

(1999) 11 DEL CK 0003
In the Delhi High Court
Case No : S. No. 2146 of 1993

Ferruccio Sias and another

APPELLANT

Vs

Jai Manga Ram Mukhi and others

RESPONDENT

Date of Decision : 09-11-1999

Acts Referred:

Companies Act, 1956 — Section 2(24)

Citation : (1999) 77 DLT 522

Hon'ble Judges : Mahinder Narain, J

Bench : Single Bench

Advocate : A.K. Sen, for the Appellant; R.K. Garg, G. Ramaswamy and M.H. Beg, for the Respondent

Judgement

1. This suit for damages, declaration and injunction was filed by the plaintiff Mr. Ferruccio Sias, stating that he is whole-time director in the company, known as SAE (India) Limited. The persons who are sued for damages, declaration and injunction, are defendants Nos. 1 to 11. All of whom were directors and/or employees of SAE (India) Limited.

2. The plaintiff asserted that the present suit is directed against the conspiracy and tortious action of defendants Nos. 1 to 7, and against their mala fide, unauthorised and illegal activities. It was asserted that these actions are detrimental to the interest of SAE (India) Limited and its shareholders; that the said defendants were usurping the control of the company, and that presently their interest is directly in conflict with the interest of SAE (India) Limited. It was also asserted that the said defendants are not entitled or authorised to represent SAE (India) Limited, or its shareholders, as they are wrongdoers. It was also asserted that they were misutilising and misapplying the funds of the company for illegal purposes in furtherance of their conspiracy. The alleged brief facts were stated thereafter.

3. The important fact which has to be kept in mind, is that it was asserted in the plaint itself, that SAE (India) Limited is an existing company, incorporated under

the Indian Companies Act VII of 1913. It was incorporated as Company No. 17 on May 12, 1951, at Waltair in the State of Tamil Nadu to execute a contract from the then Madras State Electricity Board for the construction of a 132 KV Machkund Project Transmission Line. This assertion makes it clear that SAE (India) Limited is an Indian company, incorporated under the laws of India.

4. The disputes which are raised in this plaint, appear to have crystallised as a result of the economic liberalisation policies of the present Narasimha Rao Government. Consequent upon the liberalised economic policies, it appears that those who were behind the scenes in SAE (India) Limited, wanted to come into the forefront. Those persons who were behind the scenes are stated in the plaint to be Elettrofin Societa Anonima Finanziaria. This is how the name of the company became SAE (India) Limited, which shows the connection between SAE (India) Limited and Elettrofin Societa Anonima Finanziaria.

5. It is asserted in the plaint that the aforesaid foreign company (hereinafter called "Elettrofin") was a member of the "Asea Brown Boveri group" (hereinafter called the "ABB group"). Elettrofin owns 32.32 per cent. of the issued share capital of Rs. 49,35,150, equity shares of Rs. 10 each, and is the single largest shareholder of SAE (India) Limited. It was asserted that one Dr. Cesare Rossi was an ordinary director of the company, who died some time in July, 1993. After Rossi's death, there were only five directors. After Rossi's death, J. M. Mukhi, who is an ordinary director of the company, in the absence of Dr. Cesare Rossi, used to be voted to be the chairman at the meeting of the board. The directors after the demise of Dr. Rossi, were J. M. Mukhi, K. N. Shenoy, Luigi Ruggieri, Ferruccio Sias and Niranjan Swaroop Mittal.

6. After the demise of Dr. Cesare Rossi, there were, Therefore, five directors on the board of SAE (India) Ltd. Consequent upon the economic liberalisation policy of the Narasimha Rao Government, these five directors adopted and passed a resolution, being resolution dated August 24, 1993, wherein it was agreed in principle that SAE (India) Limited, the increase of share capital of the company, which capital should be subscribed to by Elettrofin Societa Anonima Finanziaria at a price which was "a fair price". The fair price was to be determined by Mr. Malegan of S. B. Billimoria and Co., chartered accountants, who was stated to be well versed in the field of valuation of shares. This resolution is passed on August 24, 1993.

7. It is also asserted in the plaint that the proposal to be put up before the board for using the Asea Brown Boveri logo and on the stationery of SAE (India) Limited, as also on visiting cards, etc., so as to indicate that SAE (India) Limited is part of the Asea Brown Boveri group. It is asserted in the plaint that the board of directors in the meeting of the company on August 24, 1993, took the following unanimous decisions :

1. Resolved that the board of directors approve in principle the increase of share capital for issue of shares to Elettrofin S.A. shareholding to 51 per cent.

2. Resolved that ICICI Securities and Finance Company Limited be asked to suggest a fair price for the said shares.

3. Resolved that the board of directors approved in principle the amalgamation of the company with Asea Brown Boveri Ltd.

4. Resolved that S. B. Billimoria and Co., chartered accountants, be asked to suggest a fair exchange ratio for the shares for the purpose of amalgamation.

5. Resolved that Amarchand and Mangaldas and Hiralal Shroff and Co., Solicitors and Advocates, be asked to prepare a draft of a scheme for amalgamation.

6. Resolved that a committee of the board of directors be appointed comprising Mr. J. M. Mukhi and Mr. N. S. Mittal to examine the assessments and evaluations and to recommend fair terms for the said increase and issue of shares as above and the amalgamation of the company with Asea Brown Boveri Limited for consideration of the board of directors.

8. It appears from what is stated in the plaint that serious disputes arose between some of the members of the board of directors, namely, J. M. Mukhi, Mr. Madan and Mr. N. S. Mittal, firstly, regarding valuation of the shares of SAE (India) Limited, and, secondly, on the exchange rate regarding the shares of SAE (India) Limited and ABB (India) Limited vis-a-vis the amalgamation proposal. The differences seem to have come to a head, and a meeting of the board of directors of SAE (India) Limited was called, according to the plaintiff, unfairly while some of the members of the board of directors were abroad. This meeting was, according to the notice dated September 13, 1993, calling for the meeting of the board, to take place on September 15, 1993. It is contended that the notice of the meeting having been served upon all the directors by methods which were not normally adopted for serving of notice, namely, by issuing facsimile notices, and a meeting of the board of directors of SAE (India) Limited was held on September 15, 1993. In that meeting defendants Nos. 4 to 7 were appointed as whole-time additional directors, according to the plaintiff, illegally and mala fide. These four whole-time additional directors were Y. L. Madan, S. C. Singhal, P. Dasgupta and J. Narayanan.

9. It is not disputed in the plaint that while the additional directors were appointed, the pre-existing five directors, namely, J. M. Mukhi, K. N. Shenoy, Luigi Ruggieri, Ferruccio Sias and Niranjana Swaroop Mittal, continued to be the directors. The appointment of four additional directors at the board meeting on September 15, 1993, as whole-time directors, has effected a fundamental change in the management of the company, and in the board of directors of the company. It is also asserted in the plaint that this has resulted in causing damage to the "corporate interest" of SAE (India) Limited, which has given rise to cause of action to file this suit for recovery of damages.

10. This was the original plaint.

11. The suit then was for recovery of damages in the sum of Rs. 10,00,000. The

suit was filed by the plaintiff against all the defendants. The suit as filed, did not have proper court fee affixed upon it. On September 23, 1993, I gave two directions : (a) that the plaint in suit be made in accordance with the practice and procedure of this court; and (b) that the additional court fee paid after filing of the suit, be taken on record.

12. Thereafter, an application under Order VI, rule 17 of the Code of Civil Procedure, 1908, I.A. No. 8507 of 1993 was filed for amendment of the plaint in the suit. By that time, Mr. Dave had presented himself in court, and stated, without entering appearance in court as required by Order III, rule 4 of the Code of Civil Procedure, 1908, that they have filed a caveat which was, at that time, not on record.

13. I dealt with I.A. No. 8507 of 1993, by my order dated September 28, 1993. I allowed the same. As by September 29, 1993, caveat has been lodged, summons in the suit and notice of the application were taken by Mr. R. P. Dave, who was being led by Mr. R. K. Garg, senior advocate. Copies of the amended plaint and documents were ordered to be given to Mr. Dave. Direction was given to file written statement within two weeks.

14. I had heard the parties in part, and directed on August 27, 1993, that the interim orders sought by the plaintiff, be crystallised by counsel for the plaintiff.

15. By the next date, counsel for the defendants also wanted to make submissions, and I have heard them also.

16. I had pointed out to Mr. Sen that the instant plaint is a very unusual plaint, inasmuch as it lacked an averment, as per practice in this court, the plaint did not have an assertion at its beginning, or within the first few paragraphs, that the plaint in the suit is being signed and verified by a person named in the plaint, (as required by Order 29 of the Code of Civil Procedure, 1908, when suits are instituted by corporations or by individuals on behalf of corporations), and that the person who has signed and verified the plaint, has got authority to institute the suit on behalf of the corporation.

17. This has become consequential, as in the amended plaint, notice of which was given to the defendants, not only Ferruccio Sias has sued as plaintiff, but he is added as SAE (India) Limited as plaintiff No. 2. The corporation as a corporate entity, as required by Order 29, has to sue by and through a plaint which has been signed and verified by a person in accordance with Order 29 of the Code of Civil Procedure.

18. I had also pointed out to Mr. Sen that by virtue of an early decision of this court in the case of Oberoi Hotels (India) Pvt. Ltd. v. Observer Publications (P) Ltd. (Suit No. 469 of 1966, decided on 26th November, 1968), which has never been dissented from, it is also necessary that there be proper authorisation for the purposes of institution of the suit, in case the plaintiff in the suit is a corporation. It is a necessary requirement that there be proper authority by

resolution of the board of directors, or there has to be a power of attorney authorising institution of the suit on behalf of the corporation, or there has to be power conferred by the articles of association of a corporation, in a particular officer, to institute suits on behalf of the corporation.

19. Later on, Bhandare J. in a case *Nibro Ltd. Vs. National Insurance Co. Ltd.*, , has reviewed a large number of cases bearing upon the question of signing and verification of complaints, postulated by Order 29 of the Code of Civil Procedure, 1908, the authority to act and authority to institute suits, when a suit is instituted by a corporation. In that judgment also, this court has reiterated what was stated in *Oberoi Hotels (India) Pvt. Ltd. v. Observer Publications (P) Ltd.* (Suit No. 469 of 1966, decided on 26th November, 1968), about the necessity of having authorisation from the corporation to institute the suit. In view of the aforesaid two judgments of this court, with which I am in respectful agreement, it cannot be doubted that a person instituting a suit on behalf of the corporation, has to be a person authorised to institute the suit.

20. The authority to institute a suit is distinct from and in addition to what is contemplated by Order 29 of the Code of Civil Procedure, 1908, which deals only with signing of complaints and verification of pleadings by certain persons mentioned in that provision.

21. It was contended by Mr. Sen that all the documents and papers which confer authority to institute a suit on behalf of SAE (India) Limited on Mr. Sias, are in the custody of the defendants. These include the power of attorneys which have been granted to Mr. Sias by resolution of the board of directors.

22. The defendants had filed a caveat in court, and during the course of hearing, handed over copies of the power of attorneys granted in favor of Mr. Sias. They have also shown the original power of attorney to me. The relevant provisions of the power of attorney indicate that Mr. Sias has also been given power to institute suits jointly with certain persons named in that power of attorney.

23. All the powers of attorney are to be strictly construed, and the power of attorney in favor of Mr. Sias, being power of attorney, dated May 28, 1993, only gives power to sue jointly with others. That power of attorney cannot come to the aid of Mr. Sias vis-a-vis the authority to institute the present suit against the defendants on behalf of SAE (India) Limited.

24. The relevant provisions of the power of attorney dated May 28, 1993, are clauses 14, 15, 16 and 21 which read as under :

"14. To commence, prosecute or enforce and defend answer or oppose any suits and other legal proceedings (whether civil or criminal) in any court or tribunal wherever or before any Government touching any matter in which the company may hereafter be interested or concerned and as the said attorney shall think fit and to compromise refer to arbitration abandon submit to judgment or become non-suited in any such action or proceeding as aforesaid.

15. To appoint and retain solicitors, advocates, and pleaders and such appointments and retainers from time to time to revoke and others again to appoint as occasion shall require.

16. To make sign execute present and file all applications complaints petitions or written statements warrants of attorney vakalatnamas or any other document expedient or necessary in the opinion of the said attorney to be made signed executed presented or filed in relation to any of the purposes aforesaid and such documents again to receive back.

21. The attorney shall do and perform all or any of the acts and things covered by this power of attorney by joint signature with any of the following persons signing within the limits of the power of attorney granted to them by the company.

(i) Mr. N. S. Mittal : Director (ii) Mr. Y. L. Madan : General Manager (Finance) (iii) Mr. M. Dutta : General Manager (Customer Focus Facilitate) (iv) Mr. W. Fossa : General Manager (PTL Construction) (v) Mr. S. K. Bhattacharya : General Manager (PTL Commercial)

25. Faced with this situation, Mr. Sen has urged that the above said rules regarding authority to institute suits are there only because what has to be asserted, is whether the corporation is the entity which intended to sue the defendants, and if a suit is brought by a person not authorised, then the court could call for a meeting of the shareholders of the company so that the majority of them could determine whether they are willing to ratify the institution of the suit.

26. It must be noted that authority to institute a suit, and ratification of the act of institution of the suit, are two different things. The authority to institute pre-exists the institution of the suit, and ratification of the act of institution of suit which is filed, is after the suit has been instituted by a person not authorised to do so.

27. As regards the authority to commence an action, it cannot be doubted that the board of directors of the company are authorised by resolutions to act on behalf of the company. In fact, the memorandum and articles of association of SAE (India) Limited itself says that the SAE (India) Limited shall function through its board of directors. It is so stated in article 116, which reads as under :

"Subject to the provisions of the Act, the control of the company shall be vested in the board who shall be entitled to exercise all such power, and to do all such acts and things as the company is authorised to exercise and do : Provided that the board shall not exercise any power or do any Act or thing which is directed or required, whether by the Act or any other statute or by the memorandum of the company or by these articles or otherwise, to be exercised or done by the company in general meeting : Provided further that in exercising any such power or doing any such act or thing, the board shall be subject to the provisions as

may be prescribed by the company in general meeting but no regulation made by the company in general meeting, shall invalidate any prior act of the board which would have been valid if that regulation had not been made."

28. Regarding the authorisation of other persons to act on behalf of the company, the relevant articles are articles 122 and 123, the relevant parts whereof read as under :

"122. Subject to the provision of the Act and in particular to the prohibitions and restrictions contained in section 292 thereof and subject to article 123 hereof, the board may, from time to time entrust to and confer upon a managing director for the time being such of the powers exercisable under these presents by the board as it may think fit and may confer such powers for such time and to be exercised for such objects and purposes, and upon such terms and conditions, and with restrictions as it thinks fit; and the board may confer such powers, either collaterally with, or to the exclusion of, and in substitution for all or any of the powers of the board in that behalf; and may, from time to time, revoke, withdraw, alter or vary all or any of such powers.

123. Notwithstanding anything to the contrary in article No. 122, and other powers conferred by these articles, it is hereby expressly declared that the managing director and the joint managing director shall always subject to the provisions of the Act, have the following powers jointly and severally, that is to say; (17) To institute, prosecute, compound, defend, compromise, withdraw or abandon any legal proceedings by or against the company or its officers or otherwise concerning the affairs of the company and to act on behalf of the company in all matters relating to insolvencies or liquidations and to apply for and obtain letters of administration with or without will annexed to the estate of persons with whom the company have dealings."

29. It is to be noted that the authority conferred by the aforesaid articles is on the managing director and the joint managing director to institute suits. Mr. Sias is a whole-time director in terms of the power of attorney which has been granted to him. He has accepted that he is the director of the company. It is not permissible to say that he is the managing director of the company in view of the provisions of the Companies Act. Mr. Sen referred to the provisions of section 2(26) of the Companies Act, which relate to the managing director. That section reads as under :

""managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its board of directors or by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called :

Provided that the power to do administrative acts of a routine nature when so authorised by the board such as the power to affix the common seal of the

company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management :

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its board of directors."

30. In the instant case, the provisions of section 2(26) relating to managing director given in the Companies Act are not attracted for the reasons that Mr. Sias has himself accepted by the power of attorney given to him by the company that he is not managing director. He is a whole-time director and general manager, but not the managing director. He is, Therefore, not covered by articles 122 and 123 of the articles of association of the company, which give power to the managing director to institute a suit. He, Therefore, has no authority to institute this suit thereunder.

31. In view of the above position, Mr. Sen referred to a number of cases, the purport of which cases was that even if a person is not a person authorised to institute a suit on behalf of the company, yet he could institute a suit on behalf of the company, and what the court would do in such cases, is to pass interim orders, if necessary, calling for a meeting of the shareholders of the company to find out whether the majority of shareholders would ratify the action of the unauthorised person to institute a suit on behalf of the company.

32. Mr. Sen referred to *Danish Mercantile Co. Ltd. v. Beaumont* [1951] 1 All ER 925. This is a case in which the solicitors of the company brought a suit on behalf of the company without being authorised by the company to institute a suit. The court said, in that case, that the suit is not properly instituted, in that sense a nullity, and the suit is liable to be stayed if the defendant does not delay his application for stay. If the company ratifies the institution of the suit, the suit is regularised. This case does not help Mr. Sen. The company has not ratified the action of Mr. Sias which is not taken in the sphere of his authority. His action is attacked as being motivated because Mr. Sias's connection with some companies in Europe which belong to the Asea Brown Bovey group, as he has been the general manager of Asea Brown Bovey, Saldemi, a company of the group in Nigeria prior to coming to India.

33. In my view the board of directors of the company, incorporated in India, which is an independent legal entity, has to take action only keeping in view the interest of the company. The board of directors has also additionally to take action in accordance with what is perceived by them to be in the interest of the majority of the shareholders of the company, in which they are directors. In the instant case, the foreign company *Elettrofin Societa Anonima Finanziaria* holds only 33 per cent. of the shares. The rest of the shares are owned by financial institutions in India, or by shareholders in India. The board of directors of *SAE (India) Limited* would be acting properly if they were looking after the interest of

the majority of the shareholders as a whole.

34. Mr. Sen also referred to *Pender v. Lushington* [1877] 6 Ch 70. The observations at pages 78 and 79 go to show that the court is empowered to hold over an action, to call a meeting of the shareholders to assert the wishes of the majority of the shareholders. The facts of that case are different from the present one. The principle of law laid down may be good, but does not merit application to the present case.

35. Mr. Sen also referred to *Dr. Satya Charan Law v. Rameshwar Prosad Bajoria* [1950] 20 Comp Cas 39.

36. According to Mr. Sen, an unusual situation has arisen vis-a-vis the affairs of SAE (India) Limited. According to him, fundamental changes have been effected in the management of the company, whereas the company was managed by the five directors earlier, namely, J. M. Mukhi, N. S. Mittal, F. Sias, the plaintiff, K. N. Shenoy and Ruggieri. The company has been hijacked by the resolution passed by J. M. Mukhi, N. S. Mittal, over the objections of Mr. Sias, at a meeting of the board of directors, held on September 15, 1993.

37. According to Mr. Sen, only the above said three directors could be present at the meeting of the board of directors on that date, as Mr. Shenoy and Ruggieri were known to be outside India on that date and J. M. Mukhi and N. S. Mittal used the majority to induct other persons as directors of the company at the meeting of the board of directors, held on September 15, 1993. According to Mr. Sen, there was no proper notice to the directors of the company regarding the meeting to be held on that date.

38. The new directors who were elected on the board at the two meetings held, one on September 15, 1993, and another on September 17, 1993, by use of majority by J. M. Mukhi and N. S. Mittal against Mr. Sias, are Y. L. Madan, S. C. Singhal, P. Dasgupta, J. Narayanan, P. Verma and S. K. Bhattacharya.

39. Of these new directors, Y. L. Madan, S. C. Singhal, P. Dasgupta, J. Narayanan were elected at the meeting held on September 15, 1993, and P. Verma and S. K. Bhattacharya were elected at the meeting held on September 17, 1993.

40. It is to be noted that none of the old directors ceased to be directors of the company, that is to say, J. M. Mukhi, N. S. Mittal, Sias, K. N. Shenoy and Ruggieri continued to be directors of SAE (India) Limited.

41. Mr. Sen asserts that the fundamental change has happened in the management of the company, and there is a "hijacking" because of additional persons being appointed on the board of directors.

42. I must, however, note that the persons who have been appointed on the board of directors of the company, as a result of the majority of J. M. Mukhi and N. S. Mittal, are not strangers to the company. Y. L. Madan was the General Manager (Finance) of the company, S. C. Singhal was the Deputy Manager

(Personnel), P. Dasgupta was the Deputy Manager (Personnel), in charge of provident fund service, J. Narayanan was the Commercial Officer in the company, P. Verma was Deputy General Manager (Construction) of the company and S. K. Bhattacharya was Deputy General Manager (PTL-Com).

43. It must also be noted that of the old directors, J. M. Mukhi is an advocate by profession. Mr. Sias apparently has old connections with Elettrofin Societa Anonima Finanziaria, an Italian company, which is in turn, connection with Asea Brown Bovey, Zurich, which is also connected with Asea Brown Boveri, Sadelmi.

44. K. N. Shenoy is a director of Asea Brown Boveri (India) Limited, and Ruggieri is based in Milano, Italy, and is connected with the companies, associated with or connected with Asea Brown Boveri Limited, namely, Asea Brown Boveri, Zurich, Asea Brown Boveri, Sadelmi and Elettrofin Societa Anonima Finanziaria.

45. Mr. Sen also referred to and relied upon the observations mentioned in Gower's Principles of Modern Company Law, at page 643, which are as under :

"1. The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is prima facie the corporation.

2. Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadet question : or, if the majority challenges the transaction, there is no valid reason why the company should not sue.

3. There is also no room for the operation of the rule if the alleged wrong is ultra virus the corporation because the majority of members cannot confirm the transaction.

4. There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority.

5. There is an exception to this rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case, the rule is relaxed in favor of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance would never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

46. These observations are in connection with the rule in Foss v. Harbottle [1843] 2 Hare 461. The fifth exception to the rule in Foss v. Harbottle will be relatable to an action to prevent oppression of the minority by a majority. In the Indian context action lies under sections 397 and 398 of the Companies Act, not

a suit.

47. I have heard Mr. R. K. Garg, senior advocate, who appeared for the caveator. By my order dated October 6, 1993, I have said that the caveat filed in the case by Mr. R. P. Dave, advocate, has to be treated as a caveat in the instant case.

48. Mr. Garg asserted that the suit has got two plaintiffs, one Mr. Sias and other is the company. According to Mr. Garg, Mr. Sias has no authority, either in law, nor is he appointed by the power of attorney to institute the suit on his own.

49. According to Mr. Garg, Mr. Sias, the plaintiff, is a director of the company. He is a manager of the company, but he is not a manager in terms of section 2(24), of the Companies Act, as he is not the manager of the whole or substantially the whole of the business.

50. Mr. Garg also asserts that in view of the fact that Mr. Sias holds power of attorney dated May 28, 1993. He cannot assert that he is managing director in terms of section 2(26) of the Companies Act, as he has accepted by the said power of attorney, to be designated as the whole-time director and manager of the company, and he is estopped from contending otherwise.

51. I think there is force in the contention of Mr. Garg. Mr. Sias has accepted by the said general power of attorney that he is director, and also manager, for the purposes specified in that power of attorney, it is not possible for him to contend that he is the managing director of the company. Furthermore, according to the said general power of attorney issued in favor of Mr. Sias, it is not permissible for him to act otherwise than in accordance therewith. That power of attorney authorises Mr. Sias to institute the suit, but only in a particular manner. The particular manner of institution of the suit is that he must join with the persons named in the power of attorney, while instituting the suit. He has not done so. The relevant provisions of the power of attorney dated May 28, 1993, have been reproduced above. Mr. Sias has to join with others. Unless the others join with him, and none of them has joined him, he does not have authority to institute the suit on behalf of the company.

52. Mr. Garg has contended that according to the articles of association of the company, the quorum of the meeting for the board of directors is two directors, and for the meeting of the board to be held on September 15, 1993, notice whereof had been given to all the existing directors by facsimile, and that notice had been received by all the directors also. It is of no consequence that some of the directors were not present at that meeting. Notice having been received, the option was with the directors to whom the notice was sent, to attend the meeting. As they did not do so, they are themselves responsible for absenting themselves from the meeting of September 15, 1993.

53. The notice dated September 13, 1993, was sent by facsimile. The meeting was scheduled for September 15, 1993. The notice which was sent to Ruggieri in Italy, which is well connected with the international flights, gave sufficient time

to him to reach India, if he was so advised, as the flight takes about eight hours to reach, but he chose not to attend the meeting. It is also asserted that Mr. Shenoy was out of India. He is a nominated director on the board, because of the connection with the companies in Europe.

54. He was also notified with the facsimile notice. He could have also attended the meeting, had he been so inclined. As no particular manner of notifying directors of the company, in my view, Mr. Garg is right in his submission.

55. Mr. Sen relied upon the judgment of Justice North in *Homer District Consolidated Gold Mines, In re* [1888] 39 Ch. D 546. This case related to a summons under the Companies Act, and related to a meeting of directors of the company, at which the quorum was present. The meeting was held at a few hours notice to two of the directors who did not attend, of whom one did not receive notice till the next day, and the other could not attend till 3 o'clock; the fifth director was abroad and no notice was sent to him. At the board meeting the earlier resolution of the board regarding certain shares, was cancelled and another resolution passed. That case does not apply to the facts and circumstances of the instant case. The court in that case proceeded on the basis that the notice was inadequate. It was given with the knowledge that the directors were not available, the court nullified the action for that reason, and not merely for the reason that there was no agenda for the meeting accompanying the notice.

56. In the instant case it has been rightly contended by Mr. R. K. Garg, that the said case will have no application, inasmuch as facsimile notice message had been sent to all the directors concerned, which notice message had been duly received, and there was sufficient time to attend the meeting, had they been so inclined, and as a matter of fact, Mr. Sias did attend the meeting. The notices were received not only by Ruggieri at Milano, Italy, but also were served at the place where notices were usually served, to Mr. Shenoy. That they did not attend the meeting held on September 15, 1993, was of their own doing, and what was done at the meeting, cannot lead to a conclusion that what transpired at the meeting on September 15, 1993, should be nullified. In other words, Mr. R. K. Garg contends that the proposition laid down by Justice North in the said case, is good law, but on the facts the same does not apply to the instant case. I agree with what is stated by Mr. R. K. Garg. Mr. Garg also relied upon the observations of this court made in *Abnash Kaur Vs. Lord Krishna Sugar Mills and Others*, , in which it has been held that because of section 286 of the Companies Act, law does not require that there was to be an agenda for a meeting of the board of directors. Only a notice of the meeting of the board is required by section 286 of the Companies Act, and that too notice is to go to the directors in India. Agenda of the meeting is required to go for shareholders' meeting in terms of section 172 of the Companies Act. According to Mr. Garg, notice was sent by facsimile, which was received by the directors of SAE (India) Limited, who were abroad; that they did not attend the meeting is their default, and not the default of the

board of directors, who participated in the meeting. An agenda for the meetings would ensure application of the mind to the matters at hand. The meeting will be more fruitful and useful. In any case, if no agenda is circulated the directors could object at the meeting, have the meeting adjourned. The observations of North J. which were not noticed in *Abnash Kaur Vs. Lord Krishna Sugar Mills and Others*, , may need to be properly weighed and considered in an appropriate case. I am sitting singly. This case is not one such case.

57. In any case, Mr. Garg, contends that by virtue of article 88 of the articles of association of SAE (India) Limited, the board of directors can make additional directors of the company, and these additional directors, according to section 2(6) of the Companies Act, shall remain additional directors of the company till the next annual general meeting of the company.

58. It is also contended by Mr. Garg that by virtue of section 106 of the Companies Act, a secretary is duty bound to convene a meeting of the board of directors on being asked by any of the directors of the company, and the directors of SAE (India) Limited were right in calling for a meeting of the board of directors in view of the letter received from the employees of the company on September 11, 1993.

59. Mr. Garg is also right in his submission that no particular form of notice is prescribed for a meeting of the board of directors. The notice sent by facsimile will be adequate notice.

60. Mr. Sias has filed his agreement with SAE (India) Limited. This agreement is dated June 20, 1983. This agreement has a duration of five years. The designation of Mr. Sias under this agreement is general manager. In this view of the matter, it is not open to Mr. Sias to assert as he has sought to do, that he is manager in terms of section 2(24) of the Companies Act.

61. In view of the fact that Mr. Sias has accepted the agreement dated June 20, 1983, I do not think it is open to him to contend that he is governed by section 2(24) of the Companies Act. It is rightly contended by Mr. Garg that Mr. Sias is a manager of SAE (India) Limited, having powers of attorney, the terms whereof have been approved by the Government of India, as contained in the power of attorney dated May 28, 1993, and inasmuch as the general power of attorney dated May 28, 1993, also gives power or authority to Mr. Sias only to institute a suit jointly with other persons, mentioned in clause 21 of the power of attorney, he has no authority to institute the instant suit. In this connection, Mr. Garg has referred to and relied upon *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, .

62. Mr. Garg has also relied upon and referred to *Nibro Ltd. Vs. National Insurance Co. Ltd.*, , in which Bhandare J., after reviewing cases bearing upon the subject, has come to the conclusion, a conclusion with which I am in respectful agreement, that the authority to institute a suit is distinct from signing and verification of the plaint under Order 29 of the Code of Civil Procedure, 1908.

63. It is in these circumstances contended that Mr. Sias has no authority to institute the suit, and, Therefore, no interim order, as sought in the suit, can be passed by this court.

64. Mr. Garg has also relied upon and referred to Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] 1 All ER 354, wherein it is stated that the preliminary issue is whether the plaintiff is entitled to sue. According to Mr. Garg, and I think he is right in his contention, that reading articles 122 and 123 of the articles of association, along with the power of attorney dated May 28, 1993, it is clear that Mr. Sias is the director and general manager of SAE (India) Limited. He is not the managing director, as contemplated by articles 122 and 123 of the articles of association. Nor is he the joint managing director, duly authorised to institute suits. Therefore, this suit cannot be filed by Mr. Sias on behalf of the company.

65. Mr. Garg says that the disputes which have arisen in the instant case, have arisen because of the fact that the board of directors with the weight of Mr. Sias, Mr. Ruggieri and K. N. Shenoy [who is the director of Asea Brown Bovey (India) Limited], managed to pass a resolution with a majority of three of them had in the board of directors of SAE (India) Limited, that the liberalised economic policy of the present Government, be taken advantage of for issuing additional shares to Elettrofin Societa Anonima Finanziaria only, instead of issuing the shares to all the shareholders of the company, and the dispute also was regarding the valuation of the shares, that is to say the price at which the shares were to be allotted to the foreign company, and also about the proposed amalgamation with ABB India and the proportion in which the shares were to be issued to the existing shareholders of the company.

66. It is also asserted by Mr. Garg that the amalgamation with Asea Brown Boveri (India) Limited would not be in the interest of the company when Asea Brown Bovey has issued bonus shares to its own shareholders, and has also diluted the value of each share vis-a-vis the share of SAE (India) Limited, and in view of the dilution in the value of the shares of Asea Brown Boveyr (India) Limited, the proportion proposed for amalgamation of SAE (India) Limited, and the proportion proposed between the shares of SAE (India) Limited and Asea Brown Bovey (India) Limited shares was unfair.

67. According to Mr. Garg, it will be clear from a note on valuation of shares prepared by J. M. Mukhi, that the only thing which was being sought was that the valuation of the shares should be a fair valuation, and not an unfair valuation.

68. It is also contended by Mr. Garg that with the increased shareholding of Elettrofin Societa Anonima Finanziaria, the sanctioning of the amalgamation scheme, would be a matter of formality, and a majority shareholding of 51 per cent. will be able to push the matter of amalgamation through in accordance with a time-bound programme of merger, which had been drawn up for the amalgamation of the two companies.

69. Mr. Garg meets the contention of Mr. Sen that there was no cause for holding a meeting of the board of directors on September 15, 1993, by asserting that inasmuch as the decision had already been taken by the board of directors regarding the issue of additional shares to Elettrofin Societa Anonima Finanziaria, and amalgamation of the company with Asea Brown Bovey (India) Limited by the resolution of the board of directors, in which J. M. Mukhi and N. S. Mittal had participated, that a letter dated September 11, 1993, had been received from the employees of the company in which serious reservations have been made regarding their future, and in view of the fact that the Supreme Court of India had, in *National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others*, stated that the workmen of the company have to be heard in the matter of amalgamation u/s 391 of the Companies Act. It was but proper for the board of directors to meet on September 15, 1993, and for that meeting of September 15, 1993, notice was sent by facsimile to all the directors concerned. The board of directors met to consider the said letter of the employees, and in addition, to consider the exchange ratio between the shares of SAE (India) Limited and Asea Brown Bovey (India) Limited, [which have been diluted in value by issue of bonus shares of Asea Brown Boveri (India) Limited], and to consider the valuation of the shares of SAE (India) Limited, at which the said shares were to be offered to Elettrofin Societa Anonima Finanziaria. Mr. Garg says that the amount of Rs. 90 per share which seems to have been determined by S. B. Billimoria and Co. was inadequate inasmuch as the share of SAE (India) was quoted in the market, at over Rs. 230 per share.

70. According to Mr. Garg, the board of directors of every company, as observed in Gower's *Principles of Modern Company Law*, has a duty to that company alone, to the company in which they are the directors. They do not owe any allegiance, nor should they look after the interest of a company which may be the holding company of the company in which they are directors. I am in agreement with what is stated by Mr. Gower, and what is stated in *Bell v. Lever Brothers* [1932] AC 161.

71. Mr. Garg also referred to *Bell v. Lever Brothers* [1932] AC 161, to contend that it is not open to the holding company to dictate to the board of directors. The board of directors of a company must do all acts in the interest of the company, and its shareholders. I am in respectful agreement with the said view. The directors of any company cannot and should not act as if they are puppets on a string, acting out a charade on the jerks and pulls of an invisible master puppeteer (the holding company) behind the curtain, behind a corporate veil, acting for motives to cause gain to the holding company, instead of to the shareholders of the company in which they are directors.

72. It appears to me that it is fundamental to the functioning of any company that the board of directors of the company should owe allegiance only to the company in which they are the directors. It is not permissible for the board of directors to act on the dictates of any other company, even if it is a subsidiary of

that other company. It also cannot be that the directors of the company give up their duty and right of independent action, to act for the well being and the interest of the company in which they are the directors, as also the interest of the entirety of shareholders of the company in which they are directors.

73. Mr. Garg contends that there is no corporate injury to the company SAE (India) Limited, which is the basis on which the suit has been filed. The contention of Mr. Sen that there is corporate injury, is without any foundation.

74. Mr. Garg has brought to my notice that before Mr. Sias came to India as a general manager of SAE (India) Limited, he was working as general manager of Sadelmi at Lagos in Nigeria, and Sadelmi is a company of Asea Brown Bovey, Zurich. There is very strong assertion that Mr. Sias is looking after the interest of the foreign company rather than looking after the interest of SAE (India) Limited, when he institutes the instant suit, when he is a party to a resolution of the board of directors for the issuance of fresh capital of Elettrofin Societa Anonima Finanziaria to increase its shareholding to 51 per cent. and, thereafter, amalgamating it with Asea Brown Bovey (India) Limited, which is part of the grand design to benefit the foreign companies, rather than SAE (India) Limited, and its shareholders.

75. It is pointed out by Mr. Garg that Mr. Sias who is the director of the company, was originally paid Rs. 6,000 per month, and is now being paid Rs. 15,000 per month. There is a strong suggestion that this is not the payment which would be acceptable to a European, which Mr. Sias is, working in India. The suggestion is that Mr. Sias is acting at the dictates of his European masters, who still pay him over and above, and in addition to what he is receiving from SAE (India) Limited. In answer to that, Mr. Sen stated that this is a wrong suggestion. Mr. Sias is, in fact, receiving a payment of Rs. 3,72,000 per annum, which is adequate compensation to a European; as in addition to that, he also gets the usual perquisites from the company.

76. Mr. Sen also contends that the valuation of the shares at which the shares are to be given to Elettrofin Societa Anonima Finanziaria, is not an unfair valuation. Nor is it going to be an unfair valuation. That valuation has presently been approved by a known "expert" Mr. Malegam of S. B. Billimoria and Co., but is also the subject-matter of approval of the valuation department of the Industrial Credit and Investment Corporation, and as such there is no likelihood of unfairness in the valuation. He also asserts that the market value of the shares does not reflect the true and intrinsic worth of the shares, as it represents the speculative value of the shares. These are matters for the shareholders of the company to accept, after due deliberation.

77. If the holding company desires to take advantage of the policy of liberalisation of the Government of India, and to gain majority control of a subsidiary, and if a subsidiary company desires to amalgamate with another Indian company in which the holding company has substantial interest or control,

then the interest of the shareholders of the company must be protected by the directors, by insisting upon a proper and fair and just valuation of shares of the company in which they are directors, and it is only at that proper, fair and just value that the shares of the company should be offered to the holding company, which seeks to gain majority control of the company in which there are distinct shareholders. The interest of the shareholders of any company must, at all times, be protected by the directors of the company. In the instant case, the directors of SAE (India) Limited were duty bound to protect the interest of the company, which is an independent legal entity under the Indian Companies Act, and the entity is quite distinct from Elettrofin Societa Anonima Finanziaria, which is a foreign company. It was the duty of the directors of SAE (India) Limited, to protect the interest of shareholders of the company. It was the duty of the board of directors of SAE (India) Limited that the interest of SAE (India) Limited be looked after by them by insisting upon a fair and just valuation of the shares, and the directors of the Indian company were duty bound to ensure that they did not allow the majority control take over of the Indian company by a foreign company unless the foreign company paid a fair and just price for the shares, not preferentially, but along with such other persons who held the shares of SAE (India) Limited, and were prepared to buy further shares in SAE (India) Limited. In other words the directors of SAE (India) Limited were duty bound to ensure that the Indian company did not lose any valuable asset whether in terms of Indian rupees, or in terms of foreign exchange. Shares which had larger value ought not to be permitted to be acquired at a lesser value by another company, or group of companies.

78. The company is represented by a board of directors, which board of directors continues to have persons on its board who were on the board prior to September 15, 1993. They have additional directors in the company, their continuance on the board shall be determined by the shareholders in the general meeting, in accordance with the provisions of the Companies Act. No corporate injury appears to have been done to SAE (India) Limited by addition of directors to its board of directors.

79. SAE (India) Limited has been in existence in India, as stated in the plaint, since the year 1951. It has grown over a period of time. Its shares have increased in value. Apparently it is a prosperous company. It has its own facilities for research and development. It can continue to carry on business in India. According to the balance-sheets filed in this court, it has got substantial reserves. If it needs any more capital, the same can be raised by resorting to procedures which are permissible by following the procedures contemplated by the Indian Companies Act. There does not appear to be any loss occasioned to the company as a result of re-constitution of the board of directors by addition of four directors on September 15, 1993, and September 17, 1993.

80. In the aforesaid circumstances, I hold that Mr. Sias has no authority to institute the suit, and as such following the principles laid down in Oberoi Hotels

(India) Pvt. Ltd. v. Observer Publications (P) Ltd. (Suit No. 469 of 1966, decided on 26th November, 1968) and Nibro Ltd. Vs. National Insurance Co. Ltd., , the same is liable to be dismissed.

81. The suit is accordingly dismissed.