

(1969) 11 BOM CK 0001

In the Bombay High Court

Case No : Suit No's. 522 and 681 of 1969

Firestone Tyre and Rubber Co.

APPELLANT

Vs

Synthetics and Chemicals Ltd. and Others

RESPONDENT

Date of Decision : 07-11-1969

Acts Referred:

Companies Act, 1956 — Section 10, 10(1), 10E, 12, 12(1)

Citation : (1971) 41 CompCas 377 : (1971) 41 ITR 377

Hon'ble Judges : D.P. Madon, J

Bench : Single Bench

Advocate : F.S. Nariman, for the Appellant; A.K. Sen, C.K. Duphtary, R.B. Bhatt and M.R. Modi, for the Respondent

Judgement

1. As these two notices of motion were heard together, it will be convenient to dispose of them any one judgment. Both the above suits arise out of the appointment for a further term of Kilachand Devchand and Co. Private Ltd., the second defendants in Suit No. 522 of 1969 and the fifth defendants in Suit No. 681 of 1969, as the sold selling agents of Synthetics and Chemicals Ltd., the first defendants in both the suits. It will be convenient to refer to these two companies hereinafter as "the private company" and "the company", respectively.

2. These notices of motion were argued elaborately and at great length and as if their hearing were a dress rehearsal for the hearing of the suits. I propose to set out first the material facts necessary for understanding the matters in controversy between the parties and deal with the other facts while considering the rival contentions under each head of controversy raised before me. The company was incorporated on January 20, 1960, as a result of collaboration between to plaintiffs, The Firestone Tyre and Rubber Company, a company incorporated under the laws of the State of Ohio in the United States of America and Tulsidas Kilachand and other to whom for the sake of convenience, I will hereinafter refer as "the Kilachand group." The Kilachand group consists of Tulsidas and his three brothers, Ramdas, Ambalal and Chinubai, and their

relatives and other concerns and companies owned or controlled by the Kilachand family. The main object of the company is to manufacture and deal in synthetic rubber and it is the only company in India which manufactures synthetic rubber. The authorised share capital of the company is Rs. 15,00,00,000 divided into 15,00,000 shares of Rs. 100 each. The issued and subscribed share capital of the Company is Rs. 5,75,00,000 divided into 5,75,000 equity shares of Rs. 100 each, its paid up share capital being Rs. 5,74,42,545. The plaintiffs have invested large amounts both by way of loans and share capital in the company. The amount of their loan investment as on December 31, 1968, including unpaid interest was about Rs. 3,46,16,124. There is also a sum of about Rs. 83,71,875, for the balance due to the plaintiffs on account of continuing know-how and technical services rendered by the plaintiffs under an agreement dated March 25, 1960, between the plaintiffs, the company and the private company. The plaintiffs are the holders of 1,43,650 fully paid-up equity shares of the face value of Rs. 100 each in the company. Fifty shares are held by F. J. Reighley, 50 shares by G. T. Warner and 4 shares by V. N. Karode, these three being the finance director, the sales director and the secretary and director of Firestone Tyre and Rubber Company (India) Private Ltd., a wholly owned subsidiary company of the plaintiffs. These shareholdings are admitted. The aggregate of these shareholdings in the company is thus a little over 25 per cent. So far as the Kilachand group is concerned I am informed by learned counsel for the company that the Kilachand group holds or controls voting rights in respects of shares of a little over 27 per cent. of the total paid-up share capital of the company. Tulsidas, who is not a defendant in Suit No. 522 of 1969 but is the second defendant in Suit No. 681 of 1969, and his brother, Ramdas, were at all times and still are directors of the company, Tulsidas at all times being also the chairman of the board of directors of the company.

3. The private company is a subsidiary of another private company, Kesar Corporation Private Ltd. The majority of shares of the private company are held by Kesar Corporation Private Ltd. and the remaining shares by Tulsidas and his brothers. The Kilachand group controls Kesar Corporation Private Ltd. and holds most of its shares. Tulsidas and Ramdas were at all material times and are directors of both the private company and Kesar Corporations Private Ltd.

4. At the meeting of the board of directors of the company held on July 17, 1963, it was decided to appoint the private company as the sole selling agents of the company. In pursuance of such decisions the following two resolution were passed at the annual general meeting of the company held on September 23, 1963, the first of such resolutions as a special resolution and the second as an ordinary resolution :

"RESOLVED that pursuant to section 314 and other applicable provisions of the Companies Act consent be and is hereby given to the appointment as the sole selling agents of the company for all the territories comprised within the Republic of India, Nepal, Bhutan and Sikkim, of Messrs. Kilachand Devchand and

Company Private Ltd., a company in which Mr. Tulsidas Kilachand and Mr. Ramdas Kilachand directors of this company are interested as directors and members."

5. RESOLVED that pursuant to section 294 and other applicable provisions of the Companies Act, Messrs. Kilachand Devchand and Co. Pvt. Ltd. be and they are hereby appointed the sole selling agents of the company for all the territories comprised within the Republic of India, Nepal, Bhutan and Sikkim for a period of five years commencing on the 1st October, 1963, and that the terms and conditions as to remuneration and otherwise contained in an agreement, the draft thereof has been placed before the meeting and for the purpose of identification initialed by the chairman of this meeting be and the same are hereby approved.

6. RESOLVED that the board of directors be and they are hereby authorised to cause the said agreement when engrossed to be executed on behalf of the company."

7. It appears that the fifth defendant company was claiming to have incurred expenditure for setting up a sales organisation for the company prior to the aforesaid board meeting. Accordingly, in the said annual general meeting the following resolution was also passed as a special resolution :

"RESOLVED that Messrs. Kilachand Devchand and Co. Private Ltd., a company in which Mr. Tulsidas Kilachand and Mr. Ramdas Kilachand directors of this company, are interested as directors and members, be paid a sum equal to 2% of the net sale price of the company's products sold up to the date of this meeting in reimbursement of the expenses incurred by them in setting up a sales organization."

8. In pursuance of the said resolutions by an agreement dated September 24, 1963, the private company was appointed the sole selling agents of the company for all : territories comprised within India, Nepal, Bhutan and Sikkim for a period of five years commencing from October 1, 1963. Under the said agreement, each party had the right to terminate the agreement prior to the expiry of its term by giving four calendar months" notice to the other side. the private company had to set up and maintain at its own cost an adequate organisation for sale of the company's products within the said territories and to bear and pay all expenses relating to such organisation. The private company had to procure orders for the purchase of products at the prices and on the terms and conditions of sale determined by the board of directors of the company and forward them to the company's office for acceptance and the same were to be binding on the company only when and to the extent confirmed by the company. The private company undertook full responsibility for the collection of price and all other amounts due from the buyers and to make immediate payment to the company whether the amounts were actually collected from the buyers or not, on the same being demanded by the company. The private company was to be a paid a commission at the rate of 2 per cent. on the net selling price exclusive of

Government excise duty and sales tax or other like charges of the products sold by or through the selling agents within the said territories during the period of the said agreement .On products sold directly by the company the private company was to be paid such commissions as the board of directors might decide not exceeding the said rate of 2 per cent. on the net selling price. The account of commission was to be made up at the end of each quarter in each financial year. The said agreement further provided that if and when any goods manufactured by the company were sold outside the said territories during the period of the said agreement, the board of directors of the company and the private company would decide mutually whether any commission on such sales should be paid by the company to private company and the rate of such commission, if any. Clause 13 of the said agreement provided as follows :

"The terms of this agreement may be modified by mutual agreement of the board of directors of the company and the selling agent except that the rate of commission payable to the selling agents as provided in clause 12 hereof shall not be so modified."

9. It appears that the plaintiffs were not happy at the idea of granting a sole selling agency and had protested against the same. The plaintiffs, however, did not oppose the passing of the said resolutions.

10. The company started commercial production of synthetic rubber in about May, 1963. It will be interesting at this stage to know the working of the company during all these years. In no year has the company declared any dividends. For the year ending December 31, 1963, the company's balance-sheet and profit and loss account showed a loss of Rs. 29,25,604 without providing for depreciation for that year amounting to Rs. 1,03,57,132. The previous years loss was Rs. 9,38,858 and after making certain adjustments on account of tax, the aggregate amount of loss for these two years came to Rs. 38,87,990 which was carried forward to the next year. During this period the commission paid to the private company under the agreement dated September 24, 1963, including reimbursement of expenses said to be incurred by the fifth defendant, prior to their appointment, was Rs. 1,71,291. For the year ending December 31, 1964, the company's balance-sheet and profit and loss account showed a profit of Rs. 16,49,410 without providing for any depreciation for that year amounting to Rs. 1,04,42,634. Thus the total arrears of depreciation for the years 1963-64 not provided for, aggregated to Rs. 2,10,03,222. This resulted in the balance of loss aggregating to Rs. 23,05,929 being carried forward. The selling agency commission paid to the private company in that year was Rs. 8,68,117. For the year ending December 31, 1965, the net loss was Rs. 19,34,186 after providing for depreciation for that year. For the year ending December 31, 1966, the company earned a profit of Rs. 1,00,64,823 which included a sum of Rs. 84,39,325 for claims recovered against insurance claims. After providing for depreciation for that year and for 1963 and adjusting the depreciation for the year 1965 and the loss carried forward, the total loss carried

forward was Rs. 43,86,461. For the year ending December 31, 1967 the company earned a net profit of Rs. 41,62,635. After providing for depreciation for that year and the previous year's loss carried forward, the total loss was about Rs. 2,23,826 carried forward to the next year, For the year ending December 31, 1968 the net loss suffered by the company after providing for depreciation for the years 1964 and 1968 was Rs. 26,52,335. For the years 1965, 1966, 1967 and 1968 the selling agency commission paid to the private company was Rs. 14,88,318, Rs. 16,86,971, Rs. 19,86,250 and Rs. 22,50,440, respectively. Thus, the total amount of commission paid to the company for the period of the said agreement dated September 24, 1963, aggregated to Rs. 84,63,849.

11. It appears that in 1965 some correspondence took place between the Company Law Board and the company. Ultimately, by its letter dated July 28, 1965, the Company Law Board intimated to the company that after careful consideration of the information furnished by the company it appeared to the Company Law Board that the terms of appointment of the company's sole selling agents were prejudicial to the interest of the company and the company was required to show cause why the Company Law Board should not, in exercise of the powers conferred upon it u/s 294(5)(c) of the Company Act, 1956, read with the Government of India, Ministry of Finance, Department of Revenue, Notification No. G.S.R. 178, dated February 1, 1964, vary the terms and conditions of appointment of the private company as sole selling agents. The variations proposed by the Company Law Board were to make the private company liable to pay to the company the amount of price and other amounts due from the buyers, whether actually collected from the buyers or not, within 60 days from the date of the sale and not when demanded as provided in the said agreement; that no commission should be payable to the private company in respect of sales made by the company to those consumers borne on the register of the Director-General, Technical Department, Government of India, who had been required by the Government of India to furnish confirmation letters that they would purchase indigenous synthetic rubber from the company to the extent allocated to them by Government, and that the commission on sales outside the agency territories should not exceed 2 1/2 per cent. on the net selling price. This show-cause notice from the Company Law Board was considered by the board of directors. The attitude adopted by those directors who represented the plaintiffs' viewpoint was that the sole selling agency should be terminated as it was working detrimentally to the interest of the company. The board of director also set up a sub-committee to consider the position brought about by the said show-cause notice. This sub-committee resolved that the secretary of the company should be authorised to send a suitable letter requesting for extension of time from the Company Law Board up to October 15, 1965, for submitting a representation. The plaintiffs, however, continued to insist that the sole selling agency should be terminated. I do not consider it necessary to set out the details relating thereto. Suffice it to say that an extension was

granted by the Company Law Board. It is not clear from the record whether any written representation was in fact submitted on behalf of the company, but from the letter of June 15, 1966, from the Company Law Board it appears that a personal hearing was given on May 26, 1966. By the said letter the company was informed that having regard to the circumstances of the case the Company Law Board had "decided not to take any further action in the matter u/s 294(5) of the Act at this stage". It was further stated in the said letter that :

"The Board would suggest, however, that at the time of the renewal of the agreement with the sole selling agents in 1968, your company should bear in mind the view of the Board which were communicated to you (that is, the company) in their letter of even number dated the 28th July, 1965, read with their letter of even number dated the 18th September, 1965".

12. The letter of September 18, 1965, merely corrects some typographical errors in the earlier letter of July 28, 1965.

13. By a letter dated April 4, 1968, the private company intimated to the company that the company had suffered a considerable increase in their expenses due to the high price of imported alcohol and that the company had made very strenuous efforts with the Government of India to be allowed an increase in the selling price in order to offset the increased cost, but the selling price fixed by the Government of India with effect from April 1, 1968, did not offset such increased cost. It was further stated in the said letter that, in the interest of the company and in order to tide over the difficult situation of the company and in the mutual interest of both the parties and as a matter of commercial expediency, the private company was prepared to continue to charge selling agency commission as from April 1, 1968, at the rate of 2 per cent. On the net selling price of the company's products as prevailing on November 5, 1967, exclusive of Government excise duty, sales tax or other like charges sold by or through the private company. The letter concluded by saying : "You will kindly appreciate that this is an ad hoc arrangement." By its letter dated August 31, 1968, the private company pointed out to the company that the sole selling agency agreement was valid up to September 30, 1968, and requested the company to renew the said agreement "on the same terms and conditions as stipulated in the earlier agreement" for a further period of five years, that is, from September 30, 1968, to September 30, 1973. This letter was placed before and considered by the board of directors of the company at its meeting held on November 14, 1968. At that meeting Warner was in the chair, the other directors present being Reighley, Tulsidas, Ramdas, S. L. Kirloskar, R. R. Ruia and Mr. B. K. Daphtary, a solicitor and partner in the firm of solicitors, Messrs. Daphtary, Ferreira and Diwan, who were and are the solicitors for the company as also the private company. I will hereinafter refer to Mr. B. K. Daphtary as "the solicitor-director". At the said meeting Rightly and Warner opposed the further appointment of the private company. Ultimately, the solicitor-director moved the following resolution which was seconded by the said Kirloskar :

"RESOLVED that Messrs. Kilachand Devchand and Co. Pvt. Ltd. be and are hereby appointed, but subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after today, the sole selling agents of the products of the company for a period of five years commencing on 1st October, 1968, upon the terms and conditions contained in the agreement dated 24th September, 1963, as clarified by the selling agents in their letter dated 4th April, 1968, and that the acts and deeds of Messrs. Kilachand Devchand and Co. Pvt. Ltd. done on or after the 1st October, 1968, be and the same are hereby ratified and confirmed and that for such services, they be paid commission as provided in the said agreement dated 24th September, 1963, clarified as aforesaid.

FURTHER RESOLVED that an agreement with Kilachand Devchand and Co. Pvt. Ltd., the selling agents of the company, be prepared on the same terms and conditions as are contained in the said agreement, dated 24th September, 1963, and that the seal of the company be affixed on the engrossment in token of execution by the company, in the presence of any two directors of the company and the secretary of the company, Mr. K. B. Dabke, who do sign the same but before such execution a clarification be endorsed or attached to such agreement duly signed by or on behalf of the selling agents in terms of their letter dated 4th April, 1968."

14. The solicitor-director, Kirloskar and Ruia voted in favour of the resolution, while Rightly and Warner voted against it. Tulsidas and Ramdas, being interested in the said resolution, abstained from voting. I may mention at this stage that all through there has been a dispute between the parties as to whether the minutes of the board of directors of the company have been correctly recorded. It is not necessary for the purpose of these motions to go into the details of this controversy. All that is necessary to set out is that at the meeting of the board of directors held on February 3, 1969, the minutes of the board meeting held on November 14, 1968 were confirmed and Rightly read out a statement on behalf of Warner and himself requesting that it should be made a part of the minutes. By his letter dated February 4, 1969, Rightly has reproduced the text of that memorandum. According to that memorandum, at the said meeting Warner and Rightly submitted that the resolution for further appointment of the private company was not a valid in as much as the vote of the solicitor-director could not be considered as at all material times he was and continued to be an interested director, being a solicitor for the private company and there were therefore two valid votes for and two valid notes against the resolution, the resolution was not carried. On February 18, 1969, an agreement was executed between the company and private company appointing the private company appointing the private company as the sole selling agents of the company for the aforesaid territories for a period of five years commencing from October 1, 1968. All the other terms of this agreement are the same as in the said agreement the other terms of this agreement are the same as in the said agreement dated September 24, 1963, except that there is a new clause in this agreement, namely, that the

appointment of the private company was subject to the condition that it should not be valid if it was not approved by the company in the first general meeting held after the date on which the appointment was made. To this agreement was attached a letter dated February 18, 1969, from the private company to the company recording that it had executed the said sole selling agency agreement and confirming that the clarification contained in the said letter dated April 4, 1968, from the private company to the company would continue to remain in force and that the letter of February 18, 1969, should be attached to and form part of the agreement. The contents of the said letter of April 4, 1968, were reproduced in the said letter of February 18, 1969. By his letter dated February 24, 1969, Warner called upon Tulsidas to amend the minutes of the said meeting of the board held on November 14, 1968, so as to provide that the aforesaid resolution was not carried. It appears that no reply was sent to the said letter.

15. Thereafter, by their letter dated March 17, 1969, addressed to the company and its directors, the plaintiffs required them to convene the extraordinary general meeting of the company for the purpose of passing the following resolution as an ordinary resolution, namely :

"RESOLVED that the appointment of Kilachand Devchand & Co. Private Ltd. as the sole selling agents of the company"s products for a period of five years commencing on 1st October, 1968, for the territories comprised within the Republic of India and Nepal, Bhutan and Sikkim made by the board of directors of the company by a resolution passed at their meeting on 14th November, 1968, be and the same is hereby not approved."

16. The plaintiffs also set out the statement which they desired to have included in the explanatory statement to be annexed to the notice convening the said meeting. This letter came up for the consideration of the board at its meeting held on March 21, 1969, when it was resolved that the matter should be placed for the consideration of the board at the next meeting thereof to be held on March 27, 1969. At the meeting of the board held on March 27, 1969, the following resolution was passed by a majority, Rightly and Warner voting against the same. That resolution is as follows :

"RESOLVED that pursuant to the provisions of section 294 and other applicable provisions of the companies Act, if any, the company hereby approve the appointment of M/s. Kilachand Devchand and Co. Private Ltd. as the sole selling agents of the products of the company for all the territories comprised within the republic of India, Nepal, Bhutan and Sikkim for a period of 5 years commencing on 1st October, 1968, upon the terms and conditions as to the remuneration and otherwise contained in the agreement, dated 18th February, 1969, as clarified by the selling agents in their letter, dated 18th February, 1969, annexed to the said agreement, which agreement with letter annexed is placed before the meeting."

17. Prior thereto, Rightly moved and Warner seconded the preposition that the meeting requisitioned by the plaintiffs should be called first. This proposition

failed and thereafter another resolution was passed by a majority, namely, that the extraordinary general meeting to be convened by the company should be held on April 28, 1969, at 4 P.M. at Patkar Hall of S.N.D.T. University and that the extraordinary general meeting requisitioned by the plaintiffs should be held on April 29, 1969, at 4 p.m. at the same place. It was also resolved that the secretary of the company should send out notices of the said meeting together with the explanatory statements in consultation with the solicitors of the company. In pursuance of these resolutions two notices, both dated March 27, 1969, were sent out to the shareholders, the one calling the extraordinary general meeting convened by the company and the other calling the extraordinary general meeting requisitioned by the plaintiffs. The convening of these two meetings resulted in a regular proxy-battle between the plaintiffs and the Kilachand group. A large number of proxies were lodged by both sides as also a large number of letters revoking the proxies given in favour of the other group. Circulars and statements to the shareholders in the form of advertisements in news-papers were issued by both sides. The meetings were held in a "Pandal" put up in the open space adjacent to the said Patkar Hall. At both the said meetings Tulsidas took the chair. According to the plaintiffs, there were protests and objections to Tulsidas presiding at the said meetings. It is admitted that there were such protests and objections so far as the first meeting was concerned. At both the said meetings a poll was demanded and it was ordered by Tulsidas as chairman of the said meetings to be taken immediately and accordingly a poll was so taken. In respect of the poll taken at both the said meetings, defendant Nos. 3 and 4 in suit No. 681 of 1969 were appointed as scrutineers. Both these defendants are chartered accountants. The third defendant is a partner in the firm of the chartered accountants who are the company's auditors, while the fourth defendant is a partner in Messrs. Ford, Rhodes, Parks and company, : chartered accountants, who are the auditors of the said Firestone Tyre and Rubber Company Of India Private Ltd. After the poll was undertaken at the meeting of April 28, 1969, Tulsidas announced that the result of the poll would be declared by May 26, 1969, by an announcement in newspapers. Similarly, after the poll was taken at the meeting held on April 29, 1969, Tulsidas announced that the result of the poll would be declared 15 days after the result of the poll taken at the meeting held on April 28, 1969. Thereafter, by an announcement in newspapers, the announcement of the result of the poll of the meeting of the 28th April was postponed to the end of June, 1969.

18. On June 3, 1969, the plaintiffs filed Suit No. 522 of 1969. In this suit the plaintiffs have challenged the validity of both the initial appointment of the private company as the sole selling agent of the company as also their appointment as such sole selling agents for a further term. The plaintiffs have also challenged the validity of the resolution of the board passed on November 14, 1968. They have further contended that a special resolution was necessary for approving the appointment of the private company and that as the meeting of

the 28th April was convened only for passing the resolution as an ordinary resolution, the private company had vacated their office as sole selling agents as from April 29, 1969. They have also prayed for a refund by the private company to the company of all amounts of commission received by it, and for an injunction restraining the company and the private company from either acting upon the said resolution of the board of November 14, 1968, or on the said agreement of February 18, 1969, and restraining the company from paying to the private company from receiving from the company any remuneration as and by way of sole selling agency commission or otherwise in the future. In Suit No. 522 of 1969, the plaintiffs took out a notice of motion on June 11, 1969, in which they have prayed for an interim injunction for restraining the company from making any payment to the private company by way of commission or otherwise under the said resolution of the board dated November 14, 1968, or the said agreement dated February 18, 1969, read with the said letter dated February 18, 1969, or from implementing in any matter or acting upon the said resolution or the said agreement. On June 30, 1969, the result of the poll of the meeting held on April 28, 1969, was announced in newspapers. According to the said announcement, the votes cast in favour of the resolution were 2,47,480 and the vote cast against the said resolution were 2,27,309. Accordingly, by the said announcement, Tulsidas as the chairman declared that the said resolution was carried.

19. Several important events took place between the date of the issue of the said notices convening the meetings and the aforesaid announcement. Correspondence also took place between the parties both before and after the announcement of the result. Some of these facts are disputed, but some and particularly those which are necessary for forming an opinion on the order to be made on these motions are admitted. I will deal with these facts in detail while considering the arguments advanced with respect to the validity of the result of the poll.

20. On July 16, 1969, the plaintiffs filed Suit No. 681 of 1969. In this suit they have challenged the validity of the said notices convening the meetings, the conduct of the said meetings, the manner in which the result of the poll taken at the meeting of the 28th April was arrived at and the result of such poll. In the said suit the plaintiffs have prayed for a declaration that the said meeting held on the 28th April and the declaration of the result of the poll taken thereat were illegal and void and that the said meeting was not properly held as required by law. In the alternative they have prayed that the court should give directions for scrutinising the votes, proxies and letters of revocations in respect of the said two extraordinary general meetings and should appoint a fit and proper person to scrutinise them and to determine and decide the result of the said meetings and should remove Tulsidas and Defendants Nos. 3 and 4 as the chairman and scrutinisers respectively of the said meeting of the 29th April. In the said Suit No. 681 of 1969 the plaintiffs took out a notice of motion on July 17, 1969. In the said motion they have prayed for an interim order and injunction restraining

Tulsidas and the scrutinisers from exercising any power as chairman or scrutinisers of the said general meeting of the 29th April in connection with the scrutiny of proxies, letters of revocations or votes cast thereat, as also for restraining the company, Tulsidas and the private company from in any manner implementing or acting upon the footing that the resolution proposed at the said meeting of the 28th April was passed, and restraining the company from making any payment to the private company and the private company from receiving from the company any payment, whether by way of commission or otherwise, under the said resolution of the board of directors passed on November 14, 1968, or under the said agreement of February 18, 1969, read together with the said letter dated February 18, 1969, and restraining the company, Tulsidas, the private company and the scrutinisers from disposing of or otherwise dealing with the papers and documents in connection with the polls taken at the said two extraordinary general meetings including certain documents specified in exhibit "z-9" to the plaint, and for an order permitting the plaintiffs to inspect the said papers and documents. Before issuing the said notice of motion the plaintiffs, after giving notice to the defendants in the said suit, made an application to me on July 16, 1969, for ad interim reliefs, and after hearing counsel on behalf of the parties, I issued an ad interim injunction restraining the defendants to the said suit, namely, the company, Tulsidas, the scrutinisers and the private company, and each of them and their servants and agents from disposing of or in any manner dealing with the papers and documents in connection with the polls taken at the said two extraordinary general meetings including those mentioned in exhibit "Z-9" to the plaint or from opening the packets in which the papers may have been kept.

21. Though a large number of grounds have been taken in both these suits at the hearing of these notices of motion Mr. Nariman, learned counsel for the plaintiffs, has confined himself to arguing certain points only. This he has done only for the purposes of these motions and without in any manner giving up the right to argue the said points at the hearing of the suits; for instance, though in the said Suit No. 522 of 1969 the validity of the initial appointment of the private company as sole selling agents of the company made in September, 1963, has been challenged, Mr. Nariman for the purposes of these notices of motion did not argue this point at the hearing of these motions. I may also mention that all parties before me are agreed and further applied to me that it would be in the interest of the parties if the hearing of both these suits were expedited, a view which I too am inclined to take. It was also not disputed by any of the defendants that an interim injunction may be granted restraining Tulsidas and the scrutinisers in terms of prayer (a) of the said notice of motion in Suit No. 681 of 1969, namely, restraining Tulsidas and the scrutinisers from proceeding further with exercising any power as chairman or scrutinisers at the said extraordinary general meeting of the company held on April 29, 1969, in connection with the scrutiny or examination of the proxies, revocations of votes cast thereat in connection with the declaration of the result or the result of the

poll taken thereat. The reason for this is obvious. Either the company had validly approved the further appointment of the private company at the meeting held on April 28, 1969, and the resolution moved thereat was duly passed, assuming an ordinary resolution only was required, or it had not. In either event, the passing or rejecting of the resolution moved at the requisitioned meeting held on April 29, 1969, would be immaterial. If the further appointment was approved at the meeting of the 28th April its disapproval at the meeting of the 29th April would not have any effect. If the said further appointment was not approved at the meeting of the 28th April, its express disapproval at the meeting of the 29th April would be redundant. The parties are also agreed that the papers and documents in connection with the polls taken at the said two meetings should be kept in safe custody and that the parties should be permitted forthwith to take inspection thereof under proper safeguards without waiting for formal discovery, so that the hearing of the suits and particularly of Suit No. 681 of 1969 may be expedited. Though at one stage the parties agreed as to the person who should have the custody of these papers and documents and give inspection thereof, as the parties could not agree upon the form of the consent order in that behalf, no order by consent can, however, be passed with respect thereto.

22. I will now deal with the various points argued at the hearing of these notices of motion in the order in which they arise. Chronologically, therefore, I will first take up plaintiffs' objections to the said resolution passed at the meeting of the board of directors of the company held on November 14, 1968. The contentions in that behalf are taken in Suit No 522 of 1969. It is contended that the solicitor-director was prohibited by section 300 of the Companies Act, 1956, from taking any part in the discussion of or vote on, the said appointment for a further term of the private company and that, since he took part in the discussion and voted, his vote is void and therefore as there were two votes in favour of the proposition that the private company should be appointed for a further term and two votes against the said proposition, the resolution was not duly passed. On behalf of the contesting defendants, namely, the company, Tulsidas and the private company, it is contended that the solicitor-director had no such concern or interest in the matter of the further appointment of the private company as sole selling agents as required by section 300 of the Companies Act, 1956, and that assuming he had any such interest or concern, the plaintiffs all throughout knew about the same and did not raise any objection to the solicitor-director taking part in the discussion or voting at the said meeting of the board held on November 14, 1968, and the plaintiffs are, therefore, estopped from taking up this contention. The relevant provisions of law are to be found in sub-section (1) and (4) of section 299 and sub-section (1), (3) and (4) of section 300 of the Companies Act, 1956. These provisions are as follows :

"299. Disclosure of interests by director. - (1) Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company, shall disclose the nature of his

concern or interest at a meeting of the board of directors ...

(4) Every director who fails to comply with sub-section (1) or (2) shall be punishable with fine which may extend to five thousand rupees."

"300. Interested director not to participate or vote in board's proceedings. -(1) No director of a company shall, as a director, take any part in the discussion of, or vote on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company, if he is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement; nor shall his presence count for the purpose of forming a quorum at the time of any such discussion or vote; and if he does vote, his vote shall be void ...

(3) In the case of a public company or a private company which is a subsidiary of a public company, if the Central Government is of opinion that having regard to the desirability of establishing or promoting any industry, business or trade, it would not be in the public interest to apply all or any of the prohibitions contained in sub-section (1) to the company, the Central Government may, by notification in the official gazette, direct that the sub-section shall not apply to such company, or shall apply thereto subject to such exceptions, modifications and conditions as may be specified in the notification.

(4) Every director who knowingly contravenes the provisions of this section shall be punishable with fine which may extend to five thousand rupees."

23. Sections 299 and 300 reproduce the provision of section 91A and 91B of the Indian Companies Act, 1913, with certain changes. I have indicated by means of underlining the material difference between the old sections and the new sections. The material provision of section 91A and 91B of the old Companies Act were as follows :-

"91A. Disclosure of interest by director. - (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement ...

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees."

"91B. Prohibition of voting by interest director. - (1) No director shall as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote his vote shall not be counted

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees."

24. In addition to the penal consequences provided for by section 299(4), a director who acts in contravention of section 299 vacates his office as such director u/s 283(1)(i) of the Companies Act 1956. It may be mentioned that article 184B(1) of the articles of the company reproduces the provisions of section 300(1).

25. The facts which are said to make the solicitor-director an interest director within the meaning of section 300 may now be stated. These facts are all admitted by the defendants. The solicitor-director is a partner in the firm of solicitors, Messrs. Daphtary, Ferreira and Diwan. He and his firm have for several years been acting as general solicitors for the Kilachand family and in particular for Tulsidas and Ramdas and for all Kilachand concerns. They were and are solicitor for the said Kesar Corporation Private Ltd., which is the holding company of the private company, the solicitor-director being himself a subscriber to the memorandum and articles of association of the said Kesar Corporation Private Ltd. and at one time a shareholder thereof. They are also solicitors for the company and the private company right from the respective dates of their respective incorporation and the solicitor-director is a subscriber to the memorandum and articles of association of the company along with Tulsidas, Ramdas, their brother, Ambalal, Suresh, the son of Tulsidas, and Rajnikant the son of Ambalal. At the time of the incorporation of the private company on or about January 6, 1960, another partner of the firm of Messrs Daphtary, Ferreira and Diwan filed with the Registrar of companies, Bombay, a declaration of compliance with the provisions of the Indian Companies Act, 1913. Further, the solicitor-director has been a director of Track Private Ltd. since 1951 and holds more than 20 per cent. of the shares in Track Private Ltd. The said Track Private Ltd. has its registered office at the same address as the registered office of the company and the private company. The said Track Private Ltd. is the company owned and controlled by the Kilachand group in which Tulsidas, his three brother and his son, Suresh, Ambalal's son the said Rajnikant, and Tonil, the son of Ramdas, are shareholders, the word "Track" being a coined word representing the first letters in the personal names of Tulsidas, Ramdas, Ambalal,, Chinubhai and the family name, Kilachand. The solicitor-director is also a director and shareholders of Polychem Ltd. in which the Kilachand brother and their relatives hold considerable financial interest. The sole selling agents of the said Polychem Ltd. are Indian Commercial Company Private Ltd. of which almost all except two shares are held by the Kilachand family and the said Kesar Corporation Private Ltd. The solicitor-director was also a subscriber to the memorandum and articles of association of the said Indian Commercial Company Private Ltd. and the said firm of Messrs. Daphtary, Ferreira and Diwan have been and are the solicitors of the said company. The legal work of the Kilachand family and the Kilachand concerns and companies is personally attended to by the solicitor-director, including their tax matters and contentious and non-contentious matters. The

proxies for the meetings of the 28th and the 29th April which Tulsidas obtained were in favour of Tulsidas or failing him the solicitor-director or failing the solicitor-director the said Ruia or failing the said Ruia the said Kirloskar. Along with the said Ruia and the said Kirloskar the solicitor-director issued to the shareholders of the company a printed circular asking them to vote in favour of the resolutions to be moved at the said extraordinary general meeting of the 28th April. It is contended by the plaintiffs that the said firms of Messrs. Daphtary, Ferreira and Diwan and the solicitor-director as a partner in that firm have earned and are earning large sums of money as solicitors from the Kilachand family and the Kilachand concerns and companies and that as a result of his long association with the Kilachand family the solicitor-director is a family solicitor and also a close friend and a person in the confidence of the Kilachand family. It is, accordingly, submitted by the plaintiffs that the solicitor director was concerned or interested, if not directly, at least indirectly, in the further appointment of the private company and that by reason of his long association and professional relationship and close friendship with the Kilachand family and particularly with Tulsidas, he was interested in safeguarding and promoting the interests of the Kilachand family and the Kilachand concerns and, naturally, therefore, was interested and concerned in seeing that the highly remunerative sole selling agency was granted to the private company for a further maximum period of five years. It is further submitted that there was thus as conflict between his interest in the Kilachand family and Tulsidas and the private company and his duty as a director of the company.

26. Section 300 of the Companies Act, 1956, embodies, just as section 91B of the Indian Companies Act, 1913, did, the general rule of equity (see *Pratt (T.R.) (Bombay) Ltd., v. M.T. Ltd.* The clearest exposition of this rule is to be found in *Aberdeen Rly. Co. v. Blaikie*. In that case, Lord Cranworth said :

"A corporate body can only act by agents and it is course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principle. And it is a rule of universal application, that on one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person, - they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted."

27. Though this was a case from Scotland, the rule of English law is the same, for, as observed by Swinfen Eady. L.J., in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*, the doctrine rests on such obvious principles of good sense that it is difficult to suppose that there could be any system of law in which it would not be found, In *Transvaal Land Company*'s case it was held at page 503 that :

"Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards, and owes a duty to, another company which is proposing to enter into engagements with the company of which he is a director, he is in out opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others."

28. This rule was characterised by Lord Cairns L.C. in *Parker v. McKenna* as not a technical or arbitrary rule but a rule founded upon the highest and truest principle of morality. Thus, this rule applies not only where there is a conflict of interest or conflict of interest and duty but also where there is a conflict to two duties. It is immaterial whether the interest is a personal interest or arises out of a fiduciary capacity or whether the duty which is owed is in a fiduciary capacity. Actual conflict is also not necessary. A possibility of conflict is enough to bring the case within the ambit of this rule nor does the application of this rule depend upon the extent of the adverse interest. Directors stand towards the company in a fiduciary position In India this fiduciary character has received statutory recognition in section 88 of the Indian Trusts Act, 1882. The reason underlying this rule is that the company has a right to the unbiased voice, advice and collective wisdom of its directors. (See *Benson v. Heathorn*; *Imperial Mercantile Credit Association v. Coleman and Victor Ltd. v. Lingard*).

29. The section itself makes it clear that the interest or concern need not be direct. It may be indirect, Further, the words used in the section are "concerned or interested". The phrase "concerned in the contract" has been the subject-matter of judicial interpretation in England. In *Nutton v. Wilson*, the Court of Appeal had to consider rule 64 of Schedule II to the Public Health Act, 1875, under which a member of a local board who "in any manner" was "concerned in any bargain or contract" entered into by such board ceased (except in certain cases) to be such member and his office was thereupon to become vacant. By rule 70 of the said Schedule a penalty was imposed upon a person who acted as such member when disabled from acting by any provision of the Act. The defendant, a member of a local board, was employed by person with whom the board had contracted for the performance of certain works on the premises of the board, to do the portion of the work so contracted. The trial court held against the defendant and an appeal against the said decision was dismissed. In the Court of Appeal Lindley L.J. Observed at page 748 :

"There does not seem to be any question here of participating in the profits of a

contract; but the question is whether the defendant can be said to have been concerned in any bargain or contract entered into by the board. The expression "In any manner concerned" is a somewhat lax one. Cases may be put in which a person might perhaps be said in one sense to be concerned in a contract entered into by the board and yet it might be tolerably obvious that he was not "concerned in the contract in the sense in which the Act uses the words. To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

30. In *Barnacle v. Clark* the respondent was a member of a school board. He sold sand and gravel to a builder who had entered into a contract with the board for the building of a school. At the time of the sale the respondent was aware that the sand and gravel were intended to be used, as they were in fact used, in the building of the school. The respondent was prosecuted u/s 34 of the Elementary Education Act, 1870, under which a member of a school board who, inter alia, "shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board" was liable to a penalty and his office became vacant. The justices for the county of Northampton holding that the respondent was not guilty of any offence dismissed the information. Upon a case being stated to the court it was held that the respondent was guilty. *Ridley J.* referred to *Nutton v. Wilson* and observed that, though that was not a precise authority in favour of the appellants contention, it showed the lines upon which similar statutory enactments had been construed. The court came to the conclusion that, having regard to the object of the Act, it should be carefully and strictly construed and, although the respondent had unwittingly offended against the provisions of the section and although there was no suggestion that what he did was done with a corrupt purpose or from a corrupt motive and although no blame attached to him, he ought to have been convicted. The test laid down in *Nutton v. Wilson* was accepted by the Court of Appeal in *England v. Inglis* and followed by *Astbury J.* in *Holden v. Southwark Corporation*. The word "interest" occurring in section 12(1) of the Municipal Corporations Act, 1882, of England, came up for consideration of the Court of Appeal in *England v. Inglis*. In that case, the defendant, who was a member of a municipal corporation, carried on business as a jeweller and optician. The optical department was managed by his son who was not a partner but was a paid employee. A contract was made between the son in his own name and the municipal corporation for the supply of spectacles to the children of the schools controlled by the corporation's education committee. The contract was carried out by the son, the spectacles were paid for by him with his own cheque and he received moneys in his own name from the corporation and paid the amounts so received into his own banking account. The spectacles were supplied in cases bearing the son's name but the defendant's business address, some of the cases being taken at the expense of the defendant out of his stock, but the shop

was provided and the establishment expenses paid by the defendant and the fact that the spectacle cases bore the defendant's address helped to advertise his business with the consequent probability of increasing his custom. Salter J. held that "interest" in a contract within the meaning of section 12(1) of the Municipal Corporations Act, 1882, must be something more than a sentimental interest, such as arises from the natural love and affection of a man for his son; it must be a pecuniary or, at least, a material interest; but it need not be a pecuniary advantage. On the facts of the case the Court of Appeal held that the defendant had a pecuniary interest of an adverse kind in the contract and that it could properly be held that the defendant had a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, from the contract, for in any event this help to advertise his business. In *K. F. Nariman v. Municipal Corporation of Bombay*, Mulla J. had to construe clause (p) of section 36 of the City of Bombay Municipal Act, 1988, as that Act was then entitled. That clause provided :

"A Councillor shall not vote or take part in the discussion of any matter before a meeting in which he has, directly or indirectly, by himself or by his partner, any share or interest such as is described in clauses (g) to (1) both inclusive of section 16, or in which he is professionally interested on behalf of a client, principal or other partner."

31. After referring to *England v. Inglis*, Mulla J. said that it therefore followed that, where there is a pecuniary advantage, or a reasonable expectation of pecuniary advantage, it must be regarded as an "interest" within the meaning of that section. If the interest in a contract was pecuniary, it was immaterial that the amount involved was trifling. If the interest was not pecuniary, it must at least be a material interest. Mulla J. also referred with approval to the test laid down in *Nutton v. Wilson* and accepted in later cases mentioned above.

32. In the present case the solicitor-director held, vis-a-vis the company, a dual fiduciary character. He was both a director of the company as also the solicitor for the company. He was also the solicitor for the private company, for the Kilachand family and all the Kilachand concerns and companies. The position of a solicitor who acts for two clients came up for consideration before the Court of Appeal in *Moody v. Cox and Hatt*. In that case the plaintiff had contracted to purchases from Hatt, who was a solicitor, and Cox, his managing clerk, who were trustees, a portion of their trust property. Throughout the transaction Hatt acted through Cox as solicitor both for vendors and purchaser. Cox failed to disclose to the plaintiff certain valuations previously obtained showing that the property was not worth the price with the plaintiff agreed to pay. The plaintiff knew that the vendors were trustees. In the course of the negotiations the plaintiff offered and Cox accepted a bribe. Thereafter the plaintiff filed an action for rescission of the contract. The defendants counter-claimed for specific performance. Younger J., in the trial court, held that the plaintiff was entitled to succeed on the ground that Hatt had failed to fulfil his obligation as solicitor for the plaintiff to disclose to him all material facts in his knowledge relating to the matter. As to the giving of the

bribes, he held that the defendant Hatt, by affirming the contract, which he might have repudiated had removed the blot upon it placed the parties in the position in which they would have been if no bribes had been given and the plaintiff was not, therefore, deprived of his equitable right to rescission. The defendants filed an appeal which was dismissed. In the Court of Appeal Scrutton L.J, said :

"Two question will arise in cases of solicitor and client - first, as to the relation which will create this obligation, and, secondly, as to the nature of the obligation created. Where the relation of solicitor and client occurs in the very transaction attacked it will, in my view, be almost, if not quite impossible to avoid the obligation, and an independent solicitor, should be employed by the client. It is called "putting him at arm's length". It might perhaps also be effected by a clear declaration of the position by the vendor, such as this : "Mind, I am going to get the highest price I can; be on your guard; but the position would have to be made very clear in order to relieve the solicitor of obligations far exceeding those of an ordinary vendor and is a position to be avoided. More difficult questions arise when the employment as solicitor has been in other matters more or less numerous or recent, and the transaction in question is a separate transaction in which the solicitor does not act as such. It is a question of degree in every case The relation may then be an actual relation of solicitor and client in the transaction impugned, or such an antecedent relation as given rise to the influence by the solicitor and confidence by the client the effect of which has not ceased at the time of the transaction impugned But it is said that he could not disclose that information consistently with his duty to his other clients, the casuist que trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

33. Lord Cozens-Hardy M.R. described the defendants' case as almost unarguable. He said at page 81 :

"A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say

to the client."I have not discharged that which the law says is my duty towards you my client because I owe a duty to the beneficiaries on the other side". The answer is that if a solicitor involves himself in that dilemma it is his own fault."

34. The principles laid down in *Moody v. Cox and Hatt* were followed in *Goody v. Baring*.

35. On behalf of the contesting defendants it was submitted that section 299 and 300 provide for penal consequences and that not only there was a liability to be prosecuted under these sections and fined, but u/s 283(1)(i) a director who acted in contravention of section 299 vacated his office and these sections should, therefore, receive a strict construction. It was further submitted that the Companies Act was a complete code and no disqualification would be imported into section 299 and 300 unless such disqualification could be found in the section themselves and the scope of the section cannot be enlarged on any equitable principles which may have applied prior to the enactment of the sections, It was further submitted that an interest in the contract or arrangement which the sections require must be a pecuniary or a material interest. It must relate to the contract or arrangement itself and must be such as creates a conflict between the interest of the director concerned as a director of the company and his own interest in the contract and not any one else"s. Before considering these arguments I may mention that in the present case assuming the solicitor-director has concern or an interest in the appointment for a further term of the private company, he had not at any time made a disclosure thereof u/ s 299.

36. In my opinion, it is not strictly correct to say that section 300 is a disqualifying section. It is a prohibitory section. What section 300 does is to prohibit a director of a company holding a particular character from doing certain acts, namely, from taking any part in the discussion of, or voting on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company, if he is, in any way, whether directly or indirectly, concerned or interested in the contract or arrangement. After prescribing these prohibitions the section lays down the consequences of infringing them. That section 300(1) contains prohibitions is also made clear by sub-section (3) of section 300 which confers upon the Central Government the power in certain circumstances where it is of the opinion that "it would not be in the public interest to apply all or any of the prohibitions contained in sub-section (1) to a company", to direct that that sub-section shall not apply to such company or will apply with such exceptions modifications and conditions as may be specified. It may also be pointed out that the criminal liability imposed both by sections 299 and 300 is not an absolute one. It is only in respect of a director who knowingly contravenes the provisions of these section Thus, knowledge is the gist of the offence under both these sections. It is true that the sections must be strictly construed but not in favour of the director as contended. They must be construed as pointed out by Lindley L.J. in *Nutton v. Wilson*, looking at the object to be attained by the enactment of

the sections. Both under the Companies Act as in the statutes which were considered in *Nutton v. Wilson*, *Barnacle v. Clark* and *England v. Inglis* the object intended to be attained by the enactment of such prohibitions was to prevent the conflict between interest and duty which might otherwise inevitably arise. In enacting section 299 and 300, the legislature wisely did not attempt to define "concern" or "interest". Since these section were enacted in the interest of the shareholders, so that they may have the benefit of the independent, unbiased and collective judgment, opinion and wisdom of their board or director, the words used in the section have been purposely used in as general a sense as possible. To have laid down any confining limits to the operation of these section may have resulted in defeating the very object for which these sections were enacted. As pointed out by the Privy Council in *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd.* and by the Supreme Court in *Narayandas Sreeram Somani v. Sangli Bank Ltd.* with reference to the old section 91A and 91B, the section contain concise statement of the general rule of equity fully considered and accepted by the Court of Appeal in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*. As pointed out by Upjohn L.J., while sitting in the court of Appeal in *Bolting v. Associations of cinematograph Television and Allied Technicians* :

"The principle is one of the most firmly established in our law of equity and it has been repeatedly recognised and applied by the Lord Chancellors and by the House of Lords The rule is not directed at corrupt or fraudulent bargains (though, of course, it brings them within its umbrella). The rule is one of principle which depends not at all on any corrupt mens rea in the mind of the person holding the conflicting capacity This rule extends to all manner of relationships and the reports are full of examples of its application to may different circumstances. Like all rules of equity, it is flexible in the sense that it develops to meet the changing situations and conditions of the time"

37. The section must, therefore, be construed bearing in my mind the old long established rule of equity which they enact and having regard to the object intended to be attained.

38. In support of the other submissions of the contesting defendants Mr. Sen, learned counsel for the company placed reliance upon *K. F. Nariman v. Municipal Corporation of Bombay*. Now, in order to understand what precisely was laid down by Mulla J. in that case, it is necessary to look somewhat more closely at the facts of that case and the points which there arose for the court's decision, At a meeting of the Bombay Municipal Corporation a proposition was moved that the report "regarding the revisions of the present scale of tramway fares be approved and adopted". To the above proposition an amendment was moved that the further consideration of the report be adjourned till a particular date when a new corporation would have been formed. On a poll being taken there were equal number of votes in favour of and against the amendment, and the chairman exercised his additional or casting vote against the amendment and declared that the amendment was lost. The plaintiff's allegations was that 6 out

of the 17 councillors who had voted against the amendment were disqualified from voting having regard to the provisions of clause (p) of section 36 of the City of Bombay Municipal Act, 1888, now entitled the Bombay Municipal Corporations Act, 1888. While denying this the defendants contended that two councillors who voted for the amendment were disqualified from voting. Under clause (P) a councillor is prohibited from voting or taking part in the discussion of any matter before a meeting in which he has, directly or indirectly, by himself or by his partner, any share or interest such as is described in clause (g) to (1), both inclusive, of section 16, or in which he has a professional interest on behalf of a client, principal or other person. Now, it is obvious that clause (p) is in terms materially different from section 300(1). Under clause (p) the share or interest must be such as is described in clauses (g) to (1) of section 16. Further, the matter before the meeting must be one in which his interest on another person is a professional interest. The concern or interest described in section 300(1) is not subject to any such restriction, In that case with respect of certain councillors it was alleged that they were share-holders of the Bombay Electric Supply and Tramways Company Ltd. which owned and conducted tramways in the city of Bombay. Mulla J. held that if a councillor was also a shareholder of the said company and had a beneficial interest in the shares, he was disqualified from voting. He, however, held that where the share stood in the name of a councillor who had no beneficial interest in them but was a mere trustee for another, he was not disqualified from voting, because though he was under an obligation to his cestui que trust to vote at meeting of the said company in manner beneficial to the interest of the beneficiaries, as he did not owe the membership of the corporation to his being a shareholder of the said company, it was no part of his duty to vote at any meeting of the corporation as his beneficiary would have him to do. If, therefore, no such duty was imposed upon him by law, it could not be said to be a case of conflict between two duties or between interest and duty, his duty or his interest in the beneficiary being no higher than what a father has in the property of his son. While considering how far this decision applies it should be borne in mind that in the course of his judgment Mulla J. cited with approval and without qualification *Nutton v. Wilson* and *England v. Inglis* and the other English authorities referred to above. In *Nutton v. Wilson* the word "concerned" was given a very wide meaning. Mulla J. pointed out that, though in most of those case the question before the court was whether a councillor had an interest in contracts with the local board, while the question in the case before him was whether the said councillors had a share or interest in the said company, the principle laid down in those cases afforded a fairly good guide to the determination of the points before him. Mulla J. was, however, dealing only with the case of a "share or interest" u/s 36(p) of the City of Bombay Municipal Act and not of a "concern" in the matter in question. The share or interest which clause (p) describes is the interest of a councillor by himself or by him partner only, or a professional interest. But the more important point of distinction is that the decision in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company* was not cited before Mulla J. This is important because in

Transvaal Lands Company's case fiduciary capacity was expressly held to be such an interest as would give rise to a conflict. The Privy Council in *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd* and the Supreme Court in *Narayandas Sreeram Somani v. Sangli Bank Ltd.* unequivocally approved and accepted the principles laid down in Transvaal Lands Company's case and pointed out that section 91B of the 1913 Act (corresponding to the present section 300) contained a concise statement of the general rule of equity explained in that case. *K. F. Nariman's* case was, of course decided before the Privy Council and the Supreme Court decisions. The point, however, is now concluded by this pronouncement of the highest courts. It should also be noted that section 300(1) does not merely use the word "interest" but speaks both of "concern" or "interest" whether direct or indirect and in this connection reference may again be made to the observations of Lindley L.J. in *Nutton v. Wilson*, of Darling J., in *Barnacle v. Clark* and of Romer J., in *Victors Ltd. v. Lingered* referred to above.

39. It was next submitted that the interest of the solicitor-director in the private company was at the highest a sentimental interest as, for example, that of a father in his son or of a man in a relative of his and that he was under no legal duty to protect or advance the interest of the private company and cannot therefore amount to an "interest" u/s 300 and in support of this, reliance was placed upon the judgment of a learned single judge of the Rajasthan High Court in *Ramji Lal Baisiwala v. Baiton Cables Ltd.* In that case it was held that concern or interest in a contract did not include the concern or interest of a relative. Of course, there is no question of the solicitor-director being a relative of any of the Kilachands, but what was said was that, if a man has no higher than a sentimental interest in the welfare of his relative, he cannot have a higher interest in the welfare of his friend and accordingly the friendship between the solicitor-director and Tulsidas and the other members of Tulsidas' family cannot constitute an interest. Two Division Bench judgments of this High Court have, however, taken a different view with respect to interest arising out of relationship. In Special Civil Application No. 1907 of 1955, decided by Chagla C.J. and Dixit J., on December 7, 1955, it was held :

"In our opinion, the interest here is not the interest which a man may have in the prosperity of his friend. There the interest is clearly sentimental or emotional. When you have a person living jointly with his father, it seems to be in arguable that the son's interest in the prosperity of his father is purely sentimental or emotional. If the father earns more, he had more to spend on the family. His prosperity must affect the position of the son and the interest that the son has in the prosperity of his father is clearly a material or a substantial interest."

40. This case was followed in *Dattatraya Awadaji Shinde v. S. V. Bhave*, by the Division Bench consisting of Dixit and Badkas JJ. Both these were case under the Bombay Provincial Municipal Corporation Act, 1949, and in *Dattatraya Awadaji Shinde v. Bhave* the Division Bench pointed out that unless cases of conflict between interest and duty arising out of the relationship of husband and wife or

father and children were avoided purity in municipal administration would be impossible to achieve. Further, the argument of the contesting defendants overlooks the fact that the plaintiff's case is not based merely upon the friendly relations between the solicitor-director and the Kilachands. It is based upon the fiduciary character which the solicitor-director holds, vis-a-vis, Tulsidas, the Kilachand family and the Kilachand concerns and companies, by reason of the fact that his firm and he on behalf of his firm have for all this long period of years been their general solicitor and that his confidential relationship has deepened by reason of the close personal relationship which has sprung up between them.

41. It was next submitted that there was nothing to show that the solicitor-director or his firm would be acting as solicitor for the private company in the matter of its appointment as sole selling agents for a further period, and in this connection reliance was placed upon *Mohan Lal v. Grain Chambers Ltd.*, which was affirmed in appeal by the Supreme Court in *Seth Mohan Lal v. Grain Chambers Ltd.* In that case the board of director of the Grain Chambers Ltd. an association of grain merchants, passed a resolution containing the terms upon which an entry of transactions in further in gur were to be effected. This resolution was passed in pursuance of the general policy of the company carrying on its business and functions. It provided how further transactions in gur were to take place. The question whether directors of that company were interested within the meaning of the old section 91B arose for consideration of the court in petitions filed for winding up of that company. It was held that the word "arrangement" in section 91B did not cover a general scheme of the type under which at the time when the scheme was approved by the board of directors, no rights or liabilities accrued or were incurred by the members of the company, the directors or the company itself; the word "arrangement" as used in the section being intended to cover such transactions in which a director at once becomes interested, so that the either acquires some rights or incurs some liabilities as a result of it. On appeal to the Supreme Court it was held that by passing that resolution, all that was resolved at the directors' meeting was that the company should commence business in future in gur according to the rules set forth in the resolution and, therefore, the directors were not voting on a contract or arrangement in which they were directly or indirectly concerned or interested. Now, I do not see what application this case has to the facts before me. That was a case of an association framing rules for the further transaction of its won business. That case is wholly distinguishable on facts. What is apposite in this connection are the following observations of Scrutton L.J. in *Moody v. Cox and Hatt* :

"The relation may then be an actual relation of solicitor and client in the transaction impugned or such an antecedent relation as gives rise to the influence by the solicitor and confidence by the client the effect of which has not ceased at the time of the transaction impugned."

42. *Moody v. Cox and Halt* was sought to be distinguished on the ground that its

ratio applied only to the case of a solicitor acting as common solicitor for both vendor and purchaser and had no application to other transactions. In my opinion, this is not a correct reading of that authority. *Moody v. Cox and Hatt* was decided as much on the general principle of equity already sufficiently referred to above in the other cases. One must bear in mind, as Upjohn L.J. pointed out in *Bolting v. Association of Cinematograph, Television and allied Technicians* that this rule of equity is a flexible one and it develops to meet the changing situations and conditions of the time. What is important and should never be lost sight of are the words of Lord Cairns L.C. in *Parkar v. Mckenna* that "this is a rule founded upon the highest and true principles of morality". If so heavy and onerous a duty lies upon a solicitor who acts as common solicitor in just one transaction, it would be absurd to say that the duty of that solicitor would be less or would be non-existent where that solicitor has been for a long period of time the general solicitor of one of the parties in all matters.

43. It must again be emphasised that section 300(1) refers not only to an "interest" but also to a "concern". Here reference may usefully be made to *Batts Combe Quarry Ltd. v. Ford* relied upon by Mr. Nariman, learned counsel for the plaintiffs. In that case the vendors of the Batts Combe Quarry covenanted with the purchasers "that they would not within ten years either solely or jointly with or as agent, officer, manager, servant, director or shareholder of any other person or company, directly or indirectly, carry on or assist in carrying on or be engaged, concerned, interested or employed in the business of a quarry within 75 miles as the crow flies of Batts Combe Quarry". One of the vendors within ten years provided a sum of money to enable his three sons to purchase the Chelms Comb Quarry in the immediate neighbourhood of the Batts Combe Quarry and for working capital. He also took part on his sons' behalf in preliminary negotiations for the purchase of machinery and equipment for the Chelms Combe Quarry. He was not a partner in the sons' business nor in any way financially interested in it and he took no part in its management. The Appeal Court held that the father had committed a breach of the covenant. Lord Greene M.R. said :

"Quite apart, however, from the words "assist in carrying on" there are other words here which appear to me to cover this case. In my view, in doing what he did, the father was "concerned in" the sons' business. The word "concerned" is of quite general import. Clearly it cannot be limited to "concerned" in the sense of financial interest or of being an employee of the business. Again, I can see no more effective way of being concerned in a business than by providing the capital necessary to establish it, and the word "concerned" seems also to cover the assistance given by the father in the course of negotiations."

44. In the light of these authorities I am at this stage inclined to take the prima facie view that the solicitor director was directly, and if not so, at least indirectly, concerned or interested in the contract of appointment of the private company for a further term as the sole selling agents of the company and, therefore, the vote cast by him was void and there being no majority in favour of the

resolution, no valid resolution was passed at the meeting of the board held on November 14, 1968.

45. It was, however, submitted on behalf of the contesting defendants that the plaintiffs are estopped from contending that the solicitor director was an interested or a concerned director. In this connection, the contesting-defendants have relied upon various statements made by the plaintiffs in the plaint in Suit No. 522 of 1969 to show that the plaintiffs and Warner and Rightly were aware that the solicitor director was solicitor for the private company. They have further placed reliance upon statements made in the correspondence by the plaintiffs, to show that Warner and Rightly represented the interest of the plaintiffs on the board of directors of the company. It was, therefore, contended that the knowledge of Warner and Rightly must be taken to be the knowledge of the plaintiffs and the presence of Warner and Rightly at the meeting of the board held on November 14, 1968, must be taken to be for and on behalf of the plaintiffs and that Warner and Rightly not having protested at the said meeting against the solicitor-director taking part in the discussion or voting, the plaintiffs must equally be taken as having acquiesced therein. Now, it cannot be denied that there are statements in the plaint and on the record as stated by the contesting defendants. The effect of these statements now falls to be considered. On behalf of the contesting defendants reliance was placed on *T. R. Pratt (Bombay) Ltd., v. M. T. Ltd.*, *Narayandas Sreeram Somani v. Sangli Bank Ltd.* and *Ramji Lal Baisiwala v. Baiton Cables Ltd.* In *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd.* it was held that the old section 91B did not operate to deprive of the benefit of his contract with the company a third party who had no notice of the defect in the directors' authority, for to so hold would be contrary to principle and, therefore, such a person was entitled to assume that the internal management of the company had been properly conducted. The question before the Judicial Committee was the interest of directors in the execution of deed of equitable mortgage by *Pratts Ltd.* and by *M. T. Ltd.*, of their property in favour of *E. D. Sassoon and Co., Ltd.* to secure loans advanced by that company to *Pratts Ltd.* through *M. T. Ltd.* The question arose in the liquidation of *Pratts Ltd.* when *E. D. Sassoon and Co.* claimed to be the secured creditors of *Pratts Ltd.* and *M. T. Ltd.* and in the alternative to be the unsecured creditors for the amounts secured by the deed of mortgage. The directors of *Pratts Ltd.* were all directors and shareholders of *M. T. Ltd.* and one of the directors of *Pratts Ltd.* was the managing director of *Sassoons Ltd.* and was invested with all the powers of the directors of that company. On these facts the Judicial Committee held that it was impossible to regard *E. D. Sassoon and Co. Ltd.* as being ignorant that in any question between *Pratts Ltd.* and *M. T. Ltd.*, the former had no independent board and indeed no single director who was not interested on behalf of *M. T. Ltd.* and that, therefore, *E. D. Sassoon and Co. Ltd.* could not disclaim knowledge of the interest of the directors of *Pratts Ltd.* and were not entitled to assume that the provisions of section 91B has been complied with. I do not see how this authority supports the contesting defendant's case. Here also *Tulsidas* and

Ramdas who by themselves and through concerns and companies controlled by them owned all the shares in the private company were the directors of both the company and the private company. They of course knew that the solicitor-directors was the solicitor of the private company, their own personal solicitor and the personal solicitor of their other family members and their other concerns and companies and a shareholder and director in some of their concerns. Both of them were present at the said meeting of the board held on November 14, 1968. Though they did not participate in the discussion and abstained from voting, being present they certainly heard what was being said and saw what was happening and if the solicitor-director had an interest or concern in the matter of this appointment for a further term, Tulsidas and Ramdas had full knowledge of that fact and the private company, therefore, can hardly be said to be "a third party who had no notice of the defect" in the director's authority. In *Narayandas Sreeram Somani v. Sangli Bank Ltd.* the question arose under somewhat peculiar circumstances Narayandas was one of the directors of the company. Ramnath was his brother. Ramnath became indebted to the company in large amounts. In order to comply with the requirements of the Reserve Bank to re-call the loan to Ramnath, Ramnath repaid the entire balance of Rs. 1,04,198-8-0 due by him. Out of this a sum of Rs. 1,00,000 was paid on behalf of Ramnath by Narayandas who on the same date obtained a loan of Rs. 1,00,000 from the company by executing a promissory note in the said sum as collateral security along with a letter of pledge in respect of cloth, saris, etc., valued at Rs. 1,50,000. Narayandas failed to repay the loan. Further, in order to comply with the requirements of section 277, the directors of the company including Narayandas decided that they or their nominees would subscribe for a large number of shares and accordingly Narayandas decided to subscribe for 2,000 shares in the names of his wife and mother and the wife of Ramnath, and shares were accordingly allotted to these three ladies. The allotment moneys were not paid in cash but by hundis drawn in favour of the company. In suits filed against Narayandas and Ramnath for recovery of the various amounts it was contended that the allotment of the said 2,000 shares was illegal inasmuch as Narayandas was present at the board meeting at which the said shares were allotted and had voted for the allotment. The Supreme Court held that u/s 91B, if a director was an interested director, his vote was not to be counted and his presence also would not count, towards the quorum, that is to say, the minimum number fixed for the transaction of business by a board meeting, for a quorum must be a disinterested quorum and it must comprise of directors who are entitled to vote on the particular matter before the meeting. Their Lordships further pointed out that if an interested director voted and without his vote being counted there was no quorum, the meeting was irregular and the contract sanctioned at the meeting was voidable at the instance of the company against the director and any other contracting party having notice of the irregularity and since section 91B is meant for the protection of the company, the company may, if it chooses, waive the irregularity and affirm the contract. Their Lordships, therefore, held that the company having chosen to affirm the contract of allotment of shares by

filing a suit, the allotment was valid and binding on the allottees. Their Lordships further held that Narayandas could not be heard to say that there was no valid allotment of the shares since he was a director of the company and a party to the impugned resolution and had dealt with the shares on the footing that the allottees were the holders of the shares with a clear knowledge of the circumstances on which he might have founded his present objection. Now, the distinguishing feature of the Supreme Court decision is that it was the interested director who after having taken the benefit of the contract was seeking to repudiate it and thereby his liabilities and obligations thereunder by setting up the defect in his own authority of which he naturally had knowledge. This, according to their Lordships of the Supreme Court, he was estopped from doing. This case rests, therefore, on a wholly different footing from the case before me. In the present case it is not the interested director who is challenging the contract or the resolution sanctioning it on the ground of his own defect or want of authority. It is a shareholder who considers himself aggrieved by this contract who is challenging it. In the present case the question of the company affirming the contract also does not arise. One of the main disputes in Suit No. 681 of 1969 is whether the resolutions approving the appointment of the private company for a further term was in fact passed. Even the result of the poll as declared by Tulsidas shows that nearly 48 per cent of the shareholders have voted against the resolution. A large number of proxies obtained by the plaintiffs have been rejected by Tulsidas as being invalid, Similarly, a large number of proxies in favour of Tulsidas, in respect of which letters of revocation were obtained by the plaintiffs and filed with the company have been held to be not validly revoked and treated as valid by Tulsidas. If, as mentioned in the latter part of the judgment while dealing with the extraordinary general meeting of April 28, 1969, some of the decisions given by Tulsidas on the validity of proxies and revocations are contrary to law and in respect of some others there is strong reason to believe that they were not given bona fide, it can hardly be said that the company has affirmed the contract. In any event, in Narayandas case the company affirmed the contract with full knowledge of the fact that Narayandas was an interested director. In the present case the shareholders were never made aware that the solicitor-director had an interest or concern in the contract of appointment of the private company for a further term or that, but for his vote, the resolution would not have been passed at the board meeting or that his vote was void. The company acting through its board of directors did not at any time place these facts before the shareholders. It is true that in the circulars which were issued by both sides the plaintiffs had mentioned that the solicitor-director was an interested director, but in the circulars issued by Ruia, Kirloskar and the solicitor-director the contrary position was taken by

46. up or in any event suggested. Thus, the shareholders had no clear indication whether the solicitor-director had any interest or concern as alleged by the plaintiffs and they could not be said to have voted in favour of the resolution approving the appointment for a further term with knowledge of the interest or

concern of the solicitor director and its consequent effect on the resolution of the board. There can be no ratification except with full knowledge of the facts and the shareholders were never asked to ratify the said resolution after the aforesaid facts were made known to them In *Spackman v. Evanc.*, Lord Chelmsford observed :

"To render valid an act of the director of a company which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the company. Of Course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders."

47. While referring to this case the Privy Council in *Premila Devi v. Peoples Bank of Northern India Ltd.* pointed out that by knowledge of the transaction Lord Chelmsford clearly meant knowledge of the invalidity of the transaction. In the Privy Council case it was held that there can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. In *Ramji Lal Baisiwala v. Baiton Cables Ltd.*, it was held that if without the vote of the interested director, the contract would still have been carried through it is not affected. But if without the vote of the interested director the contract would not be carried through or without him there would be no quorum, then the contract was voidable at the option of the company. On facts, however, it was held that two directors formed a quorum, and out of the three director of the company, the two who voted had no concern or interest. In the present case, without the vote of the solicitor-director the board's resolution of November 14, 1968, would not have been passed as there would have been no majority and the question of the company affirming it, as pointed out above, cannot arise, assuming the contract is voidable. It is true that today, at the hearing, the company is supporting this resolution but then the persons fighting the litigation on behalf of the company are its board of directors or rather the majority of the board of director which is controlled by Tulsidas and they cannot be said to represent or reflect the opinion of the company acting through its shareholders.

48. It is also pertinent to note that section 300(1) makes a significant departure from the language used in the old section 91B. While section 91B provides "and if he also so vote, his vote shall not be counted", section 300(1) enacts "and if he does vote, his vote shall be void". It was submitted that this was not a material change and did not alter the position and in support of this, reliance was again placed upon the observation, at page 192, in *Ramji Lal Baisiwala v. Baiton Cables Ltd.* to the effect that the substitution of the expression "his vote shall be void" in place of "his vote shall not be counted" does not make any difference, for if a vote was not to be counted, that vote was a nullity, that is, void. With respect to the learned single judge who decided this case I am unable to subscribe to this view. The Companies Act, 1956, is as its long title shows "An Act to consolidate

and amend the law relating to companies". While re-enacting section 91B as 300(1) the legislature has made a departure in the language used. The difference in the language is in a very material part of the section inasmuch as that part enacts one of the consequences of contravening the prohibition laid down in that section. Such change of language must therefore be taken to have been made deliberately and with the intention of preventing the object underlying the section from being defeated. When something is declared by a statute to be void, it cannot be validated on the theory of acquiescence or ratification. There can be no estoppel against a statute. The word "void" cannot be equated with the word "voidable." To my mind the object providing that the "vote shall be void" was to make the vote a nullity and incapable of affirmance or ratification. If, therefore, without the vote in question being counted, a resolution could not be passed, then the resolution must be taken not to have been passed.

49. It was next submitted that Warner was in the chair and that he having declared the resolution as having been passed, he should be taken to have given his second or casting vote in favour of the resolution. The short answer to this is that a casting vote has to be given and is not a matter of presumption. On the facts, it would also be illogical to draw any such presumption. Admittedly, Warner voted against the resolution. He, therefore, cannot consistently with this, cast his second vote in favour of the resolution, unless the whole matter were to be treated as a farce. Further, even assuming that the acts of Warner and Rightly are to be taken as the acts of the plaintiffs, the facts on the record do not make out a case of estoppel apart from the position that there cannot be an estoppel against a statute. When the draft minutes of the meeting held on November 14, 1968, were circulated to the directors, Rightly altered the said draft minutes. The minutes then came up for approval before the meeting of the board of directors held on February 3, 1969. At that meeting Rightly read out a memorandum on behalf of himself and Warner and requested that the said memorandum should be made a part of the minutes. Rightly and Warner voted against confirmation of the said minutes as written in the minutes book. The solicitor-director, Ruia and Kirloskar voted for confirming the said minutes and the minutes as written in the minutes book and approved by the majority of the directors were confirmed and signed, Tulsidas and Ramdas were also present at this meeting but abstained from voting. This is shown by the minutes of the meeting held on February 3, 1969. On the next day, by his letter dated February 4, 1969, Rightly reproduced the said memorandum which clearly states that the vote of the solicitor-director could not be considered as he was at all material times and continued to be an interested director and as there were two valid votes for and two valid votes against the resolution, the resolution was not carried. The said memorandum further states that unless this was properly recorded in the minutes of the meeting of November 14, 1968, the minutes should not be considered as having been approved. Thus before the minutes were confirmed, Warner and Rightly have recorded their objection. The sole selling agency agreement was executed

thereafter on February 18, 1969, with full knowledge of this objection. I, therefore, do not find it possible at this stage to hold that by any act of theirs Warner and Rightly have induced the company or the private company to believe that the said resolution was validly passed and to act upon such belief and thereby alter its position to its prejudice.

50. It is also difficult to accept the proposition that because certain directors represent the interests of a shareholder, they are in their capacity as directors or agents of that shareholder. Warner and Rightly are shareholders in their own right and have elected as directors by the shareholder of the company. Mr. Nariman, learned counsel for the plaintiffs, has in this connection relied upon a decision of the Court of Appeal in *Gramophone and Typewriter Ltd. v. Stanley*. The question arose whether an English company was liable to Income Tax upon the full amount of the profits made by a German company. It was held that the fact that the English company held all the shares in the German company by itself did not make the business of the German company the business of the English company and the English company was only liable to pay Income Tax upon such profits of the German company as had been received in England. This case is, however, not relevant. In view of the mandatory prohibition contained in section 300(1) and of the deliberate departure made in the language of that section from the language used in section 91B, I am at this stage inclined to hold that the vote of the solicitor-director cannot be validated but is void and that the resolution was not duly passed. I am also not inclined at this stage to accept the contention that the plaintiffs are estopped from taking up this ground.

51. There can be no estoppel against a statute nor can a person waive any right or benefit conferred by a statute unless it is of a personal and private nature. There is clear distinction between a contractual or a statutory right created in favour of a person for his own benefit and a right which is created on the ground of public interest and policy. The rule of waiver cannot apply to a prohibition based on public policy (see post *Master-General, Bombay v. Gangaram Babaji Chavan*). The prohibitions contained in section 300(1) are prescribed in public interest and policy to safeguard the interests of the shareholders. It was, however, urged on behalf of the contesting defendants that the proposition that there is no estoppel against a statute is too wide and that principle has not been accepted in several cases. In support of this submission reliance was, however, sought to be placed upon only one case, namely, *Towers v. African Tug Company*. That case arose under peculiar circumstances. The secretary and manager of the company who was a party to the payment of an interim dividend out of capital had received dividend on shares held by him. He and another shareholder who had also received dividend on the shares held by him filed a suit on behalf of themselves and all other shareholders of the company, other than those who were defendants, for an order to compel the directors to make good to the company the amount distributed as such dividend. The Court of Appeal negatived the claim. Vaughan Williams L.J. held that the fact that capital had been distributed in the payment of this dividend was recognised by the company and

the shareholders and that this was an interim dividend and they were minded to replace this capital and had further prospects of completely replacing it out of the profits of that very year and, therefore, the action was wholly unnecessary. He further stated that the court is not bound when it sees that an ultra vires act is in the course of being put right to give relief to a plaintiff who has acquiesced in the wrong and who has himself part of the proceeds of the wrong in his pocket. Sterling L.J. expressly starts his judgment by saying that he desired to rest his decision on the particular facts of that case and held that the action ought to have been dismissed on the ground that the personal conduct of the plaintiffs was such as to preclude them from obtaining relief. The company had also filed a counter-claim to recover from the plaintiffs the very dividends which they had in their pockets. This counter-claim was allowed. This case was distinguished in a later court of appeal case, namely, *Mosley v. Koffyfontein Mines Ltd.* on the ground that the plaintiff in that case did not seek an injunction or anything with reference to the future but a personal order upon the directors to refund to the assets of the company the amount which had been wrongfully abstracted from the capital. *Towers v. African Tug Company* turned upon its facts, and I fail to see how it bears out the proposition canvassed by the contesting defendants.

52. The next point for consideration is whether a special resolution was necessary for the appointment for a further term of the private company as sole selling agents of the company either under the provisions of section 314 of the Companies Act, 1956, or article 183 of the articles of association of the company. When the private company was appointed the sole selling agents in 1963, the resolution appointing it was passed as a special resolution. This was done as it was then considered that by reason of the fact that Tulsidas and Ramdas were directors and members of the private company, section 314 applied to the appointment of the private company as sole selling agents u/s 189(2) of the Companies Act, 1956, a resolution is a special resolution when, inter alia, the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution and the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, are not less than three times the number of the votes, if any, cast against the resolution by members so entitled to vote. The notice convening the extraordinary general meeting of April 28, 1969, however, specifies the intention to propose the resolution in question as an ordinary resolution nor are the votes cast in favour of the requisite majority required by section 189(2), the votes in favour of the resolution as declared by Tulsidas being a little over 52 per cent. of the votes cast both in person and by proxy. Since the plaintiffs who opposed the appointment for a further term of the private company hold more than 25 per cent. of the shares in the company it is obvious that if a special resolution were required, it could never be passed.

53. To understand the plaintiff's submissions based on section 314 of the

Companies Act, it is necessary to see the relevant provisions of section 204, 294 and 314 of the Companies Act, 1956.

"204. Restriction on appointment of firm or body corporate to office or place of profit under a company. - (1) Save as provided in sub-section (2), no company shall, after the commencement of this Act, appoint or employ any firm or body corporate to or in any office or place of profit under the company, other than the office of managing agent secretaries and treasurers or trustee for the holders of debentures of the company, for a term exceeding five years at a time

(4) Nothing contained in sub-section (1) shall be deemed to prohibit the re-appointment, re-employment, or extension of the term of office, of any firm or body corporate by further periods not exceeding five years on each occasion :

Provided that any such re-appointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force.

(5) Any office or place in a company shall be deemed to be an office or place of profit under the company, within the meaning of this section, if the person holding it obtains from the company anything by way of remuneration, whether as salary, fees, commission, perquisites the right to occupy free of rent any premises as a place of residence, or otherwise"

"294. Appointment of sole selling agents to require approval of company in general meeting. - (1) No company shall, after the commencement of the Companies (Amendment) Act, 1960, appoint a sole selling agent for any area for a term exceeding five years at a time :

Provided that nothing in this sub-section shall be deemed to prohibit the re-appointment, or the extension of the terms of office, of any sole selling agent by further periods not exceeding five years on each occasion.

(2) After the commencement of the Companies (Amendment) Act, 1960, the board of directors of a company shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made.

(2A) If the company in general meeting as aforesaid disapproves the appointment, it shall cease to be valid with effect from the date of that general meeting"

"314. Director, etc. not to hold office or place of profit. - (1) Except with the consent of the company accorded by a special resolution, -

(a) no director of a company shall hold any office or place of profit, and

(b) no partner or relative of such a director no firm in which such a director or relative is a partner, no private company of which such a director is a director or member, and no director, managing agent, secretaries and treasurers, or

manager of such a private company shall hold any office or place of profit carrying a total monthly remuneration of five hundred rupees or more, except that of managing director, managing agent, secretaries and treasurers, manager, legal or technical adviser, banker of trustee for the holders of debentures of the company - (i) under the company; or

(ii) under any subsidiary of the company, unless the remuneration received from such subsidiary in respect of such office or place of profit is paid over to the company or its holding company :

Provided that it shall be sufficient if the special resolution according the consent of the company is passed at the general meeting of the company held for the first time after the holding of such office or place of profit

Explanation. - For the purpose of this sub-section, a special resolution according consent shall be necessary for every appointment in the first instance to an office or place of profit and to every subsequent appointment to such office or place of profit on a higher remuneration not covered by the special resolution, except were an appointment on a time scale has already been approved by the special resolution

(2) If any office or place of profit is held in contravention of the provisions of sub-section (1), the director, partner, relative, firm, private company, managing agent, secretaries and treasurers or the manager, concerned, shall be deemed to have vacated his or its office as such on and from the date next following the date of the general meeting of the company referred to in the first proviso or, as the case may be, the date of the expiry of the period of three months referred to in the second proviso to that sub-section, and shall also be liable to refund to the company any remuneration received or the monetary equivalent of any perquisite or advantage enjoyed by him or it for the period immediately preceding the date aforesaid in respect of such office or place of profit

(3) Any office or place shall be deemed to be an office or place of profit under the company within the meaning of sub-section (1),- ...

(b) in case the office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it obtains from the company anything by way of remuneration whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise."

54. Sub-section (1) of section 314 formerly required the previous consent of the company accorded by a special resolution in cases where the provisions of that sub-section were applicable. By the Companies (Amendment) Act, 1965 (31 of 1965), in order to obviate the difficulties which might arise from this stringent restriction, the word "previous" was deleted and the first proviso was inserted so as to now provide for the passing of the special resolution according consent at the first general meeting held after the appointment. The Explanation was added

to sub-section (1) by the Companies (Amendment) Act, 1960. It is the plaintiffs' case that a sole selling agency is an office or place of profit and that, since Tulsidas and Ramdas were and are members and directors of the private company, the provisions of section 314 were attracted by reason of the Explanation to sub-section (1) and as the consent of the company was not accorded by a special resolution, the private company vacated its office from April 29, 1969, and is also liable to refund to the company any commission received by it for the period October 1, 1968, to April 28, 1969, in respect of such sole selling agency. In support of this contention Mr. Nariman, learned counsel for the plaintiffs, has relied upon *Shalagram Jhajharia v. National Company Ltd.* in which A. N. Ray J. of the Calcutta High Court held that a sole selling agency is an office of profit for the purposes of section 314. On behalf of the contesting defendants it was urged that section 314 had no application to the sole selling agencies because section 314 is a general section, while section 294 contains special provision dealing with sole selling agencies and that these specific and special provision exclude the general provisions of section 314 and, therefore, what applied to the present case were only the provisions of section 294 which require only an ordinary resolution. It was further submitted that in *Shalagram Jhajharia's* case this aspect was not urged and, therefore, not considered by the court.

55. If we examine the scheme underlying section 204, 294 and 314, it will be seen that section 204 places restrictions on the appointment of firms and bodies corporate to any office or place of profit under the company other than certain offices specified in the said section. In substances the restriction is as to the term for which appointment can be made. Section 204 deals generally with all offices and places of profit. Section 294 deals with the specific case of appointment of sole selling agents. In addition to the restriction on the term for which such appointment can be made, section 294 also provides for the approval of the company to such appointment. It also confers powers upon the Central Government to exercise supervision and control over such appointments by entitling it in the prescribed manner to vary the terms and conditions of the agency so as to make them no longer prejudicial to the interests of the company. The case of sole selling agents is dealt with separately as it is a highly lucrative appointment and for this reasons the restrictions imposed are more elaborate than in the case of other office or places of profit. The object underlying section 314 is, however, different. The mischief Which section 314 seeks to remedy is the holding by a director either personally or indirectly through other persons mentioned in clause (b) of sub-section (1) of section 314 of an office or place of profit under the company or its subsidiary. The object is to prevent directors from taking advantage of their position to earn profits from the company in addition to their remuneration as directors. Thus, section 314 deals with a wholly different problem from that dealt with u/s 204 and 294 and there is, therefore, no question of the provisions of section 294 excluding those of section 314.

56. On behalf of the contesting defendants it was further submitted that a sole

selling agency was not an office or place, and, assuming it was an office or place, it was in any event not an office or place under the company. It was submitted that in ordinary parlance the word "office" means a particular place or position with duties attached to it and the words "office or place" used in conjunction with the word "under" implies subordination and, consequently, a relationship of employer and employee. It was further submitted that under the agreement dated February 18, 1969, as also under the earlier agreement dated September 24, 1963, the private company as sole selling agents was not a subordinate or employee of the company but had independent functions to perform and that the said agreements were as between principal to principal and under them the private company was an independent contractor. In support of these submission reliance was placed on *Guru Gobinda Basu v. Sankari Prasad Ghosal*. The question which arose in the case was whether the appellant was disqualified from being chosen as, and from being a member of the House of the People under article 102(1)(a) of the Constitution. The Election Tribunal held that the appellant was a partner in a firm of chartered accountants who were auditors for several Government companies and, therefore, was a holder of offices of profit both under the Government of India and the Government of West Bengal and was accordingly disqualified from standing in the election under article 102 of the Constitution. It was not contended by the appellant before the Supreme Court that this was not an office of profit, but what was contended was that the office was not held under the Government of India or the Government of any State. The Supreme Court held that for holding an office of profit under the Government, one need not be in the service of the Government and there need be no relationship of master and servant. The decisive test is the test of appointment. The Supreme Court did not accept the submission advanced on behalf of the appellant that the several factors which entered into the determination of this question - namely, the appointing authority the authority vested with power to terminate the appointment, the authority which determined the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf - must all co-exist and each must show subordination to Government and that it must necessary follow that if one of the elements is absent, the test of a person holding an office under the Government is not satisfied. Their Lordships observed that in the case referred to an approved by them, it was pointed out that the circumstances that the source from which the remuneration was paid was not from public revenue was held to be a neutral factor, not decisive of the question. Their Lordships held that whether stress is to be laid on one factor or the other will depend on the facts of each case. Relying upon this authority it was submitted that in the present case the sole selling agency agreements satisfied none of the tests laid down therein. This authority, however, is expressly against this submission. What was held in *Guru Gobinda Basu v. Sankari Prasad Ghosal* was that whether stress is to be laid no one factor or the other would depend on the facts of each particular case and the contention that all the factors enumerated should co-exist

expressly rejected. Further, this submission is not even justified by the terms of the agreement, By clause (1) of the agreement dated February 18, 1969, as also of the earlier agreement dated September 24, 1963, the company expressly appointed the private company as its sole selling agents. It is thus an appointment which was made by these agreements. Section 294 of the Companies Act also speaks of appointment of sole selling agents by a company. Thus, the test laid down by the Supreme Court to be the decisive test is satisfied in the present case. The other clauses of the agreements also show that the company is to exercise control over the private company in respect of the working of the sole selling agency. It is the board of directors of the company which is to fix from time to time the selling price of the company products and the terms and conditions of sale. The private company is to obtain orders for purchases at the prices and on the terms and conditions thus determined and forward them to the company's office for acceptance. Such orders are to be binding on the company for execution only when and to the extent confirmed by the company and are to be subject to such other terms and conditions as the board of directors of the company may from time to time determine. The private company is expressly prohibited from accepting any order on its own authority. The board of directors of the company has the power from time to time to prescribe forms for orders, contracts, etc. Further, the company is conferred the power to terminate the agreement at any time by notice in the event of the private company committing a breach of the agreement. The private company receives a commission from the company. Clause 12 of both the agreements, which is the relevant clause provides as follows :

"In consideration for the foregoing services to be rendered by the selling agents, the company shall pay to the selling agents a commission"

57. Thus, as the words underlined by me show, the parties have expressly agreed that under the said agreements the private company has to render services to the company.

58. The complete answer to this contention is, however, to be found in sub-section (3) of section 314. Sub-section (3) as originally enacted prescribed when an office or place in a company should be deemed to be an office or place of profit under the company within the meaning of sub-section (1). By the Companies (Amendment) Act, 1960, the words "in the company" were omitted and the sub-section as amended provides as follows :

"Any office or place shall be deemed to be an office or place of profit under the company within the meaning of sub-section (1)"

59. Sub-section (3) is a deeming provisions and by the operation of the legal fiction created by sub-section (3), inter alia, in case a private company (in which a director of the company is a director or member) holding a place or office obtains from the company anything by way of commission, it is to be deemed to be an office or place of profit under the company. Such an office or place need

not be in fact in the company or under the company in that sense canvassed by the contesting defendants. In the present case, the private company is to receive commissions under the sole selling agency agreements, the commission is to be obtained by it for services to be rendered by it and, as pointed out above, the company controls the manner in which the sole selling agency is to be performed.

60. It is also pertinent to note that sub-section (1) expressly excludes some of the offices and places of profit which would not be office or place of profit if the contention of the contesting defendants were correct. Amongst the offices and places so excluded are those of banker and trustee for the holder of debentures. In *Astley v. New Tivoli Ltd.*, the articles of association of the defendant-company provided that the office of a director would be vacated if he accepted or held any other office or place of profit under the company, except that of a managing director. The plaintiff, a director of the defendant-company, was by resolution of the board of directors appointed one of the trustees for the holders of debentures issued by the company. Under the trust deed the trustees were to receive annually a sum of money as remuneration. The question which arose for determination was whether the plaintiff, by reason of his being a trustee of the trust deed relating to debentures issued by the company, had vacated his office by reason of the aforesaid article. It was held that the trusteeship was a place of profit under the company though there may be difficulty in saying that it was an office under the company. The object underlying the relevant article was thus stated by North J. at Pages 155-156 :

"I think that the meaning really is to prevent the directors, who are acting as the agents of the company, doing anything by which a director can continue as director, and yet accept or hold an additional office or place of profit under the company. It is intended to prevent the directors having power to accumulate in themselves various places of profit. A director is not to be a master and servant at the same time I think a man who has been selected by the company - by the director - to fill the position of trustee of a covering deed on the terms of receiving from the company, out of the coffers of the company, regular payment of so much a year during the time that he continues to fill that office in addition to his payment as director, is occupying a place of profit."

61. The object underlying section 314 is the same as stated by North J. It is to prevent a director, or his partner or relative, or any firm in which a director or his relative is a partner, or a private company of which such a director or member, and director, managing agent, secretaries and treasurers, or manager of private company in which such a director is a director or member, from holding any office or place of profit carrying a total monthly remuneration of five hundred rupees or more under the company and thereby put in his pocket, directly or indirectly, additional profit above the remuneration to which he is entitled as such director, unless three-fourths of the members of the company, voting either in person or by proxies, agree to this being done at a meeting called to pass such a resolution. To hold that a sole selling agency is not an office or even a place of

profit and that the appointment as sole selling agent of persons mentioned in section 314 can be made by an ordinary resolution requiring only a bare majority for it to be passed, while in respect of the holding by such persons of other offices and places of profit a special resolution is required, would be to exclude from the restrictive effect of section 314 a highly lucrative place or office of profit while bringing within its fold other offices and places of profit not so lucrative. Section 294A also expressly refers to a sole selling agency as an office. I am, therefore, of the opinion that the private company was appointed to an office or place of profit under the company and that since two of the directors of the company, namely, Tulsidas and Ramdas, were both directors and members of the private company, it would be an office or place of profit under the company within the meaning of section 314.

62. The question still remains as to whether in the case of appointment as sole selling agents of the private company for a further term, a special resolution was necessary. The answer to this question depends upon the true construction to be placed upon the Explanation to sub-section (1). This Explanation was introduced by the Amendment Act of 1960. Under that Explanation, a special resolution would be required for every appointment in the first instance to an office or place of profit. It is also required in the case of "every subsequent appointment to such office or place of profit on a higher remuneration not covered by the special resolution, except where an appointment on a time scale has already been approved by the special resolution". On behalf of the plaintiffs it was submitted that the only "subsequent appointment" contemplated by the latter part of the Explanation was where the special resolution according consent to the appointment in the first instance provided for a subsequent appointment on the same terms as to remuneration or for a subsequent appointment on a higher remuneration, and if there was no provisions in the original appointment for a subsequent appointment or for a subsequent appointment on a higher remuneration, then the subsequent appointment would require a special resolution. In reply it was submitted that what the original special resolution was required to cover was not a subsequent appointment on the same remuneration or lower remuneration but a subsequent appointment on a higher remuneration only and that if a subsequent appointment was made on the same remuneration or on a lower remuneration, then even though the original agreement or the special resolution in the first instance did not contemplate a further appointment, none-the-less such appointment would be made and the consent of the company accorded to it by an ordinary resolution.

63. Now, bearing in mind the object sought to be attained by the enactment of section 314, the better construction appears to me to be the one advanced by the plaintiffs, To accept the contention of the contesting defendants would be to hold that where once an appointment to an office or place of profit is made with the consent of the company by a special resolution for the initial maximum period of five years, such appointment could be renewed indefinitely by repeated subsequent appointments for the same maximum period by merely a bare

majority without such appointments being contemplated at the time of the original appointment. Such a construction would militate against the object underlying section 314. As mentioned before, the object is to prevent directors from putting into their pocket, either directly or indirectly, more remuneration, whether by way of salaries, fees, commission, perquisites, etc. other than the remuneration to which they are entitled as such directors. Where three-fourths of the members of the company have agreed to a director so obtaining profits from the company, for a period of five years only, it cannot be that they should be deemed to have given their consent to the directors doing so for all times by repeated subsequent appointments consented to by merely a bare majority of the members. The ordinary rule of construction is that the one which harmonises best with the intention of the legislature and the object sought to be attained by the enactment should be adopted, and applying these principles of construction the view which I am inclined to take today is that unless the appointment in the first instance, to which in the consent of the company has been accorded by a special resolution, provides for a subsequent appointment, the subsequent appointment would also require the consent of the company to be accorded by a special resolution irrespective of the fact whether the remuneration to be received is the same or lower (sic higher).

64. So far as the present case is concerned, the appointment in the first instance under the agreement, dated September 24, 1963, to which the previous consent of the company was obtained by a special resolution passed at the general meeting held on September 23, 1963, did not contain any provisions for a renewal, reappointment or continuance of the term of the sole selling agency and therefore on the construction I am inclined to adopt the consent of the company required to be accorded to the further appointment was by a special resolution. The resolution passed at the extraordinary general meeting on April 28, 1969, was an ordinary resolution. Even the number of votes required for passing the resolution as a special resolution were not cast in favour of the resolution. After this meeting, not taking into account the extraordinary general meeting held on April 29, 1969, the annual general meeting of the company was held on August 28, 1969. u/s 294(2), an appointment is to be approved by the company in the first general meeting held after the date on which the appointment was made. If the meeting of April 28, 1969, were held to be invalid as contended for by the plaintiffs and not even taking into account the requisitioned meeting held on April 29, 1969, the meeting at which such special resolution was required to be passed would be the annual general meeting held on August 28, 1969, which not having been done, the appointment ceased to be valid.

65. It was next submitted on behalf of the plaintiffs that, even assuming that in the case of a subsequent appointment a special resolution was required only if such appointment were on a higher remuneration, not covered by the special resolution according consent to the appointment in the first instance, in the present case the further appointment was in fact on a higher remuneration. In support of this submission reliance was placed upon the said letter dated

February 18, 1969, from the private company to the company stating that the clarification contained in its letter dated April 4, 1968, would continue to remain in force. Under the letter of April 4, 1968, the private company agreed to accept as from 1st April, 1968, commission at the rate of 2 per cent. on the net selling price of the company's products as prevailing on November 5, 1967. According to the plaintiffs, even though the intention at the date when the letter of April 4, 1968, was written or even on February 18, 1969, may have been that the private company should receive commission at a lower rate than what it would otherwise have been entitled to, the possibility of the private company receiving higher remuneration cannot be ruled out, for there is always the possibility of the selling prices in the future being lower than those prevailing on November 5, 1967. It is said that in fact such a situation has already arisen. It is alleged by the plaintiffs in their affidavit in rejoinder to the company's affidavit in reply in the notice of motion in Suit No. 522 of 1969 that in June 1969 the Government of India fixed prices of synthetic rubber at rates lower than those prevailing on November 5, 1967. In support of these allegations a copy of a letter dated June 4, 1969, addressed by the Government of India to the company is annexed to the said affidavit. In that letter it is stated that with effect from June 8, 1969, the plaintiffs should market their products at the prices not exceeding those specified in the said letter. The prices so specified are lower than those prevailing on November 5, 1967. The reason for the revision as stated in the said letter is that the selling prices fixed on April 2, 1968, were on the assumption that 25 per cent. of the company's requirements of alcohol would be met from domestic sources, while the balance of 75 per cent. would have to be met from imports but it was found that the actual proportion of indigenous alcohol to imported alcohol used by the plaintiffs worked out to 40 per cent. for indigenous alcohol and 60 per cent. for imported alcohol and that for the next 12 months the proportion would be 70 per cent. for indigenous alcohol and 30 per cent. for imported alcohol. The answer to this is to be found in paragraph 12 of the affidavit dated July 15, 1969, of J. B. Shukla, the secretary of the private company. In that affidavit he has not admitted that the Government of India is proposing a reduction in the selling prices. He has further stated that :

"Assuming while denying that there is possibility of the prices of synthetic rubber being reduced by Govt. below those prevailing on 5th November, 1967, I deny that the 2nd defendants could not claim commission at the rate of 2% on the basis of the prices prevailing as alleged."

66. After making this denial he sets out to state that the intention of the private company was that it would forgo commission on the excess if the price was higher than that prevailing on November 5, 1967, and to claim commission at the rate of 2 per cent. of the price actually prevailing on the date of sale or on the price prevailing prior to November 5, 1967, whichever is lower. It is somewhat difficult to understand these contradictory averments. By these averments the private company is in any event denying that it cannot claim commissions at the rate of 2 per cent. on the basis of the prices prevailing on

November 5, 1967. If, therefore, the contention of the private company is that it is in any event entitled to commission on the prices prevailing on November 5, 1967, its intention becomes irrelevant. If the intention was as alleged in the said affidavit of Shukla, there was nothing simpler than to have had an express provision to that effect either in the agreement dated February 18, 1969, or in the said letter dated February 18, 1969. It was, however, contended that this intention was shown by the use in the said letter of the words "clarification" and "ad-hoc arrangement". I do not find it possible to construe these words as meaning that the private company would be entitled to commission at the rate of 2 per cent. on the prices actually prevailing at the date of the sale or those prevailing on November 5, 1967, whichever is lower. It is obvious that the prices of the company's products vary from time to time. These prices are fixed by the Government and they have varied in the past and they may well vary in the future. There is no binding obligation on the private company either under the said agreement dated February 18, 1969, or under the said letter of the same date to accept commission on the basis of the prices prevailing on the date of sale or on November 5, 1967, whichever are lower. In fact, under clause 13 of the agreement the terms of the agreements with respect to the rate of commission provided in clause 12 cannot be modified by mutual agreement of the board of director of the company and the private company though other terms can be. Any revision in the rate of commission will, therefore, require the mutual consent of the company at a general meeting and the private company. To accept the submission of the contesting defendants that the words "higher remuneration" in the Explanation to section 314(1) cannot cover the case of the possibility of a higher remuneration would be to defeat the object of the section. If there is possibility in the variation of the amount of remuneration receivable by the holder of the office or place of profit under which such holder could receive a higher remuneration than what was provided at the time of the appointment in the first instance, it cannot be said that the subsequent appointment was on the same terms as to remuneration or on lower remuneration. In this view of the matter also the consent of the company to appointment of a private company for a further term was required to be accorded by a special resolution.

67. It was then submitted on behalf of the plaintiffs that this was not a subsequent appointment within the meaning of the Explanation to section 314(1), as this was an appointment made with retrospective effect. The first appointment of the private company expired on September 30, 1968. In fact, the private company by its letter dated August 31, 1968, pointed this out to the company and requested it to renew the agreement on the same terms and conditions for a further period of five years. Nothing was done thereafter until the question of the further appointment was brought before the board of directors on November 14, 1968. Realising that between October 1, 1968, and November 14, 1968, the private company was acting as sole selling agents without having been appointed as such, the resolution of the board passed at that meeting expressly provided "that the acts and deeds of Messrs. Kilachand

Devchand and Co. P. Ltd. done on or after the 1st October, 1968, be and the same are hereby ratified and confirmed and that for such services, they be paid commission as provided in the said agreement dated 24th September, 1963, clarified as aforesaid". Now, I have not been shown any power in the board of directors of the company to make an appointment with retrospective effect. Sub-section (2) of section 294 which speaks of the appointment of a sole selling agent by a board of directors of a company does not provide for any such appointment to be made with retrospective effect. It was submitted that even if the directors had such powers the words "subsequent appointment" in the Explanation to section 314(1) imply continuity. It was not disputed by the contesting defendants that, if between the original appointment and the further appointment the appointment of another person had intervened, it would not have been a "subsequent appointment". The question is whether an appointment made after the expiry of the period of the first appointment is a subsequent appointment. The dictionary meaning of the word "subsequent" as given in the Shorter Oxford English Dictionary, volume II, page 2062(1), is "following in order or succession; coming or placed after, esp., immediately after; following or succeeding in time; existing or occurring after esp; immediately after something expressed or implied" It was argued that such a construction would entail great hardship, for a board may not be able to meet by reason of the circumstances beyond its control, such as illness of directors. I am not able to see any such hardship as: envisaged .I fail to see why a subsequent appointment should be deferred till the last moment. Even in the present case the private company asked for further appointment to be made one month before the expiry of the original terms. The board could have met within that months and passed the necessary resolution Section 204(4) expressly makes it permissible for re-appointment, re-employment or extension of the term of office or place of profit within two years preceding the date on which it is to come into force. Even otherwise, the only "hardship" is that a special resolution would be required in my opinion, bearing in mind the object for which the section was enacted. The word "subsequent" implies a continuity without a break, and an appointment for a further term not made before or on the expiry of the earlier appointment but thereafter would not be a "subsequent appointment". I also fail to see how the board of directors of the company acquired the power to make this appointment and that too with retrospective effect. The Companies Act does not confer any power upon the board of directors to appoint sole selling agents. The effect of section 294(2) is to lay restrictions on the power of the board to make appointments of sole selling agents provided they have such power under the articles. Assuming the board of directors of the company had the power to appoint sole selling agents, under article 183 of the articles of association of the company no director or other persons mentioned in section 314 is, without the previous consent of the company accorded by a special resolution, to hold an office or place of profit under the company or any of its subsidiaries except as provided in the said section. Thus, except in cases where section 314 does not require a special resolution the board of director of the company would have no

power to make the appointment but the appointment would have to be made by the company itself and that too by a special resolution. Though the requirement as to previous consent of the company u/s 314(1) was deleted by the Companies (Amendment) Act, 1965, a corresponding amendment has not been made in article 183 though several other articles in the articles of association of the company were amended in view of the amendments made by the Amending Act of 1965. Thus, in cases where a special resolution would be required under article 183 the board would have no power to make the appointment.

68. The next question to be considered is, assuming the board of directors has the power to make this appointment and that too with retrospective effect whether this action of the board has been approved or ratified by the general meeting held on April 28, 1969. The notice convening the meeting and the resolution set out therein which was required to be passed does not set out that part of the resolution of the board under which the acts and deeds of the private company done on or after October 1, 1968, were ratified and confirmed and it was further resolved to pay them commission in respect of services rendered for the said period as provided in the said agreement of September 24, 1963, clarified by the said letter of April 4, 1968, The shareholder were never informed that for this intervening period the sole selling agents had acted without any authority and that they were not entitled to any commission unless the same was provided for expressly. The explanatory statement to the notice convening the extraordinary general meeting for April 28, 1969, also does not point this fact out to the shareholders In these circumstances I am doubtful whether it can be said that any appointment with retrospective effect was ratified or approved by the shareholders. It was conceded that an appointment for five years October 1, 1968, cannot be read as an appointment for five years from the date of the resolution of the board or as an appointment for a period from November 14, 1968, to September 30, 1973. u/s 294(2) the approval of the company must be of an appointment made by the board. The appointment made by the board included ratification of the acts and deeds of the private company for the period October 1, 1968, to November 14, 1968. If this was not approved, then I very much doubt whether it can be said that there was an approval u/s 294(2) to the further appointment of the private company.

69. The next point relates to the validity of the two notices dated March 27, 1969, convening the extraordinary general meeting on April 28, 1969, and April 29, 1969. The arguments here are based on the provisions of section 173(2) of the Companies Act, 1956. The relevant provisions of that sub-section are :

"Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular the nature of the concern or interest, if any, therein, of every director, the managing agent, if any, the secretaries and treasurers, if any, and the manager, if any."

70. According to the plaintiffs the said notices ought to have set out the nature of the concern or interest of the solicitor-director in the matter of the appointment of the private company for a further term as the sole selling agents of the company and the correspondence which took place between the company and the company Law Board during 1965 and 1966, particularly the said letter dated July 28, 1965, and June 15, 1966, from the Company Law Board to the Company. It was submitted that these were material facts concerning the item of business to be transacted at the said meetings and the non-disclosure, therefore, in the explanatory statement to the said notices invalidates the said notices. That the item of business to be transacted at the said meetings was special business is not disputed. The questions to be considered are whether the above facts were material facts and if either of them was a material fact, the consequence of the non-disclosure thereof in the explanatory statement. If the solicitor-director was an interested or a concerned director, the nature of his concern or interest in the further appointment of the sole selling agents was a material fact which required to be disclosed in the explanatory statement and this position is not disputed. The contention of the contesting defendants, however, is that the solicitor-director was not a concerned or an interested director. This point has already been considered by me in connection with the resolution of the board of directors at its meeting on November 14, 1968, and I have already expressed the prima facie conclusion reached by me that he had a concern or an interest in this matter. The only question, therefore, which remains to be considered in this connection is the consequence of such non-disclosure. First, however, I will deal with the question whether the correspondence with the Company Law Board can be said to be a material fact concerning the business to be transacted at the said meeting. Now, the first meeting was for approving the private company's appointment as sole selling agents for a further term. The second meeting, namely, the meeting requisitioned by the plaintiffs, was for not approving the said appointment. Any fact which would have a relevance or bearing upon the approval or a non-approval of the said appointment would, in my opinion, be a material fact concerning the said items of business. The facts relating to this correspondence may be briefly recapitulated from this angle. The said letter dated July 28, 1965, was a show cause notice issued by the Company Law Board u/s 294(5) on the ground that it appeared to the Company Law Board that the terms of appointment of the private company were prejudicial to the interests of the company. By this letter the company was required to show cause why u/s 295 the terms and conditions of the appointment of the private company should not be varied. This matter was at that time considered so important that a sub-committee of the director was formed to consider it. Ultimately, by its said letter dated June 15, 1966, the Company Law Board decided not to take any further action in the matter at that stage. The said communication, however, expressly stated that :

"The Board would suggest, however, that at time of the renewal of the agreement with the sole selling agents in 1968, your company should bear in

mind the views of the Board which were communicated to you in their letter of even number dated the 28th July, 1965, read with their letter of even number dated the 18th September, 1965."

71. It was submitted by the contesting defendants that this was merely a suggestion and not a directive or an order and that the proceedings commenced by the show-cause notice u/s 294(5) having terminated, there was no obligation to disclose this correspondence in the explanatory statement. This argument cannot be accepted. u/s 294(5) the Central Government has the power to require such information regarding the terms and conditions of the appointment of the sole selling agent as it considers necessary for the purpose of determining whether or not such terms and conditions are prejudicial to the interest of the company. There after, if it is of the opinion that they are prejudicial to the interest of the company, it has the power to make such variations in those terms and conditions as would in its opinion make them no longer prejudicial to the interests of the company. If a company refuses to furnish such information, the Central Government has the power to appoint a suitable person to investigate and report on the terms and conditions of the appointment of the sole selling agents. Thus, the Central Government is conferred wide and extensive statutory powers of control over the sole selling agencies of companies and is constituted the statutory authority to determine whether the terms and conditions of the sole selling agency are prejudicial to the interests of the company or not. u/s 10E these powers of the Central Government have been delegated to the Company Law Board. Where, therefore, a statutory authority empowered to decide whether the terms and conditions of the appointment of a sole selling agent are prejudicial to the interest of the company or not had already opined that certain provisions of the said agreement dated September 24, 1963, were prejudicial to the interest of the company and expressly required the company to bear its views in mind at the time of the renewal of the agency, it cannot be said that the disclosure of the views of the Company Law Board to the shareholders at the time of further appointment on terms which contained the very features objected to by the Company Law Board was not material. The object underlying section 173(2) is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them.

72. Any fact which would influence them in making up their minds, one way or the other, would be a material fact u/s 173(2) and had to be set out in the explanatory statement to be notice of the meeting. The views expressed by the Company Law Board would have certainly played a part, and perhaps an important part, in enabling the company's shareholders to make up their minds whether to vote for approval of the further appointment or not.

73. The contention that the matter was closed by the said letter dated June 15, 1966, is too naive and is belied by subsequent events. By its letter dated April 9, 1969, headed "Sole selling agents; terms and conditions of appointment u/s 294(5) of the Companies Act, 1956", the Company Law Board called upon the

company to clarify how the renewed agreement was proposed for approval of the shareholders without reference to the views of the Board communicated to the company earlier. The concluding paragraph of that letter stated :

"From, the perusal of the renewed agreement, it appears, prima facie, that the terms are prejudicial to the interests of your company and this Board will have to examine to what extent the terms and conditions require modification or abrogation. You are, therefore, hereby informed that if any such variation is ultimately made by the Company Law Board, the terms of the said agreement would be effective from 1st October, 1968."

74. There was further correspondence pursuant to this letter to which I will refer later.

75. In *Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* it was held that section 173 enacted a provisions which was mandatory and not directory. Bhagwati J., as he then was, observed in that case :

"The object of enacting section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provisions is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interest of the management in any particular action being taken. Having regard to the whole purpose and scope of the provisions enacted in section 173, I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken. If, therefore, there was any contravention of the provisions of section 173, the meeting of the company held on 5th September, 1961, would be invalid and so also would the resolution passed at that meeting be invalid."

76. The same view was taken by a Division Bench of the Calcutta High Court in *Shalagram Jhajharia v. National Co. Ltd.* That was a case of a resolution to approve u/s 294 the appointment of sole selling agents, In that case Mitter J. observed :

"It is well known that if a company can sell its products without the employment of agents its profits would be substantially higher than in case where the selling was done through agents. On the other hand it cannot be ignored that selling is best done through an organization of experts and specially when sales have to be made to overseas customers the employment of an overseas agent is almost a necessity. As the legislature has thought it fit to provide that shareholders must

approve of the appointment of selling agents the opportunity given to the shareholder must be full and complete and there must be a full and frank disclosure of the salient features of the agency agreement before the shareholders can be asked to give their sanction. The provision for inspection of the agreement at the registered office of the company is not enough. Few shareholders have either the time or the inclination to go to the registered office to find out what the company is about to do. Moreover, such an opportunity is illusory in the case of shareholders who do not live in Calcutta when the registered office is situated here."

77. Section 71 of the Companies Clauses Consolidation Act, 1845, required every notice of an extraordinary meeting or of an ordinary meeting to specify the purpose for which the meeting was called. In *Kaye v. Croydon Tram* sell its undertaking to another company under which the purchasing company agreed to pay, in addition to the sum payable to the selling company, a substantial sum to the directors of the selling company as compensation for loss of office, and the agreement was made conditional upon its adoption by the shareholders of the selling company. The resolution approving the agreement was passed by a large majority notwithstanding the plaintiffs opposition. Thereupon the plaintiff commenced an action and served a notice of motion for an injunction to restrain the selling company from carrying the agreement into effect. The notice calling the meeting stated that the meeting was convened for the purpose of considering the agreement for the sale of the undertaking of the selling company to the purchasing company. It further stated that the directors and the secretary had agreed to retire on being paid a lump sum as compensation for their loss of office. The Court of Appeal held that the notice had been "most artfully framed to mislead the shareholders" since a very considerable portion of that, which was part of the consideration for the purchase, was not to be paid to the vendors but was to be paid to the directors and officers of the selling company. Lindley M.R. said at page 369-370 :

"It is tricky notice, and it is to my mind playing with words to tell shareholders that they are convened for the purpose of considering a contract for the sale of their undertaking, and to conceal from them that a large portion of that purchase-money is not to be paid to the vendors who sell that undertaking I do not think that this notice discloses the purpose for which the meeting is convened. It is not a notice disclosing that purpose fairly, and in a sense not to mislead those to whom it is addressed."

78. The Court of Appeal, accordingly, granted the injunction prayed for subject to this that it left the selling company free upon a proper notice to sanction the agreement. It is pertinent to note that section 71 of the Companies Clauses Consolidation Act was similar to section 172(1) of the Companies Act, 1956, which requires every notice of a company to contain, inter alia, a statement of the business to be transacted thereat and that there was no provision in the Companies Clauses Consolidation Act similar to the mandatory provision of

section 173(2).

79. It is alleged in the affidavits in reply filed on behalf of the company and Tulsidas that the explanatory statements to the notices of the meeting held on April 28, 1968, and April 29, 1968, respectively, were placed and generally approved at the board meeting held on March 27, 1969, at which Rightly was also present, the suggestion being that Rightly and through him the plaintiffs had approved both the said explanatory statements. It was submitted that even in their requisition dated March 17, 1969, for calling an extra ordinary meeting, in the explanatory statement which the plaintiffs required to be included in the notice convening such meeting, they had not required the fact either of the interest or concern of the solicitor director or the said correspondence with the Company Law Board to be set out. Now, when one turns to the minutes of the board meeting held on March 27, 1969, it is apparent that the only discussion about the explanatory statements was with respect to the requisitionists meeting, when the solicitor-director pointed out that the statements of facts set out in the requisition should be sent to the shareholders with the notice of the requisitioned meeting and, as the said statement was silent regarding the directors interests in the resolution, the same should be added. There is no mention in the minutes of the explanatory statement in respect of both the said meetings being placed before or generally approved by the board as alleged. Further, by their said requisition dated March 17, 1969, the plaintiffs did not set out the whole of the explanatory statement to be incorporated in the notice. What they did was to make a request that in the explanatory statement which would be annexed to the notice the statement set out by them should be included. They were thus anxious that certain facts should be included and not that they did not want other material or relevant facts to be excluded. It is the duty of the company acting through its board to incorporate in the explanatory statement all material facts concerning the item of special business to be transacted at a meeting. At the said board meeting held on March 27, 1969, one of the resolutions passed was that the secretary of the company should sent out notices of the said two meetings together with the explanatory statements in consultation with the solicitors of the company. This shows that neither the explanatory statements nor their drafts thereof were placed before the board meeting, much less approved.

80. It was next sought to be contended that the plaintiffs had knowledge of the correspondence and of the interest and concern of the solicitor-director and, therefore, they could not complain about the same and that is only a shareholder who was ignorant of these facts could make such a complaint. In support of this contention reliance was placed first upon *Parashuram Detaram Shamdasani v. Tata Industrial Bank Ltd.* In that case the Tata Industrial Bank decided to amalgamate with the Central Bank of India Ltd. and an agreement of amalgamation was entered into. A meeting of the shareholders was called for approving the scheme. The plaintiff who had in the past adopted a hostile attitude towards the bank, which attitude was known to the shareholders,

opposed the scheme. On a poll being demanded, there were 5,25,249 votes in favour of the resolution, while only 369 votes were cast against, and out of these 369 votes 100 votes being of the plaintiff and 10 of his brother. The plaintiff and his brother filed a suit challenging the resolution. The plaintiff's suit and appeal were dismissed and he filed an appeal to the Privy Council which too failed. The Privy Council observed that the fact that the action was personal to the appellant was unfortunate for him as he knew before the first meeting everything about the scheme that was to be known and that he had written letters to the shareholders and no possible complaint of the notice or circular on the ground of insufficiency was, therefore, open to him. On a perusal of notice their Lordships came to the conclusion that it was no way questionable. Another of the plaintiff's complaint was that he was denied a hearing at the general meeting. The court held that on the evidence it appeared that "there was no organised opposition; there was a very clearly expressed indication by the shareholders that they did not desire further to hear the appellant, and what really happened was that the appellant desisted from any further effort to make himself heard because even he realised that no further speech from him would be of any avail." Reliance was also placed upon *Maharani Lalita Rajya Lakshmi v. Indian Motor Co. (Hazaribagh) Ltd.* in which the Privy Council decision in *Shamdasani's* case was followed, and upon *Kalinga Tubes Ltd. v. Shanti Prasad Jain*, which was affirmed by the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.* Relying upon these authorities it was sought to be contended that the plaintiffs, having full knowledge of the facts which according to them were not disclosed in the explanatory statements, had no right to challenge the validity of the notices on this ground and were estopped from doing so. There is, however, no such plea in any of the affidavits in reply, and this question really does not arise for my consideration, but as this question was argued at some length and as the contesting defendants insisted that they could spell out such plea from their affidavit in reply - which they have been able to do - I will shortly deal with the same. In my opinion, none of these authorities support the contesting defendants. Each turns upon its own facts. The Privy Council decision in *Shamdasani's* case was under the Indian Companies Act, 1913, which did not contain any section corresponding to section 173(2) of the 1956 Act. Regulation 49 of Table A of Schedule 1 of the 1913 Act, inter alia, required that, in case of special business, the general nature of that business should be set out in the notice. This regulation corresponds to section 172(1) of the 1956 Act which requires every notice of a meeting to contain a statement of the business to be transacted thereat. The Privy Council did not have to decide the question of a mandatory statutory provision, non-compliance with which would invalidate the notice. The Privy Council held that there was nothing questionable about the notice. The plaintiff who had a long history of dispute with the bank was a hopeless minority. The shareholders did not appear to have put any faith in any statement made by him. They did not even desire to hear him further. The action, therefore, was, on the face of it, personal only to him and his brother, who held between them 110 out of 5,25,618 votes, but of which 5,25,249 votes

were cast in favour of the resolution. The Calcutta case was of an application u/s 397 of the 1956 Act, and what was contended was that failure to comply with section 173(2) made it a case of oppression in conducting the affairs of the company. The court held that it could not be oppression because of breach of section 173(2) could make the meeting called invalid and no more, and if such a meeting was invalid, the Companies Act provided procedure for calling valid or regular meetings or for regularising irregular proceedings, a right which was open to every shareholder. The case of Kalinga Tubes Ltd. v. Shanti Prasad Jain was also a case under sections 397 and 398 of the Companies Act. There was no plea as to the invalidity of the notice taken in the petition or in the affidavits, but at a large stage of the case of oral submissions were made challenging the validity of the notice on the ground of non-compliance with section 173(2). As the High Court expressly pointed out, no question arose about the disclosure of any interest of any director and the only contention on this aspect of the case was that the notice was invalid for want of necessary particulars in the explanatory statement. On examining the explanatory statement the High Court came to the conclusion that it was comprehensive enough and was in compliance with the statutory requirements. The court further pointed out that had any objection being taken in the petition at the earlier instance, the appellant company could have shown that no such material fact was relevant or could have been given. The court observed at page 215 :

"In particular cases, the omission to state the material facts may invalidate the notice and consequently may hit the relative resolution passed in a meeting of the shareholders who might be completely misled by the terms of the notice."

81. In this case also the plaintiff was in a hopeless minority, and the court held that in that view of the matter, any amount of elucidation in the explanatory statement would not have been of any avail. The court also observed that, assuming only material facts had been omitted from the notice, the mere omission of such facts would not per se invalidate the notice and the resolution passed in the meeting. It further held that what are material facts and what is the nature and the extent of interest u/s 173(2) are questions of fact depending on the facts of each case and the party who knew the real nature of the transaction could not complain of the insufficiency of the notice. The court held that, in the facts of that particular case, they were not concerned to look to the interest of absentee shareholders. Before the Supreme Court, however, the appellant, Shanti Prasad Jain, was not allowed to urge this point inasmuch as the objection was not taken in the petition, and as a point was a mixed question of fact and law, the court further added :

"We may add that, though the objection was not taken in the petition, it seems to have been urged before the appeal court. Das J. has dealt with it at length and we would have agreed with him if we had permitted the question to be raised. This attack on the validity of what happened on March 29, 1958, must thus fail."

82. Now, what Das J. in the High Court really hold was that the explanatory

statement was comprehensive and that there was no non-compliance with section 173(2) and that what are material facts including the nature or concern of a director were questions of fact depending on the facts and circumstances of each case. The rest of what Das J. observed was really in the nature of an obiter. Even, on the facts, the present case stands on a wholly different footing. There is no question of the plaintiffs being in a hopeless minority. They have secured, even as declared by Tulsidas himself, about 48 per cent. of the votes cast. Admittedly, the Life Insurance Corporation of India which, along with its subsidiaries held about 13,000 shares, had voted against the resolution. Looking to the slight difference between the respective shareholdings of the plaintiffs and the Kilachand group, in this case what really counted were the votes of the independent shareholders. It is with reference to the effect on them and the consequent result of the plaintiffs being able to secure their votes that the case must be considered. It was urged that in the statements issued by the plaintiffs, both by way of circulars to the shareholders and by advertisements in the newspapers asking for support, they had not only pointed out that the solicitor-director was interested and concerned but had also referred to the letter of the Company Law Board of July 28, 1965, read with the letter of September 18, 1965 and the letter of June 15, 1966, and, therefore, the shareholders had a correct picture before them and could not be said to be misled by any omission in the explanatory statements. This is not correct and the argument does not present a true picture. The various circulars and advertisements have been put in by consent as exhibits. Exhibit A is a statement issued by Ruia, Kirloskar and the solicitor-director, while exhibit B is an advertisement containing a statement of the private company. All the three directors in their statements have asserted that they were the only independent directors. If the correct position with respect to the solicitor-director is as I have opined above, this was itself a misleading statement. The circulars and advertisements of the plaintiffs were in reply to the statements of the directors, and the advertisement given by the private company followed upon this. In the private company's statement it is stated that :

"The Company Law Board had gone into this appointment in 1965, and, after a careful examination, overruled the objections raised by Firestone in a full-fledged memorandum and cleared the terms. The Company Law Board had, however, remarked that "at the time of the renewal of the agreement with the sole selling agents in 1968 ..., thus visualising the renewal of the agreement in 1968."

83. This again is a misleading statement, for the relevant and important words the Company Law Board's communication, namely, that "your company should bear in mind the views of the Board which were communicated to you in their letter of even number dated 28th July, 1965, read, with their letter of even number dated 28th September, 1965", were omitted and substituted by dots, thus suggesting that the Company Law Board had no objection to the renewal of the agreement in the same form in 1968. In my opinion, this omission is deliberate and made with the intention to mislead, particularly in view of the letter dated April 9, 1969, from the Company Law Board to which I have already

referred to above, which letter was certainly known to Tulsidas but most certainly not known to other shareholders of the company. This statement of the private company appeared in the newspaper "Indian Express" of April 15, 1969, and in the newspaper "Financial Express" of April 16, 1969, that is, after the receipt of the said letter of April 9, 1969. Secondly, in the light of what was stated in the said communication from the Company Law Board of June 15, 1966, the statement that the Company Law Board had declared the terms of the sole selling agency was hardly a fair or a true statement. All that the Company Law Board did was to say that it had decided not to take any further action u/s 294(5) at that stage but had clearly indicated that unless the objections raised by the Company Law Board were taken into account at the time of the renewal of the agreement, further action would be taken. The shareholders had thus before them a conflicting picture and at least with respect to the relevant facts a misleading picture as presented by the Kilachand Group and those supporting it. The plaintiffs' objection to the validity of the notice, therefore, cannot be dismissed so lightly on the ground of their own knowledge of its infirmity as contended by the contesting defendants. On the contrary, in my opinion, the plaintiff's objections are well founded and, consequently, the said notices and meetings, particularly the notice for the meeting of the 28th April and the meeting held on that day, and the resolution passed at that meeting are invalid. Closely connected with this point is the objection of the plaintiffs with reference to the non-disclosure of the Company Law Board's said letter of April 9, 1969, to the shareholders at the meeting of the 28th April. Tulsidas as the chairman of the board of directors took the chair at the said meeting of the 28th April. It was submitted on behalf of the plaintiffs that, since Tulsidas was vitally interested in the said resolution, he deliberately suppressed from the shareholders the receipt of the said letter so as to keep back from them the knowledge that the Company Law Board was objecting to the said further appointment. Tulsidas's answer is to be found in paragraph 15 of his affidavit-in-reply affirmed on August 14, 1969. The relevant portion is :

"I say that by the said letter, the Company Law Board only sought clarification from the 1st defendant company which was given by the 1st defendant company by its letter dated 22nd April, 1969. I say that there was no necessity for the said letter dated the 9th April, 1969, being circulated to the board of directors of the 1st defendant company as the same had been adequately dealt with and, as no further communication has been received from the Company Law Board, the said letter dated the 9th April, 1969, was dealt with in the ordinary course after consulting the solicitors of the 1st defendant company. I deny that the said letters dated the 9th April, 1969, and 22nd April, 1969 were wrongfully or with mala fide intention suppressed as alleged. I say that the said letter and the reply was placed at the first board meeting of the 1st defendant company held thereafter."

84. Very much the same statements are made in the affidavit-in-reply filed by Dabke, the secretary of the company, on behalf of the company. The board

meeting referred to in Tulsidas's affidavit was held on June 25, 1969. At least one thing is obvious on Tulsidas's own statement, that it was necessary to place the said letter before the board. Bearing this in mind let us examine the bona fides of Tulsidas. By his letters of April 9, 1969, and April 22, 1969, Rightly called upon Tulsidas as the chairman of the company to call a meeting of the board of directors immediately. Copies of these letters were sent to all the directors. It appears that these letter were written as Rightly desired that the procedure to be followed at the said extraordinary general meetings should be discussed and agreed upon at a board meeting. No meetings was, however, called until June 25, 1969. Now, if any such board meeting were called, obviously Tulsidas would have had to place this letter from the Company Law Board before the board of directors and Rightly would have come to about it. Rightly learnt about this letter only when in the newspaper of April 30, 1969, it was reported that Mr. Fakhruddin Ali Ahmed, the Minister for Industrial Development and Company Affairs, had stated in Lok Sabha on April 29, 1969, that the Company Law Board had recently asked the company for an explanation as to why the recommendations of the Company Law Board were not included in the agreement of February 18, 1969. Thereupon, Rightly by his letter dated April 30, 1969, called upon the secretary of the company to immediately let him have a copy of the said communication and any correspondence relating thereto and further stated that no reply should be sent thereafter unless he had an opportunity of seeing the draft thereof. Thereafter, Rightly was given inspection of the said letter dated April 9, 1969, and the company's reply dated April 22, 1969. The reply of April 22, 1969, is signed by Dabke. The astonishing thing about this reply is that according to the affidavits-in-reply of Tulsidas and Dabke, Tulsidas by himself dealt with the letter "in the ordinary course" after consulting the solicitors of the company, namely, the firm of Messrs. Daphtary, Ferreira and Diwan. Now, was Tulsidas a proper part to deal with this letter and keep the knowledge of both the letter and the reply to himself until the fact that there was such a communication came out by reason of the statement made by the Minister in the Lok Sabha ? Tulsidas was the person vitally interested in the further appointment of the private company as sole selling agents. As will be shown later, while dealing with another aspect of the case, but for the sole selling agency commission received by the private company its actual working for the year ended September 30, 1968, would has shown a loss. On the previous occasion when communication was received from the Company Law Board, that is, in 1965, the matter was considered so important that a sub-committee of directors was appointed to deal with it. Why were the objection of the Company Law Board to the further appointment dealt with in this fashion by Tulsidas alone ? Tulsidas's explanation that it was not necessary to circulate the letter as no further communication had been received from the company Law Board after the company's reply of April 22, 1969, is untenable on the face of it. What was required to be circulated to the directors was the letter of the Company Law Board before any reply was sent thereto. According to Tulsidas, the matter was important enough to place before the board of directors. The plaintiffs contention

that a board meeting was not called in April, 1969, though repeatedly requested by Rightly because, otherwise, this correspondence would have come to the knowledge of Rightly and through him to the knowledge of the shareholders appears, therefore, to be well founded. No one can be naive enough to believe, as Tulsidas expects it to be believed, that because no further communication had been received to the company's reply dated April 22, 1969, between April 22, 1969, and April 28, 1969, the Company Law Board had dropped the matter and it was, therefore, not necessary to apprise the shareholders about this correspondence. The contention in the affidavits-in-reply of Dabke and Tulsidas that it was for this reason that the said correspondence was not disclosed at the said extraordinary general meeting does not reflect credit upon them, and in this connection what transpired subsequently is instructive. By the letter dated August 29, 1969, a copy of which is put in by consent and marked as exhibit No. 1, the Company Law Board called upon the company u/s 294(5) (a) of the Companies Act to furnish certain information regarding the terms and conditions of appointment of the private company as selling agents of the company for a further term. There are in all 16 items in respect of which such information is required to be furnished. The margin of difference between the votes for and against the impugned resolution was very narrow, and, in my opinion, this correspondence may have well influenced resolution may have well influenced the necessary number of shareholders to vote against the resolution even assuming the result of the poll was declared by Tulsidas was correct.

85. It was also submitted on behalf of the contesting defendants that the Company Law Board's letter of April 9, 1969, showed non-application of mind, that it was addressed by some under-secretary and the facts on which it was based were not existing facts, and for the said reason also it was not required to be communicated to the shareholders. It is not necessary to go into the rival contentions as to the validity or otherwise of the objections raised by the Company Law Board and whether some of the facts which existed at the time of the Company Law Board's objections in 1965 continued to exist in 1969, for one thing is clear that Tulsidas, the person most vitally interested and concerned, cannot be the sole judge of this. It was his duty to place these letters before the meeting of the shareholders. Whatever had to be pointed out to the shareholders could have been mentioned by Tulsidas at the meeting and it would have been then for the shareholders to consider the company law board's objections and Tulsidas's explanation thereto. The submission that the letter was signed by some under-secretary is hardly worthy of mention. It is true that the letter is signed by the under-secretary to the company Law Board in the same way as the earlier communications from the Board, but it is clear from the letter itself that it is a communication from the Company Law Board. In fact, the said letters dated July 28, 1965, and September 18, 1965, were also signed by the under-secretary to the Company Law Board. These were, however, not treated as letter from some under-secretary and not from the Company Law Board. This letter of April 9, 1969, and the company's reply remained in the exclusive knowledge of

Tulsidas, Dabke and the company's solicitors and were, in my opinion, deliberately back from the knowledge of all other shareholders and directors with a view to see that the said resolution of further appointment of the private company as sole selling agents should be got passed. In *Tiessen v. Henderson Kekewich J.* pointed out that :

"..... the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness - that not only must the matter be fairly put before the meeting, but the meeting itself must be conducted in the first possible manner."

86. To repeat the words of Mitter J. in *Shalagram Jhajharia v. National Co. Ltd.* :

"As the legislature has thought it fit to provide that shareholders must approve of the appointment of selling agents the opportunity given to the shareholders must be full and complete and there must be a full and frank disclosure of the salient features of the agency agreement before the shareholders can be asked to give their sanction."

87. In the present case it cannot be held that the shareholders were given full and complete opportunity or that there was a full and frank disclosure, and I am inclined to accept the plaintiffs' case that the resolution, said to be passed at the meeting of April 28, 1969, falls in the well-known category of resolutions obtained by trick.

88. I will now deal with the other objections of the plaintiffs to the meeting of April 28, 1969. The main amongst these are that Tulsidas was not entitled to take the chair at the said extraordinary general meeting, that he had no right to give any decision as to the validity of any proxy or letter of revocation after the votes were cast and that the decision he has given with respect of such objections are bad in law and are promoted by a mala fide motive of invalidating as many votes in favour of the plaintiffs as possible in order to secure a majority for the resolution approving the appointment of the private company for a further term. It was submitted on behalf of the contesting defendants that under article 92 of the articles of association of the company the chairman of the directors, if present and willing to take the chair at any general meeting, whether annual or extraordinary, was entitled to do so. It was further submitted that, in order to show his fairness, Tulsidas had expressed his willingness to vacate the chair in favour of any person who was unanimously agreed upon to take the chair in his place and had even suggested the name of another director of the company, Pratap Bhogilal, but rightly had objected thereto and so Tulsidas continued to act as chairman. This gesture was to my mind a meaningless one, because from the nature of things no one could have expected at the said meeting and any agreement upon any subject at the said meeting. It was further stated that since article 92 authorises the chairman of the directors to take the chair at a general meeting and as the articles of association of a company form a contract between the company and the members and between the members inter se, the member

had agreed to an interested person being the chairman of every general meetings much as the majority of the business which comes up before a general meeting related to the acts of directors. This argument does not appear to me have any relevance. What was before the meeting was not the act of Tulsidas as a director in which he was concerned or interested as a director to see that the same should be upheld by the meeting. What was before the meeting was not the act to Tulsidas as a director in which he was concerned or interested as a director to see that the same should be upheld by the meeting. What was agreement entered into between the company and the private company controlled by Tulsidas under which the private company and, therefore, indirectly, Tulsidas, were to receive considerable amounts by way of remuneration and profit. In this matter Tulsidas, in his capacity as a director, had not taken any part in the resolution of the board passed at its meeting held on November 14, 1968. His interest in the item of business before the meeting was, therefore, not in his capacity as director of the company but in his capacity as director and member of the private company and as the person controlling the private company, and it was his personal interest which would be vitally affected if the resolution was not passed. I was referred to certain authorities in this connection, but I do not propose to discuss them or to go further into this question inasmuch as for the purpose of these notices of motion, I am prepared to assume that Tulsidas was entitled to take the chair. Nonetheless, I am of the opinion that any presumption of bona fides which may attach to the acts of an independent chairman cannot be applicable to Tulsidas's acts, in the present case. Similarly, I do not propose to consider the elaborate arguments advanced and the number of authorities and passages from text books cited before me as to when a poll is said to be completed. I will also assume for the purposes of the present notices of motion that Tulsidas was entitled to give his decision on the validity of the proxies and of the letters of revocation at the time when he did. As far as the question of directors or decision given by Tulsidas on the validity of the proxies and letters of revocation is concerned, it was submitted on behalf of the contesting defendants that the defendants would fail if such directions or decisions were bad in law. It was further submitted that short of fraud in the conduct of the meeting or in the declaration of results or manifest error of law in the directions and decisions given upon questions of validity of proxies and revocations, the decisions and directions of the chairman cannot be challenged. For the purpose of these notices of motion I will accept this proposition without going into the authorities and the rival submissions in that behalf. Even then, in my opinion, the result as regards these notices of motion must be the same. Even assuming that any presumption of bona fides would attach to the action of Tulsidas as the chairman of the meeting, such presumption is rebutted by the conduct of Tulsidas in deliberately suppressing from the meeting the said letter of April 9, 1969, from the Company Law Board to the company and the company's reply dated April 22, 1969, thereto as also the other circumstances to which I will presently refer. Further, as will be pointed out, several decisions or directions given by Tulsidas cannot be supported in law nor was any attempt made to

justify them as being correct in law. If so, the result declared by Tulsidas cannot be said to be the true of the meeting. I may also point out that while article 97(2) of the articles of association of the company makes the declaration of the chairman, whether on a show of hands a resolution has or has not been carried, or has or has not been carried either unanimously or by a particular majority, conclusive evidence of the that fact, without proof of the number or portion of the votes cast in favour of or against such resolution, there is no such provision with respect to the declaration of the result of a poll. Under article 98(6) it is only the decision of the chairman on any difference between the scrutineer appointed by the chairman to scrutinise the votes given on the poll and the report to him which is made conclusive and not his declaration of the result of the poll.

89. Before I deal with the decisions or directions given by Tulsidas, a few further facts which are important on this aspect of the case require to be set out. In the plaint in Suit No. 681 the plaintiffs have made a grievance that the company through its secretary got some data fed into the computers mentioned by the Tata consultancy Services, Bombay, and that the proxy lodged at the registered office of the company were wrongfully caused to be removed to the Tata Consultancy Services on April 26, 1969, and thereafter and that when such data was fed, neither the scrutineers nor the plaintiffs were on the scene and the fact on that date the scrutineers were not even appointed and the data was fed into the computers was known only Tulsidas and Dabke and that till today no one else knows the nature of such data or the accuracy or sufficiency thereof or the sufficiency or accuracy with which answers or results were obtained from the computers. The plaintiffs have submitted that for this reason the result, purported to be declared from the alleged result from the said computers, is not valid and binding. Now, the position with respect to the appointment of Tata Consultancy Services is as astonishing as that relating to the Company Law Board's said letter of April 9, 1969. Just as in the letter case Tulsidas on his own purported to deal with the said letter and to reply thereto, so here Dabke, the secretary of the company, on his own, without consulting the board of directors and without any authority from the board of directors, engaged the services of the Tata Consultancy Services. The services to be performed by the Tata consultancy Services are set out in their letter of April 15, 1969. They agreed to transcribe the names of shareholders and joint shareholders along with their holdings into cards and transfer them on to a magnetic tape provided this data was supplied to them by April 19, 1969. This master tape was then to be sorted in dictionary order in order to produce alphabetical index which would be used by the company's share department to identify the shareholders giving the proxies. Further, information regarding proxies and the revocations was to be punched into cards and a proxy register was to be printed showing separately for the Kilachand group and for the plaintiffs the following particulars, namely, (a) name of the shareholder, (b) the total number of shares held, (c) proxy number, (d) the date of proxy, (e) number of shares against the proxy, (f) date of revocation,

if any, (g) revocation number, and (h) number of shares against the revocation. After the polling had taken place, information from the polling papers were to be picked up and a fresh register showing the latest position of the polled proxies was to be prepared. The register would flag those cases where the proxies could be disputed, helping to avoid, as stated in the said letter, "unnecessary screening of valid proxies". It appears that the Tata Consultancy Services were paid a sum of Rs. 20,000 for this work. There is no resolution of the board meeting authorising the engagement of the Tata consultancy Services or the payment of such amount to them, except that the fact that such payment had been made was intimated to the board of directors at its meeting held on June 25, 1969. In justification of his action Dabke sought to rely in his affidavit-in-reply upon a previous instance when similar assistance was taken from the International Business Machines corporation. According to him, in 1960, when the company's shares were oversubscribed to about 60 times the face value of the share offered to the public, assistance of the International Business Machines corporation was similarly taken for processing allotment letters and refund orders, etc., and at that time also no resolution of the board of directors was passed sanctioning such procedure, and it was the secretary and the office staff who attended thereto. Now, I fail to see what analogy there is between the two cases. Processing of allotment letters and refund orders was not a contested matter, while here there was a hotly disputed question on which the directors and shareholders were sharply divided. It is also alleged that Dabke had informed the directors of the company, including Reighley, about this arrangement. The Rightly gave his consent to it does not seem to be borne out by the record. Why this was not put before and resolved upon at a meeting of the board of directors, even though the plaintiffs were insisting that such meeting should be called, is a question which has not been answered in the affidavits-in-reply. According to the Affidavit-in-reply made by Dabke, he got prepared a list of shareholders on the register of the company together with the folio number, number of shares held by them, the names of the joint holders, if any, and their addresses and sent t to the Tata Consultancy Services for preparing the master tape. This appears to have been done prior to April 26, 1969. On the basis of this data the master tape was prepared by the Tata Consultancy Services and an alphabetical index in the dictionary order was made and submitted by them to the company. After receipt of the proxies, a rubber stamp was put on each proxy indicating by means of the letter "F", "K" and "G" whether such proxy was in favour of the plaintiffs or the Kilachand group or was in favour of an independent party, the letters "F", "K" and "G" standing respectively for "Firestone", "Kilachand" and "General". To these proxies was given a register folio number, serially numbered. Different serial numbers were given to the proxies lodged in favour of Rightly and Tulsidas. The proxies which were serially numbers were grouped according to the letters of the English alphabet and folio numbers were put thereon with the held of the staff of the company. It is alleged that at the said time many of the proxies in favour of Rightly and two others did not state the name of the shareholder but merely stated "I, the under signed" and before at the bottom the signature

"purporting to be that of the shareholder" and that in many of such cases it was not possible to decipher the name of the shareholder from the signature or to relate the name of the purported shareholder "as appearing on the proxy register of members" in spite of diligent efforts by the staff of the company. Folio numbers were, therefore, not given to such proxies and such proxies are referred to as "untraceable" in the affidavit-in-reply. After the remaining proxies were arranged as aforesaid and numbered and stamped with the relevant letter, they were sent under armed escort of the Tata consultancy Services in the company of two representatives of the plaintiffs, two of the private company and two of the company for preparation of proxy analysis which accordingly was done by them. It is alleged that said arrangement of taking and bringing back proxies to and from the Tata consultancy Services was arrived at on April 26, 1969, in consultation with Ramdas, Reighley, Warner and their solicitor and solicitor-director. The said proxies were removed on 26th and 27th April, 1969, from the company's office to the office of the Tata consultancy Services. It is alleged that the plaintiffs had deputed their own representatives to accompany the said proxies as well as deputed their representatives to supervise the return of the said proxies. It is said that there could be no question of consulting the scrutinisers when data was fed into the computers prior to April 28, 1969, since on that date no scrutinisers were appointed. Prior to the date of the said meeting held on April 28, 1969, after the master tape had been so prepared from the data supplied as aforesaid, the data with respect to the proxies was fed into the computers for processing on the 26th and 27th April, 1969. After the date of the said meeting the data relating to the revocation letters received was further fed into the computers "in order that the 1st defendant company and/or the scrutinisers may have a complete picture and/or a register of the proxies and revocation letters lodged with the 1st defendant company". It is further alleged that the scrutinisers were present at the time the data relating to revocation letters was fed into the computers. Paragraph 42 of the said affidavit further alleges :

"As a result of the feeding of this data the scrutinisers and the 1st defendant company had before them a register showing the names of shareholders, number of share held by them, the proxies and the revocations, if any, given by them. The validity of the proxies and the revocations was thereafter subsequently determined by the chairman and/or under his directions in accordance with his decisions and directions given in his letter dated 26th June, 1969, to me. As the scrutinisers were not concerned and/or were not entitled to determine the validity or invalidity of the proxies they were not informed of the further data regarding the validity of the proxies which was fed to the computers subsequent to the said letter I say that even the 2nd defendant was not aware of the actual data fed into the computers at the time the same was fed into the computers. I further say that the scrutinisers had themselves checked the register of proxies obtained from the Tata consultancy Services on 14th May, 1969, as also the work done by the office of the 1st defendant company."

90. In his affidavit-in-reply Tulsidas has supported what Dabke has alleged, stating that Dabke informed him about the said facts. Certain averments made by Tulsidas in Paragraph 20 of the said affidavit-in-reply are important and require to be quoted :

"I say that I was not ware of the actual data which was fed into the computers at the time the same was fed into the computers. I say that necessary data was fed into the computer by he secretary of the 1st defendant company in consultation with the Tata consultancy Services. I say that the further data that was fed into the said computer after 26th June, 1969, was based upon my decisions on the validity or otherwise of various proxies and letters of revocations..... I say that, as explained above, the scrutinisers know the nature of the data fed except the data which was fed after I had given my decisions aforesaid." The plaintiffs have denied any prior knowledge, consent or approval of Reighley, warner or the plaintiffs to what was done. Even according to the contesting defendants, there was no prior knowledge or approval or consent of either Reighley, Warner or the plaintiffs. It also seems consistent with the other facts to be believe that Rightly protested against the proxies being removed as he alleges, and that the plaintiffs" representatives accompanied the said proxies along with others "to supervise the return of the said proxies as stated and alleged by Dabke himself in his affidavit-in-reply." In any event, it is not the case of the contesting defendants that anybody except the Dabke knew what the complete data was which was fed into the computers.

91. At the hearing three registers were produced. Two of them were proxy registers, one prepared before and the other prepared after June 26, 1969. These were referred to at the hearing as the old proxy register and the new proxy register. The old proxy register was produced by the company the while the new proxy register was forwarded by the company to the scrutinisers and produced by them. The third was a printed register consisting of sheets headed "Register of defective proxies and/or revocations". Admittedly, however, it is a register relating to proxies only prepared or got prepared by Dabke in the company"s office. Each sheet has several columns headed "(1) Reference folio number, (2) Number of shares held, (3) Serial number, this being the serial number given to the proxy, (4) Duplicate, (5) Without date or signature, (6) Date or signature filled by rubber stamp or typed, (7) Differs from specimen signature, (8) Sig. or P/A or B/Reso. not Regd., that is, signature of power-of-attorney or board resolution not registered with the company, (9) Without the common seal of the company, (10) Stamps not cancelled, (11) Stamps adjudicated, (12) Party out of Maharashtra and stamps of Maharashtra, (13) Without date of meeting, (14) With dates of two meetings and (15) Unsigned." This register was forwarded by the company to the scrutinisers and was produced by the scrutineers.

92. One of the charges levelled by the plaintiffs is that Tulsidas deliberately deferred giving his decisions or directions on the objections raised to the proxies and revocations until a complete picture of proxies was before him, so that he

may know how any decision given by him would affect the voting, and give his decisions from that point of view, not fairly and honestly but with the mala fide object of invalidating the proxies in favour of Reighley, so that the resolution could be got passed. The first objection relates to the late lodging of proxies. Under article 110 of the articles of association of the company, no instrument of proxy is to be treated as valid and no person is to be allowed to vote or act as proxy under an instrument of proxy unless such instrument of proxy has been deposited at the registered office of the company at least 48 hours before the time appointed for holding the meeting. This is in conformity with the provisions of section 176(3) of the Companies Act, 1956. Thus the last minute for lodging proxies at the registered office of the company was by 4 p.m. of April 26, 1969. According to the plaintiffs, 1017 proxies in favour of Tulsidas and three others were deposited by Shukla, the secretary of the private company, after 4 p.m. on April 26, 1969, and after the bell announcing the expiration of time allowed for depositing proxies had been rung. At that time Reighley, Karode, one P. K. Nambia, also a shareholder of the company, and the third defendant were present. Karode and Rightly objected to such proxies being deposited. Such objection was recorded by Karode on the same day and confirmed by Rightly in the presence of the third defendant who has attested their signature. These 1017 proxies were in 12 unopened packets. These packets were opened and numbered and a note has been put on the said letter of objection to the effect that "after numbering as above, receipt has been given to Kilachand Devchand and Company Private Ltd. by Synthetics and Chemicals Ltd. at 5-55 p.m. on 26-4-69". According to the affidavits-in-reply, at about 12-30 p.m. on the 26th April, the company received from the private company several packets containing all the proxies in favour of Tulsidas and three others, each packet containing several files of proxies. For the purposes of facilitating the passing of receipts after the counting of proxies by the company's staff the private company had attached to each file a typed list in duplicate showing the names of shareholders purporting to have issued proxies in favour of Tulsidas and others with the folio number and the number of shares held by each shareholder. All the said packets were brought by Shukla, the secretary of the private company, along with two or three other representatives of the private company and deposited with the company. The physical counting of the said proxies took a considerable time and receipts were granted in respect of the proxies contained in each file after the proxies in each file were counted as of the time when the packets were received. Arrangements had been made to receive the proxies in the open landing space opposite the lift. After counting the proxies, they were removed inside the office of the company. Exactly at 4 p.m. Dabke asked the staff of the company to stop counting the proxies lodged by the private company on the landing and to remove the uncounted proxies contained in the packets inside the office of the company for the purpose of counting and issuing receipts. It is further stated that the proxies lodged by the plaintiffs which were pinned together in lots of 100 each generally (that is, not classified in the manner in which proxies lodged by the private company) were lodged between 2-30 p.m. and 3-30 p.m. and the

counting of such proxies finished by 4 p.m. It is further alleged that it was pointed out to Karode and others that the said packets brought by the private company had been deposited at 12-30 p.m. Now, whether these 1017 proxies were lodged at 12-30 p.m. as alleged by the contesting defendants or after 4 p.m. as alleged by the plaintiffs is a question of fact which will fall to be decided at the hearing, but one or two circumstances are significant. The total number of proxies in favour of Rightly and others was about 11,732. These were on Dabke's own showing in lots of 100 each generally and not classified as proxies lodged by the private company were. These could, however, be counted within a period of about one hour on Dabke's own admission. The total number of proxies lodged on behalf of the Kilachand group was about 7,789 including the 1,017 disputed proxies. It is thus difficult to understand why, when these 7,789 proxies were lodged at 12-30 p.m., they could not have been counted till 2-30 p.m. or till 5-55 p.m. It is also difficult to understand why a receipt was not given in respect of the said packets to the effect that so many packets said to contain so many proxies were received. In fact, on April 28, 1969, Rightly had deposited approximately 11,730 revocations contained in two trunks and in respect of these trunks receipts were issued showing that trunk of a particular colour said to contain revocation letters was received at the registered office of the company on April 28, 1969, at 2-50 p.m. It is also significant that, prior to the affidavits-in-reply, the story now set up about all these proxies being brought at 12-30 p.m. has not been setup in the correspondence.

93. At the said meeting of April 28, 1969, written objections were raised by a shareholder, Kishore K. Koticha, to several proxies in favour of Rightly and others. It appears that a similar letter of objection was written by Koticha with respect to the proxies lodged for the meeting of April 29, 1969. By his letter of April 30, 1969, Koticha stated that the objections which he had raised about the proxies in his letters of 28th and 29th April would also apply to the letters of revocation lodged by the plaintiffs. Copies of the letters of April 28, 1969, and April 30, 1969, have been exhibited by consent and the copy of the letter of April 30, 1969, bears an endorsement that three letters were received by the company on May 2, 1969. By their attorney's letter of June 10, 1969, the plaintiffs raised several objections to the proxies in favour of Tulsidas and three others. A reminder was written on June 23, 1969. The reply to this letter was only given by Tulsidas on July 2, 1969, after he declared the result of the meeting held on April 28, 1969. It is contended by the contesting defendants that the plaintiffs' attorney's letter cannot be treated as objections raised by a shareholder to the said proxies. It is not necessary to decide this question also as, on Tulsidas's own showing, whatever objections were raised were equally applied to proxies both in favour of Rightly and in favour of himself. Apart from that when we come to consider these objections it will be obvious that some of them are of such a nature that whether actually taken or not, the proxies to which they applied could never have been treated as valid. It is, however, alleged in paragraph 66 of Dabke's affidavit-in-reply that, as the only objections were to

the proxies in favour of Reighley, tabulations were made, that is, the register of defective proxies was prepared only with respect to such proxies and not with respect to the proxies in favour of Tulsidas. This again is not true. The register of defective proxies produced in court includes two sheets, on which in the left hand corner at the top is written in ink "Kilachand P.", that is, the proxies in favour of Tulsidas. These two sheets are in respect of shareholders in ledger folio "N". From this an inference must arise that similar sheets must have been prepared with respect to other shareholders who gave or purported to give proxies in favour of Tulsidas but the same have not been produced. In the register of defective proxies, in the case of Rightly and others as also in those two sheets the entries in the columns are in ink but the totals of the columns are in pencil and on several sheets there is an analysis of the different types of proxies worked out at the back. This is more than sufficient to convey to any one what the effect on the voting would be if a particular class of proxies were held to be valued or invalid. It is difficult to believe that a similar analysis was not one in respect of proxies in favour of Tulsidas, if a register in respect thereof was prepared. At the hearing various statements were sought to be handed over to me and facts and figures were given to me of the various heads under which the proxies in favour of both parties would fall. I was also handed over by learned counsel for the company a specimen page, said to be a copy of one of the sheets in one of the proxy registers. I have returned this document and not kept it on the file. Based on the contents of the said specimen copy, detailed arguments were advanced to me by the contesting defendants. When this specimen copy was compared with the original sheet, of which it purported to be a copy, it was found that not only the headings of the columns differed but what was filled in under the columns had no relation to the original sheet. I may mention in fairness to the attorneys of the company that this specimen copy was prepared not in their office but in the office of the company. There were also other statements made under instructions from those representing the company present in court which also did not turn out to be correct. For this reason I have refused to accept or attach any weight to any statement made from the bar which does not find a place on the record.

94. On the sixth day of the hearing, in order to answer the plaintiffs' charge that the giving of directions by Tulsidas was deliberately delayed until he could see for himself a complete picture of the proxies and revocations so as to bring about a result favourable to himself, Mr. C. K. Daphtary, learned counsel for Tulsidas, applied in Suit No. 681 of 1969 for leave to put in a further affidavit explaining why the directions were not given by Tulsidas in writing till June 26, 1969, and to show that they were given orally on June 19, 1969. The plaintiffs objected to any such further affidavit being filed at this late stage and I rejected the said application for several reasons. There is no warrant whatsoever for saying that any directions as to the objections were given by Tulsidas prior to June 26, 1969. The passages from the affidavits-in-reply of Dabke and Tulsidas which I have set out above make this amply clear. These passages further make it amply clear

that Tulsidas gave his directions only after a complete picture was presented to him. It is also abundantly clear from the said affidavits that the validity of the proxies and revocations was determined by Tulsidas and/or in accordance with his directions given in his letter of June 26, 1969. For this reason as also for the reason that this application was made at too late a stage, I rejected the said application. Immediately thereafter Mr. Sen, learned counsel for the company, called upon Mr. Daphtary to produce the opinion of counsel obtained by Tulsidas on the objections to proxies for the meeting of April 28, 1969, and to the letters of revocation. This was also objected to by Mr. Nariman on behalf of the plaintiffs. I upheld the objection because nowhere is there any suggestion in any of the affidavits-in-reply that any opinion of counsel was taken. In fact, so that he may have a complete picture before him, and it was thereafter that he gave his decisions and directions which are contained in his said letter of June 26, 1969. Secondly, whatever counsel may have opined as to the validity in law of any objection is immaterial. The matter is to be decided by the court itself and not in accordance with the opinion given by counsel. For these reasons I did not permit Mr. Daphtary to produce any such opinion.

95. I will now examine the validity of the objections to the proxies. Though the plaintiffs are challenging the validity of most of these decisions, at the hearing of these notices of motion Mr. Nariman, learned counsel for the plaintiffs, has confined himself to only some of them. The decisions or directions of Tulsidas are contained in his said letter of June 26, 1969. That letter is addressed to Dabke and begins this way :

"Now that the papers relating to the extraordinary general meeting held on 28th April, 1969, have been tabulated I am giving the following directions."

96. The opening words of this letter also make it abundantly clear that these directions have been given after the papers relating to proxies, etc., had been tabulated and on the basis of such tabulations, that is, after Tulsidas had before him a clear picture as to the proxies to which a particular infirmity applied. The first decision objected to at the hearing of these notices of motion is that contained in direction 1(c) under which a proxy by a company not bearing the company's seal was to be rejected. u/s 176(5)(b) of the Companies Act, 1956, an instrument of a proxy where the appointer is a body corporate, is to be under its seal or is to be signed by an officer or an officer or an attorney duly authorised by it. Article 109 of the articles of association of the company contains a similar provision. This direction is, therefore, contrary to law. It was submitted on behalf of the contesting defendants that the result of a wrong direction is a mixed question of fact and law and such direction cannot be held to be wholly bad. I am unable to follow this submission. Rejection, therefore, of proxies given by a company not under its seal but signed by one of its officers or an attorney duly authorised by it would be a wrongful rejection contrary to law and such proxies must be held to be valid.

97. The third group of directions relates to stamps on proxies. Direction 3(a)

provides that a proxy which bears no revenue stamp should be rejected. There is no direction as to what is to be done if a proxy bears a revenue stamp which has not been cancelled. Admittedly, there were proxies in favour of Rightly as also Tulsidas on which the stamps remained uncanceled. In paragraph 40 of the affidavit-in-reply of Dabke and paragraph 18 of the affidavit-in-reply of Tulsidas it is stated that the proxies, the stamps on which were not cancelled were not rejected, whether the same were in favour of one group or the other. This direction cannot be supported in law. u/s 10 of the Indian Stamp Act, 1899, read with rule 13(f) of the Indian Stamp Rules, 1935, a proxy is to bear an adhesive stamp. Section 12 of the Indian Stamp Act provides as follows;

"12. Cancellation of adhesive stamps. - (1) (a) Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again;

(b) whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid, cancel the same so that it cannot be used again.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.

(3) The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

98. Thus, u/s 12(2) any proxy on which the stamp is not cancelled must be treated as an unstamped proxy and ought to have been rejected. In *In re Tata Iron and Steel Co. Ltd.* Crump J. has also held that the proxies which are unstamped or upon which the stamps have not been cancelled must be excluded and any votes recorded on the authority of such proxies should equally be excluded. No attempt has been made to support the legal validity of this direction but it was suggested that this was a favour to the plaintiffs inasmuch as several proxies in their favour bore stamps which were not cancelled. This overlooks the fact that on the admission of both Dabke and Tulsidas, there were proxies also in favour of Tulsidas on which the stamps were not cancelled.

99. Direction 3(b) requires proxies against which objections have been raised and which are signed by shareholders described as residing outside Maharashtra State and which do not bear the stamp of the State where the shareholder is said to reside to be rejected. This direction again cannot be supported in law. u/s 2(11) of the Indian Stamp Act, an instrument is said to be duly stamped when it bears an adhesive or impressed stamp of not less than the proper amount and when such stamp has been affixed or used in accordance with the law for the time being in force in India. u/s 10(1), all duties with which any instrument are

chargeable are to be paid and such payment is indicated on such instruments by means of stamps, (a) according to the provisions contained in the said section, or (b) when no such provision is applicable thereto as the State Government may by rule direct. There is no provision in the Indian Stamp Act with respect to an instrument executed in one State which is required to be used in another State. Rule 3(1) (i) of the Bombay stamp Rules, 1939, made in exercise of the powers conferred, inter alia, by section 10, provides that all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps issued by the Provincial Government for the purposes of the Act. Under rule 18, except as otherwise provided by the said rules, adhesive stamps used to denote duty are to be the requisite number of stamps bearing, inter alia, the words "India Revenue" or "Bombay Revenue". The words "Provincial Government" and "Bombay Government" are now to be read as the "State Government" and the "Maharashtra Government". Proxies, therefore, executed by shareholders in another State and bearing the stamps of the Maharashtra State could not have been validly rejected and ought to have been treated as valid. I may mention that no attempt was made to support the validity of this direction.

100. Direction 3(c) requires that proxies by shareholders described as residing outside Maharashtra State which bear the certificate of the stamp office to be shown to Tulsidas. This again is surprising. Section 32 of the Indian Stamp Act provides for a certificate to be granted by the Collector by endorsement on the instrument in question to the effect that the full duty with which it is chargeable has been paid. Under sub-section (3) of section 32, any instrument upon which an endorsement has been made u/s 32 is to be deemed to be duly stamped and, if chargeable with duty, is to be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped. There was, therefore, no question of Tulsidas or anybody sitting in judgment upon the certificate of the stamp officer. All such proxies, therefore, ought to have been held to be valid. Here again no attempt was made to justify the validity of the direction.

101. Direction 5 requires that where there is a difference between the specimen signature of the shareholder giving the proxy and the signature on the proxy, the proxy should not be rejected by Dabke but the proxy and the specimen signature should be shown to Tulsidas for his decision. It nowhere appears that any such signatures were ever shown to Tulsidas. None of the affidavits-in-reply mention that any such signature was ever shown to Tulsidas. On the contrary, the affidavits-in-reply show that this work was done by the staff of the company. This is also clear from the correspondence with the scrutineers. In their letter of June 27, 1969, the scrutinisers have stated that they had deleted from the proxy registers those proxies on which specimen signatures differed from that on the records of the company and all the duplicate proxies on the basis of tabulations prepared by the company and test checked by them. Further, in paragraph 50 of the affidavit-in-reply of Dabke and paragraph 31 of the affidavit-in-reply of

Tulsidas there is an express admission that the signature were verified by the staff of the company and test checked by the scrutineers. There is, therefore, no question of any such signature being shown to Tulsidas. It is the of the contesting defendants that on a proper construction of the relevant articles in the articles of association of the company and a proper demarcation of the respective functions of chairman of the meeting and the scrutineers, Tulsidas as the chairman of the meeting had to decide upon all question of validity of proxies. If this submission is correct, then it was for Tulsidas alone to have compared the signatures in question. Whether the signature on proxy differs from the specimen signature or not was not a ministerial matter but a matter involving judgment, which matter could not have been delegated either to the secretary or the staff of the company.

102. Direction 6 provides that where the name of the shareholder cannot be ascertained either from the information given on the proxy or the signature the proxy must be rejected. As appears from paragraph 42 of the affidavit-in-reply of Dabke, a large number of proxies in favour of Reighley, namely, those referred to as "untraceable", were rejected and no folio number given thereto on the ground that it was not possible from the signature to decipher the name of the shareholder or to relate the name of the purported shareholder with any name appearing on the register of members and that this was done immediately after April 26, 1979, or thereabouts. No identification letters were given to these proxies and they did not feature in any of the proxy registers and were, therefore, not taken into account. It certainly was not for the company's staff to reject such proxies. Tulsidas admittedly never had a look at any one of these proxies. By their letter of May 21, 1969, the scrutinisers stated that there were approximately 5,000 revocations and 1,000 proxies in favour of Reighley, which were reported "untraceable", and that similarly about 700 revocations in favour of Tulsidas and others were also reported "untraceable". It appears that such proxies and revocations lodged by the plaintiffs, bore on the reverse certain reference numbers. By the said letter the scrutinisers requested that the company's office should be instructed to trace the said proxies and revocations with the help of reference on the back of the documents and suggested that the assistance of the respective parties may be taken for that purpose. In the progress report which the scrutinisers made on May 22, 1969, they have referred to their letter of May 21, 1969, and requested that the same should be attended to. By their attorneys' said letter of June 10, 1969, addressed to Tulsidas, the plaintiffs pointed out that the staff of the company had not mentioned folio numbers on approximately 1,450 proxies and 5,000 odd revocations in favour of Reighley, while they had given folio number to all proxies and revocations in favour of Tulsidas. They have further recorded that on May 5, 1969, Rightly and Karode were in the office of the company and had offered to assist in putting the folio numbers by a reference to the plaintiffs' internal records, but this offer was not availed of. By the said letter they requested that the assistance of Rightly and Tulsidas in placing the correct folio numbers on the said proxies and

revocations should be taken. The plaintiffs by their attorney's letter June 23, 1969, sent a reminder to Tulsidas. By their attorneys' another letter of the same date the plaintiffs pointed out these facts to the scrutinisers and requested them to do the needful. A copy of this letter was forwarded by the scrutinisers to Tulsidas. The plaintiffs sent a reminder to the scrutinisers by their attorneys' letter of June 27, 1969. It appears that Rightly also handed over to the scrutinisers in the presence of Dabke four files containing the information which would be useful for processing the proxies and letters of revocation in question. Along with their another letter dated June 27, 1969, addressed to Tulsidas the scrutinisers enclosed a copy of the said letter dated June 27, 1969, addressed by the plaintiffs' attorneys to the scrutinisers and also recorded the fact that the said four files had handed over to them by Rightly in the presence of Dabke. They also pointed out that they had so far not received any reply from Tulsidas to their letter of June 23, 1969. By his letter of June 28, 1969, Tulsidas stated that it was no part of their duty as scrutinisers to have accepted papers from Rightly and that he had given to the secretary the directions relating to the work of the secretary and as soon as the secretary finished his work, the scrutinisers would take in hand the scrutiny of the voting papers and counting of the votes and report to him. It is thus clear that a large number of proxies and revocation letters in favour of Rightly were not taken into account merely on the ground that the company's office could not make out from the signature or the other information contained in the proxies the name of the shareholder giving the proxies. This work was left to Tulsidas who claiming to be the sole judge of the validity of proxies and revocation letters to be done by the secretary and the staff of the company and even when assistance was offered on the basis of the information appearing on the proxies and revocation letters themselves, namely, the reference numbers on the back thereof, to help the company's staff "trace these proxies and revocation", such offer was rejected. This attitude on the part of Tulsidas militates against his claim of bona fides, fairness and impartiality.

103. Direction 7 requires that wherever there is a difference between the specimen signature and the signature on the revocation letter, the revocation letter should be shown to Tulsidas for decision. As is clear from what is stated with respect to direction 6, no such revocation letter was ever shown to Tulsidas, but such revocation letters were dealt with only by Dabke and the office staff.

104. Direction 8(a) requires undated revocation letters to be ignored. The plaintiffs has lodged about 11,000 revocation letters obtained by them. The position appears to be that a large number of revocation letters in favour of Rightly and others were undated, while those in favour of Tulsidas were dated. In *re Tata Iron and Steel Co. Ltd.*, Crump J. said that such an objection with respect to proxies hardly required discussion. He observed :

"The proxy was lodged within the time allowed and before the date of the meeting. I can understand that an omission to state the date of the meeting may be a serious defect, but as for the date of execution I can only say de minimise.

No authority has been cited for questioning a proxy on such grounds."

105. I fail to see why the same principle should not apply to revocation letters. Under article 113 of the articles of association of the company, a vote given in pursuance of a proxy is to be valid notwithstanding, inter alia, the revocation of the proxy provided no intimation in writing of such revocation has been received at the registered office of the company before the vote is given. All that is, therefore, required to revoke a proxy validly lodged is the receipt of revocation letter before the vote is given. No form of revocation letter is prescribed and this insistence on date appears to be incapable of explanation except that a large number of undated revocation letter were those of proxies in favour of Tulsidas and others. Actually in the proxy register prepared by the Tata Consultancy Services most revocation letters have been bearing the date April 28, 1969. It was said at the hearing that this date is a mistake and as appears on the record, a large number of the revocation letters in favour of Rightly were undated. There is no mention in the affidavit-in-reply that such a mistake was made or as to who made this mistake or how such a mistake came to be made. It was said at the hearing that this direction applied only where there were cross revocation letters in favour of both parties, one of which was dated and the other undated. There is no warrant for this statement either in the said letter of June 26, 1969, or in any of the affidavits in reply and this statement, therefore, cannot be accepted. The direction unequivocally applies to all undated revocation letters and, in fact, as the record shows, all undated revocation letters, whether they were cross revocation letters or otherwise, have not been taken into account. This direction, therefore, does not appear to have been given bona fide.

106. Direction 8(b) states that the letters of revocation filed by Firestone and Kilachand in the form annexed to the said letter of June 26, 1969, were not revocation letters and should be ignored. The form of revocations filed by the plaintiffs and objected to, show that such revocation letters are addressed to the company, signed by the shareholders and headed "EXTRAORDINARY GENERAL MEETING ON 28TH APRIL, 1969, and 29th April 1969" and are in these terms :

"I have signed forms of proxy and forms of revocation in favour of Mr. Tulsidas Kilachand and others. I have subsequently revoked the said forms of proxy and revocation and executed fresh forms of proxy and revocation in favour of Mr. F. J. Rightly and others. Kindly note the aforesaid position in your register and acknowledged receipt of this letter."

107. Now, I fail to see what can be objected to in this form. All that was said was that this form referred to revocation as having been done earlier and did not by itself revoke the proxies. The form of letter of revocation in favour of Tulsidas is more elaborate and it state that the executant had executed the final proxies in favour of Tulsidas and others and had on that day revoked all proxies executed in favour of Rightly and others. Now, I fail to see why either of these two forms of revocation should be rejected. A proxy holder is merely an agent of a shareholder to vote at a particular meeting. u/s 203 of the Indian Contract Act,

1872, except where an agent has an interest in the subject-matter of the agency, the principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal, and u/s 207, revocation may either be expressed or implied, and u/s 208, so far as regards third persons, termination of the authority takes effect when it becomes known to them. No particular form of revocation is provided for by the articles. Article 113 only requires an intimation in writing of revocation to be received at the registered office of the company before the vote is given. In the forms revocation rejected by Tulsidas it is made expressly clear that the proxies given by the shareholder in favour of a particular individual have been revoked by him and they ought, therefore, to have been held to be valid.

108. Direction 8(c) says that where the name of the shareholder cannot be ascertained either from the information given on there revocation letter or the signature, the revocation letter should be rejected. A large number of revocation letters obtained by Rightly and others have been rejected on this ground. Here the position is the same as in the case of "untraceable" proxies and what I have said with regard thereto while considering direction 6 must also apply to direction 8(c).

109. Direction 8(d) provides that if there are two or more revocation letters given by the same shareholder in favour of different parties and they all bear the same date, they will cancel out. This direction is wholly untenable in law. I fail to see why the revocation letter would cancel each other out. They would on the contrary cancel the proxies in respect of which they have been lodged. The effect of this direction would be that if proxies were given by a shareholder in favour of both the parties and one bears a later date than the other, the cancelling out of the cross letters of revocation in respect thereof would make valid or revive the proxy of the later date. I am unable to see on what principle of law this can be. The effect of such revocation letters must be taken as cancelling the proxies in respect of which these letters have been lodged.

110. Direction 9(a) states that a proxy given by a shareholder will revoke an earlier proxy given by him, whether in favour of the same persons or other person unless the later proxy is validly revoked, in which case the earlier proxy will stand. The later proxy would of course revoke an earlier proxy, but I fail to see how, when a later proxy which has revoked an earlier proxy is itself revoked, the earlier proxy can be resuscitated. The result of a later proxy being revoked would be that the later proxy would also fall and not that the earlier proxy would revive. This direction too must, therefore, be said to be bad in law.

111. Direction 9(c), inter alia, provides that where a shareholder has given proxies in favour of both Rightly and others as also Tulsidas and others, than if both the proxies are undated or both bears the same date, they will be treated as cancelling each other unless one of the proxies is validly revoked. Here also to my mind the result would cancel each other out irrespective of whether one of them is thereafter revoked or not because revocation of one of such proxies

cannot lead to the revival of the other proxy. This direction also, therefore, does not seem to me to be justified in law.

112. So far as the bona fides of Tulsidas are concerned, it may also be mentioned that after the result was declared, Reighley, in his capacity as director, repeatedly requested Tulsidas as well as Dabke as the secretary of the company to give him inspection of various papers. Copies of that correspondence are annexed to the plaint in Suit No. 681 of 1969. It is not necessary to refer to that correspondence in any great detail, but it cannot be disputed that several of the documents, of which Rightly required inspection in his capacity as director, were those of which he was entitled to inspection u/s 209(4)(a) of the Companies Act, 1956. Nonetheless inspection was denied to him. It was said at the hearing that it was obvious that the plaintiffs were contemplating filing suits and this inspection was asked for by Rightly for the purposes of such suits. If a director is entitled to take inspection, his motive in doing so is irrelevant. In fact, among the documents, of which inspection was not given to Reighley, was the said letter of June 26, 1969, which came to the knowledge of the plaintiffs and Rightly for the first time when a copy of it was annexed to the affidavit-in-reply of Dabke as also of Tulsidas. This fact also militates against the claim of bona fides put forward by Tulsidas.

113. Thus several directions given by Tulsidas are bad in law and some others are not given. Apart from this, admittedly the results prepared by the Tata Consultancy Services contain several mistakes. The result was communicated by the Tata consultancy Services to the company by their letter of June 30, 1969, signed by one Y. P. Sahni. Along with that letter a new proxy register was forwarded to the company together with a list of what is referred to as "additional changes which were not incorporated in the main register as they had been missed by the company". It further appears from the said letter that due to two punching errors, the total shares shown against the plaintiff groups from page No. 347 onwards of the register had to be amended, which was to be done by ignoring the lakh position, and as a result thereof, the total shares shown on the last page No. 465 was required to be read at 70,698 and not 8,70,698. A mistake of eight lakhs in the total and in the punching of figures can hardly be said to be a negligible error. The letter further states that due to changes which were pointed out to the Tata Consultancy Services by the company, the final figures had to be further amended as set out in the said letter. These correction are as follows :

114. Along with the said letter the Tata Consultancy Services also returned the old proxy register in which the said changes were marked. This letter was sent to the company in duplicate and was delivered by hand. One signed original was retained by the company and the other sent the scrutineers. In both the original letters, after the portion reproduced above, further corrections have been made in ink under the heading "Firestone" in the first three columns. These corrections are :

115. Thus, the total proxies in favour of Rightly and the number of shares which such proxies represent are reduced by 1 proxy and 6 shares respectively. I am informed by Mr. Sen, learned counsel for the company, that the initials "D. V." are the initials of the man from the Tata Consultancy Services who delivered these letters to the company and that these corrections were made by him when these further mistakes were pointed out to him by the company when the said letters of June 30, 1969, were delivered to it. Both the signed originals of the said letters have been exhibited by consent.

116. From this, it is obvious that no reliance can be placed even upon the accuracy of the result obtained through the services of the punching cards and the computer. Thus, the result obtained was based on decisions erroneous in law, not given bona fide and containing, for aught one knows, further arithmetical errors as yet undetected. The decision so arrived at cannot be said to be valid and cannot stand. It was submitted on behalf of the contesting defendants that on this position what the court should do would be to give correct directions and direct a fresh count on the basis thereof, and that in fact the plaintiffs have made an alternative prayer to this effect Suit No. 681 of 1969. I do not propose to decide at this stage what the effect of these wrong decisions and arithmetical mistake is, whether it renders invalid the said meeting and the resolution passed thereat or whether the court has the power in such a case to give proper directions and direct a re-count. This will have to be decided at the hearing of the suit, but one thing cannot be disputed. Today there is no resolution of the company for a further term, and in view of the large number of proxies and revocation letters in favour of Tulsidas and others which appear to have been rejected and proxies and revocation letters in favour of Tulsidas and others which appear to have been treated as valid by reason of these erroneous decisions, and bearing in mind that the majority in favour of resolutions as shown in the result of the poll declared by Tulsidas is only of 20,171 votes, and having regard to the fact that the one proxy in favour of Rightly and others averages about 10 votes or more, while that in favour of Tulsidas and others averages about 13 to 14 votes, it may well be that if a recount as submitted were ordered, the resolution would be lost.

117. There are a number of objections taken by the plaintiffs in connection with this aspect of the case. In view of the conclusion which I have already reached, I do not consider it necessary to deal with these objections and they may well be decided at the hearing of the suit.

118. The question that remains is what order to make in this case. It was submitted by Mr. Nariman, learned counsel for the plaintiffs, that since the conclusions I have arrived at are that the resolution passed at the meeting of the board held on November 14, 1968, and the notice convening the said meeting of April 28, 1969, and what was transacted at the said meeting are all invalid, the court must restrain the continuance of an ultra vires and an illegal act and grant an injunction as prayed for. On the other hand, the contesting defendants

submitted that the conclusions to which I have arrived at on these notices of motion can only be prima facie and on such prima facie conclusions the court ought not to grant an injunction. I have at this stage held in favour of the plaintiffs on almost all points. Even though the conclusions I may have reached are prima facie and not final conclusions, I would have been inclined to grant an injunction as prayed for, but for the fact that all parties are agreed that the hearing of both these suits should be expedited and they should be heard and disposed of as early as possible, a view which in the interests of the parties, I am also inclined to take. I accordingly do not think it necessary at this stage to disturb the status quo ante. But what is the status quo ante ? Admittedly, right from October 1, 1968, the private company has voluntarily not taken any amount for its commission. It may have done this either because the private company may have apprehended that the opposition of the plaintiffs to this appointment for a further term may prove successful or because it may have feared action by the Company Law Board. In fact, in its letter of April 9, 1969, the Company Law Board had made it expressly clear that any action taken by it would be effective as from October 1, 1968. If, therefore, the private company is to be allowed to continue to function as it has been doing, it can only be upon terms. It was submitted that the financial condition of the private company is no sound that no condition need be imposed and no security taken as the private company is solvent enough to refund any moneys which it may receive. In support of this submission a copy of the balance-sheet of the private company for the year ending September 30, 1968, has been put in by consent and marked exhibit No. 8. This balance-sheet, however, does not quite bear out this claim, for certain items shown on the assets side cannot be taken at the value shown therein. In the summary of investments, out of a total investment of Rs. 1,23,39,296, investments of the value of Rs. 59,65,133 are in shares of subsidiary companies which are, however, not quoted on the market, and investment of the value of Rs. 13,19,532 in shares of subsidiary companies quoted on the market. Further, on the assets side are shown two sums of Rs. 2,31,130 and of Rs. 27,25,818 aggregating to Rs. 29,56,948 due from the Digvijay Spinning and Weaving Company Ltd., which are stated as "considered good". The Digvijay Spinning and Weaving Company Ltd. is a company under the same management as the private company and it is interesting to know its fate. By a notification No. BRU 21690-LAB. I, dated July 9, 1969, of the Government of Maharashtra Industries Gazette Department published in Part I-L of the Maharashtra Government Gazette, Extraordinary of July 9, 1969, the Government of Maharashtra in exercise of the power of the powers conferred by section 3 and clause (a) (iv) of sub-section (1) of section 4 of the Bombay Relief Undertakings (Special Provisions) Act, 1958, declared that the said Digvijay Spinning and Weaving Company Ltd. should be conducted for a period of one year commencing on July 9, 1969, and ending on July 9, 1970, to serve as a measure of unemployment relief, and has further directed that during the said period any right privilege, obligation or liability accrued or incurred before July 9, 1969, and any remedy for the enforcement thereof should be suspended. A copy

of the relevant gazette has been put in by consent and marked exhibit C. Thus, this debt is today not recoverable, assuming that a company which had to be declared as a relief undertaking is capable of meeting its debts. Further, the auditors' notes appended to the said balance-sheet show that the sales tax assessments of the company have been finalised up to March 31, 1967, only and that there are pending assessments in respect of which the private company does not expect any liability to be imposed. How far this expectation is true can only be known when the assessments are finalised, but we should bear in mind that the exception of the private company in respect of the debts due from the Digvijay Spinning and Weaving Company Ltd. was certainly not justified. The auditors' notes also show that the bonus is paid and accounted for on cash basis and, therefore, no provision has been made in respect thereof during the year and that no depreciation is provided on land and godown and on building other than the portion used for business which aggregated to Rs. 87,827, u/s 205 of the Companies Act, 1956. Further, on the assets side is shown a sum of Rs. 39,76,604 for advances and other Income Tax payments and the note to it runs, "completed assessment up to Asstt. Year 1963-64 but under appeals; no adjusted therefore .Note (B) of the company auditors' report to the shareholders states that the auditors could not, in the absence of availability of tax assessment records, ascertain the adequacy or otherwise of the liability for taxation and provision thereof. This provision is in the sum of Rs. 22,82,770. The secured loans aggregate to Rs. 82,01,245, while the unsecured loans aggregate to Rs. 16,09,817. As the profit and loss account shows, the actual working of the company has resulted in a profit of Rs. 3,76,429, though the final figure of profit shown in the profit and loss account which is taken to the balance-sheet is Rs. 7,32,273 arrived at by taking into account certain other items such as balance as per last balance-sheet and Income Tax refunds of previous years. In the affidavit-in-reply of J. B. Shukla, the secretary of the private company, commission in the sum of Rs. 21,03,300 is stated to have been earned from the sole selling agency for the year ending September 30, 1968. According to the said affidavit, the private company incurred expenses in respect of the sole selling agency in the sum of Rs. 17,11,300. Thus, according to the said affidavit, the profits earned from the sole selling agency are Rs. 3,92,000. If, therefore, the profits from the sole selling agency were not there, then for the year ending September 30, 1968, the actual working of the private company would have shown a loss. The financial position of the private company cannot, therefore, be said to be so sound as to justify dispensing with security.

119. It was then submitted by the contesting defendants that in respect of the working of the sole selling agency, the private company has to incur expenses which under the terms of the agreement are to the borne by it and, therefore, at least the amount of such expenses should be allowed to be received unconditionally by it. In the said affidavit-in-reply of Shukla it is said that the expenses incurred for the year ending September 30, 1968, were in the sum of Rs. 17,11,300 and a summary of such expenses is annexed as exhibit A to the

said affidavit. After this affidavit was filed, the plaintiffs by their attorneys' letter of September 8, 1969, called upon the private company to give them inspection of documents from which the correctness of such expenses could be ascertained as also inspection of the balance-sheet for the year ending September 30, 1968, and the documents required by law to be annexed or attached thereto, including the profit and loss account and the auditors' and the director's report, which balance-sheet was referred to in the said affidavit. By its attorneys' letter of September 9, 1969, the private company refused to give inspection. The plaintiffs have denied that the expenses could be in the sum alleged by the private company. No supporting material is placed before me to show how the figures in the summary of expenses annexed to the said affidavit have been arrived at. In view of several incorrect statements made in the affidavits-in-reply, not much reliance can be placed on these figures unsupported by any other material. It is also alleged in the said affidavit that the cost of the company of setting up a separate sales organisation would be over Rs. 25,00,000 and a statement thereof is annexed as exhibit B to the said affidavit of Shukla. This exhibit B refers to an estimate as contemplated by an expert committee sent by the plaintiffs in 1965. After this affidavit was filed, by their letter dated September 10, 1969, the plaintiffs asked for inspection of the report of such estimate. No such inspection was given to the plaintiffs nor has any such report been produced before me and it is not possible at this stage to place reliance upon this estimate without a detailed picture thereof being presented. The plaintiffs in their affidavit-in-reply have pointed out that 85 per cent. of the synthetic rubber produced by the company is bought by the 7 tyre companies and about 50 consumers borne on the list of the Director-General of Technical Development and that no particular sales organization or special sales effort is necessary for selling the company's products in view of this fact and the fact that the company is the only company in India which makes synthetic rubber. There appears to be considerable force in this. In any event, no sufficient cause has been made out why is this case the normal rule as to taking of security should be departed from. It was also submitted that, as in order to set up its sales organisation the company would have to incur expenses, in the interest of the company, therefore, instead of making the company incur such expenses the court should permit the private company to continue as sole selling agents pending the suits and direct a certain amount to be paid to it towards expenses, and not by way of commission to be retained by it irrespective of the result of the suits. In view of the provisions of the Companies Act, this is an astonishing submission to make. Under the sole selling agency agreement the private company has to set up and maintain at its own expense an adequate organisation for sale of the company's products within the agency territories and is to bear and pay all expenses relating to such organisation. Such expenses are, therefore, to be met by the private company out of the amount of commission received by it. u/s 294(2A), if the appointment of a sole selling agent is disapproved by the company in general meeting it ceases to be valid with effect from the date of the general meeting and section 294A (1) (a) provides that

"A company shall not pay or be liable to pay to its sole selling agent any compensation for the loss of the office in the following cases :-

(a) where the appointment of the sole selling agents ceases to be valid by virtue of sub-section (2A) of section 294."

120. Under sub-section (2) of section 314, if any office or place of profit is held in contravention of the provisions of sub-section (1), not only is such office or place vacated on and from the date next following the date of the general meeting of the company at which a special resolution according to the consent was required to be passed, but the holder of such office or place also becomes liable to refund to the company any remuneration received by him for the period immediately preceding such date in respect of such office or place of profit. Thus, in law, if the plaintiffs were to succeed, the private company would not only be not entitled to receive any commission but would also be bound to refund moneys, if any, received by it by way of commission. The submission of the contesting defendants, therefore, amounts to asking the court to ignore and circumvent the mandatory provision of the Companies Act enacted in public interest and to seek to perpetuate an illegal payment by means of a court order. This the court consistently with the law ought not to do. Since the private company has rested content with not taking any commission for a period over eight months prior to the filing of the first suit, there is no reason why it should be permitted to take any amount for the period preceding the hearing of these notices or motion. At the highest it can only be permitted to take a reasonable amount towards expenses from October 1, 1968, upon giving security and upon condition of repayment or refund and the necessary director in that behalf will be given in the order which I will pass.

121. So far as the other prayers in the notice of motion in Suit No. 681 of 1969, are concerned, as mentioned before, the contesting defendants do not oppose the granting of an injunction to restrain Tulsidas and the scrutinisers from acting as such in respect of the said extraordinary general meeting held on April 29, 1969. The parties had also agreed upon proper custody of all the papers and documents in connection with polls taken at the meeting held on the 28th and the 29th April, 1969. They are also agreed that inspection may be taken under proper safeguard of all such papers forthwith without waiting for formal discovery.

122. As mentioned before, the parties wanted to take a consent order with respect to this prayer, but no consent order can be passed inasmuch as the form of the order was not agreed to. This was because the plaintiffs have prayed for a receiver of all the papers and documents in connection with both the meeting including those set out in exhibit 29 to the plaint. According to the company, some of the documents mentioned in exhibit 29 do not exist. I am not today determining which document exists and which does not. An ad interim injunction was given by me, as mentioned before, restraining each of the defendants from disposing of or in any manner dealing with any of the said papers and documents including those mentioned in exhibit 29. In spite of this, in none of the affidavits-

in-reply is the existence of any of these documents denied. Since for whatever reason a consent order cannot be passed, it is not possible to appoint any private individual to be the custodian of these papers and the normal rule must prevail.

123. All parties are agreed that the hearing of both these suits should be expedited, but according to the contesting defendants, Suit No. 522 of 1969 ought to be heard first and Suit No. 681 of 1969 to be heard one month thereafter. It was submitted that Suit No. 522 of 1969 was filed as a short cause, the pleadings in that suit are complete and when the suit came on board for directions as a short cause, it has been ordered to be tried as a contested short cause on December 1, 1969, while Suit No. 681 of 1969 is filed as a long cause and written statements have not yet been filed therein. The last date for filing written statements in Suit No. 681 of 1969 was August 23, 1969. If the defendants have chosen not to file their written statements, the blame for this lies only on them. The date for hearing which is given in respect of Suit No. 522 of 1969, is however, not a peremptory date and experience shows that the suit is not likely to come on board on December 1, 1969, or for a considerable time thereafter. These notices of motion have been argued as if the hearing thereof were the hearing of the suits, and apart from formal discovery in both suits and the written statements in Suit No. 681 of 1969, substantially what remains to be done is only inspection of the papers and documents in connection with the polls. There is also neither convenience nor merit in hearing Suit No. 681 of 1969 one month after suit No. 522 of 1969. On the contrary, it is in public interest for saving public time as also in the interest of the parties that these suits should be heard one after the other and by the same judge.

124. Accordingly, I grant, pending the hearing and final disposal of both Suit No. 522 of 1969 and Suit No. 681 of 1969, an injunction restraining the Synthetics and Chemicals Ltd., the first defendants in both the suits, and its officers, servants and agents from paying the Kilachand Devchand and Company Private Ltd., the second defendants in Suit No. 522 of 1969 and the fifth defendants in suit No. 681 of 1969, any payment by way of commission or otherwise in pursuance of the said resolution dated November 14, 1968, of the board of directors of Synthetics and Chemicals Ltd. or under the said agreement dated February 18, 1969, and/or the said letter dated February 18, 1969, as also restraining Kilachand Devchand and Company Private Ltd., its officers, servants and agents from receiving from Synthetics and Chemicals Ltd. any amount by way of such commission or otherwise in pursuance of the said resolution or the said agreement and/or the said letter. I further order and direct that, pending the hearing and final disposal of both the said suits, Synthetics and Chemicals Ltd. shall deposit in court for the period commencing from October 1, 1969, the amount which would have been payable by it as commission to Kilachand Devchand and Company Private Ltd. under the said agreement dated February 18, 1969, read with the said letter dated February 18, 1969, were the said sole selling agency agreement held to be valid. The amount for the month of October, 1969, shall be deposited on or before November 30, 1969, and the amounts for

the subsequent months on or before the thirtieth day of each succeeding month.

125. Kilachand Devchand and Company Private Ltd. will be at liberty to withdraw one-half of the amount of each such deposit upon furnishing a bank guarantee or security to the satisfaction of the prothonotary and senior master of this court and on condition that the event of the plaintiffs succeeding in either of the said two suits, Kilachand Devchand and Company Private Ltd. will forthwith deposit into the court the amounts so withdrawn by it for the purpose of being refunded to Synthetics and Chemical Ltd.

126. I also grant, pending the hearing and final disposal of this suit, an injunction restraining Tulsidas Kilachand, the second defendant in Suit No. 681 of 1969, from in any manner exercising any power or function as chairman of the extraordinary general meeting of Synthetics and Chemicals Ltd. held on April 29, 1969, as also restraining defendants Nos. 3 and 4 in Suit No 681 of 1969 and each of them from exercising any power or function as scrutinisers appointed at the said extraordinary general meeting.

127. I also appoint, pending the hearing and final disposal of this suit, the court receiver to be the receiver of all the papers and documents in connection with the polls taken at the extraordinary general meetings of Synthetics and Chemicals Ltd. held on April 28, 1969, and April 29, 1969, respectively, including the papers and documents specified in exhibit 29 to the plaint in Suit No. 681 of 1969, except such of them as may have been marked as exhibits at the hearing of these notices of motion but including the registers produced in court at the said hearing. The registers produced in court will be tied up in packets sealed by the office of the prothonotary and senior master of this court and forwarded to the court receiver. The court receiver will take charge of all the other papers and documents in the presence of the attorneys of the plaintiffs and of the defendants in Suit No. 681 of 1969,. Defendants Nos. 1 to 5 or defendants Nos. 1,2, and 5 in Suit No. 681 of 1969 will be at liberty to nominate the attorneys or any one of them to attend on their behalf for this purpose. All the papers and documents taken charge of by the court receiver will be tied up in packets and sealed with the seal of the court receiver and of the attorneys of the plaintiffs and of the attorneys of the defendants in Suit No. 681 of 1969. The defendants Nos. 1 to 5 or defendants Nos. 1,2 and 5 in Suit No. 681 of 1969 will be at liberty to nominate the attorneys of any one of them to affix the seal on their behalf. The parties will be entitled forthwith to take inspection of all the papers and documents of which receiver has been appointed in the court receivers office during officer hours every working day. Such inspection will be taken in the presence of a responsible representative of the attorneys of the plaintiffs and of the attorneys of the defendants in Suit No. 681 of 1969. The defendants Nos. 1 to 5 or defendants Nos, 1, 2 and 5 in Suit No. 681 of 1969 will be at liberty to nominate the representative of the attorneys or any one of them to attend on their behalf for this purpose. The seal of the packets will be opened only in the presence of such representatives of attorneys and after inspection is over on

each day, the papers and documents will be again tied up in packets and sealed as aforesaid by the courts receiver and such representatives of attorneys. The attorneys of the parties will be at liberty to initial all such papers and documents.

128. I direct the defendants in Suit No. 681 of 1969 to file their written statement on or before November 30, 1969.

129. The affidavits of documents in each of the said suits shall be made on or before December 15, 1969, and inspection of the documents disclosed therein shall be given forthwith after such discovery is made.

130. I direct that Suit No. 522 of 1969 shall be placed peremptorily on board for hearing and final disposal, subject to a part-heard matter, on February 2, 1970, and that Suit No. 681 of 1969 be placed on board for hearing and final disposal on the same date immediately after Suit No. 522 of 1969.

131. So far as the costs of these notices of motion are concerned, the hearing has lasted nearly 63 hours. Looking to the length of the hearing, the heavy record, the elaborate preparation and arguments and the complexity and importance of the question involved and the fact that each side is represented by three, and in some cases more than three, counsel, except defendants Nos. 3 and 4, who are represented by two counsel only, I direct that the costs of these notices of motion be taxed on the long cause scale with two counsel being allowed and shall be costs in the cause.