acts and conduct of the respondents have resulted and are likely to result the affairs of the company and conduct the manner prejudicially to public interest and/or in a manner of shareholders of the company including the petitioners.

18. According to the petitioner, at present there is a complete deadlock in the board of directors of the company and the disputes between the petitioners and the respondents cannot be resolved in the domestic forum of the company. It is further alleged that the respondents proceeded illegally and wrongfully in changing the nature and character of the shareholding of the company and are also purporting to alter the composition of the board of directors of the company. It is further contended that the annual return of the financial year ended March 31, 1989, the statutory formalities have not been complied with owing to the high-handed attitude adopted by the respondents. The petitioners are being denied their right and shareholders and directors of the company are also unable to assert of their right as shareholders of the company.

19. In view of the aforesaid acts of oppression and mismanagement, according to the petitioner, the respondents are taking steps in a manner that the company would be wound up and will prejudice the rights of the petitioners. The petitioner further contended that a special officer or an administrator should be appointed.

20. The suit which was filed by Dhanka Devi being Suit No. 874 of 1989 was dismissed on July 28, 1995, for non-prosecution and all interim orders were vacated.

21. On September 1, 1998, the respondent-company and Chandra Prakash filed an application, inter alia, praying for that the notice which was issued by the chairman (appointed by the hon''ble court) be declared illegal, null and void.

22. On September 2, 1998, a further petition was filed in the suit by Dhanka Devi and prayed for an order for recalling of the orders passed by the hon''ble court on June 20, 1995, and July 28, 1995, and further prayed for an order of interim injunction restraining respondents Nos. 2 and 3 (i.e., Bhagirath and Lila) from dealing with the said 1,650 shares and further restraining them from exercising their voting rights in respect thereof. An interim order was passed on the said application in ex parte.

23. On September 4, 1998 the matter was mentioned before His Lordship Sujit Kumar Sinha J., when the interim order was recalled and liberty was given to hold the meeting of the company on September 5, 1998, but any resolution taken thereat was not to be given effect to without the leave of the court. Accordingly, on September 5, 1998, an extraordinary general meeting was held under the chairmanship of Rajat Kumar Ghosh, Barrister-at-Law, and resolutions were passed constituting a board of directors.

24. Thereafter, Bhagirath further moved an application, inter alia, praying for injunction restraining respondents Nos. 4 to 7 herein from operating any of the bank accounts of respondent No. 1 without the consent and/or prior permission of Bhagirath Agarwal.

25. On December 18, 1998, an interim order was passed and Mr. Rajat Kumar Ghosh was appointed as the special officer on the company to ascertain the statutory and other liabilities as also running expenses of the company.

26. The suit which was dismissed and the application was filed for recalling of the said order, the said application came up for final hearing and was heard and dismissed by me on August 4, 1999. An appeal was preferred from the order passed by me and on September 13, 1999, the appeal was dismissed. It is pertinent to note that in the said appeal an injunction order was prayed for by the appellant restraining the Bhagirath and others from giving effect to the resolution passed in the extraordinary general meeting held on September 5, 1998. The said appeal and interim application were dismissed by the Hon''ble Division Bench presided over by His Lordship S. B. Sinha A. C. J.

27. A SLP was filed from the said order of the hon''ble Division Bench. The

Hon''ble Supreme Court was pleased to grant leave to appeal on February 7, 2000. Leave was granted by the Hon''ble Supreme Court of India. It further appears that there was no interim order passed by the Hon''ble Supreme Court.

28. Mr. S. B. Mukherjee, learned senior counsel, appearing on behalf of the petitioner contended that after the dismissal of the suit and further after the order passed by this hon''ble court in respect of recalling order of such dismissal has also been dismissed. He further contended that no stay has been granted by the Hon''ble Supreme Court of India in the matter. Accordingly, the petitioners have a right to exercise their voting rights in respect of the shares transferred by the mother to the Bhagirath group.

29. The point has been taken by the respondents that no order should be passed at this stage since the matter is pending before the Hon''ble Supreme Court of India. Mr. Mukherjee further contended that such contention is fallacious. Even if the appeal is allowed by the Hon''ble Supreme Court until the suit is decreed in favour of the plaintiff (the Chandra Prakash group), the petitioners (the Bhagirath group) would continue to remain the registered owner of the said shares and they cannot be deprived of their legitimate rights in respect of the said shares.

30. He further drew my attention to the order passed by the Hon''ble Division Bench on August 4, 1998, where the Hon''ble Division Bench was pleased to record as follows :

"According to Chandra Prakash who is for all intents and purposes representing the interests of the appellants, this withdrawal of the suit was made immediately after Tarachand died on March 18, 1995. It is also stated that as far as Dhanka Devi is concerned, after the demise of Tarachand, Dhanka Devi "went completely blank (sic) and she has remained as such since then. According to the appellants, Dhanka Devi cannot hear, speak, read or write. She is completely bedridden and is leading a "vegetable existence". It is further stated that she is being looked after by Chandra Prakash.

Assuming this to be true, it is undisputed that the order dated July 28, 1995, has not been challenged by Chandra Prakash in any proceedings whatsoever. As far as Dhanka Devi is concerned, she is bound by that order by which her allegations against Bhagirath were not pressed. She is not, at least, entitled to raise the same issue in a different proceeding.

As far as Chandra Prakash is concerned, he cannot run a case which is different from that of his mother, Dhanka Devi, in respect Of the properties which belonged to Dhanka Devi herself. This he may have done, had he chosen to challenge the order dated July 28, 1995, which dismissed Dhanka's suit against Bhagirath, albeit for non-prosecution. Therefore, the owner of the shares, the transfer of which is being challenged by Chandra Prakash, does not herself dispute the transfer to Bhagirath. The mere fact that an affidavit had been filed by Tarachand on her behalf does not change the position as the affidavit was

affirmed in 1990 and Dhanka Devi withdrew her allegations against her son, Bhagirath, in 1995."

31. He further contended that the application filed by the petitioner for holding an extraordinary general meeting of the shareholders of the company arid for the purpose of electing a valid board of directors Chandra Prakash did not controvert the statements made by the petitioner in the said application. Therefore, at this stage neither Dhanka Devi nor any other respondents can challenge the title of the petitioner in respect of the shares transferred in their favour by their mother Dhanka. Therefore, the respondents cannot challenge the said transfer which does not belong to them.

32. He further relied upon a passage from Buckley on the Companies Acts, 14th edition, volume 1 page 934 which is reproduced hereunder :

"And where a transfer through non-observance of formalities has been irregularly, though not invalidly made, lapse of time, coupled with recognition of the transferee as a shareholder, may render the transfer incapable of being impeached."

and contended that the transfer of the said shares has not been challenged on the basis of infringement of the articles of associations. The shares having been transferred and the transfer having been registered in the records of the company as is evident from the annual return filed with the Registrar of Companies, this point does not survive. The shares were transferred in the instant case in 1983 which was duly registered with the Registrar of Companies and the suit has been filed only in the year 1989 and the same had already been dismissed for non-prosecution on July 28, 1995, and further the suit had already been dismissed. The SLP which has been preferred, has been admitted, but no stay was granted by the Hon"ble Supreme Court. Therefore, he contended that such transfer cannot be questioned at this stage.

33. He further contended that the story made out in the affidavit by the respondents that Tarachand had to leave Calcutta and settled down in Delhi with Chandra Prakash--is totally baseless and without any evidence. The discovery of transfer of shares in favour of Bhagirath and others only came to their knowledge in the year 1989 is totally a concocted story and motivated inasmuch as if such fact has to be taken into account in that case u/s 283 of the Companies Act Tarachand and Chandra Prakash are deemed to have vacated their respective offices as directors for not having attended the board meeting of the company and all subsequent actions taken by them as directors of the said company are deemed to be non est in the eye of law.

34. Similarly, the meeting of the board of directors alleged to have been convened on October 26, 1989, for the purpose of removal of Bhagirath as director of the said company, also is non est in the eye of law and the business transacted at such board meeting is null and void since Tarachand and Chandra Prakash have not been away in Delhi for six years should not have attended the

meeting of the board of directors of the company. Accordingly, he submitted that the resolution passed in the meeting held on November 21, 1989, is also null and void.

35. He further contended that no meeting can be held without giving any notice to the directors of the company. He further relied upon Section 286 of the Companies Act and contended that any act in violation of such section will render the meeting illegal and any business transacted in the said meeting will be declared as null and void until and unless such business is ratified in a subsequent meeting to be held properly. In support of such contention he relied upon a judgment reported in *Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI)*, . Accordingly, he submitted that the meetings held on October 18, 1989, and October 20, 1989, are illegal and the business transacted in the said meetings is non est in the eye of law.

36. He further contended that the alleged meeting of the board of directors for the purpose of removal of Bhagirath from the board of directors is fabricated and is of no effect. Accordingly, he submitted that no effect should be given in respect thereof.

37. He further contended that there is no explanation that has been given by the board of directors for issuance of new 1960 shares. He further submitted that no particulars have been furnished in respect of the transaction in connection with the said 1960 shares. There is no reflection in the account how the money has been paid and if at all paid how such funds were utilised by the company. There is no reason that has been given why the fresh shares were not issued and/or allowed in favour of Bhagirath or Dhanka although according to him, if such shares were issued the petitioners and Dhanka Devi had legally a right to get proportionately for the same but no step was taken by Tarachand and Chandra Prakash. Shares were issued with the sole object and intention for the purpose creating a new majority in the shareholding of the respondent-company for the benefit of Tarachand and Chandra Prakash. He further drew my attention to the affidavit filed by the respondents and submitted that there is no whisper in the affidavit in respect of the share money received by the company. He further contended that for the purpose of retaining control over the company the procedure for issuance of the shares should be struck down by this hon'ble court. In support of such contention he relied upon judgment reported in *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, .

38. He further drew my attention to sections 41(2), 159, 160, 161 and 164 of the Companies Act and contended that the onus of proving the contrary namely that Bhagirath Agarwal and his group are not shareholders of the said transferred shares is entirely on Dhanka Devi and since the suit has already been withdrawn is nothing but a desperate attempt on behalf of Chandra Prakash to continue his perpetual control over the affairs of the company. Accordingly, he submitted that this application should be allowed and the order should be passed in his favour.

39. Mr. Bimal Chatterjee, learned senior counsel, appearing on behalf of respondents Nos. 1, 4,5 and 6 submitted that there are only two points of disputes. First, the purported transfer of 350 shares made by Bhagirath in favour of the members of his own family out of Smt. Dhanka Devi's holding of 1,660 shares and second, is the issuance of 1,960 shares on October 20, 1989, and allotment of the said shares in favour of Tarachand and Chandra Prakash. According to him, so far as the transfer of 1,650 shares out of Smt. Dhanka Devi's holding of 1,660 shares is concerned, that has been reflected in the suit of Smt. Dhanka Devi. Subsequent thereto the said suit according to Bhagirath had been subsequently withdrawn by the mother and the same is now pending before the Hon''ble Supreme Court of India and a special leave has already been granted and the matter is pending before the Hon''ble Supreme Court. The issue of 1,960 shares on October 20, 1989, is a subject-matter of challenge in this petition. According to him, the grounds of challenge principally are that no notice of any meeting or otherwise had ever been given to Bhagirath by the company in regard to such issue of shares.

40. He further contended that the board meeting could not be held in view of the order passed by this hon''ble court at the instance of the petitioner. No steps were taken by Bhagirath until the death of Tarachand. He further contended that since the appeal is pending before the Hon''ble Supreme Court this petition should not be disposed of at this stage.

41. Mr. Chatterjee further submitted that the order was passed on December 18, 1998, and the special officer was directed to ascertain as to what statutory and other liabilities and also running expenses of the company and further it was directed that the special officer will find out which of those liabilities would be made first, further, to find out as to what funds, if any, were lying with the company. Although the said order is still subsisting, no step is being taken by the petitioners.

42. He further contended that the extraordinary general meeting held by the special officer has also been challenged in this hon''ble court and the matter is still pending. His further contention is that in view of the pendency of the appeal of Smt. Dhanka Devi in the Hon''ble Supreme Court of India, any attempt either to clothe Bhagirath or Chandra Prakash with absolute power to control the administration of the company without final determination of the majority and minority between the two brothers would lead to further litigation. Accordingly, he submitted that hearing of the present application may be kept in abeyance and at the same time the day-to-day management of the affairs of the company can peacefully and without any impediment be carried out through the impartial special officer in the line of the order dated December 18, 1998, empowering the special officer with more power including power to carry on the pending litigations between the company on the one hand and the third party on the other.

43. He further submitted that the company has no trading capacity. The business

of the company is only to let out and to realise rents, issues and profits and disburse lawful and legitimate expenses.

44. He further contended that no case has been made out by the petitioner in respect of mismanagement of the company in question. There is no oppression on the part of the respondents. He further contended that no reasons have ever been given by Bhagirath as to why Dhanka Devi transferred 1,350 shares in favour of Bhagirath and the members of his family. In support of his submissions he relied upon judgments reported in *Nurcombe v. Nurcombe* [1985] 1 All ER 65 (CA), *K. M. J. Joseph v. Kuttanad Rubber Co. Ltd.* [1984] 56 Comp Cas 284 (Ker) and *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, .

45. Mr. Pratap Chatterjee appearing on behalf of Smt. Dhanka Devi Agarwal submitted that the petitioners have contended that Bhagirath and his wife have claimed to be the owners of 1,650 shares belonging to respondent No. 3 by payment of full consideration. According to him, no proof of such payment or any document in support of the alleged transfer has been disclosed. As such the petitioners have miserably failed to prove the right, title and interest in respect of the said 1,650 shares which according to the petitioner has been transferred from respondent No. 3 to petitioners Nos. 1 and 2. Without the said shares the petitioners cannot claim to be majority shareholders of the company.

46. He further contended that Tarachand died on March 18, 1995, and Bhagirath thereafter took steps to withdraw the suit being Suit No. 874 of 1989.

47. He further submitted that respondent No. 3 had never authorised or instructed any advocate to withdraw the said suit. He further submitted that since special leave to appeal has been granted by the Hon'ble Supreme Court of India by an order dated February 7, 2000, the order of dismissal of the suit for non-prosecution has lost its finality and will not operate as *res judicata* between the parties. He further relied upon a judgment reported in AIR 1931 263 (Privy Council) , and submitted that proper course for the court would be to adjourn the action pending the decision of the appeal before the Hon'ble Supreme Court.

48. He further contended that if this hon'ble court proceeds on the basis that respondent No. 3 has ceased to be the owner of the 1,650 shares only by virtue of the alleged withdrawal of Suit No. 874 of 1989, the SLP would become infructuous. Alternatively, if it is held that the said suit being No. 874 of 1989 has been dismissed as withdrawn and such dismissal order has become final even then respondent No. 3 is entitled to raise the same pleas as and by way of defence in the present proceeding. Respondent No. 3's right in the said shares is not extinguished by withdrawal of the said suit. In support of such submission he relied upon a judgment reported in AIR 1939 110 (Privy Council)

49. He further submitted that respondent No. 3 may be estopped from filing a fresh suit on the same cause of action but respondent No. 3 is not precluded from raising the same plea again by way of defence in another proceeding. In support of such submissions he relied upon judgments reported in *Ghulam*

Haidar Khan v. Pt. Harshi Kesh, AIR 1937 Oudh 385; Amrao Singh and Others Vs. Santan Dharam Sabha, Chandigarh, ; Usha Sales Ltd. and Others Vs. Aruna Gupta and Another, .

50. He further contended that Section 41 of the Companies Act has no application in the facts and circumstances of this case. He further contended that entries u/s 164 of the Companies Act are only prima facie evidence. According to him, this hon"ble court will not proceed on the basis of the prima facie evidence. He further submitted that reference has been made to affidavit filed jointly by Tarachand Agarwal for self as well as on behalf of Dhanka Devi Agarwal where it has been stated that Bhagirath Agarwal illegally caused the shares to be transferred.

51. He further contended that there has not been any admission in respect of such transfer by the respondents. If the petitioner wants to rely upon the affidavit he has to also admit that such transfers were unlawful and illegal. He further submitted that this hon"ble court would be pleased not to proceed on the basis that Bhagirath Agarwal and his wife are the owners of the 1,650 shares belonging to respondent No. 3.

52. Accordingly, he submitted that until the matter is decided by the Hon"ble Supreme Court, this matter may be kept in abeyance.

53. After considering the facts and circumstances of this case it appears to me that the shares which were transferred in favour of the petitioners cannot be questioned at this stage in this application. It is a fact that such allotment of shares has been challenged in a suit filed by Dhanka Devi which has already been dismissed. Until a decree is passed in favour of the said plaintiff, Dhanka Devi, no steps can be taken in respect of such transfer of shares. Therefore, in my opinion this court is bound to take the shareholding as it was standing after such transfer.

54. I further do not have any hesitation to accept the contention of Mr. Mukherjee, learned senior advocate appearing on behalf of the petitioner, that the removal of the petitioner Bhagirath from the board of directors is illegal, inter alia, on the ground that the meetings of the company held on October 26, 1989, and November 21, 1989, were without complying with the provision of Section 286 of the Companies Act and, therefore, steps taken in violation of such provisions of the Companies Act in my opinion, will render the meeting illegal and the business transacted therein should be declared as null and void.

55. It further appears that the respondents themselves admitted that the meetings were held after giving verbal notice to the two sons. Therefore, there cannot be any hesitation to hold that no formalities for issuance of notice in writing was followed.

56. It further appears that the 1,960 shares of the said company were issued only for the purpose of retaining control over the company without following the

provisions of the Companies Act, It further appears that from the facts of the case that offer was not given to the petitioners to have the shares on pro-rata basis in respect of issuance of 1,960 shares of the said company. Mr. Mukherjee, learned senior advocate, submitted that such steps taken by the Chandra Prakash and Tarachand only for the purpose of retaining control over the management of the said company.

57. It is apparent from the steps taken by the said Tarachand and Chandra Prakash that such issuance of shares have been done illegally and accordingly in my opinion the contention of Mr. Mukherjee, learned senior advocate, must be upheld by me as it further appears that no explanation was also issued in connection with the new 1,960 shares. Accordingly, I do not have any hesitation to strike down such issuance of shares on the following grounds :

(a) No board meeting of the company was convened or held for the purpose of sanctioning the said issue and allotment of shares in favour of respondents Nos. 2 and 4.

(b) No notice of such board meeting was given to petitioners Nos. 1 and 2 for the purpose of sanctioning of such issue and allotment of shares in favour of respondents Nos. 2 and 4.

(c) No notice of any general meeting of the company was given either to the shareholders or to the petitioners for the purpose of sanction and approval of such issue.

(d) No application was made by respondents Nos. 2 and 4 for allotment of any further shares of the said company.

58. On July 8, 1998, application was moved and an order was passed by His Lordship Sujit Kumar Sinha J. holding an extraordinary general meeting of the shareholders for the purpose of electing directors and auditors. His Lordship was pleased to appoint Mr. Rajat Kumar Ghosh, Bar-at-Law, as the chairman of the said extraordinary general meeting and further he was directed to file a report before this court. Appeal was preferred before the Hon''ble Division Bench and the Hon''ble Division Bench was pleased to direct that the extraordinary general meeting should be held and the result of the extraordinary general meeting will abide by the outcome of this application. It appears from the report filed by the said chairman Rajat Kumar Ghosh, Bar-at-Law, in respect of the said extraordinary general meeting held on September 5, 1998, that the following directors were appointed in the said meeting :

(a) Bhagirath Agarwal;

(b) Leela Agarwal;

(c) Rajesh Agarwal;

(d) Shyam Agarwal;

(e) Anita Goel.

59. In my opinion effect should be given to the said resolution passed in the said extraordinary general meeting held pursuant to the order passed by the Hon"ble Division Bench and the said board of directors are directed to take the following steps :

(a) To convene and hold the annual general meeting for the year ended March 31, 2001 by September 30, 2001.

(b) Steps to be taken to the cause of the audit of the books of account of the company for the year ended March 31, 2001, for which purpose, M/s. P. C. Agarwal and Co. is appointed as the chartered accountants, who will hold office till the conclusion of the next annual general meeting.

(c) Holding of annual general meeting of the company for the years ended March 31, 1989, to March 31, 2001, are dispensed with. The filing of the accounts of the company for the said period. The filing of the annual return of the company is also dispensed with.

60. The delay and/or default in holding the annual general meeting is condoned since the company was restrained by an order of the court from holding any board meeting or general meeting during the pendency of these proceedings.

61. The board of directors, constituted as above, shall carry on the day-to-day affairs of the company and take steps for the collection of all rents from the tenants and discharge all liabilities by way of Income Tax, corporation taxes, electricity charges, salary of the staff and other liabilities, if any. The board shall also be entitled to let out the company's properties. The board of directors shall take immediate steps for filing of the Income Tax returns and statutory returns on the basis of the books of the account of the company or reconstituted books, as may be required.

62. All statutory books, books of account and other records of the company should be kept in the registered office of the company. The petitioners and the respondents who are in possession of the statutory books, books of account and other records of the company are directed to make it over to the board of directors within a fortnight from date.

63. All correspondence in respect of the company lying with the parties shall be handed over to the board of directors. The special officer, who was appointed to hold the meeting and the special officer of the company shall be the chairman of the board of directors for six months who will be paid a remuneration of 250 Gms. per month.

64. For the reasons stated hereinabove, this application is thus disposed of.