

(1978) 06 CAL CK 0039
In the Calcutta High Court
Case No : Suit No. 48 of 1978

Gobind Pritamdas Malkani

APPELLANT

Vs

Amarendra Nath Sircar and Others

RESPONDENT

Date of Decision : 09-06-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 39
Companies Act, 1956 — Section 314
Constitution of India, 1950 — Article 311

Citation : (1980) 50 CompCas 219

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Advocate : S.S. Ray, P.C. Sen and Goutam Mitra, for the Appellant; Sankar Das Banerjee, Ashoke Sen, Samiram Sen, Sankar Ghosh, Sudipla Sircar and R.C. Nag, for the Respondent

Final Decision : Dismissed

Judgement

Padma Khastgir, J.—A company formerly known as N. C. R. Corporation and since April, 1974, known as M/s. National Cash Registers Co. with limited liability incorporated in the U.S.A., having its registered office at U.S.A., carried on business in India, inter alia, at 4/D, B. B. D. Bag, East Calcutta, within the jurisdiction of this court, at Madras, New Delhi, Bombay and Ahmedabad. The said company hereinafter referred to as "the American company" was carrying on the business of import and marketing in India of various accounting and other machines. The plaintiff, Gobind Pritamdas Malkani, Amarendra Nath Sircar, Keshab Ranjan Chakraborty, Bhabatosh Dey and many others were employed by the said American company. The plaintiff, Govind Pritamdas Malkani, was the manager of the Bombay branch.

2. By an agreement in writing dated 16th of February, 1974, executed between the American company and the defendants Nos. 1, 2 and 3, the American company agreed to sell and transfer to the defendants Nos. 1, 2 and 3, the entire

business of the American company as a going concern with effect from the 1st of December, 1973, together with all benefits, assets, properties, losses, book debts, liabilities, for the total price of rupees equivalent to 2,00,000 dollars. The salient terms and conditions of the said agreement were first of all that the said transfer would be completed on or before the 1st of June, 1974, after obtaining the consent and approval of the Reserve Bank of India under the provisions of the Foreign Exchange Regulation Act, secondly, the vendee shall take over and retain in its employment all the staff, employees, workmen and other personnel employed by the American company at various places in India, on the same terms and conditions of their services as they were with the American company, thirdly, the Indian company will allow the employees to participate in the share capital of the company to the extent of 15 per cent.

3. On the 16th of May, 1974, the defendants Nos. 1, 2 and 3 caused the defendant No. 4, i.e., Cash Register Co. India Private Ltd., to be incorporated under the Companies Act, 1956, hereinafter referred to as "the Indian Co.". Under the articles of association of the company, the first directors of the said company are the defendants Nos. 1, 2 and 3 for their lives or until one of them voluntarily retires because of personal reasons. None of the said first directors are liable to retire by rotation. The other material articles for the determination of the dispute between the parties at this stage are :

4. Article 62 which provides that unless otherwise determined by the company in a general meeting, the directors shall not be required to hold more than one share in the share capital of the company as qualification for his or her eligibility as a director. Article 60 provides that until otherwise determined by the general meeting the number of directors shall not be less than two or more than seven. Article 68 provides that the office of the director shall ipso facto be vacated if, inter alia, on the ground he ceases to hold the qualifying shares. Article 71 of the company provides that the company in its general meeting may, subject to the provisions of these articles from time to time appoint new directors in office and may impose, increase or reduce share qualification of any other kind for the eligibility of the directors. Article 1 provides that the regulations contained in Table "A" in the First Schedule to the Companies Act, 1956, shall apply to this company except in so far as modified or altered by the articles herein contained.

5. Pursuant to the agreement with the American company and also in accordance with the sanction and order of the Reserve Bank of India, all the employees including Mr. Malkani were taken over by the Indian company under the same terms and conditions as they were employed in the American company. Mr. Malkani continued to act as a branch manager at Bombay.

6. According to Mr. Malkani, he has served the American company for the last 25 years with great efficiency and neither the American company nor the Indian company has any complaint against him. On the contrary being fully satisfied with the valuable services rendered by him, the defendants Nos. 1, 2 and 3 have agreed under an oral agreement to take him as a director on partnership basis

and on equal terms with that of the defendants Nos. 1, 2 and 3 in the said company. It is his further case that as a result of various assurances, discussions and negotiations it was agreed that the petitioner, Mr. Malkani, would be appointed as a director and he would have equal rights along with the other three defendants in respect of the shareholding, rights and responsibilities in terms of the articles of association of the company. In this respect many correspondence passed by and between the parties wherefrom it would appear that the defendants Nos. 1, 2 and 3 agreed to take the plaintiff as a working director of the defendant No. 4 at the next general meeting which was due to be held in November, 1976. In the meantime, they agreed to take him as an additional director for which the petitioner was required to give a letter of consent and a draft consent prepared by M/s. Orr Dignam & Company was sent by the defendant No. 1 to the petitioner. At a meeting of the board of directors held on 16th of February, 1976, the petitioner was appointed as a working director of the defendant No. 4 and by a letter dated 23rd of December, 1976, the defendant No. 1 communicated the said decision of the board of directors to the petitioner and requested the petitioner to apply for directorship which according to the petitioner, he duly accepted in writing which fact of course is denied by the defendants in their affidavits. It was also notified to the petitioner that his remuneration, perquisites and contribution of share would be determined in the general meeting soon after the business of the American company is transferred to the Indian company. At a meeting of the board of directors held on 24th May, 1976, it was resolved that the petitioner would be appointed as a working director of the company with effect from 1st of August, 1976, at a remuneration to be decided after the business of the American company is transferred to the Indian company. One equity share of Rs. 100 was decided to be issued to Mr. Malkani as the qualifying share.

7. According to the petitioner on 5th of January, 1978, the petitioner for the first time came to know from a circular dated 1st of January, 1978, that the entire Indian business of the American company has been acquired by the defendant No. 4 and such acquisition has become operative and effective on and from 18th of November, 1977. From another announcement it appeared that the company called upon the employees of the Indian company to participate in the shareholding of the company to the extent of 15 per cent. pursuant to the direction of the Reserve Bank of India. From those announcements it appeared that the petitioner has not been shown then; as one of the directors along with the defendants Nos. 1, 2 and 3. On his enquiry by letter dated 28th of November, 1977, the defendant No. 1 as managing director of the defendant No. 4 wrongfully and illegally alleged that the petitioner's directorship in the company was tentative and there was only an offer for appointment of the plaintiff as a director but that offer did not materialise into a valid and lawful appointment of the plaintiff as a director.

8. As a result of that, the present suit has been filed by the plaintiff for various reliefs and the present application has been taken out by the petitioner, Mr.

Malkani, for an injunction restraining the defendants from issuing any shares, an injunction restraining the defendants from interfering with his position as a director, and also an injunction restraining the defendants from removing and/or interfering with his services as a branch manager of the company. Various orders have been passed in this suit. The first of such orders was passed by his Lordship Mr. Justice S.C. Deb on 25th of January, 1978, whereby his Lordship enjoined the defendants as the directors of the defendant No. 4 from allotting any share, except to the employees of the defendant No. 4 for 10 days and also enjoined the defendants and the directors of the company from interfering with the functions of the plaintiff as a director of the defendant No. 4 and/or terminating as a manager of the Bombay branch of the defendant No. 4 or National Cash Register Co. Thereafter, the suit and the application were released by his Lordship Mr. Justice S.C. Deb and by way of special assignment they appeared before me. On 10th of February, 1978, I modified the order passed by his Lordship Mr. S.C. Deb to the extent that till the hearing of the application the plaintiff will not act or hold himself as the director of the defendant No. 4, Thereafter, another application was taken out on behalf of the petitioner seeking for various directions in respect of various details of management, control and administration of the Bombay branch and necessary orders were passed to suit the convenience of all the parties and also considering the fact that the usual working of the Bombay branch which had 46 employees should not be affected by this dispute amongst the directors, and as such various directions were also given regarding the working of the banking accounts so that the smooth day to day running of the Bombay branch is not hampered because of this dispute amongst the parties.

9. Mr. S.S. Roy appeared with Mr. P.C. Sen and Goutam Mitra on behalf of the petitioner and submitted that first of all an order of injunction be passed restraining the defendants from interfering with the petitioner's services as the manager of the Bombay branch till the hearing of this suit. He submitted that while granting such an injunction the court has ample power under Order 39 of the CPC to grant such an interim relief and the court is not confined to or restricted by the provisions of the Specific Relief Act. As, according to Mr. Roy, the Specific Relief Act is not a complete code and is not exhaustive by itself, as such the court's power to grant such an interim relief is not confined to or restricted to the provisions of the Specific Relief Act. He further submitted that in proper cases the court has in fact granted an order of injunction. In this respect he craved reference to two English decisions reported in [1975] 2 All ER 233 (CA) (Chappell v. Times Newspapers Ltd.) and [1971] 3 All ER 1345 (CA) (Hill v. C. A. Parsons & Co. Ltd). Mr Roy further referred to a case reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, and submitted that although a contract of personal service cannot ordinarily be specifically enforced but an order of injunction can be granted, and he submitted that this case of the petitioner falls within the special exceptional category and as such an order of injunction restraining the defendants from

interfering with the services of the petitioner as a branch manager should be granted. He particularly drew my attention to the judgment of Mr. Justice Bhagwati delivered in the case referred to above and submitted that a progressive view of the matter should be taken and considering the present difficulties in securing jobs in India, the law regarding master and servant should be given a liberal interpretation and reliefs should be granted in favour of the petitioner. He further submitted that cases involving personal relations and of personal nature should be distinguished from professional management of impersonal nature and in such cases there is no reason why specific performance should not be granted of any contract of employment which does not involve relationship of personal character. He further referred to cases reported in AIR 1914 Cal 362 and Ram Sadan Biswas Vs. Mathura Mohan Hazra and Others, and In Re: Nanda Lal Mukherji, and submitted that the court's power to grant an interim injunction is not limited in such a case to the provisions of the Specific Relief Act but the court in special circumstances may grant an order of injunction under Order 39 of the CPC. His second submission was that the plaintiff's position as a director should not be disturbed by the defendants till the hearing of this suit. He drew my attention to the fact that although Mr. Malkani was required to take the qualification share within two months from the 1st of August, 1976, before the said period of the two months expired, the articles of association of the company have been amended whereby it has been made no longer necessary for a director to hold any qualification share, and as such he is not disqualified from acting and holding himself out as a director of the company. Thirdly, he submitted that although Mr. Malkani was holding an office of profit of that of a manager with the company that fact was within the knowledge of the board of directors and the shareholders and in spite of having the said knowledge they have decided to appoint Mr. Malkani as a director, and as such he is not disqualified u/s 314 of the Companies Act. Fourthly, he submitted that not only the directors have written letters to him and accepted him as a director of the company but they have also written various letters to various parties including the directors of the American company bringing to their knowledge the fact that Mr. Malkani has been taken in as a director of the Indian company. Moreover, from the statutory returns filed by the company all along even as late as on 5th of January, 1978, it would appear that Mr. Malkani has been shown in the returns as a director of the company. Nowhere from the returns it would appear that Mr. Malkani was taken as a tentative director as alleged to be claimed by the respondents in these proceedings. He further submitted that, as his name appears from the statutory returns filed with the Registrar of Companies, those returns u/s 164 of the Companies Act shall prima facie be evidence of such directorship of the company. Moreover, u/s 303 of the Companies Act, every company is required to keep at its registered office a register containing the names of its directors, managing directors, secretary and other particulars. The company in this case has not produced the said register to show the actual position. As such his client should be regarded as a director of the company and the defendants should be enjoined from interfering with his position as a

director. Last of all Mr. Roy submitted that the purported allotment of shares in favour of the defendants Nos. 1, 2 and 3 are not binding on the petitioner as from the returns filed with the Registrar of Companies it would not show that such a meeting was held and such shares were issued by the company to the said directors. Although he has not taken this point in the petition, he has submitted that he has taken this point in the affidavits in reply and the court is entitled to pass an order taking into consideration all the facts as pleaded in the affidavit-in-reply.

10. Mr. Sankar Das Banerjee, Mr. Ashoke Sen, Mr. Samiran Sen, Mr. Sahkar Ghosh, Mr. Sudipta Sircar and R.C. Nag appeared on behalf of the defendants. The first point taken by them is, the petitioner is not entitled to get any order of injunction restraining the company from interfering with or dispensing with his services as a branch manager of the company at Bombay as the court will not specifically perform a contract of personal service by giving an order of injunction ; secondly, Mr. Ghosh submitted that Mr. Malkani by not taking the qualification share within two months" time has disqualified himself to remain or act as a director; thirdly, Mr. Malkani by not disclosing his position or office of profit in the company has disqualified to remain as a director ; fourthly, the board of directors under the articles of association of the company cannot appoint any new directors, and as such any appointment by the directors is ultra vires the articles and is not binding on the company. Mr. Ghosh's further contention is that the oral agreement as set out by the petitioner is wrongful as there has never been such an agreement by and between the petitioner and the defendants Nos. 1, 2 and 3 to take him as a director on partnership basis and on equal terms. The court should not look into an oral agreement which is against the provisions of the articles of the company as under the articles of association of the company, it is the company which has the right to appoint the new directors. Moreover, he submitted that the terms alleged to have been agreed upon by and between the petitioner and the respondents Nos. 1, 2 and 3 are vague and not complete and as such not binding on the parties. He submitted that, although in the letters the expression "equal partnership" has appeared, yet no literal construction to the said words be given except to mean that the directors wanted to act in comradeship or in friendship with Mr. Malkani who was looking after the Bombay branch of the Indian company. Mr. Ghosh has submitted that the shares having already been allotted in favour of the defendants Nos. 1, 2 and 3 and as such no order of injunction can be passed in respect of non-allotment of shares. The petitioner, according to Mr. Ghosh, was not entitled to get any shares as there has never been any oral agreement to allot to him any share on equal basis along with the respondents Nos. 1, 2 and 3. Lastly, he submitted that no order should be passed on this application in favour of the petitioner.

11. It is the admitted case that Mr. Malkani was acting as a branch manager at Bombay under the terms and conditions whereby he could be removed by giving three months" notice or salary for three months in lieu of notice. His case is

governed by the ordinary law of master and servant. In case the defendants desired to dispense with the services of Mr. Malkani, his only remedy in law would be to get damages for wrongful dismissal. The defendants can tender three months' salary in lieu of notice and avoid such action by the plaintiff. The plaintiff cannot, in this suit, ask for specific performance of a contract of personal nature. He is also not entitled to get a permanent injunction restraining the defendants from interfering with his services as a branch manager. The law in this respect is very clear. The Supreme Court of India in various decisions have laid down and explained the law in clear and unambiguous language.

12. In a case reported in *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others*, it has been held that, "a contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service, can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognised exceptions--(i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the industrial law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute". The relief of declaration and injunction under the provisions of the Specific Relief Act is purely discretionary and the plaintiff cannot claim it as of right. The relief has to be granted by the court according to the sound legal principles and *ex debito justitiae*. The court has to administer justice between the parties and cannot convert itself into an instrument of injustice or an engine of oppression. In these circumstances, while exercising its discretionary powers the court must keep in mind the well-settled principles of justice and fair play and should exercise the discretion only if the ends of justice require it, for justice is not an object which can be administered in vacuum. "It is well settled that the courts do not enforce a contract of personal service in the absence of special circumstances". The same view was also expressed in the case reported in *S.B. Dutt Vs. University of Delhi*, where specific performance of a contract of personal service was not allowed. In the case reported in *Republic Stores (Trade) Vs. Jagajit Industries Ltd.*, it has very recently been held by the Division Bench of this hon'ble court that "no injunction can be granted for the specific performance of a contract which is determinable at the will of the parties. Where mandatory injunction cannot be granted, no temporary injunction can be granted in aid of the main relief which cannot be granted. In the case in [1912] 16 CLJ 555; 15 IC 614 (*Jital Singh v. Raja Kamaleswari Prosad*), it was held by Sir Asutosh Mookerjee that "an order of temporary injunction under Order 39, Rule 2 of the C. P. C. can be sought only in aid of the prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success he cannot obtain a decree for perpetual injunction it is not competent for him to ask for temporary injunction, during the pendency of the suit. In granting a temporary injunction, the court acts in aid of the legal

right, so that the property may be preserved in status quo ".

13. In the case reported in AIR 1933 Lah 203 (N. W. Rly. Administration v. N. W. Rly. Union, Lahore) it has been held, "the issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. It is not sufficient reason for the purpose of issuing a temporary injunction that the suit would be infructuous if it did not issue. Under Sections 21(b) and 56(f) of the old Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract to employ certain people". The same view has been held in Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, and S.B. Dutt Vs. University of Delhi, .

14. Applying the principles as laid down amongst other cases and in the case reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, the plaintiff's case is not a case of any special circumstances, as such it does not fall in any of the three categories of exceptions as laid down by the Supreme Court of India. Generally, when there is an adequate remedy in damages injunction will not be granted. An injunction is granted in aid of the legal right sought to be established. While granting an order of injunction, the court will have first to see that there is a bona fide contention between the parties and then on which side in the event of obtaining a successful result of the suit will be the balance of inconvenience if the injunction is not issued. The petitioner who seeks the aid of the court must be able to show a fair prima facie case in support of his claim-although he need not make out a clear legal title but he must satisfy the court that he has a fair question to raise as to the existence of his legal right which he sets up but if the cause of action discloses no prima facie case that the contract on which the court cannot and will not grant specific performance then in such a case no temporary injunction should be granted. From the undisputed facts, it would appear that under the terms of the contract of service the petitioner's service was terminable at the will of the employer by giving him three months' notice or salary in lieu of three months' notice. At the hearing of this suit, the plaintiff is not entitled to get specific performance of the said contract of personal service nor is he entitled to get a permanent injunction restraining the defendants from dispensing with his services or terminating his services. As such, the plaintiff's claim in case of such wrongful dismissal would be damages only. Moreover, neither in the plaint nor in the petition, the petitioner has made out a case of any threat or intention on the part of the respondent to dispense with his service. The law frowns on specific performance of a contract of personal service. It is true a great hardship or humiliation would be caused if his service as the branch manager is terminated by the defendants by giving him three month's notice or salary in lieu of three months' notice. For that the plaintiff has all the sympathy of this court but in view of the law relating to master and servant existing at present and in view of the provisions of the Specific Relief Act and also in view of the numerous decisions of the Supreme Court, I am unable to come to the plaintiff's rescue by granting him an order of injunction to that effect. However hard the case of the

plaintiff may be, that cannot be allowed to make bad law. As such, I am of the opinion that, in view of the existing law relating to master and servant and in view of the numerous decisions of the Supreme Court of India, the plaintiff is not entitled to an order of injunction restraining the respondents from dispensing with his service as a manager of the Bombay branch. A company cannot be restrained by an injunction from dispensing with the services of its manager nor can the shareholders be restrained by an injunction from considering the removal of such a person at a general meeting. The only remedy for such a wrongful dismissal is a suit for damages. The court cannot enforce an unwilling employer to retain in service a person unwanted by the employer. The position of a manager requires a lot of confidence reposed by the employer in him as he is required to perform his duties with utmost confidence and with best competency. As such, the court should not impose the services of such a person on an employer who has lost confidence in him. Moreover, the service of a manager is in the nature of a personal service which cannot be specifically enforced by a court of law. u/s 14 of the Specific Relief Act no injunction should be granted in respect of; (a) a contract for the non-performance of which compensation in money is an adequate relief, (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot enforce specific performance of its material terms, (c) a contract which is in its nature determinate, (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise. Applying the said principles, in the present case, I am of the opinion, and I find that the plaintiff has not made out any special case which would entitle him to get an order of injunction.

15. Although in the case of Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , Mr. Justice Bhagwati has suggested that a distinction should be drawn in different types of cases of personal service but he agreed with the other learned judges as to the proposition that under the ordinary law of master and servant the court should not grant an order of injunction unless the petitioner's case falls into any of these three special types of exceptional cases as laid down in that decision; as such the said decision cannot be of any avail to the petitioner for the purpose of getting an injunction restraining the defendants from interfering with his services as a branch manager or terminating his services as such. In the case Chappell v. Times Newspapers Ltd. [1975] 2 All ER 233 (CA), Justice Lord Denning M.R. held that an exception was created by that court in the case of Hill v. C.A. Pearsons & Co. Ltd. [1971] 3 WLR 995 ; [1971] 3 All ER 1345 (CA), in view of the fact that both the employer and the man although had complete confidence in one another, yet the employers against their wishes had to give notice of termination of his employment under pressure from a trade union and as such an injunction was granted, and by granting such an injunction the law was vindicated and justice was done. The facts of this case are totally different from the facts of the case on

which such injunction was granted. Moreover, law of master and servant as it stands today in India is very clear and no such injunction can be granted unless the case falls in any of the three categories as mentioned above.

16. The next point for consideration in this application is whether the petitioner is entitled to get an order of injunction restraining the defendants from interfering with his position as a director of the Indian company. The petitioner in the plaint has made out a case of an oral agreement whereby the defendants Nos. 1, 2 and 3 have agreed to take him as a director on partnership basis, and on equal terms and conditions as that of the defendants Nos. 1, 2 and 3. Under the articles of association of the company, it is the company which has the right to take in a new director at a general meeting of the company and the directors are not entitled under the articles of association of the company to take any new director. Moreover, the directors have no right to enter into any agreement where the company is not a party to it to bind the company with such an agreement. Whether there was such a valid agreement or not would be the subject-matter of this suit but at the moment certain factors are important for the purpose of a decision for granting an interim relief pending the disposal of the suit. It is an admitted case that Mr. Malkani, although required to take a qualification share of Rs. 100, failed to do so in terms of the articles of association of the company. Although the articles of association of the company have been amended and/or modified, yet the said amendment has not been given any retrospective effect. Moreover, Mr. Malkani, although he has submitted that his holding of the position of the branch manager is an office of profit with the company was known to the company and in spite of that knowledge the board of directors have decided to appoint him as a director, in my opinion, that does not absolve Mr. Malkani from satisfying the provisions of Section 314 of the Companies Act. u/s 314 of the Companies Act, only when the company accords its consent by a special resolution in that case the director is absolved from the liability as envisaged u/s 314 of the Companies Act. Although the appointment of Mr. Malkani by the board of directors was adopted by the company subsequently at a general meeting, yet there was no special resolution which accorded a consent to Mr. Malkani's holding the position of the branch manager at Bombay. As such, he has disqualified himself from acting as a director of the company. Although under Article 1 of the articles of association of the company, the Regulations contained in Table A in the First Schedule of the Companies Act have been made applicable to this company, an exception has been made in cases where so far as those are modified or altered by the articles of association of the company under the articles of association of the company. It is that the company under Article 71 at a general meeting may appoint new directors and the board has not been given any power to appoint such directors. As such, any appointment by the board of directors is ultra vires under the articles of association of the company. Although the appointment of Mr. Malkani as a director of the board was adopted by a subsequent meeting by the company held on 30th September, 1977, the court cannot injunct the company and the shareholders from holding a meeting and

passing a resolution and deciding not to re-elect the petitioner as a director of the company. In fact, it is the case of the respondents that at a meeting held on 9th of January, 1978, at the extraordinary general meeting of the Indian company, the company has decided that the petitioner should not act as a director of the company, in the interest of the company. As such, any order passed by the court would be rendered nugatory by the company and its shareholders at its next general meeting. Although the plaintiff was appointed as a working director of the company his remuneration and perquisites and the division of duties were left to be decided by the company only after the taking over of the American company by the Indian company and at a subsequent general meeting which has not been done by the company after its taking over.

17. From the minutes of the meeting, it would appear that although it was within the knowledge of the directors and that of the shareholders of the company that Mr. Malkani was holding such office, in terms of Section 314 of the Companies Act the company has not by its special resolution accorded or exempted the plaintiff from such disqualification. As such, the plaintiff is not entitled to get any advantage of the minutes of the board meeting as also of the meeting of the shareholders of the company. Mr. Ghosh also submitted that from the minutes of the meeting dated 8th of January, 1978, it would be abundantly clear that the shareholders of the company and the directors do not wish to have Mr. Malkani as a director of the company. As such, the court should not impose an undesirable director on the company. More so, when the company at its next meeting would remove the said director and the court's order would be rendered nugatory by the company at the first available opportunity. As such, the court should not interfere with the internal and/or domestic affairs of the company. The articles of association of the company give power to the company to appoint a director and to nobody else. In this respect, Mr. Ghosh referred to a case reported in [1888] 37 Ch D 1 (CA) (*Browne v. La Trinidad*) and the case reported in [1974] 2 All ER 653 ; [1974] 1 WLR 638 (Ch D) (*Bentley-Stevens v. Jones*), where an injunction was refused in spite of the fact of the existence of certain irregularities in the holding of the meeting of the company. Although in such a case before the termination of B and a person as trustee for the intended company, by which it was stipulated that B should be a director and should not be removed and although, such agreement was acted upon, yet no contract adopting it was entered into between the plaintiff and the company, and it was held in that case that there was no contract between B and the company, and as such no order of injunction was passed. The court cannot grant an interlocutory injunction in respect of irregularities which could be cured by going through proper processes. Even assuming that the plaintiff was a quasi-partner he could still be expelled by the company as the company had statutory right to remove him from its board and his only remedy was held to be considered at the time of winding up of the company on the ground that it was just and equitable for the court to make such an order. Even assuming that the plaintiff's case is correct that there was such an oral agreement to take the plaintiff as a partner on equal

terms along with the other directors of the company, such contract for quasi-partnership would be relevant only in the case of winding up of the company but that fact alone would not entitle the plaintiff to get an order of injunction as the court should not interfere or force the company to conduct their business in a particular manner. The case reported in *Ram Autar Jalan Vs. Coal Products P. Ltd.*, held that while deciding the question whether the plaintiff is a director or not in a company, the court should give consideration not only to the factual aspect as to whether the plaintiff has been functioning as a de facto director but the court should give also due consideration to the legal aspect of the matter. The case reported in [1908] 24 TLR 469 (CA) (*Bluett v. Stutchbury's Ltd.*), where it was held that the directors who derive their power could only act in accordance with the articles and cannot bind the company by appointing a man as managing director for four years so as to deprive the company of their power and duty of considering at the next general meeting whether the person so appointed was a fit and proper person and eligible for re-election under the articles of association of the company or removable under the articles and there the court held that it was completely outside the power of the directors and competence to enter into any agreement which would entirely deprive the company of its right under the articles of association. In this case also, the company, not being a party to the said agreement, could not be held to be bound by an agreement entered into by and between the directors and Mr. Malkani. The company has not ratified and/or accepted the said agreement entered into by its directors with the plaintiff. As such, I am inclined not to pass any order injunctioning the company and/or the respondents from interfering with the plaintiff's position as a director of the company. With regard to the last point of allotment of shares there is neither any averment in the plaint nor in the petition challenging the allotment of the said shares by the company in favour of the defendants Nos. 1, 2 and 3. Mr. Roy's submission that in view of the fact that no return has been filed with the Registrar of Companies in respect of the allotment of the shares and as such the allotment of the said shares are invalid and not binding on the petitioner is unacceptable to me. u/s 75 of the Companies Act, a return of the allotment of shares should be filed with the Registrar of Companies within a certain period and, in the absence of that, certain penal provisions have been made. Non-filing of the return will not make the allotment of the shares bad. There is a distinction between the provisions of Section 75 and the provisions of Section 108 of the Companies Act. From the records it would appear that such a return was filed with the Registrar of Companies but the said returns being incomplete, the company was asked to file proper returns. Filing of the return is not a pre-requisite condition; as such the allotment in fact does not become invalid for non-compliance of the same. Moreover, this point being taken for the first time in the affidavit-in-reply, the defendants did not get any chance of dealing with the same ; as such it would not be proper on my part to pass any order relying on the facts as stated in the affidavit-in-reply. Applying the principles as laid down in *Ram Autar Jalan Vs. Coal Products P. Ltd.*, in order to get an order of injunction, the plaintiff will have not only to satisfy the court

regarding the factual position of his acting as a director but also must satisfy the court that in law he was holding such position as a director.

18. The case reported in Law Reports [1975] AC 396 (HL) (American Cyanamid Co. v. Ethicon Ltd.) holds "if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief ...The grant of an interlocutory injunction is a remedy that is both temporary and discretionary..... The object of the interlocutory injunction is to protect the plaintiff against the injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

19. The whole question for determination is whether the petitioner in law is entitled to act as a director and not whether he has been de facto functioning as a director.

20. In view of the facts and the law as stated above, I am inclined not to pass any order on this application ; as such I dismiss the present application with costs.