
(1982) 10 CAL CK 0004
In the Calcutta High Court
Case No : Company Petition No. 332 of 1981

Bhubaneshwar Singh and Another	Vs	APPELLANT
Kanthal India Ltd. and Others		RESPONDENT

Date of Decision : 13-10-1982

Acts Referred:

Companies Act, 1956 — Section 397, 398, 43A
Foreign Exchange Regulation Act, 1973 — Section 29

Citation : (1986) 59 CompCas 46

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : S.B. Mukherjee, for the Appellant; P.R. Mridul, for the Respondent

Judgement

Basu, J.—This is an application under Sections 397 and 398 read with Sections 402, 403 and 406 of the Companies Act, 1956 (hereinafter referred to as "the Act"). The facts relating to the making of the present application may be noted.

2. Since 1937-38, M/s. B.M. Singh and Sons, petitioner No. 5 herein, had business association and connection with A.B. Kanthal Sweden, which later on amalgamated with the Bulten group of industries. The company is now known as " Bulten Kanthal A.B. ", which is respondent No. 2 herein (hereinafter referred to as " the Swedish company ").

3. Petitioner No. 5 used to sell the products of the Swedish company which were electrical resistance wires and strips in India.

4. In July, 1961, A.B. Kanthal, prior to its amalgamation with the Bulten group, applied to the Government of India for permission to set up an electrical resistance wires and strips mill in India. This proposal, which is annexure "B" to the main petition, envisaged 60% of the shares of the proposed company to be held by the Swedish company and 40% by the Indian shareholders.

5. In anticipation of a company being incorporated in India, an agreement was entered into on September 23, 1964, between A.B. Kanthal on the one hand and

Jagdiswar Singh and others being the partners of petitioner No. 5 on the other. This agreement, inter alia, provided for the authorised capital, the issued capital, the respective shareholding, the number of directors, quorum of board meetings, etc., the details of which need not detain us. Suffice it to say that some of these provisions were incorporated in the articles of association of the company, which was formed later on, as will appear from what is stated hereinafter.

Similarly, another agreement was entered into on the same date between A.B. Kanthal and the partners of petitioner No. 5 which was known as the "shareholders" agreement".

6. The Government of India, by its letter dated April 18, 1964, approved of the formation of a company with foreign capital participation on condition that the foreign collaborators would be entitled to only 49% capital participation.

7. In pursuance of the agreement between the Swedish company and the partners of petitioner No. 5, a company called "Kanthal India Ltd." (hereinafter referred to as "the Indian company"), was incorporated on April 22, 1965. Although this company was initially incorporated as a private limited company, it became a public company by reason of the insertion of Section 43A of the Act, which came into force on and from September 12, 1967. Thereafter, as provided in the formation agreement and consequent upon the incorporation of the Indian company, a sole selling agency agreement was entered into between the Indian company and the partners of petitioner No. 5, whereby and whereunder, petitioner No. 5 was appointed the sole selling agent of the products of the Indian company. Although the sole selling agency agreement had been renewed from time to time its basic features remain more or less the same. The last of such renewal took place in 1978 and is valid for a period of five years and would be in force till May, 1983. Both the original agreement and the last renewal thereof have been duly approved by the Central Govt. in accordance with the provisions of the Act. One of the clauses of the agreement provides for termination of the agreement by twelve months" prior notice in writing.

8. Since the inception of the Indian company, the Indian group of shareholders and the Swedish group of shareholders had 49% shares each in the capital of the Indian company. The balance 2% of the shares of the Indian company was held by one A.C. Daphtary, since deceased, in whom admittedly both groups had full faith and confidence. Mr. Daphtary was the Swedesh Consul in Calcutta and was appointed the chairman of the board of directors of the Indian company as a nominee of the Swedish group of shareholders. It is evident from the records that as long as Mr. Daphtary was alive, there has never been any major rift between the Swedish group of shareholders and the Indian group of shareholders of the Indian company.

9. The articles of association of the Indian company, which was initially a private limited company and is now a Section 43A-company, contained restrictions on the right to the transfer of shares and the articles also vested in the shareholders

a right of pre-emption. The relevant articles around which a lot of controversy in this case centered are Articles 3, 34, 35, 36, 38 and 40. These articles may be conveniently set out herein below :

" 3. The company being a private company, the following provisions shall have effect, namely :--

(a) the number of members of the company (not including persons who are in the employment of the company and persons, who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased) is not to exceed fifty, but where two or more persons hold one or more shares in the company jointly, they shall for the purpose of this paragraph, be treated as a single member ;

(b) an invitation to the public to subscribe for any shares in, or debentures of, the company is hereby prohibited ;

(c) the right of transfer of shares of the company shall be restricted in the manner, hereinafter in these articles provided.

34. Subject to the provision of Section 111 of the Act, the board may, in its absolute and uncontrolled discretion, refuse to transfer any proposed transfer of shares and shall not be required to give any reasons for such refusal but subject thereto with the prior consent of all the other members of the company, shares may at any time be transferred by a member or other person entitled to transfer to any person whether he be a member or not : Provided that where a member is a body corporate, it shall be entitled to transfer its shares to another body corporate (whether incorporated in India or not) which is its subsidiary or holding company and shall also be entitled to transfer any of its shares to any persons who will hold such shares as its nominees.

35. Except where shares are transferred by a member or other person entitled to transfer in pursuance of the aforesaid article, the person proposing to transfer any share (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice") to the company that he desires to transfer the same. Such notice shall constitute the company as his agent for the sale of the share to any member of the company or person selected by the board willing to purchase the share (hereinafter called " the purchasing member") at a fair value to be agreed upon between the proposing transferor and the purchasing member and in default of such agreement at the " fair value " to be fixed by the auditors in accordance with Article 38 hereof. A transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revocable except with the sanction of the board.

36. If the company shall within six months from the date of the transfer notice or from the date when the " fair value" is fixed find a purchasing member and shall

give notice thereof to the proposing transferor, he shall be bound upon payment of the agreed fair value or the " fair value" as fixed in accordance with Article 37 hereof to transfer the share to the purchasing member provided that the time-limit prescribed in this article shall be extended for such reasonable period as may be necessary for obtaining any approval required by any law for the time being in force in respect of such transfer.

38. If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the proposing transferor shall be deemed to have appointed any one director of the company as his agent to execute the transfer of the share to the purchasing member and upon the execution of such transfer and upon receipt of the purchase money the company shall cause the name of the purchasing member to be entered in the register as the holder of the share and shall hold the purchase money in trust for the proposing transferor. The receipt of the company for the purchase money shall be a good discharge to the purchasing member and after his name has been entered in the register in purported exercise of the aforesaid powers, the validity of the proceedings shall not be questioned by any person. If the proposing transferor fails and neglects to hand over the share certificate after the purchasing member had paid in full the purchase money, the board shall have a right to issue a duplicate share certificate and to cancel the share certificate which the proposing transferor may have failed and neglected to hand over to the purchasing member.

40. The shares specified in any transfer notice shall be offered by the board to the members as nearly as may be in proportion to the existing shares of the company held by them. If a member should not be willing to accept the full number of shares offered to him within the time specified in the transfer notice, the offer shall elapse with regard to the unaccepted shares and the board shall offer such shares to such other members who have fully accepted shares offered to them as nearly as may be in proportion to the existing shares held by them respectively. If no member shall accept the offer of any share within the time specified, which shall not be less than three months or shall give notice that he does not wish to accept the offer, the board shall be entitled, to offer the shares to any person or persons selected by it as the person or persons whom it is desirable to admit to membership. "

10. The only other articles of association of the Indian company which require to be noted are the following. Article 115 provides that the chairman of the board of directors of the Indian company would be nominated by the Swedish company so long as they hold 49% of shares in the Indian company. Article 75 provides that the chairman would have a casting vote at the general meetings. Article 118 provides that the chairman would have a similar casting vote at the meetings of the board of directors.

11. The Foreign Exchange Regulation Act, 1973 (hereinafter referred to its " the FERA "), came into operation on January 1, 1974, Section 29 of the FERA, inter

alia, provided that a company in which the non-resident holding is more than 40% would require permission of the RBI to carry on business in India. Section 29(4) also provided that any non-resident holding more than 40% shares in such Indian companies would be required to apply to the RBI for permission to hold such shares and the RBI may either allow them to continue to hold such shares or give directions for disinvestment or impose appropriate conditions while granting licence to carry on business in India.

12. It appears from the records that on June 26, 1974, the Indian company made an application to the Exchange Control Department of the RBI for permission u/s 29 of the FERA. The copy of the covering letter is annexure to the petition wherefrom it appears that all the necessary particulars and documents were sent along with the application. The RBI, however, refused to grant permission to the company and it wanted that the foreign equity shares of the company should be reduced to 40%. On May 21, 1976, the Indian company again applied to the RBI for reconsideration of its decision. The RBI granted permission to the company to continue its operation in India and to have non-resident share holdings in excess of 40%, inter alia, on condition that the Indian company was to earn foreign exchange by export of goods manufactured by it at ex-factory cost (less excise duty, if any) and the export in each year being not less than 10% of the ex-factory cost of the Indian company's total production during the relevant year. The export obligation would be in force till such time the non-resident's interest in the company would continue to be more than 30/40%.

13. On May 5, 1978, the Indian company in terms of the RBI's sanction executed an undertaking whereby it undertook to earn foreign exchange by export of goods manufactured by it. On January 9, 1981, the RBI informed the Indian company that it had failed to comply with the conditions contained in para. 2(iv) of its letter dated November 26, 1977, and called upon the Indian company to bring down the foreign equity capital to 40%.

14. On March 8, 1981, at a meeting of the board of directors of the Indian company, it was resolved to issue fresh equity shares of Rs. 20,00,000 and offer shares worth Rs. 4,41,000 to Bulten Kanthal A.B. so that together with the shares already held by them and the shares that would be offered to the Swedish company, the total shareholding of the Swedish company in the Indian company after the fresh issue will come down to 40%. The distribution of the balance of the fresh issue was also decided upon. At the meeting, the chairman of the board of directors was authorised to take necessary action to implement this decision of the board.

15. In pursuance to this decision, a letter dated April 1, 1981, was written to the RBI informing them about the aforesaid proposal.

16. By its letter dated July 2, 1981, the RBI rejected the proposal with regard to the increase of capital as suggested by the Indian company. It further suggested

a proposal for dilution by disinvestment of 9% shares held by the non-resident shareholders and called upon the company to submit an application u/s 19(5) of the FERA. It may be mentioned at this stage that this last requisition of the RBI for an application u/s 19 of the FERA is a little mystifying because at the hearing before me it was accepted by both the parties that Section 19(5) of the FERA has no application to the present case.

17. At a meeting of the board of directors of the Indian company held on July 27, 1981, the letter of the RBI dated July 2, 1981, was considered and it was resolved, inter alia, that a sub-committee consisting of Mr. D.C. Singhanian and Mr. G.K. Thanawala should ascertain the reaction of the authorities towards the proposal of either to issue additional shares of Rs. 10,00,000 so that the quantum of shares held by the Swedish company in the Indian company is reduced to 40% or the 9% shares of the Swedish company be diluted by transfer of those shares in favour of Mr. M.T. Shah, who at that time was the chairman of the board of directors of the Indian company. It was also resolved that if the reaction of the Controller of Capital Issues is not favourable to the aforesaid proposal, the sub-committee was to evolve another alternative proposal which may be acceptable to the RBI and to report back to the board for consideration and submission of the final proposal to the RBI.

18. There is another factual aspect of this case which may be conveniently noted at this stage. As mentioned above, Mr. A.C. Daphtary, who was holding 2% of the shares of the Indian company and who was appointed chairman of the board of directors, died on April 27, 1980, leaving his wife, a son and a daughter. He also left a will dated August 28, 1979, whereby and whereunder he appointed one Mr. Jagjit Singh as his sole executor. Under the will, which will be set out hereinafter in full, Mrs. Leila Daphtary, the widow of Mr. Daphtary, was to be the sole legatee in respect of his entire estate.

19. In or about September, 1980, Mr. M.T. Shah was nominated by the Swedish company as the chairman of the board of directors of the Indian company in place and stead of Mr. Daphtary, since deceased. At the instance of the Swedish company, the board of directors of the Indian company was also reconstituted. This was done consequent upon the change in the control of the Swedish company in Sweden.

20. The board of directors of the Indian company met on June 23, 1981, in Bombay and transacted various items of business. In the minutes of the meeting, the following statement appears :

" Shares of late Mr. A.C. Daphtary : G. Hildingson reported that Mrs. L. Daphtary had met him in Europe recently and offered to sell the shares of the late Mr. A.C. Daphtary to Mr. M.T. Shah on the transmission of the shares in her favour and the board took note of this report. "

21. It appears from the records that on August 18, 1981, Mrs. Leila Daphtary is alleged to have executed a power of attorney in favour of Mr. M, T. Shah in

respect of the 812 shares which stood in the name of the late Mr. A.C. Daphtary, reciting therein that she had received full consideration for transfer of the shares from Mr. M.T. Shah.

22. Thereafter, a meeting of the board of directors of the Indian company was held on August 25, 1981. Two of the nominee directors of the Singh group of shareholders asked for adjournment but such request was not acceded to. Consequently, the meeting held on the 25th August, was attended only by the nominee directors of the Swedish company. Among the various resolutions passed, there were only two resolutions which featured in the controversy between the parties in the present case and may be set out verbatim. At page 205 of the annexures, the following resolution occurs:

" RESOLVED THAT, as previously decided in the last meeting of the company held on July 27, 1981, a proposal may be submitted to the RBI to divest Bulten Kanthal A.B. of 9% of the shares held by them in favour of Mr. M.T. Shah. "

23. The second resolution is as follows :

" RECORDAL OF WILL OF LATE Mr. A.C. dAPHTARY. The will dated August 28, 1979, of late Mr. A.C. Daphtary sent to the board by Mrs. Leila Daphtary, vide her letter dated March 14, 1981, was placed before the board by Mr. M. Subramanyam for consideration. After discussion it was :

RESOLVED THAT the Will dated August 28, 1979, of late Mr. A.C. Daphtary be and is hereby, recorded.

RESOLVED FURTHER that 812 shares held in the name of late Mr. A.C. Daphtary be and are hereby transmitted in favour of Mrs. Leila Daphtary, the heir of late Mr. A.C. Daphtary, and that the secretary and director or two directors of the company be and are hereby authorised to transmit the shares in her favour.

Since the secretary expressed his inability to affix his signature on the share certificates, the transmission was effected by two directors, Mr. C.K. Thanwala and Mr. Subramanyam, and the secretary was directed to make the appropriate entries in the register of shareholders."

24. In pursuance of these resolutions an application was made to the RBI on September 23, 1981, u/s 19(5) of the FERA. The forwarding letter was sent on behalf of the company by Mr. M.T. Shah as its chairman.

25. These two resolutions precipitated the situation and was followed by a series of correspondence between the parties inter se and between Singh group of shareholders and their advocates-on-record and the RBI. Ultimately, the Swedish company by their telex dated September 15, 1981, declined to sell 9% shares to the petitioners and expressed their desire to sell the shares to Mr. M.T. Shah only.

26. The only other factual aspect to be noted before I come to the controversy between the parties is that, according to the petitioners, at the instance of the nominee directors of the Swedish shareholders, M/s. S. R. Batliboi & Co.,

chartered accountants, were appointed to make a special review of the accounts of the Indian company for the accounting year ended December, 1979. In the report which was submitted to the Indian company, there are certain adverse remarks against Mr. B. Singh regarding the Indian company's transactions with Beni Ltd., Pratap Development Co. P. Ltd. and Kantilal T. Garach & Co. According to the petitioners, these findings are totally baseless. In support of this, the petitioners caused a report to be prepared by M/s. K. Prosad and Co., chartered accountants, dealing with the findings of M/s. S. R. Batliboi and Co.

27. At a meeting of the board of directors held on June 23, 1981, the board considered both the reports and decided not to pursue the matter for the present.

28. According to the petitioners, at the instance of Mr. M.T. Shah, who is stated to be openly hostile, to the Singh group of shareholders, the board purported to take up the issue and appointed a sub-committee to make a recommendation on the basis of the report of M/s. S. R. Batliboi and Co., notwithstanding the previous resolution of the board mentioned above.

29. In these circumstances, the petitioners have filed the present petition complaining of acts which are prejudicial to the public interest, prejudicial to the interest of the company and acts oppressive to the petitioners as shareholders of the Indian company.

30. The first controversy between the parties was with regard to the 2% shares of the Indian company numbering 812 shares which were held by Mr. A.C. Daphtary, since deceased. As mentioned earlier, Mr. Daphtary died on April 27, 1980. As also indicated earlier and it is the admitted case that Mr. Daphtary left a will whereby and whereunder he appointed one Mr. Jagjit Singh of New Delhi as his sole executor under the will. The text of the will is material for our purposes and is set out herein-below :

" A8, Maharani Bagh, New Delhi-110 065. August 28, 1979.

I, Anil Chandra Daphtary, do hereby declare this as my last will and testament.

I wish that, in the event of my death, all my property and possessions be given to my wife, Leila. In the event that my wife predeceased me, my possessions should be equally divided between my children, Anjali and Vivek. Those of my possessions which are physically indivisible may be retained jointly by my children if they so agree between themselves. If they are unable to agree, the particular item or asset should be sold under the direction of my executor and the proceeds equally divided between my children.

I hereby appoint Mr. Jagjit Singh of E29, Panchsheel Park, New Delhi, as sole executor to my estate.

(Sd/-) Anil Chandra Daphtary."

31. It may be mentioned at this stage that a copy of the will was forwarded to the directors of the Indian company by Mrs. Daphtary. The letter dated March 14,

1981, contained the following paragraphs :

"I would be most grateful if the request for transmission can be granted. I shall send the share certificate for appropriate endorsements and the same can be returned to me."

32. Admittedly, no probate has yet been granted of the will of Mr. Daphtary.

33. According to the petition, this letter of Mrs. Daphtary although dated March 14, 1981, forwarding the copy of the will was never placed before the board of directors of the Indian company until the controversial board meeting held on August 25, 1981, when none of the nominees of the Singh group were present. From the minutes of the board meeting dated August 25, 1981, it appears that the letter of Mrs. Daphtary was with Mr. Subramanyam, an alternate director of the Indian company, who produced the letter.

34. At an earlier meeting of the board held on June 23, 1981, the board took note of a report of Mr. G. Hildingson, a Swedish director of the Indian company, who reported that Mrs. Daphtary had met him in Europe and offered to sell her husband's share to Mr. M.T. Shah, on transmission of the said shares in her favour. It is the petitioner's apprehension that there must have been some confidential arrangement regarding the shares of Mr. Daphtary with the nominees of the Swedish company.

35. At the hearing, it was not disputed that these 812 shares representing 2% of the Equity share capital of the Indian company still stand registered in the name of the late Mr. Daphtary. This fact had been recorded by me in the course of the hearing in the minutes of this court on January 21, 1982.

36. The main controversy with regard to this question was as to the relevant article which is applicable with regard to the transmission of these shares. The two relevant articles on these questions are Articles 48, 49 which may be set out hereinbelow :

" 48. The executor or administrator or succession certificate holder of a deceased member (not being one of several joint holders) shall be the only person recognised by the company as having any title to the share registered in the name of such member, and in case of the death of any one or more of the joint holders of any registered share, the survivor shall be the only person recognised by the company as having any title to or interest in such share, but nothing herein contained shall be taken to release the estate of a deceased joint holder from any liability on the share held by him jointly with any other person. Before recognising any executor or administrator or succession certificate holder, the board may require him to obtain a grant of probate or letters of administration or other legal representation, as the case may be, from a competent court in India and having effect in Calcutta. Provided nevertheless that in any case where the board in its absolute discretion thinks fit it shall be lawful for the board to dispense with the production of probate or letters of administration or such other

legal representation upon such terms as to indemnity or otherwise as the board, in its absolute discretion, may consider adequate.

49. Any committee or guardian of a lunatic or minor member or any person becoming entitled to or to transfer a share in consequence of the death or bankruptcy or insolvency of any member upon producing such evidence that he sustains the character in respect of which he proposes to act under this article or of his title as the board thinks sufficient, may, with the consent of the board (which the board shall not be bound to give), be registered as a member in respect of such shares, or may subject to the regulations as to transfer hereinbefore contained, transfer such share. This article is hereinafter referred to as " the transmission article ".

37. According to Mr. S.B. Mukherjee, who appeared on behalf of the petitioners, in the present case, Article 48 squarely applies to the facts of the present case. According to Mr. Mukherjee, Articles 48 and 49 are mutually exclusive. According to this contention, since Article 48 applies, Article 49 can have no application to the present case. It was submitted on an analysis of Article 48 that upon the death of a shareholder, only the executor, the administrator and the holder of a succession certificate are the persons who can be recognised by the company and brought on its register of members in place and stead of the deceased shareholder. Before it recognises such an executor, etc., the board may require the executor to produce a grant of probate or letters of administration, as the case may be. The board, however, has absolute discretion to dispense with the production of such a grant of probate on such terms as to indemnity as it may think fit. But the principal provision of Article 48, on which considerable emphasis was laid was that, on the death of a shareholder, nobody but the executor, the administrator or the holder of a succession certificate could be recognised by the board.

38. Turning to the facts of the present case, it was submitted that admittedly one Jagjit Singh is the executor of the entire estate of the late Mr. Daphtary under his will. There is nothing to show that Mr. Jagjit Singh, the executor, has ever applied to the company for being registered in place and stead of the late Mr. Daphtary. There is no dispute that no probate has been granted of the will of Mr. Daphtary. Consequently, it was submitted that Mrs. Daphtary, at this stage, had no locus standi to apply to the company for having the shares of the late Mr. Daphtary transmitted in her favour.

39. On the assumption for the sake of argument that Article 49 could be said to be applicable to the present case, it was contended by Mr. Mukherjee that Article 49 gives two options and puts the person who is entitled to the shares to an election Such a person at his option may either :

(i) be registered as a holder of the shares ; or

(ii) transfer the shares.

40. In the instant case, Mr. Mukherjee submitted that even assuming that Mrs. Daphtary could get herself registered as holder of the said shares, she could, however, not transfer the said shares without complying with Articles 34, 35 and 40. These articles which have been set out hereinabove, give a pre-emptive right to the existing shareholders to take these shares. Only if such a right is waived by the existing shareholders, it can be given to an outsider. In other words, unless the existing shareholders give their consent to a transfer in favour of an outsider, it cannot be done. Since Mr. M.T. Shah, in whose favour these two per cent. shares have been purported to have been transferred, is an admitted outsider, such a transfer is violative of the relevant articles of association of the Indian company.

41. On this aspect of the matter, Mr. Mookherjee further submitted that the letter of Mrs. Daphtary dated March 14, 1981, was deliberately not placed before the meeting of the board of directors of the Indian company held on June 23, 1981. It was placed only at the board meeting of August 25, 1981, when none of the nominees of the Singh group were present. There was no item on the agenda of the board meeting of August 25, 1981, with regard to the transmission of shares in favour of Mrs. Daphtary. Such action on the part of the nominee directors of the Swedish group, it was submitted, lacked in probity and was not bona fide.

42. According to the petitioner, incentives were given to Mrs. Daphtary for transfer of the shares of the late Mr. Daphtary in favour of M.T. Shah by paying her a sum of Rs. 42,000. Such payment was made without any resolution of the board of directors and was at the instance of Mr. M.T. Shah. It was submitted that it will appear from the record that the petitioners' group objected to the proposed transfer of these 2% shares to Mr. Shah by a letter dated September 8, 1981, addressed by M/s. Rajesh Khaitan & Co., advocates-on-record for the petitioners to the Indian company. The petitioners also offered to purchase the said 2% shares. It was pointed out with reference to certain documents annexed to the second interim application that a power of attorney has been executed by Mrs. Daphtary in favour of M.T. Shah wherein Mrs. Daphtary described herself as the " executrix ". In the power of attorney it has also been declared that Mrs. Daphtary has received full consideration from Mr. Shah for the transfer of the shares.

43. Mr. Mukherjee drew my attention to the fact that contradictory statements have been made on behalf of the respondents on this aspect of the matter. In the first affidavit-in-opposition it has been stated that the shares were agreed to be purchased by Mr. M.T. Shah whereas in the second affidavit-in-opposition, it has been stated that the shares have already been purchased by Mr. Shah.

44. Consequently, it was submitted that proper reliefs should be given with regard to this purported transfer by directing the sale of the said two per cent. shares to the petitioners in accordance with the articles of association of the Indian company.

45. Mr. P.R. Mridul, who appeared for the contesting respondents, submitted that the transaction in question was not governed by Article 48 of the articles of association of the company. It was. Mr. Mridul's contentions that this transaction is fully governed by Article 49 which provides for the transfer of shares in consequence of the death of a member. It was submitted by Mr. Mridul with reference to the paras. 50A, 56 and 65 of the petition that these paragraphs show that the petitioners are willing to deal with Mrs. Daphtary in respect of the 2% shares of the late Mr. Daphtary.

46. I must say that it is difficult to appreciate this contention of Mr. Mridul on the basis of the abovementioned paragraphs. To illustrate, I quote a portion of para. 50A of the petition, which is in the following terms :

" Your petitioners are desirous of and/or willing to purchase the said 9% holding of the said Swedish company and are willing to pay a price in accordance with the provisions of the articles of association of the said company and sanction of the RBI. Indeed, by several letters all dated September 8, 1981, addressed on behalf of the petitioners to the said Swedish company, Mrs. Leila Daphtary, the said company and its directors, with copies to the Central Government authorities, your petitioners exercised their pre-emptive right and evinced their desire to purchase the said 9% holding of the said Swedish company and the 2% shares held by late A.C. Daphtary."

47. Paragraph 56 of the petition contains the following statements :

" In the premises and facts stated hereinbefore aforesaid, to wind up the said company would unfairly prejudice the interest of the public, the said company as well as your petitioner, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable. It is indeed of paramount interest to the said company that the hon"ble court be pleased to pass an order directing the said Swedish group to transfer their equity holding to the extent of the 9% to the aforesaid Singh group and to the extent of the 2% by the said Mrs. Leila Daphtary to your petitioners so that the continuing oppression by the majority over the minority cease for all times to come."

48. It is evident from these two paragraphs that the petitioners are expressing an unequivocal desire to purchase the 9% holding of the Swedish group, an aspect which will be dealt with hereinafter as also the 2% shares of the late Mr. Daphtary and are asking the court to direct such transfer and sale in favour of the petitioners. It will follow that on the basis of the above averments, I am entirely to come to the conclusion that the petitioners have not at any stage consented either expressly or impliedly to the transfer of the 2% shares of the late Mr. Daphtary either in favour of Mrs. Daphtary or in favour of Mr. M.T. Shah.

49. As already indicated, it was the submission of Mr. Mridul that the action of the board of directors in permitting the transmission of shares to Mrs. Daphtary falls within the purview of Article 49 as Mrs. Daphtary was a person who became entitled to transfer all the shares in consequence of the death of late Mr.

Daphtary and the board of directors would transmit the shares to her upon production of evidence that she sustained a character in respect of which she proposed to act under the said article. It was pointed out by Mr. Mridul that the board had received a copy of the will, as will appear from the letter dated March 14, 1981, written by Mrs. Daphtary by which she had offered to produce the share certificates. In fact, according to Mr. Mridul, the board received the share certificate in the meeting dated August 25, 1981, through Mr. M.T. Shah who was the transferee. The evidence before the board, viz., the will and the share certificates, sustained the board's action. The board correctly took the view that Mrs. Daphtary was the person who became entitled to the transfer of the shares in consequence of the death of the late Mr. Daphtary.

50. In trying to meet the submission of Mr. S.B. Mukherjee that even assuming that Article 49 applies and Mrs. Daphtary became entitled to have the shares transferred in her favour on the death of late Mr. Daphtary, such transfer can only be in compliance with the other articles of association of the Indian company and in particular Article 34 thereof, Mr. Mridul submitted that Article 34 does not confer any right of pre-emption. According to Mr. Mridul, Article 34 merely restricts the right of a shareholder in the manner prescribed therein. It was submitted that this article comprised of four limbs :

" (i) The first limb makes article subject to Section 111 of the Act;

(ii) The second limb confers absolute and uncontrolled discretion of the board to refuse or accept transfer ;

(iii) The third limb is subject to the second limb. It envisages that a member can transfer shares to any other member or a non-member but such transfer has to be effectuated with the prior consent of all other members. " Prior consent " does not confer a right of pre-emption but merely enables the other members to object reasonably to the unsuitablity of a member or a non-member being made the transferee shareholder ;

(iv) The proviso, which is the fourth limb of the article, is an independent provision. It authorises a body corporate, inter alia, to transfer its shares to its " nominee " unrestrained by the requirements of the third limb."

51. The second principal item of controversy between the parties was with regard to the sale of the 9% of the shares of the Indian company held by the Swedish company. The factual background to this controversy may be noted.

52. Prior to the incorporation of the Indian company, the Swedish company wanted to have 60% of the shares of the Indian company and the other 40% was to be held by the Indian shareholders. This will appear from a letter dated July 20, 1961, addressed by the Swedish company to the Ministry of Commerce and Industries, Government of India. The formation agreement dated September 23, 1964, between the Swedish company and the Singh group, however, provides that the Indian shareholders will have 51% of the shares and the

Swedish company 49%. The matter was, however, set at rest by a letter of the Government of India dated April 18, 1964, by which the Swedish company was allowed to have 49% of the equity participation of the Indian company. The admitted position is that, since its incorporation, 49% of the shares of the Indian company were held by the Swedish company, 49% by the Singh group and 2% by the late, Mr. Daphtary. According to the petition, although the majority of the directors were nominated by the Swedish company and the Singh group had always been a minority in the board of directors, there was no hitch of any kind whatsoever between the two groups with regard to the functioning of the company until the arrival of Mr. M.T. Shah on the scene.

53. Some time in the early part of 1977, the Indian company made an application before the RBI u/s 29(2)(a) of the FERA to carry on their existing business activities in India. On or about November 26, 1977, the RBI granted that permission subject to the following conditions :

" The company shall earn foreign exchange by export of the goods manufactured by it, the ex-factory cost (less excise duty, if any) of such exports in each year being not less than 1 Often) per cent. of the ex-factory "cost (less excise duty, if any) of the company"s total production during the relative years. This export obligation shall be fulfilled within two years from the date of receipt of our letter No. EC. CO. FCS. 1203/641 (Activity) 30. II. 17/77 dated May 6, 1977, and subsequently the company"s exports in each year out of its own production shall continue to be maintained at a level not less than the minimum level of export performance stipulated above. The said export obligation shall be in force till such time the nonresident interest in your company continues to be more than 40%."

54. Admittedly, the Indian company failed to honour its exports commitment in terms of the above conditions imposed by the RBI whereupon the Reserve Bank directed that the non-resident holding in the Indian company should be diluted to 40% as provided in the FERA.

55. As indicated earlier, initially the Indian company proposed to dilute the non-resident interest by increasing its share capital as appears from the minutes of the meeting of the board of directors dated March 30, 1981.

56. This proposal was, however, rejected by the RBI. At a board meeting held on July 27, 1981, a sub-committee consisting of Mr. Singhania and Mr. Thanawalla was constituted to ascertain the views of the Controller of Capital Issues which, however, did not materialise. Ultimately, at the board meeting held on August 25, 1981, where the Singh group did not participate, the following resolution was passed :

" Resolved that, as previously decided in the last meeting of the company held on July 27, 1981, a proposal may be submitted to the RBI to divest Bulten Kanthal A.B. of 9% of the shares held by them in favour of Mr. M.T.Shah."

57. It is this decision of the board of directors of the Indian company to allow the transfer of all these 9% shares of the Indian company held by the Swedish company in favour of Mr. M.T. Shah which is challenged before " me in this application.

58. The principal ground of challenge of Mr. S.B. Mukherjee on this aspect of the matter is founded on Article 34 of the articles of association of the Indian company which has been set out hereinabove. It is submitted by Mr. "Mukherjee that these 9% shares of the Indian company held by the Swedish company could only be transferred to a non-member or an outsider with the consent of all the other shareholders. It was submitted that at the meeting of July 27, 1981, no consent of the other shareholders to the sale of 9% shares to Mr. Shah was either given or recorded. It was submitted that such consent under Article 34 cannot be the subject-matter of a board meeting or even a general meeting. It is an individual right of a shareholder and such consent must be evidenced either in writing or by some overt act on the part of each shareholder. It was submitted that, in the facts of this case, such consent of the shareholders was conspicuous by its absence. It was submitted that at the board meeting there was nobody representing the Swedish group as shareholders qua shareholders. Mr. A.C. Daphtary being dead, nobody, it was submitted, could represent him at the meeting. Mr. B. Singh, who was present at this meeting, holds about 12% of the shares of the Indian company but he had no authority to consent to any transfer on behalf of the other shareholders of the Singh group. It was submitted that there was not even an allegation in the affidavit-in-opposition that the Singh group of shareholders consented to the sale of 9% of the shares to Mr. Shah.

59. In support of the submission that the Singh group never consented to the 9% shares of the Indian company being transferred to Mr. Shah, Mr. Mukherjee strongly relied on two telex messages.

60. In one telex message from the Swedish company the following sentence occurs :

" AS WE ARE COMPELLED TO DECREASE OUR SHAREHOLDING WE DO NOT AGREE THAT THE ARTICLES ARE APPLICABLE AND WE FIRMLY HAVE TO STATE THAT WE WISH TO TRANSFER 9 PER CENT. TO MR. M.T. SHAH AND NOBODY ELSE."

61. The above telex message was replied to by another telex message from Mr. B. Singh dated September 19, 1981, where the following statement occurs!

" ARTICLES ARE APPLICABLE IRRESPECTIVE WHETHER COMPELLED SALES OR VOLUNTARY SALES WE DO NOT AGREE TO TRANSFER OF YOUR 9 % SHARES TO mr. M.T. SHAH WE DO NOT UNDERSTAND THE REASON WHY YOU WANT TO SELL YOUR SHARES TO MR. M.T. SHAH ONLY AND NOBODY ELSE WHEN WE ARE ENTITLED UNDER INDIAN LAWS AS WELL AS WILLING TO PAY PRICE. PLEASE LET US KNOW PRICE OFFERED BY MR. SHAH WE AGREE TO PAY SAME PRICE SUBJECT TO APPROVAL OF the RESERVE BANK OF INDIA."

62. According to Mr. Mukherjee, this telex message from B. Singh, on behalf of the Singh group, clearly shows that there was no question of the Singh group of shareholders agreeing to the transfer of these 9% shares to Mr. M.T. Shah.

63. Mr. P. R. Mridul, who appeared for the respondents, placed strong reliance on a decision of the English Court of Appeal in the case of *Express Engineering Works Ltd., In re* [1920] 1 Ch 466 (CA). In that case, a syndicate of five persons formed a private company, in which they were the sole shareholders, and sold to it for ? 15,000 in debentures of the company, property which they had, a few days before, acquired for ? 7,000. The contract for the sale and the issue of the debentures was carried out at a meeting of the five who and there then appointed themselves directors. This meeting was described in the minutes as a board meeting. At a subsequent meeting; the seal of the company was affixed to the debentures. The articles of the company provided that no director should vote in respect of any contract or arrangement in which he might be interested. In the winding up of the company, the liquidator claimed a declaration that the issue of the debentures was invalid and should be set aside.

64. It was held by the English Court of Appeal that there being no suggestion of fraud, that the company was bound in a matter *intra vires* by the unanimous agreement of its members. Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting, and transacted the same business. In these circumstances, the issue of the debentures was not invalid.

65. As will be obvious from the facts narrated hereinabove that this decision sought to be invoked by Mr. Mridul as an authority for the proposition that by reason of the silence and absence of protest on the part of the nominees of the Singh group of shareholders on the board, the court should infer that the Singh group of shareholders consented to the transfer of the 2% shares in favour of Mrs. Daphtary and the 9% shares of the Swedish company to Mr. M.T. Shah.

66. Mr. S.B. Mukherjee submitted that the above English decision has no application whatsoever to the facts of the instant case. It was submitted factually this case is clearly distinguishable. In the English case, all the shareholders were the directors of the company and a decision taken at a meeting of the board of directors in which all the shareholders-directors were present was considered to be a meeting of shareholders. In the instant case, none of the directors is a shareholder. It was pointed out that there was no allegation that the shareholders present were the only shareholders of the Indian, company or that the directors present were representing all the shareholders in their capacity as shareholders or had authority to consent on behalf of all the shareholders. It was submitted that the right to consent or not to consent to a transfer is a personal right of each shareholder and cannot be vicariously waived.

67. Mr. Mukherjee strongly objected to the submission of Mr. Mridul that Mr. B. Singh represented the entire Singh group of shareholders at the meetings of the

board of directors. It was pointed out, in the first place, that Mr. B. Singh as the president of the company was merely an observer at these meetings and had no right to vote. It was further submitted that the provisions of the articles of association and the provisions in the pre-incorporation agreement and the correspondence between the parties would clearly show that Mr. B. Singh was not representing the Singh group of the shareholders. In any case, it was pointed out that no such case had been made out in the affidavits.

68. A pertinent question was posed by Mr. Mukherjee that if the Swedish group of shareholders were so sanguine that consent had been given by the Singh group of shareholders to the transfer of the 2% and 9% of the shares of the Indian company, then why were the resolutions passed in an unseemly haste at the meeting of August 25, 1981, when these were not on the items of the agenda of the meeting and when no one representing the Singh group of shareholders was present at the meeting ? It was submitted emphatically that there can be no question of any waiver or acquiescence of the Singh group of shareholders in respect of the above-mentioned transfers at this meeting.

69. Coming to the articles of association of the Indian company on this aspect of the matter, Mr. Mukherjee submitted that the relevant articles are Articles 34 to 40 which have been set out hereinabove. It was submitted that these articles should be read together so that a harmonious construction may be arrived at by the court.

70. Mr. Mukherjee analysed the articles in a manner which may now be adverted to.

71. According to his submissions, Article 34 has four paragraphs. First, it confers a power on the board to refuse registration of transfers. Secondly, it provides that a member or a person entitled to transfer may transfer his shares with prior consent of all the other shareholders to any person whether he is a member or not. Thirdly, a shareholder which is a body corporate may transfer its share to its subsidiaries or a holding company. Fourthly, the body corporate may also transfer its share to any person who would hold the same as its nominee. In the event of the last two types of transfers, the consent of the other shareholders is not necessary.

72. Mr. Mridul, for the respondents, sought to advance an argument in this connection to that effect that the transfer of 9% of the shares of the Indian company held by the Swedish company in favour of Mr. M.T. Shah is governed by the proviso to Article 34 and, as such, the consent of the other shareholders was not necessary. This contention was sought to be repelled by Mr. Mukherjee on the ground that Mr. Shah is not a nominee of the Swedish company. Reference was made in this connection to the first affidavit-in-opposition, paras 54, 62, 64 and 65.

73. On this aspect of the matter, it was submitted by Mr. Mukherjee that the transfer to a nominee under Article 34 would not transfer the beneficial interest

in the shares unless the provisions of Section 187C of the Companies Act, 1956, were complied with. In any event, Article 34 cannot be construed as conferring a higher right on the foreign shareholders to hold more than 40% shares in an Indian company unless permitted by the RBI. In other words, in the absence of any permission from the RBI, a foreign company cannot hold either by itself or through its nominees more than 40% shares of an Indian company. Admittedly, in any case, no such permission had been obtained by the Swedish company from the RBI for the transfer of 9% of its shareholding in the Indian company in favour of Mr. M.T. Shah, assuming that Mr. Shah was its nominee.

74. As an elaboration of this aspect of the argument it was submitted that if the contention of Mr. Mridul is accepted, then the entire purpose of enacting the prohibition of holding of more than 40% of the equity shares of an Indian company by a foreign company would be completely defeated. In other words, if this contention is accepted, the Swedish company would continue to hold 49% of the shares of the Indian company by itself and through its nominees, notwithstanding the prohibition in the FERA.

75. Coming back to the article, it was submitted that Articles 35 to 45 provide the mechanics of transfer of shares by the members of the Indian company. The first condition is a notice of the intention of transfer to be given to the company which will constitute the company as an agent of the member for the purpose of finding out whether any other member is willing to purchase the shares. It was pointed out that, in the facts of this case, no such notice was given. It was pointed out that it is only, after such a notice has been given, that the company becomes an agent of the member for the purpose of transfer and the mechanics contemplated in Article 40 of the articles comes into play. If there is a dispute as to the fair value of the shares, it is to be resolved in terms of Articles 36 and 37. There may be a default by the selling member which is dealt with in Article 38. There may be a default by the company which is dealt with in Article 39. There may be a default by a purchasing member where the remedies are provided by Article 40. It was submitted that Article 40 must be read in conjunction with Article 35. It was pointed out by Mr. Mukherjee that there can be no question of offering these 9% shares to the Swedish company, an argument that was sought to be advanced by Mr. P.R. Mridul.

76. Reference was made in this connection by Mr. Mukherjee to the recent and well-known decision of the Supreme Court in the case of Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743. In that case, it was held that where the equity participation of a foreign company has to be diluted by virtue of the provisions of the FERA, there is no question of offering the shares which are to be divested by the foreign company for the purpose of dilution to itself, i.e., the foreign company.

77. At this stage, I would like to deal with certain objections of a preliminary nature which were raised by Mr. P. R. Mridul, appearing on behalf of the respondents.

78. Mr. Mridul submitted that the petition before me does not make out a case for invoking either Section 397 or Section 398 of the Act. He started with the rather well-known proposition that Section 397 would be attracted only if it can be shown that on facts there is a case for the winding-up of the company. In support of this proposition Mr. Mridul referred to two well-known decisions of the Supreme Court in the case of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., and Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 (SC). He next referred to another well-known proposition that, u/s 397, the gist of the cause of action is injury to the rights of shareholders qua shareholders. Consequently, he submitted that any grievance pertaining to injury to the petitioner in their capacity as directors or creditors or selling agents or in respect of any breach of any pre-incorporation agreement would be irrelevant and cannot be taken into account. In support of this proposition, Mr. Mridul referred to two English decisions in the case of H.R. Harmer Ltd., In re [1958] 3 All ER 689 : [1959] 1 WLR 62 : 29 Comp Cas 305 (CA) and Westbourne Galleries Ltd., In re [1971] 1 All ER 561 : [1971] 2 WLR 618 (CA).

79. It was next submitted that individual or isolated illegal acts do not necessarily and by themselves amount to oppression within the meaning of Section 397 of the Act. It is only when illegal acts are of such a nature as would show that the majority is abusing its power or is otherwise guilty of burdensome, harsh and wrongful conduct that the provisions of Section 397 can be said to be attracted. Then there would be " oppression " so as to attract the provisions of Section 397 of the Act. In support of this proposition. Mr. Mridul relied on the decision of Mohanlal Ganpatram Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd., and the decision of the Supreme Court in Needle Industries" case [1981] 51 Comp Cas 743 which has been noted above.

80. It was submitted that one of the tests of what constitutes " oppression " within the meaning of Section 397 of the Act is to see whether the majority is taking an unfair advantage of its position as a majority. In support of this proposition, reference was made to the English case of Five Minute Car Wash Service Ltd., In re [1966] 1 All ER 242 : [1966] 1 WLR 745 ; [1966] 36 Comp Cas 566 ; The second test, it was submitted, is to find out whether in exercise of its fiduciary power the group concerned was attempting to destroy the existing majority or to create a new majority which did not exist previously. In support of this proposition, reference was again made to the recent Supreme Court decision in Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 which has been mentioned above.

81. It was next submitted that the concept of "just and equitable" as applicable to the situations governed by Section 397 is a restricted concept. Merely because there is dissatisfaction at being out-voted or dissatisfaction as a result of a minority of shareholders not getting what it desired to get, it cannot be said that there is a justifiable lack of confidence so as to attract the " just and equitable "

clause. Reliance was placed in this connection on the case of *Loch v. John Blackwood Ltd.* [1924] AC 783 (PC) and *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another*, .

82. Finally, it was submitted as a proposition of law that two cumulative conditions are necessary before interference u/s 397 can be said to be warranted. They are, first, that it is just and equitable to wind up the company and, second, that the affairs of the company are conducted in a manner oppressive to its members. Reference was again made to the case of *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, .

83. Turning to the facts of the instant case, it was submitted that no case whatsoever has been made out to wind up the company. The company owns two factories one at Varanasi and the other at Pune. Both the factories are doing very well. There has been progressive increase in dividends. In the year 1980, the company declared 10% dividend. The products of the company and in particular the electrical resistance wires, which are manufactured in the Varanasi factory, enjoy a very stable market as mentioned in para. 54 of the petition. The precision castings manufactured by the company are supplied to Bhaba Atomic Research Centre and various Defence and Government organisations. The demand for this product is more than the existing manufacturing capacity in India.

84. The board of directors of the company consist of three directors nominated by the Swedish group, two directors nominated by the Singh group and one appointed by the U.P. Industrial Finance Corporation. There is no allegation that there is any deadlock in the functioning of the board of directors or functioning of the company. Mr. B. Singh is the president of the company. Mr. M.T. Shah is the chairman of the company. There is no allegation that they cannot carry on the business of the company or that there is any friction in the management. There is no plea that any directors of the Singh group have been excluded from the management. There is no plea that Mr. B. Singh is prevented from functioning as the president of the company.

85. It was further submitted that the company is not a glorified partnership.

86. The relations between the Singh group and the Swedish group arose out of commercial transaction. There is no element of personal relationship. Hence, it was submitted that the principles of winding-up referable to a partnership are not available in the present case. Even assuming that these principles were applicable, there is no breach of faith or lack of probity in the conduct of the Swedish group. Thus, the preliminary requirement for the applicability of Section 397 of the Act is not fulfilled.

87. The provisions of Section 398 of the Act, it was submitted, has no manner of application because there was no allegation of mismanagement or even any apprehension of mismanagement in the affairs of the Indian company or of any allegation of any material change having taken place in the management or

control of the Indian company. Reference was again made in this connection to the Supreme Court decision in the case of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., .

88. It was pointed out that, as admitted in paragraph 17(a) of the petition, the Swedish company held 49% shares of the Indian company and the Singh group held 49% shares. It was further admitted in para. 17(b) of the petition that the 2% shares were held by Mr. Daphtary until his death as the nominee of the Swedish company. Thus, the pattern of shareholding has been that the Swedish group has 51% and the Singh group 49%. The fact that 2% shares held by late Mr. Daphtary is transmitted to Mrs. Daphtary who, in turn, transfers them to Mr. M.T. Shah does not result in any material change in the control of the company. Hence, Section 398 of the Act is not attracted. Lastly, on this aspect, it was submitted that the common legal determinant both for Sections 397 and 398 of the Act relevant for the present petition is conduct lacking in probity and such conduct resulting in injury to the company or to the interest of the public or of the minority shareholders. It was submitted that in the facts of this case, the said determinant was totally absent.

89. Mr. Mukherjee, appearing for the petitioners, submitted that the preamble to the FERA and the policy guidelines issued by the Central Govt. under Sections 75 and 76 of the FERA in relation to Section 29 of the Act make it clear that one of the objectives of the Act is to control dealings in securities. The entire idea is to provide for Indian participation in companies where there is a foreign equity holding. The guidelines issued by the Central Govt., a copy of which was produced in the course of the hearing by Mr. Mridul and has been made part of the records of this case, clearly go to show that as a condition to the grant of what is called a COB licence u/s 29 of the Act, the RBI could insist upon the dilution of foreign shareholding. The intention clearly, according to Mr. Mukherjee, is not to allow the continuation of such foreign shareholding either directly or through nominees.

90. It was submitted by Mr. Mukherjee that the recent Supreme Court decision of "Needle Industries" case [1981] 51 Comp Cas 743 clearly establishes that the non-resident shareholding cannot be permitted to continue beyond the limit laid down in the FERA and the result of such continuation would be a clear violation of the provisions of the FERA resulting in an automatic cessation of the COB licence. Even if the foreign non-resident shareholders be willing to take up more shares, they cannot be permitted to do so in view of the express provisions regarding the foreign shareholding in the FERA. It was submitted that the principles laid down in "Needle Industries" case [1981] 51 Comp Cas 743 on this aspect of the matter applies in full force to the instant case.

91. It was submitted that when under the provisions of the Act, the RBI asked for or required disinvestment of foreign shareholdings, the Reserve Bank is not merely concerned with the repatriation of foreign exchange but it is also concerned with Indianisation in the sense that there should be bona fide

participation by Indian shareholders in the equity capital of such a company. This, it was submitted, is evident from the preamble of the FERA, the provisions of Sections 19 and 29 and the guidelines issued u/s 29. It was submitted that the Supreme Court decision in "Needle Industries" case [1981] 51 Comp Cas 743 clearly goes to show that foreign shareholders have no option but to dispose of their shares in accordance with the directives of the RBI. It was further submitted that the above decision is an authority for the proposition that if dilution of foreign holdings takes place by issue of further shares, the Swedish company would not have any right to the further shares. Similarly, they would have no right, in a case where the disinvestment becomes necessary as distinct from expansion of the capital base to disinvest in favour of a nominee, to permit such a disinvestment in favour of a nominee or nominees of the foreign shareholders would have the effect of violating the provisions of the FERA.

92. Another factual aspect of the controversy between the parties may be alluded to at this stage. It has been submitted, on behalf of the respondents, that the genesis of the dispute between the Swedish company and the Singh group is the threat of termination of the sole selling agency of petitioner No. 5, M/s. B.M. Singh and Sons. It has been further alleged that the report of M/s. S. R. Batliboi & Co., a firm of chartered accountants, who were appointed by the Indian company to review the accounts of the Indian company in the year 1979 was adverse to the Singh group. It has been submitted, on behalf of the respondents, that the sole object of the present proceedings is to forestall any action which the Indian company might take for termination of the sole selling agency of petitioner No. 5. It has also been submitted that the petitioner is not entitled to invoke the "just and equitable" clause because they have not come with clean hands. It was further submitted that the petitioners have been guilty of misappropriation.

93. On behalf of the petitioners it was pointed out that although the expression "misappropriation" have been used several times in the affidavit by Mr. Shah, those allegations are not only false but are reckless and without any particulars whatsoever. It was further pointed out that in the ante litem correspondence between the parties, there is no whisper of any misappropriation of funds by the Singh group.

94. With regard to the reference to para. 23(a) of the main petition by the respondents to show that petitioner No. 5 had received a sum of Rs. 52 lakhs odd as agency commission, it was submitted, on behalf of the petitioners, that there was nothing wrong in this. The agency commission was payable in terms of the agreement between the Indian company and petitioner No. 5. Such agreement has not only been approved by the shareholders of the Indian company but it has also been approved by the Central Government. It was mentioned that it was only after Mr. Shah joined the board of directors that the payment of commission to petitioner No. 5 was temporarily stopped. There is no dispute, according to the petitioners, with regard to the quantum of commission

payable to petitioner No. 5. This would be evident from the Indian company's balance-sheet which has been approved by the shareholders and all the directors of the Indian company. The last balance-sheet for the year ended December 31, 1980, shows that a sum of Rs. 5,40,000 is still due and payable by the company to petitioner No. 5 on account of sole selling agency commission.

95. It was pointed out on behalf of the petitioners that para, 23(b) of the main petition, which was not referred to by the respondents, would go to show that the Swedish company has received a sum of Rs. 83 lakhs odd for basic raw materials as against Rs. 52 lakhs odd which was received by petitioner No. 5 from the Indian company. It was also pointed out that about Rs. 9 lakhs is still due and payable by the Swedish company to the Indian company and part of it may not be recoverable as being barred by limitation.

96. It was further submitted, on behalf of the petitioners, that the sole selling agency agreement provided for termination at twelve months' notice in writing prior to the date of expiry. The agreement is due to expire in May, 1983. In view of the highhanded and mala fide conduct of Mr. Shah, who is the chairman of the board of directors and has a casting vote, the petitioners have prayed for and obtained an injunction restraining the Indian company from terminating the agency pending the disposal of the main petition. Such injunction is not one of the final reliefs in the proceedings but is an only interim relief in aid of the final relief that may be granted.

97. It was pointed out that the report of M/s. S. R. Batliboi & Co. is factually incorrect. This report has been dealt with in the report of M/s. K. Prosad and Co., another firm of chartered accountants. The latter report has been heavily relied upon by the petitioners on this aspect of the matter. In the report of M/s. S. R. Batliboi & Co., it has been alleged that Mr. B. Singh did not disclose his connection with Beni Ltd. to the board of directors of the Indian company. It was submitted, on behalf of the petitioners, that Mr. B. Singh is not a director of the Indian company.

98. Under an agreement with the Indian company, he has certain advisory functions. Therefore, neither under the law nor under any contractual relationship with the Indian company is Mr. Singh obliged to make any disclosures to the Indian company about the financial position of Beni Ltd. of which he is the managing director. However, full facts relating to Beni Ltd. were known to the directors of the Indian company. Each and every transaction of the Indian company with Beni Ltd. was approved by the board of directors of the Indian company. The board of directors of the Indian company could have easily found out that supplies were being made to Beni Ltd. without payments being received therefor. Reference was made in this connection to the minutes of various board meetings of the Indian company which were tendered and forms part of the records of this case by virtue of my order dated January 25, 1982. It will appear from the minutes of the meetings that the board was fully aware of the actual position. As will appear from the language used in the board

resolutions, the board "considered", "examined", "scrutinised" the transactions between the Indian company and Beni Ltd. and approved of such transactions at various board meetings. Pointed reference was made to the fact that notwithstanding the report of M/s. S. R. Batliboi & Co., the board of directors of the Indian company at their meeting held on March 30, 1981, at which three directors representing the Swedish group were also present, resolved to support the scheme propounded by Beni Ltd. It was further pointed out that at the board meeting held on July 27, 1980, it was recorded that the amount due and payable by Beni Ltd. was considered "good and realisable".

99. In so far as the adjustments of the sole selling agency commission with the claim of Kantilal T. Garach & Co. is concerned, it was pointed out that it is the case of the petitioners that no money was received by petitioner No. 5 from M/s. Kantilal T. Garach & Co. Since the above company was introduced to the Indian company by petitioner No. 5 and the company's goods have been sold to them and since an insinuation was made that this money would not be paid by the above company, petitioner No. 5 asked the Indian company to adjust the claim of the Indian company against the above company against the selling agency commission admittedly payable by the Indian company to petitioner No. 5. In fact, such adjustment was made in or about 1979 and nobody has ever challenged the same. It was further pointed out that the Indian company has filed a suit against the above company for recovery of the balance amount after taking into account the above-mentioned adjustments. It was further pointed out that under the sole selling agency agreement, payments were to be made by the buyers directly to the Indian company and there was no guarantee by the sole selling agent to recover these moneys from the buyers or to pay them to the Indian company in the event of default by the buyers. It was submitted, on behalf of the petitioners, that these misleading allegations have been made with the sole object of prejudicing the mind of this court, if such a thing was possible.

100. With regard to the loan to Pratap Development Co. (P.) Ltd., it was pointed out that the board of directors of the Indian company had approved the loan. If in doing so the board of directors had violated any statutory provisions, they would be responsible for the same. It was further pointed out that this question is now of academic interest since the entire amount with interest has been paid by Pratap Development Co. (P.) Ltd.

101. With regard to the report of M/s. S. R. Batliboi & Co., the findings of which have been discussed above, it was pointed out that at a meeting of the board of directors of the Indian company held on June 23, 1981, it was resolved not to pursue the above report. Thus, at the point of time when the present application was made, there was no apprehension at all of any proceedings being initiated on the basis of the report of M/s. S. R. Batliboi & Co. It is only after the present application was moved and the interim orders obtained that at a meeting of the board of directors held on September 25, 1981, it was resolved to constitute a sub-committee to devise a method for taking steps in pursuance of the report of

M/s. S. R. Batliboi & Co. According to the petitioners, it will appear from the draft minutes of the board meeting dated September 25, 1981, as circulated by the secretary of the Indian company and as purported to have been corrected by the chairman, that the chairman, Mr. Shah, has manipulated the minutes and inserted an item therein for revival of the report of M/s. S.R. Batliboi & Co. although this was not one of the items of the agenda for that meeting.

102. Mr. S.B. Mukherjee submitted that in the context of the above facts and circumstances, the petitioners had cause for genuine apprehension when they came to court regarding the termination of the sole selling agency agreement. This apprehension, according to Mr. Mukherjee, is fully justified by the extremely hostile attitude which is taken by Mr. M.T. Shah in his affidavit-in-opposition. It was submitted that the court should not allow the termination of the sole selling agency by the present board of directors in which the Swedish group have a majority particularly in view of the fact that the sole selling agency agreement is valid up to May, 1983. The agreement is renewable every five years and requires twelve months' notice in writing before termination. The agreement was approved by the shareholders and the Central Government.

103. According to Mr. Mukherjee, the conduct of the respondents lacked in probity and fair dealing and they have acted in a manner which is oppressive, burdensome, harsh and wrongful. Illustrations of such conduct were catalogued and may be noted below.

(a) When the auditors of the company gave the report for the year ended December 31, 1980, to the effect that about Rs. 9 lakhs payable by the Swedish company has not been confirmed by them, the Swedish group and their nominee directors wanted to charge the auditors. It is significant to note that in the affidavit filed by the Central Government, this particular amount which is outstanding and payable by the Swedish company has been highlighted.

(b) The Swedish group have also tried to forestall any action being taken with regard to the claim of about Rs. 10 lakhs which have not been recovered on the ground of export rejection.

(c) The Swedish group have tried to perpetuate their 49% shareholdings by attempting to transfer 9% of their shares to Mr. M.T. Shah in contravention of the provisions of the FERA.

(d) As soon as Mr. Shah joined the board of directors and at the first meeting which he attended and presided over in December, 1980, a resolution was passed stopping the payment of selling agency commission to Mr. B.M. Singh and Sons, petitioner No. 5. This action has been sought to be justified by saying that similar payment of dividends to the Swedish shareholders was also suspended. It was submitted by Mr. Mukherjee that dividends are declared only once in a year unless there is an interim declaration of dividends and the amount of the dividends can only be repatriated after a considerable time has elapsed in obtaining the approval of the RBI.

(e) Mrs. Daphtary's letter dated March 14, 1981, forwarding a copy of her husband's will which was lying with Mr. M. Subramonium which was not placed before the board of directors till the controversial meeting of August 25, 1981, in which it was resolved to transmit the shares in the name of Mrs. Daphtary in clear violation of articles of association of the Indian company.

(f) A sum of Rs. 42,000 was paid to Mrs. Daphtary without any resolution of the board of directors and at the instance of Mr. Shah as an inducement for transfer of 2% shares in favour of Shah.

(g) The meeting of the board of directors was held on August 25, 1981, notwithstanding the request for adjournment by Mr. Singhanian by his letter dated August 10, 1981, and by Mr. Jalan in his telex dated August 18, 1981. Significantly, the most vital and important decisions regarding the transfer of 9% shares to Mr. Shah and the transmission of 2% shares in favour of Mrs. Daphtary were taken at this board meeting although none of these items featured in the agenda of this meeting. And although the agenda was circulated on August 21, 1981, none of the nominee directors of the Indian shareholders were present at the meeting.

(h) At the meeting of the board of directors held on June 23, 1981, it was resolved that the report of M/s. S. R. Batliboi and Co. should not be pursued for the time being. This was sought to be revised at the instance of Mr. Shah by manipulating the minutes of the meeting of September 25, 1981. Mr. Shah tried to smuggle in a few lines regarding this matter.

(i) The minutes of the meeting of the board of directors on September 25, 1981, were wrongfully manipulated and changed."

104. Mr. S.B. Mukherjee also catalogued the acts which, according to the petition, are oppressive to the petitioners as shareholders and/or prejudicial to the public interest and/or prejudicial to the company and may be noted below :

(a) (i) It has not been disclosed that Shah is a nominee of the Swedish group in the application purported to have been filed u/s 19(5) of the FERA. Retention of control over this 9% shares by the Swedish group is not only an indirect violation of the Act but also is a direct violation in view of the provisions of Section 29(4) of the Act. The licence to carry on business, it was submitted, was liable to be cancelled for misleading the authorities and suppressing material facts from them.

(ii) If shares are sold to Mr. Shah, it will only sow the seeds of future discord and litigation. The attitude of Shah is extremely hostile towards the petitioners as will appear from his affidavit-in-opposition.

(iii) Violation of the provisions of the FERA may lead to closure of the business of the Indian company. My attention was drawn to the well-known decision of the Supreme Court in the case of Needle Industries (India) Ltd, v. Needle Industries (Newey) India Holding Ltd. [1985] 51 Comp Cas 743.

At p. 825 of the report the following passage occurs :

" 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."

(b) It was pointed out that in view of the auditor's report which has been referred to above, the recovery of money from the Swedish company by the Indian company is in jeopardy.

(c) A sale in favour of Shah will perpetuate foreign control to the extent of 49% of the shareholders. In other words, this disinvestment will not Indianise the Indian company to the extent of 60% of the Indian shareholding which is the declared policy of the Government of India. This would be directly prejudicial to the public interest.

(d) The device adopted to acquire the 2% shares of Mrs. Daphtary and its transfer to Mr. Shah is directly wrongful and illegal as to deprive the petitioner of their pre-emptive right granted by the articles of association of the Indian company.

105. It was pointed out by Mr. Mukherjee that the real opposition in this case is not from the Swedish group but from Mr. Shah. It was pointed out that the affidavit filed, on behalf of the Swedish group, by Mr. Subramonium merely adopts the statements made in the affidavit of Mr. Shah. It was pointed out with reference to the main petition that initially there was complete confidence in M.T. Shah. It was submitted that this is not unusual in the case of companies which are really governed by the principles of partnerships that relations are founded on mutual faith and confidence. However, a point of time may arrive when such mutual faith and confidence is lost. It was submitted that the petitioners in the instant case are justified in losing, their confidence in Mr. Shah because of the hasty steps he took since the passing of the board resolution at the meeting held on August 25, 1981, regarding the transfer and transmission of shares which were entirely for the personal benefit of Mr. Shah. Reliance was placed in this connection on the well-known English case of *H. R. Harmar Ltd., In re* [1958] 3 All ER 689 ; [1959] 29 Comp Cas 305. The following passage was relied on by Mr. Mukherjee : (at p. 333 of 29 Comp Cas) :

" That being so, it seems to me that the question which arises in this case, as indeed in almost any other case of this character, is a pure question of fact to be determined in accordance with the circumstances of the particular case. In the course of the argument it was suggested that the approach to this issue of fact was in some ways analogous to the approach to the question of fact which arises in a matrimonial cause where the petition is on the grounds of cruelty. I am disposed to think there is some force in the suggestion that there is a similarity between the two proceedings,....."

106. It was pointed out that the affidavit-in-opposition filed by Mr. Shah is full of

false, reckless and scandalous allegations against the Singhs. Mr. Shah is neither a shareholder nor a creditor of the company and has no stake whatsoever. In the circumstances of the case, the Singh group has no reason whatsoever to repose any confidence in Mr. Shah.

107. A point was taken by the respondents that the petition is not maintainable because B.M. Singh and Sons, petitioner No. 5, who have no shares in the Indian company, have been made party to the petition. This contention was sought to be repelled by Mr. Mukherjee on the ground that at one point of time large sums of money became due and payable by the Indian company to petitioner No. 5. At a meeting of the board of directors of the Indian company held on May 15, 1968, it was decided to allot 4,500 equity shares to petitioner No. 5 in lieu of the company's liabilities to the firm. These shares were, however, allotted to the four individual partners of the firm and not to the firm. In any event, it was submitted that the addition of petitioner No. 5, although not registered as a shareholder, makes no difference to the maintainability of the application. It was submitted that the application can be held to be valid in any event at the instance of the other four petitioners.

108. It was submitted by Mr. Mridul that it should be held, in the facts of this case, that the executor of the will of late Mr. Daphtary, namely, Mr. Jagjit Singh, had assented to the legacy of the 2% shares in favour of Mrs. Daphtary:

My attention was drawn in this connection to Section 333 of the Indian Succession Act, 1925, which is in the following terms :

"333(1). The assent of the executor or administrator to a special bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature of the circumstances of the property require that it shall be transferred in a particular way.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator."

109. Although considerable arguments were advanced by Mr. Mridul which were sought to be repelled by Mr. Mukherjee, in my view, the legal position on this aspect of the matter is perfectly simple. Mr. Mridul's submission on this point is totally unacceptable for two reasons. In the first place, Section 333 of the Indian Succession Act can only be invoked when there is a question of the executor's assent to a specific legacy. As will appear from the will of the late Mr. Daphtary which has been set out in an earlier part of this judgment, the entire estate of the late Mr. Daphtary was bequeathed to his wife. In other words, there was no specific legacy which was the subject-matter of bequest under the will. To put it differently, the 2% shares of Mr. Daphtary cannot be said to be a specific legacy under the will to which the executor could have assented in favour of Mrs. Daphtary. Section 333 of the Indian Succession Act, in my view, is totally inapplicable in this case.

110. The second reason for rejecting the contention of Mr. Mridul is that on the materials on record there is nothing to show that the executor had in fact assented either verbally or in writing or such assent can be implied from his conduct. For these two reasons, the contention of Mr. Mridul on this aspect of the matter is rejected. Certain authorities were cited by Mr. Mridul on this point which I do not consider necessary to discuss.

111. Mr. Mridul repeatedly emphasised the fact that there was no allegation of mismanagement of the Indian company. There are positive facts to show that the company is doing very well. This contention, in my view, is also misconceived. It is not the case of the petitioners that the company is being mismanaged. The specific case is that, in the facts and circumstances of this case, the Indian group is being oppressed by the Swedish group in collusion with Mr. Shah. The question of mismanagement therefore is, in my opinion, totally irrelevant.

112. In his written notes of arguments, Mr. Mridul has included an elaborate discussion as to the meaning of the word "nominee". Having regard to the admission of the petitioner that Mr. Shah is a nominee of the Swedish group, I feel it unnecessary to deal with this question any further.

113. Mr. Mridul has also included elaborate submissions on the question as to whether there are any proceedings pending before the RBI. In view of the stand taken from the Bar by Mr. Mridul that Section 19 of the FERA not having any application to the present case and that the pending application u/s 19(5) of the Act not being maintainable, I refrain from elaborating on this part of the argument any further.

114. As noted earlier, Mr. Mukherjee emphatically submitted that the resolutions with regard to the transfer of 9% shares of the Swedish group in favour of Mr. M.T. Shah and the transfer of 2% shares held by the late Mr. Daphtary in favour of Shah could not be held to be valid resolutions inasmuch as there was no agenda with regard to those resolutions at the relevant meeting. This contention of Mr. Mukherjee was sought to be answered by Mr. Mridul by the submission that under the law an item not on the agenda can also be taken up. According to Mr. Mridul, the principle of law is well settled that notice of a board meeting need, not unless strictly otherwise provided, specify the nature of business to be transacted.

115. It was submitted by Mr. Mridul that the relevant articles of association of the Indian Company with regard to board meetings are Articles 113 and 114. Those articles are in the following terms :

"113. The meetings of the board shall be held in accordance with the provisions of Section 285 of the Act and notice of such meetings shall be given to every director in accordance with the provisions of Section 286(1) of the Act provided notice of such meeting shall be sent to the directors residing out of Calcutta by registered air-mail post or by cable so as to reach the addressee thereof in the normal course at least twenty-one days before the date of the meeting unless by

prior consent accorded in writing or by a cable all the directors agree to such meeting being held on shorter notice. Provided that where an alternate director has been appointed, it shall be sufficient for the purpose of this article to send a notice or to obtain the consent of such alternate director only. Unless otherwise determined from time to time and at any time by the consent of all the directors for the time being in India, meeting of the board shall take place at the office.

114. A director may, at any time, and the secretary shall, upon the request of a director made at any time, convene a meeting of the board."

116. Section 286(1) of the Companies Act, 1956, which is referred to in Article 113 is in the following terms :

" Notice of every meeting of the board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director. "

117. On the strength of the above section and the above article, it was submitted by Mr. Mridul that neither the section nor the articles require any specification of the agenda either expressly or by necessary implication. According to Mr. Mridul, the above section and the above articles should be contrasted with Section 172 of the Companies Act, 1956, and Article 69 of the articles which require specific mention of the agenda.

118. On the question whether a company can transact an item of business at its board meeting in the absence of an agenda in that behalf, reliance was placed by Mr. Mridul on an English decision in the case of *La Compagnie De Mayville v. Whitley* [1896] 1 Ch D 788. At pages 796-7 of the report, Lindley L. J. observed as follows :

" This case involves one question which is of great importance to companies. The rest of the points are comparatively trifling. The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do it ; but it strikes me, as it struck Lord Tenterden in *Rex v. Pulsford*, 8 B & C 350, that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation. It is not uncommon for directors conducting a company's business to meet on stated days without any previous notice being given either of the day or of what they are going to do. Being paid for their services--as they generally are, and as is the case in this company--it is their duty to go when there is any business to be done; and to attend to that business whatever it is and I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies. "

119. Reference was made by Mr. Mirdul in this connection to Palmer's Company Law, 22nd edition, Volume I, at pages 661-62, where the following passage occurs :

" The articles usually provide that any one director may summon a meeting directly or by requesting the secretary to do so.

Prima facie, due notice must be given convening a meeting of directors, and in default the meeting is irregular ; but this is not always necessary, for, by the articles, or by the determination of the directors, meetings may be held at fixed times, in which case no notice of each separate meeting need be given. Where notice has to be given, it may be given verbally unless the articles require it to be given in writing, and it must be given a reasonable time before the meeting.....

Notice of a board meeting need not, unless the articles otherwise provide, specify the nature of the business to be transacted. "

120. Reference was also made to Buckley on the Companies Acts, 12th edition, at page 886, where the following passage occurs :

" Every member of the board ought no doubt, in the absence of special circumstances, to have sufficient notice of each meeting, and a director cannot waive his right to notice. If such notice has not been given, and a few of the directors purport to overrule the previous decision of all without giving the rest an opportunity of attending, their act will be void.

But notice of the business as distinguished from notice of the meeting is not necessary. In the case of special business, it may be prudent and right to give notice of it, but it is not legally necessary to do so. "

121. Having regard to my findings on the other issues involved in this application, I do not feel inclined to express any opinion on this contention of Mr. Mridul.

122. Mr. Mukherjee did not dispute, the contention of Mr. Mridul that in order to succeed in an application under Sections 397 and 398 of the Companies Act, 1956, the complaints must relate to the capacity of the petitioners as shareholders of the company. He, however, submitted that the fact that the petitioners may have other capacities such as that of petitioner No. 5 as the sole selling agent will not affect the maintainability of the petition. Reliance was placed in this connection on the well-known English decision in the case of H.R. Harmer Ltd., In re [1958] 3 All ER 689 ; [1959-3 29 Comp Cas 305. Reference was made to a passage at pages 703 and 704 of the report which is as follows (at p. 327 of 29 Comp Cas) :

" Then the third submission of Mr. Harold Brown was that what was done by the father was not oppressive of the rights of the sons as members, but merely oppressive of their rights as directors. I cannot accept this. It appears to me that

the sons as members and not merely as directors were oppressed by the singular conduct of the father. The oppression must no doubt be oppression of members as such, but it does not follow that the fact that the oppressed members are also directors is a disqualifying circumstance when the question of relief u/s 210 arises. "

123. It may be noted that Section 210 of the English Act corresponds to Section 397 of the Indian Act.

124. Reference was also made by Mr. Mukherjee to the decision of Mallick J. in the case in *Albert David Ltd., In re* [1964] 68 CWN 163. Reference was placed to a passage at page 175 of the report which is as follows :

" According to Mr. Mukherjee, a shareholder is given the right to apply under Sections 397 and 398, when his right as shareholder is affected. If his right qua director is affected, that is, if he is improperly removed from the board or prevented from being appointed as a director, this infringement of a shareholder's right cannot be the foundation of an application under Sections 397 and 398 of the Act, I am unable to agree with Mr. Mukherjee. The right to appoint a director is a very valuable right of a shareholder and when this right is infringed, his right qua shareholder is also affected. The shareholder in such a case is entitled to apply u/s 397 of the Act, complaining that the affairs of the company are being conducted in the manner oppressive to himself. "

125. With regard to the contention of Mr. Mridul that the acts of oppression must be continuous, Mr. Mukherjee referred to the well-known decision in *In re Sindhri Iron Foundry (P.) Ltd.* [1964] 34 Comp Cas 510; 68 CWN 118 (Cal). Reference was made to a passage at page 130 of the report which is in the following terms (at p. 523 of 34 Comp Cas) :

" In my view, the respondents' contention that in order to attract Section 397 of the Act, the oppressive act complained of must be wrongful conduct which continues over a period of time, is not tenable. The wrongful act complained of in this case is a single act of raid, but its effect, as I see it, is continuous and persistent oppression of the petitioners by the Prosad group. The claim of the Prosad group to have held an extraordinary general meeting, to have authorised issue and allotment of new shares, to have altered the character and composition of the board, unmistakably indicate its aim and object. The law, in my view, does not contemplate that a petitioner who is otherwise entitled to relief under this section must be able to show that there has been a continuous course of oppressive conduct over a period of time before he, can obtain relief under this section."

126. Reference was also made to the decision of the Court of Appeal in the abovementioned case which is the case of *Ramashankar Prosad and Others Vs. Sindri Iron Foundry (P) Ltd. and Others*, . Reference was made to paragraph 55, p. 529, of the report wherein the following passage occurs :

" While it is true that the oppression was not of long duration having at best commenced only a few weeks before the matter was brought into court, there can be no doubt that its effect was continuous and would have persisted but for the intervention of the court. The cases of Harmer [1958] 3 All ER 689 : [1959] 29 Comp Cas 305 and Scottish Co-operative Society Ltd. [1959] AC 324, afford instances where the oppression had been going on for some time but in my opinion it is not necessary that the petitioner who comes to court for redress u/s 397 should have submitted himself to oppression over a period before he can invoke the powers of the court. If the oppression is of short duration but is of such a lasting character that redress is impossible by calling board meetings or general meetings of the company, a case for intervention u/s 397 is made out."

127. On the strength of the above declarations, it was submitted by Mr. Mukherjee that our courts have held if there is a single act which gives rise to a chain reaction, that would be sufficient for invoking the jurisdiction of this court. The present case, according to Mr. Mukherjee, is of such a type.

128. Dealing with Mr. Mridul's submission as to an alternative remedy, Mr. Mukherjee pointed out that, according to Mr. Mridul, three alternative remedies were available to the present petitioner. The first is a suit for injunction. The second is an approach to the Reserve Bank under the FERA. The third is a rectification application u/s 155 of the Act.

129. As a proposition of law, Mr. Mukherjee submitted that the proceedings under Sections 397 and 398 being a remedy alternative to winding up, the court is not called upon to find out whether there is an alternative to an alternative. In any event it was submitted that a wrongdoer cannot complain that the person wronged might have chosen another remedy. Reference was made in this connection to the above-mentioned decision of H. R. Harmer Ltd., In re [1958] 3 All ER 689 at p. 704 ; [1959] 29 Comp Cas 305 , wherein the following passage occurs :

" Fourthly, counsel for the father said that the acts complained of might have been restrained by injunction in so far as they were acts done without the authority of the board. As to this, I do not think a wrongdoer in this field can well complain that the person wronged might have chosen another remedy."

130. On the question of filing a suit, Mr. Mukherjee pointed out that such a suit cannot be a minority action for injunction; this is because of the fact that 2% shares still stand in the name of the late A.C. Daphtary, The two groups are equally balanced having 40% shares each. In other words, the Indian group cannot be called a minority. Further, the complaints relate to oppression or acts prejudicial to the public interest. In the circumstances, a petition under Sections 397 and 398 is the proper remedy.

131. With regard to the alternative remedy of approaching the Reserve Bank, it was pointed out with reference to the correspondence with the Reserve Bank which has been noted above that the Reserve Bank has unequivocally decided in

favour of dilution of foreign equity participation to the tune of 9% of the shares of the Indian company. Further, it was the admitted case of the parties that Section 19(5) of the FERA has no application in this case. In any event, the court had restrained the respondents from pursuing the intended application u/s 19(5) of the FERA. In the circumstances, it was submitted, there was no question of approaching the Reserve Bank any further.

132. It was finally submitted that this is a case of complete deadlock as the two groups have equal shareholding. The partnership principle fully applies to the facts of the instant case. On this aspect of the matter Mr. Mridul relied on the decision of the English Court of Appeal in *Westbourne Galleries Ltd., In re* [1971] 1 All ER 561 ; [1971] 2 WLR 618. Mr. Mukherjee pointed out that this case has been overruled by the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All ER 492 ; [1973] AC 360. According to Mr. Mukherjee, the principles of this case have been applied and accepted by our Supreme Court to the extent that where, before being incorporated, there was a partnership or where the shares are held more or less equally, the partnership principle will apply.

133. On the amplitude of the court's power to give relief in an application under Sections 397 and 398 of the Act, strong reliance was placed on a recent decision of a Division Bench of this court in the case of *Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick* [1980] 50 Comp Cas 771. At pp. 782-83 the following passage occurs :

" It should be borne in mind that when a court passes an order under Sections 397, 398 and 402 as has been done in the instant case, there could be no limitation on the court's power while acting under the sections. Instead of winding up a company, the court under the abovementioned sections has been vested with ample power to continue the corporate existence of a company by passing such orders as it thinks fit in order to achieve the objective by removing any member or members of a company or to prevent the company's affairs from being conducted in a manner, prejudicial to the public interest. The court u/s 398 read with Section 402 of the Act has the power to supplant the entire corporate management. Under the aforesaid sections, the court can give appropriate directions which are contrary to the provisions of the articles of the company or the provisions of the Companies Act.

In the instant case, the court directed that the share register of the company would be in the custody of the special officer and also directed that the proxies should be filed at the residence of the special officer. The board of the company under the chairmanship of the special officer settled the notice of the adjourned general meeting at its meeting on May 17, 1978. The board decided that the proxies should be filed at the residence of the special officer, fresh nominations were to be filed with the special officer at his residence and, as such, by sending the said notice dated May 17, 1978, settled by the special officer, the company and the special officer were merely complying with the directions of the court for convening the adjourned general meeting. The meeting held on July 17, 1978,

cannot be said to be illegal, in our view."

134. At pages 784-85 of the report, the following passage occurs :

" The order dated June 7, 1978, as already stated, does not appear to us to have done away with all the previous directions of the court for conducting the adjourned annual general meeting or the filing of the proxies or nominations. It merely extended the time to file nominations for election to the office of directors. Under Sections 397 and 398 read with Section 402, power has been conferred upon the court " to make such orders" as it thinks fit. The power conferred upon the court by the abovementioned sections is very wide and object or objects sought to be achieved by the exercise of such power have been stated in Sections 397 and 398. As we read Sub-clauses (a) and (g) of Section 402 of the Act, we have no doubt in our mind that the intention of the Legislature under the abovementioned sections was to confer wide and ample powers upon the court for the regulation of the conducting of a company's affairs and to provide for any other matter which the court thinks just and equitable to provide for in the interest of the corporate body and the general public....

By reason of what has been stated hereinabove, it appears to us that the court had power to make the order in regard to convening and holding of the meeting, filing of proxies or nominations or any other matter for the purpose of conducting the affairs of a company which might be contrary to the provisions of the articles of the company or the Companies Act, by virtue of the provisions of Sections 397 and 398 read with Section 402 of the said Act."

135. On the question of the wide amplitude of the court's power in granting relief in a petition under Sections 397 and 398 of the Act in exercise of powers u/s 402 thereof, reference was made by Mr. Mukherjee to the Supreme Court decision in the well-known case of *Cosmosteels Pvt. Ltd. v. Jairam Das Gupta* [1978] 48 Comp Cas 312. At p. 318 of the report, it is as follows :

" The scheme of Sections 397 and 402 appears to constitute a code by itself for granting relief to oppressed minority shareholders and for granting appropriate relief, a power of widest amplitude, inter alia, lifting the ban on a company purchasing its shares under court's direction, is conferred on the court. When the court exercises this power by directing a purchase of its shares by the company, it would necessarily involve reduction of the capital of the company. Is such power of the court subject to a resolution to be adopted by the members of the company which, when passed with statutory majority, has to be submitted to court for confirmation ? No canon of construction would permit such an interpretation in which the statutory power of the court for its exercise depends upon the vote of the members of the company. This would inevitably be the situation if reduction of share capital can only be brought about by resorting to the procedure prescribed in Sections 100 to 104. Additionally, it would cause inordinate delay and the very purpose of granting relief against oppression would stand self-defeated. Viewed from a slightly different angle, it would be impossible

to carry out the directions given u/s 402 for reduction of share capital if the procedure under Sections 100 to 104 is required to be followed. Under Sections 100 to 104, the company has to first adopt a special resolution for reduction of share capital if its articles so permit. After such a resolution is adopted which, of necessity, must be passed by majority, and it being a special resolution, by a statutory majority, it will have to be submitted for confirmation to the court. Now, when minority shareholders complain of oppression by majority and seek relief against oppression from the court under Sections 397 and 398 and the court, in a petition of this nature, considers it fair and just to direct the company to purchase the shares of the minority shareholders to relieve oppression, if the procedure prescribed by Sections 100 to 104 is required to be followed, the resolution will have to be first adopted by the members of the company ; but that would be well nigh impossible because the very majority against whom relief is sought would be able to veto it at the threshold and the power conferred on the court would be frustrated. That could never have been the intention of the Legislature. Therefore, it is not conceivable that when a direction for purchase of shares is given by the court u/s 402 and consequent reduction in share capital is to be effected, the procedure prescribed for reduction of share capital in Sections 100 to 104 should be required to be followed in order to make the direction effective."

136. This authority was very strongly relied upon by Mr. Mukherjee as showing the widest amplitude of powers the court has u/s 402 of the Act. It was submitted that in exercise of that power, the court could if necessary override certain statutory provisions of the Companies Act as has been done in the above case.

137. On the question of the application of the partnership principle in an application for winding-up of a company under the just and equitable clause, Mr. S.B. Mukherjee relied on a decision of the Supreme Court in the case of *Hind Overseas P. Ltd. v. Raghunath Prasad Jhunhunwalla* [1976] 46 Comp Cas 91. Although that case related to the winding-up of a company, Mr. Mukherjee referred to Section 397, which, inter alia, provides that the court must be of the opinion that the facts in Section 397 application would justify the making of a winding-up order on the ground that it was just and equitable that a company should be wound up.

138. In that case, it was held that in a case where the shareholding is more or less equal and there is a case of complete deadlock in the company on account of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding-up on the just and equitable ground. In a given case, the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil, it is found that in reality it is a partnership.

139. Mr. Mukherjee submitted that the principle enunciated by the Supreme

Court squarely applies to the facts of the present case. Here there is a complete deadlock because of the Indian group and the Swedish group holding 49% shares each in the Indian company. Further, on piercing the veil, it should be held by this court that in reality it is a partnership between the Swedish group and the Indian group or the "Singh group".

140. In my view, this contention of Mr. Mukherjee is sound and should be accepted. In my view, this is indisputably a case of complete deadlock ; further, in reality, it is a partnership between the Swedish group on the one hand and the Singh group on the other.

141. I have recorded the submissions of both the petitioners and the contesting respondents both on facts and on law somewhat elaborately. I shall now record my decision on the various points somewhat briefly. I am of the opinion that the transfer of 9% shares of the Swedish group in favour of Mr. M.T. Shah is in clear contravention of Article 34 and the other connected article of the Indian company. I accept the contention of Mr. S.B. Mukherjee with regard to the interpretation of these articles. I am of the opinion that Article 34 contains a "pre-emptive" provision. In other words, these 9% shares could not be transferred to Mr. Shah unless they were offered to the existing shareholders other than the Swedish group. I accept the contention of Mr. Mukherjee based on the well-known decision of the Supreme Court in *Needle Industries*" case, [1981] 51 Comp Case 743, that there is no question of offering these shares to the Swedish group in view of the provisions of the FERA. In my view, under the relevant articles noted above, the only way it could be offered to Mr. Shah was if it could be shown on the facts that the existing shareholders other than the Swedish group had consented to such a transfer which would mean that they have waived their pre-emptive right under the articles. In my view, such consent or waiver cannot be established in the facts of the present case. I accept the contention of Mr. Mukherjee that this consent must be given by each individual shareholder and cannot be inferred by the presence of any shareholder as representing a "group" at a board meeting or even by his implied assent. To put it concretely, even assuming that the presence of Mr. B. Singh or of the nominees of the Indian group could be construed as an implied assent to the transfer of the 9% shares of the Swedish group in favour of Mr. Shah, such implied assent would not amount to a compliance with the abovementioned articles with regard to the transfer. I accept the submission of Mr. Mukherjee that such consent, as mentioned above, would have to be the individual act of each shareholder and cannot be spelt out in a representative manner. It would follow that I reject the somewhat elaborate submission of Mr. Mridul on this aspect of the case.

142. With regard to the question whether a mere illegality or an action of the company contrary to the articles would by itself warrant the interference of the court under Sections 397 and 398, I am of the opinion that this legal proposition which was not disputed does not stand in the way of the petitioners obtaining relief in the present case. From the facts and circumstances of the instant case

which have been elaborately set out hereinbefore, I am of the view that the Swedish group with the help of its nominee, Mr. M.T. Shah, is determined to oust the Indian group from the management of the Indian company. To avoid prolixity, I refrain from giving reasons for my conclusion which will appear from what has been stated hereinabove.

143. I am further of the opinion, in the light of the facts and circumstances stated hereinabove, that there was a deliberate attempt by the Swedish group to circumvent the provisions of the FERA with regard to the dilution of foreign equity participation. I am of the opinion this is not a mere technical breach of the law on this question. I am of the view that these provisions of the FERA are intended to provide for effective Indian control of these types of companies. As such, I am of the opinion that this is very much a matter of public interest as it involves the implementation of a national policy through appropriate legislative measures.

144. With regard to the attempt to transfer the 2% shares of the Indian company which were and still are registered in the name of the late Mr. Daphtary in favour of Mr. M.T. Shah, I am of the view that this is as much in contravention of Article 34 and other connected articles of the company as the attempted transfer of 9% shares of the company in favour of M.T. Shah. In other words, the transfer of these 2% shares is vitiated by the same infirmities as the transfer of the 9% shares mentioned in an earlier part of this judgment.

145. I accept the submission of Mr. Mukherjee that the question of alternative remedy does not arise in this case. I accept the submission that there is no pending proceedings before the RBI and, as such, the question of the RBI being a competent authority to decide the issues involved in this application does not arise. I also accept the submission of Mr. Mukherjee that there is no question of a minority action by way of injunction in the facts of the present case.

146. I further hold that the provisions of the Indian Succession Act, 1925, viz., Sections 149, 213, 327 and 333, which were sought to be relied upon by Mr. Mridul, have no manner of application to the question of the transfer of 2% shares in favour of M.T. Shah.

147. I am further of the view that the attempts by the nominees of the Swedish group to rake up S. R. Batliboi and Co.'s report, although at an earlier board meeting it was decided not to take any steps pursuant to the report for the present, is nothing but an attempt on behalf of the Swedish group and its nominees to find a ground for termination of the sole selling agency in favour of petitioner No. 5. I hold that the petitioners were justified in being apprehensive that attempts would be made to terminate the sole selling agency agreement which is otherwise valid up to May, 1983. It would follow that I am of the view that the petitioners are entitled to relief on this account also.

148. It should be evident from what I have stated hereinabove that the petitioners, in my view, have made out a case of oppression within the meaning

of Section 397 and are entitled to appropriate relief.

149. In the result, this application succeeds. The resolution passed at the board meeting of respondent No. 1 held on August 25, 1981, purporting to transmit the 812 shares of the late A.C. Daphtary in favour of Mrs. Leila Daphtary is declared void and illegal and the same is directed to be delivered up cancelled. The resolution passed at the board meeting of respondent No. 1 held on August 25, 1981, purporting to sanction disinvestment, by respondent No. 2, of 9% shares held by it in favour of respondent No. 3 is declared void, illegal and not binding on the company and its shareholders and is directed to be delivered up cancelled. Respondent No. 2 is directed to transfer the shares to the extent of 9% of the paid-up capital of respondent No. 2 out of the shares registered in the name of respondent No. 2 to the existing shareholders of the Indian company other than the Swedish group in accordance with Article 34 of the articles of association of the Indian company and other connected articles at the rate of Rs. 150 per share. Such sale is to be completed within a period of 10 weeks from date. Respondent No. 1 is directed to deal with the 2% shares as registered in the name of late Mr. A.C. Daphtary in the manner laid down in the relevant articles of association of the Indian company.

150. In the event of the executor to the will of the late Mr. Daphtary or his legatee under the will intending to sell the 2% shares, they are directed to comply with the relevant articles of association of the Indian company and the observations made in this judgment with regard thereto.

151. Respondent No. 1 is directed to take all necessary steps to obtain the sanction of the RBI, if necessary, for the purpose of the remittance of the purchase price of the 9% shares. In default of transfer of 9% shares by respondent No. 2 as aforesaid, respondent No. 2 would be restrained from exercising any voting right or any other rights in respect of the above-mentioned 9% shares till the transfer of these shares.

152. Until a new board of directors is elected at the extraordinary general meeting of respondent No. 1 to be held as directed hereinafter, respondent No. 1 is directed to be managed by a committee of management consisting of Mr. Bhubaneshwar Singh and Mr. K.N. Jalan as the representatives of the Singh group of shareholders and Mr. C.K. Thanawala and Mr. M.T. Shah as the representatives of the Swedish group of shareholders. Dr. Monotosh Mukharji is appointed chairman of the committee of management. Dr. Monotosh Mukharji would be entitled to a remuneration of 150 G. Ms. per month which is to be paid out of the assets of the respondents.

153. The chairman of the committee of management is directed to convene an extraordinary general meeting of the shareholders of respondent No. 1 within a period of twelve weeks from the date for the purpose of electing a new board of directors. After the election of the board of directors, the chairman and the members of the committee of management will stand discharged and they will

hand over the charge of the management, books, papers and documents of respondent No. 1 to the new board of directors. The notice dated September 25, 1981, convening the 16th annual general meeting of respondent No. 1 is hereby cancelled. The new board of directors will take steps for convening and holding the annual general meeting in accordance with law.

154. The executives of the company including the chief executive are directed not to make any financial commitment in so far as the workers of the Pune and Varanasi factories are concerned save in the matter of bonus and for the payment of existing remuneration to the workers without an order from the committee of management.

155. There will be an order in terms of prayer(n) of the petition. There will also be an injunction restraining the present board of directors from functioning until the committee of management is appointed. After the election of the new board, the existing board shall stand superseded.

156. Respondent No. 1 and its existing shareholders are directed not to take any steps for the purpose of implementing the operative part of my judgment and order for a period of two weeks after the reopening and there will be a stay of the operation of my order with regard to the committee of management for the same period in regard to the transfer of shares.

157. I make it clear that the injunction on the executives, mentioned above, will continue.

158. The contesting respondents are directed to pay the costs of this application to the petitioners.

159. All parties to act on a signed copy of the operative part of the order.