

(1991) 11 KL CK 0020

In the High Court Of Kerala

Case No : M.F.A. No's. 776-779 of 1990 (C.P. No's. 29, 42 and 46 of 1989)

Mathrubhumi Printing and Publishing Co. Ltd.

APPELLANT

Vs

Vardhaman Publishers Ltd. and Others

RESPONDENT

Date of Decision : 28-11-1991

Acts Referred:

Companies Act, 1956 — Section 108, 155, 31, 397, 398
Stamp Act, 1899 — Section 12, 2(11), 63

Citation : (1992) 73 CompCas 80

Hon'ble Judges : T.V. Ramakrishnan, J; K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : K.K. Venugopal, C.M. Devan and C.S. Vydyanathan, for the Appellant; Ramaswamy, Attorney-General, M. Pathrose and Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Radhakrishna Menon, J.—These appeals are not only important to the parties involved in them but they raise several questions of general importance relating to the power of the appellant company, a public limited company, to alter its articles and especially its power to introduce a new article, the effect of which is to empower it to refuse to recognise transfer of shares which it could not have refused under the articles as they stood at the time of transfer as the transfer was prior to the alteration.

2. Facts relevant and requisite to dispose of the disputes can briefly be stated thus : The petitions from which the appeals arise are petitions u/s 155 of the Companies Act, 1956 (for short "the Act"), for rectification of the share register ; some of them filed at the instance of the transferors and some at the instance of the transferees, of the equity shares of Mathrubhumi Printing and Publishing Company Ltd. (for short, "the company"), a company registered as a public company limited by shares. The transferees lodged the share transfer applications with the company for registration of transfers of 455 shares. The

transferees are public limited companies, wholly owned subsidiaries of M/s. Bennet Coleman and Company Ltd. which publish the Times of India group of publications. The transferee companies, before the expiry of the statutory period of two months contemplated under the Companies Act to register the transfer, filed the above company petitions for rectification of the share register mainly on the ground of unnecessary delay in entering in the register the fact of the transferees having become members. They also moved the learned single judge with a separate application for the issue of an interim injunction restraining the appellant from holding the extraordinary general meeting scheduled to be held on March 13, 1989, for amending the articles of association of the company by inclusion of article 17. The petition for interim injunction was opposed by the appellant. The learned single judge, by order dated March 10, 1989, rejected the interim application holding that the extraordinary general meeting could be held, but any decision that would be taken at the said meeting or any decision the board of directors would take, should be subject to the final orders in the company petition. The extraordinary general meeting was held on March 13, 1989, as per schedule. The transferee company's executive director, Sri P. R. Krishnamoorthy, Dr. Ram S. Tarneja, managing director of the Dharmayug Investments Ltd. one of the petitioners, and other executives of the various companies also participated in the proceedings of the said extraordinary general meeting. They participated as the power holders of the transferors. Article 17 of the articles of association was inserted by special resolution passed at the said extraordinary general meeting. Article 17 reads :

"The board shall have the right in its absolute discretion and without assigning any reasons to decline to register the transfer of any equity share in the company, whether fully paid up or not, to a person or persons whether individuals, companies or otherwise, who in the opinion of the board, would not be desirable or whose association with the company may be detrimental to the interests of the company or may affect the laudable objects of the company or who alone or with others may have other competing business."

3. The board of directors of the appellant company thereafter at its meeting held on March 20, 1989, declined to register the transfers on various grounds such as : non-compliance with the statutory provisions of Section 108, non-payment of transfer fee and also on the ground that the transferees are companies who are not desirable to be included in the membership of the company as they were competitors to the appellant company.

4. The respondents in these appeals who are the petitioners in the company petitions filed amendment petitions seeking to include grounds that the decision to hold the extraordinary general meeting and the decision to amend the articles of association by inclusion of Article 17 were illegal and mala fide, and that the decision of the board in declining to recognise the transfer was illegal and that the directors acted with ulterior motive and contrary to the interest of the company. Regarding the objection on the cancellation of the stamps, the

transferees contended that the cancellation of stamps was proper and that the other objections raised by the company are frivolous.

5. The company petitions were heard jointly and, by a common judgment, the company court passed orders directing Mathrubhumi to register the transfer of 432 out of 455 shares dealt with in the four company petitions, subject to certain conditions in respect of certain shares. Registration was disallowed only in respect of 23 shares.

6. It is the said common judgment that is under challenge in these appeals. The questions arising for consideration are :

(i) Was the company justified in refusing to register the transfer of shares on the grounds :

(a) that the instrument; of transfer are not duly stamped ; and

(b) that the transfer applications are not accompanied by evidence showing payment of fee as per Article 22 of Table A of Schedule I to the Companies Act ?

(ii) Whether the alteration of the articles of the company by inserting Article 17 is valid ?

(iii) If valid, is Article 17 applicable to the transfers in question ?

(iv) In the facts and circumstances of the case, was the board justified in refusing the registration of transfers ?

7. We shall now deal with question No. (i). The answer depends upon the construction of Section 108 and Articles 21 and 22 of Table A of Schedule I to the Act and Section 2(11), Section 12, Section 63 of the Indian Stamp Act, 1899 (for short "the Stamp Act"). We shall now reproduce the provisions, leaving out the parts which are not relevant here.

"108(1). A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures."

"21. The board may, subject to the right of appeal conferred by Section 111, decline to register -

(a) the transfer of a share, not being a fully-paid share, to a person of whom they do not approve ; or

(b) any transfer of shares on which the company has a lien.

22. The board may also decline to recognise any instrument of transfer unless-

- (a) a fee of two rupees is paid to the company in respect thereof ;
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the board may reasonably require to show the right of the transferor to make the transfer ; and
- (c) the instrument of transfer is in respect of only one class of shares."

"2. Definitions.--In this Act, unless there is something repugnant in the subject or context,-- . . .

(11) Duly stamped.--"Duly stamped" as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount, and that such stamp has been affixed or used in accordance with law for the time being in force in India.

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 ; and

(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."

"63. Penalty for failure to cancel adhesive stamp.--Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees."

8. Learned counsel for the appellant formulated his argument thus : Judicial pronouncements including those of the apex court have categorically declared that the words "shall not register" employed in Section 108, are indicative of the legislative intent that the provisions contained in the section are mandatory. This mandatory character is further strengthened by the negative form of the language (vide Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others, , P.V. Chandran Vs. Malabar and Pioneer Hosiery P. Ltd. and Another, and P.V. Chandran Vs. Malabar and Pioneer Hosiery P. Ltd. and Another, To say that a duly stamped instrument within the meaning of Section 108 was lodged with the company, it must be established that the adhesive stamps affixed thereto have been effectually cancelled. Dilating on this point counsel submitted thus : So far

as an instrument executed in India is concerned, the adhesive stamps affixed thereto require to be cancelled at the time of execution of the instrument unless it be that such stamps had been already cancelled by the person who had affixed the adhesive stamps to that instrument as provided for under Clause (b) of Sub-section (1) of Section 12. This is what is provided for by Section 17 of the Stamp Act. These requirements shall be complied with before the instrument of transfer is lodged with the company because these provisions are mandatory. Here, all the instruments lodged, in so far as the adhesive stamps affixed on the instruments were cancelled only at the time of lodgment, are liable to be treated as not duly stamped. In some cases, transfer fee has also not been paid. As such, the company is bound to refuse registration.

9. Strict compliance with the requirements of Section 12 of the Stamp Act, however, is not warranted as these requirements are not mandatory in nature and as such failure to comply with the said requirements will not justify a declaration that the instrument is not duly stamped, is the argument of counsel for the respondent. That that is the position under the Stamp Act is clear from the provisions contained in Chapter IV of the Stamp Act, counsel further submits. He continued his argument and submitted thus : If before actual lodgment of the instruments, the stamps are effectually cancelled, the board is bound to accept such instruments as duly stamped and cannot treat the same as not duly stamped on the ground that the stamps were not cancelled at the time of execution. The time of cancellation is not a mandatory requirement u/s 12 of the Stamp Act. What is mandatory is only the manner of cancellation of the stamps and if the stamps are cancelled in an effectual manner so that it cannot be used again, that will amount to substantial compliance with the requirements of Section 12 of the Stamp Act. The time at which the cancellation takes place is totally irrelevant if at the time of lodgment or at the time when the board takes up the instruments for consideration the stamps were duly cancelled. In support of this argument he cited the following decisions :

10. *STO v. K. I. Abraham* [1967] 20 STC 367 : AIR 1967 SC 1823 ; *Amman v. Merniman* 117 ER 1164 ; *Royal Bank of Scotland v. Tottenham* [1894] 2 LR 715 (QB) ; *Ramen Chetty v. Mahomed Ghouse* [1889] ILR 16 Cat 432; *Motilal v. Jagmohundas* 6 BLR 699 and *Surij Mull v. Hudson* [1900] ILR 24 Mad 259.

11. Before we consider the scope of the above contentions it is relevant to refer to some of the admitted facts. Some instruments of transfer were stamped at the time of lodging and those stamps were cancelled by the chartered accountant, Sri Gopalakrishnan, representing the respondents who lodged the instruments with the secretary of the appellant company on behalf of the transferees. On some of the instruments the fee contemplated under Article 22 of Table A of Schedule I to the Companies Act had not been paid. On a few of the instruments though stamps were affixed they were not cancelled at all.

12. Sections 10 - 16 are included in Part B of Chapter II of the Stamp Act whereas Sections 17, 18 and 19 are included in Part C. The provisions included in

Part B govern matters, namely, duties how to be paid, use of adhesive stamps, cancellation of adhesive stamps, instruments stamped with impressed stamps how to be written, etc., whereas Sections 17, 18 and 19 contained in Part C relate to the time of stamping the instruments. To put it differently, Part B contains provisions prescribing the mode or manner of use of adhesive stamps, the manner of cancellation of the adhesive stamps affixed to any instrument whereas the provisions contained in Sections 17, 18 and 19 pertain to the time when an instrument executed in India and one executed outside India shall be stamped. Sections 17 - 19 thus deal with the time of stamping an instrument. The expression "before or at the time of execution" in Section 17 clearly indicates that an instrument chargeable with duty and executed in India shall be stamped before or at the time of execution. The term "stamped" in Section 17 means duly stamped, i. e., stamped not only with a stamp of the amount required by law but also in the manner and with the kind of stamp prescribed by law. Sections 18 and 19 prescribe the procedure that shall be adopted for stamping a document executed outside India. Such instruments need be stamped only after the execution but within the time prescribed by these sections. We have now to focus our attention on the provisions contained in Section 12. The section concerns the manner of cancelling adhesive stamps affixed to a document. Under the section, the adhesive stamp should be cancelled at the time of execution (clause (b) of Sub-section (1)) except in cases of instruments made mention of in Sections 18 and 19 where the stamps must be cancelled at the time of affixing the same to the said instruments (see Clause (a) of Sub-section (1)). The language employed in Sub-section (1) of Section 12 is in the nature of a direction and, therefore, the person executing the instrument or affixing the stamp to an instrument already executed, as the case may be, shall cancel the stamp. Failure to comply with this direction results in the levy of penalty provided for u/s 63. This, in short, is the scheme of these sections contained in Part B and Part C of the Stamp Act. This scheme makes it very clear that the stamps affixed to any instrument executed in India require to be cancelled at the time of the execution of the document following the procedure prescribed in Clause (b) of Sub-section (1) of Section 12. The cumulative effect of Sections 17 and 12(1)(a) and (b) is that, unless the person executes an instrument on a paper bearing an adhesive stamp already cancelled in the manner prescribed under Clause (a), he is bound to cancel the adhesive stamp which he is obliged to affix to the instrument at the time he executes the instrument in India. That this is how the adhesive stamps affixed to instruments executed in India shall be cancelled is made further clear by Sections 18 and 19 read with Section 12(1)(a). It is relevant in this context to note that an instrument executed outside India, in order to be declared to be duly stamped, must be affixed with the adhesive stamps, provided the said instrument is one of the five categories of instruments contemplated u/s 11. A reference in this connection to Section 47 is also relevant. This section refers to a situation where a person other than the one who has executed the document made mention of therein but at the same time not residing outside India, can affix the stamp to the instrument and cancel the same before payment due

under the instrument is made.

13. When exactly the stamp affixed to an instrument whether executed in India or outside India, requires to be cancelled is the further question arising for consideration in the context. The words employed in Section 12(1) make it very clear that the stamp must be cancelled either when it is affixed, or if it is not so cancelled, it must be cancelled at the time of the execution of the instrument which act, going by the definition of the word "execution", is at the time of the signing of the instrument. To put it pithily, cancellation of the stamps, as per Section 12, is expected to be done either when stamps are affixed or when the instrument is executed, that is, when the executant affixes his signature to the instrument. Judicial pronouncements in this regard have cleared the doubt as regards the simultaneous nature of the action of cancellation of the stamp and signing the instrument thus :

"Viewed in this light, the provision could only mean that the stamps must be cancelled either immediately they are affixed or immediately after the maker puts his signature. In other words, the entire process must take place in such a manner that one must be able to say that it has been done simultaneously as part of the same transaction. T. C. Raghavan J. (as he then was) took the same view in *Kuruvila Markose Vs. Varkey Varkey*, . relying on the ruling of the Division Bench of the Madras High Court in *Surij Mull v. Hudson* [1900] ILR 24 Mad 259 . We are in respectful agreement with the view taken by the earlier Kerala decision, as that is the only practical and reasonable way of interpreting Section 12 of the Stamp Act." (see *K.A. Lona etc. Vs. Dada Haji Ibrahim Hilari and Co. and Others*,

14. We have now to probe into the object sought to be achieved by the sections contained in Chapter IV of the Stamp Act. The caption given to this Chapter indicates that the sections included in this Chapter are intended to deal with instruments not duly stamped. The scheme of the sections contained in this Chapter reflects the clear and unambiguous intention of the Legislature that an instrument not duly stamped cannot be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer. These instruments, however, can be impounded by the persons mentioned in Section 33. On the payment of the duty and penalty, if any, u/s 35, Section 40 or Section 41, the person admitting such instrument in evidence, or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty, or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof and the name and residence of the person paying them (see Sub-section (1) of Section 42). Section 42(2) says that every instrument so endorsed shall thereupon be admissible in evidence and may be registered and acted upon and authenticated as if it had been duly stamped. It is relevant in the context to keep in mind the significance of Section 44. This section provides that when any duty or penalty has been paid

u/s 35, Section 37, Section 40 or Section 41, by any person in respect of an instrument, and, by agreement or under the provisions of Section 29 or any other enactment in force at the time such instrument was executed, some other person was found to bear the expenses or providing the proper stamp for such instrument, the first-mentioned person shall be entitled to recover from such other person the amount of the duty or penalty so paid. It can be inferred from the words employed in the section that it applies only to the person who is not liable for payment of stamp duty ; but, however, has to pay the deficiency and penalty and not to the person who is bound to pay the duty. These provisions read along with Sections 12, 17, 18 and 19 of the Stamp Act make it clear that only an instrument "duly stamped" can be admitted in evidence, may be registered or acted upon. To put it briefly the cumulative effect of the sections contained in Part B and Part C of Chapter II and those contained in Chapter IV, is that, an instrument, in order to be produced in evidence, registered or acted upon, must be duly stamped. And, therefore, if the instrument is not properly executed or the stamp affixed to the instrument is not cancelled before execution or at least at the time of execution, the said instrument must be deemed to be unstamped. A catena of decisions referred to in para 9, cited at the Bar by counsel for the respondents, in the light of the principles of law stated above, have no application here. On these decisions being examined, it can be seen that in these decisions the only question that was considered was, whether unstamped instruments can be admitted in evidence, but what will be the effect of impounding and the consequential payment of deficient duty and penalty has not been considered in these decisions. These sections, meant to avoid evasion of duty, in our view have declared in clear terms that only instruments duly stamped can be produced in evidence, registered or acted upon.

15. It can accordingly be opined without fear of contradiction that Section 12, although expressed in affirmative language, is having a negative impact. The provisions contained in Section 12, therefore, can be said to be absolute, explicit and pre-emptory. A reference in this connection to the well-established principle of interpretation, namely, every statute limiting anything to be in one form, although it spoke in the affirmative, yet includes in itself a negative, is relevant. In other words, if an affirmative statute which is introductive of a new law, direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way (see Craies on Statute Law, 17th edition, pages 264 and 265). We, on account of the above principle, are emboldened to declare that the provisions contained in Section 12 are mandatory and, therefore, non-compliance with the requirements prescribed thereunder make the instrument not duly stamped and, therefore, shall not be received in evidence, registered or acted upon.

16. None the less, the respondents could have availed of the benefit of Sub-section (2) of Section 42 if the board of directors of the company can be treated as a person within the meaning of Section 33 and hence empowered to rectify the irregularity and thereby give a declaration that the instrument of transfer

must be deemed to be duly stamped, that is, the instrument bears adhesive or impressed stamps of not less than the proper amount and such stamps have been affixed or used in accordance with law for the time being in force. Such a contention the respondents, in our view, cannot raise because the board of directors of a company cannot be said to be a person in charge of a "public office". The word "impounding" in Section 33, in the context in which it is used, takes in its fold the power not only to levy the correct duty but to correct all irregularities like, for example, to return the instrument to the party to get the stamps cancelled, if on examination stamps affixed to the instrument are found not duly cancelled, etc. Failure on the part of the person holding a public office to pass such orders may provide the aggrieved party a cause of action to approach courts for the issue of appropriate directions in that regard and not otherwise.

17. The argument of learned counsel for the transferees that what is mandatory is only the manner of cancellation of the stamps and if the stamps are cancelled in the manner so that they cannot be used again, that will amount to substantial compliance with the requirements of Section 12 of the Stamp Act, in the light of the principles enunciated hereinbefore, is not sustainable. So is the case with the argument that the time at which the cancellation shall take place is irrelevant for the purpose of deciding whether the instrument in question can be acted upon as duly stamped.

18. Applying this principle to the facts of the case, we are of the view that, inasmuch as the instruments of transfer of the shares are not duly stamped, duly not stamped because on the admitted facts the adhesive stamps had not been cancelled at the time of execution, the board of directors of the company was justified in rejecting the request of the transferees to have their names entered on the register. The above view expressed by us is supported by the rulings of this court in P.V. Chandran Vs. Malabar and Pioneer Hosiery P. Ltd. and Another, and P.V. Chandran Vs. Malabar and Pioneer Hosiery P. Ltd. and Another, and of the Supreme Court in Mannalal's case [1977] 47 Comp Cas 185 ker. The learned single judge, however, is of the view that non-compliance with the above requirements is not fatal to the transaction in that the non-compliance with the requirements is only an irregularity which can be corrected by giving the applicants for registration a chance to correct them. The learned judge lost sight of the principles enunciated in the decisions of this court and the Supreme Court aforementioned when the learned judge rendered the above decision and, therefore, the said decision is unsustainable.

19. It has come out in evidence that in some cases the proper fee within the meaning of Article 22 of Table A of Schedule I to the Act has not been paid. The non-compliance with the requirements prescribed by this article is fatal, it cannot be cured by offering to file the share certificate and a demand draft for the fee in the court. The court has no jurisdiction to accept the documents and the fee (see P.V. Chandran Vs. Malabar and Pioneer Hosiery P. Ltd. and Another, . The learned judge in that decision has observed thus :

"It is only after the instrument of transfer along with the share certificate and the registration fee are delivered or left at the office of the company duly, does the occasion for the directors to consider the matter arise."

20. This decision of the learned single judge has been confirmed in appeal by the Division Bench and ultimately by the Supreme Court by rejecting the special leave application. The learned judge, therefore, was in error in issuing a direction to the company to recognise the transfers after receiving the fee the transferees are bound to pay in terms of Article 22. This decision of the learned single judge, in any view, shall be said to be per incuriam.

21. Remaining questions we shall now consider. Touching upon these questions, learned counsel for the appellants contended thus : u/s 31 of the Act, a company has very wide power to alter its articles. The only statutory limitation in the exercise of such power of alteration is the one contained in Section 38 of the Act. Of course, such power should also be exercised bona fide for the benefit of the company as a whole. Even vested rights of members can be affected by the alteration if the alteration is "bona fide for the benefit of the company as a whole". Learned counsel in this connection relied upon the following decisions :

Pepe v. City and Suburban Permanent Building Society [1893] 2 Ch 311; Atten v. Gold Reefs of West Africa Ltd. [1900] 1 Ch 656 ; Sidebottom v. Kershaw Leese and Co, Ltd. [1920] 1 Ch 154 ; Shuttleworth v. Cox Brothers and Co. [1927] 2 KB 9 ; Greenhalgh v. Arderne Cinemas Ltd. [1951] 1 Ch 286 ; and Rights and Issues Investments Trust Ltd, v. Stylo Shoes Ltd. [1965] Ch 250 : [1964] 3 All 628.

22. The Scottish case relied upon by the learned single judge is the solitary decision which has struck a different note from the principles laid down in the above cases, counsel further submits. The said decision is solely based upon an ipsi dixit and as such cannot be preferred to the above decisions enunciating correct principles. The allegations of mala fides and other grounds highlighted in the cross-appeals are baseless. However that may be, the validity of the resolution passed at the extraordinary general meeting cannot be questioned by initiating proceedings u/s 155. It is all the more so in the case of the transferors. The transferors can at best contend that the resolution is a fraud played on the minority shareholders and if that be the position, in order to invalidate the said resolution the transferors at best can have recourse either to Section 397 or to Section 398 read with Section 399. So far as the transferees are concerned they are not entitled to challenge the resolution at all because at the time the resolution was passed their names had not been entered on the register and as such for all practical purposes the transferors continue to be the shareholders. The allegation that the reasons shown in the resolution rejecting the applications for registration are perverse/unreasonable, in the circumstances, cannot be sustained.

23. Learned counsel for the respondents refuted the above argument. According

to him, the question pertaining to registration of the transfer requires to be considered with reference to the articles that existed at the time when the transfers were made, that is, in January and February, 1989, or at the date of the lodgment of the applications for registration. Dilating on this aspect he contended that the articles reflect a contract between the member and the company and as such a public document containing a representation to the public as to what the contract is, so that the members of the public, who want to deal with the company or its members in regard to various matters, can act upon the articles pertaining to those matters. From the point of view of the transferor his share is freely transferable without any restriction (see Section 82 of the Act) and the said right enures to the benefit of the transferees of the shares and if that be so, the transferees have the right to challenge the resolution rejecting their request to register the transfers based on a change introduced in the articles particularly if the change is after the lodgment. The amendment of the articles is made in violation of Section 173 read with Section 189 since the resolution based on which the amendment is made is substantially different from the resolution proposed. The resolution under the circumstances is mala fide and suffers from want of good faith and application of mind. Right from the beginning the directors appear to be of the view that the applications for registration somehow or other shall be rejected and to accomplish this they got the resolution passed in haste. He further contended that the issue arising in this connection is directly covered by the Scottish case relied on by the learned single judge to give a verdict in their favour. Assuming that the resolution was defective for the reason that the instruments were not duly stamped, the court has the jurisdiction to give an opportunity to the respondents to correct the defect.

24. It is too late in the day to contend that a company has no authority to alter the articles. A company has the power to alter its articles by special resolution passed at a general meeting. Such alterations will be valid provided they are not inconsistent with the provisions of the Companies Act and the memorandum of association (see para 4 to 7 of Gore-Broume on Companies, volume 1, 44th edition). A reference in this connection to Sections 31 and 38 of the Act also is profitable. We shall reproduce these sections (leaving out parts which are not very material here) :

"31. Alteration of articles by special resolution. -- (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may, by special resolution, alter its articles :

Provided that no alteration made in the articles under this sub-section which has the effect of converting a public company into a private company, shall have effect unless such alteration has been approved by the Central Government.

(2) Any alteration so made shall, subject to the provisions of this Act, be as valid as if originally contained in the articles and be subject in like manner to alteration by special resolution."

"38. Effect of alteration in memorandum or articles.--Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member, if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date, to contribute to the share capital of, or otherwise to pay money to, the company :

Provided that this section shall not apply-

(a) in any case where the member agrees in writing either before or after a particular alteration is made, to be bound by the alteration ; or

(b) in any case where the company is a club or the company is any other association and the alteration requires the member to pay recurring or periodical subscriptions or charges at a higher rate although he does not agree in writing to be bound by the alteration."

25. Construing these provisions a Division Bench of the Madras High Court has opined thus : (see Swaminathan (M. V.) v. Chairman and Managing Director, SIDCO [1988] WLR 41).

"Section 31(2) of the Companies Act cannot be understood to mean that any alteration made in the articles of association would have retrospective effect as if it was there from the inception of the articles of association. The section is intended only to confer validity on the alteration made to the articles. It is only for the limited purpose of making the alteration valid it is to be treated as if it was originally in the articles. It is seen from sections 29 and 30 of the Companies Act that certain formalities are prescribed for articles of association. Unless the requirements of sections 29 and 30 are satisfied, the articles of association will not be valid in law. If the same formalities are to be gone through whenever any alteration is made, it may lead to several difficulties. For example, Section 30(c) of the Companies Act requires the articles to be signed by each subscriber of the memorandum of association. If an alteration to the articles is also to be signed by all the subscribers to the memorandum of association, it may not be possible at all. In order to avoid such a situation, Section 31(2) of the Act provides that the alteration made in accordance with Section 31(1) shall be valid as if it was part of the original articles. It is only for this limited purpose that the legal fiction is introduced by the said section. We cannot extend the scope of the fiction so as to make the alteration itself retrospective in effect for all purposes."

26. With respect we agree with the view expressed by the Madras High Court. It is pertinent to note in this connection that counsel representing both the appellant and the transferees have very fairly conceded that the amended article has no retrospective operation. An incidental question, however, would arise immediately and it is this : Whether the altered article would interfere with the transfer of shares effected by the shareholder prior to the resolution amending the articles. We are of the view that the transferor remains subject to the altered

article if it is shown that he continues to be a shareholder of the company. We are fortified in this view by the decision in *Pepe's case* [1893] 2 Ch 311, where after considering an amendment to the rule divesting a member of the society of his vested right to withdraw his shares, passed after the issue of the notice in writing expressing his desire to withdraw the shares, was held binding on the member because at the time of altering the article he continued to be a member of the society. We shall in this connection reproduce relevant parts of the ruling in *Pepe's case* [1893] 2 Ch 311 .

"It has been settled by a series of authorities that a person in such a position is still a member of the society, and it follows that, under his contract with a society which has power to alter its rules, he remains subject to the rules when duly altered."

27. The High Court of Australia, after reviewing the decisions in *Pepe* [1893] 2 Ch 311 and *Sidebottom* [1920] 1 Ch 154, have held in *Peters' American Delicacy Company Ltd. v. Heath* (61 CLR 457) thus :

"(1) Section 20 (corresponding to Section 31 of the Act) empowers-a company to alter its articles only subject to the conditions contained in the memorandum of association.

(2) An alteration in a particular case may constitute a breach of contract with a shareholder, but such a breach of contract does not invalidate the resolution to alter the articles (see *Allen's case* [1900] 1 Ch 656.

(3) The fact that an alteration prejudices or diminishes some of the rights of the shareholders is not in itself a ground for attacking the validity of an alteration (see *Sidebottom* [1920] 1 Ch 154, *Shuttleworth* [1927] 2 KB 9 and *Allen's* [1900] 1 Ch 656 cases). Any other view would, in effect, make unalterable and permanent any articles of association which conferred rights upon a class of shareholders, or possibly upon any shareholder, if they or he desired that those rights should continue to exist unchanged. It is plainly not the law that the fact that an alteration of articles alters the rights or prejudices the rights of some shareholders is sufficient to prevent the alteration from being validly made.

(4) The power to alter articles must be exercised bona fide. It is generally said that the power must be exercised bona fide for the benefit of the company as a whole, and all the recent authorities refer to the statement by Lindley M. R. in *Allen's case* [1900] 1 Ch 656. ... It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded.

(5) It is not for the court to impose upon a company the ideas of the court as to what is for the benefit of the company. It is for the shareholders to determine whether an alteration of the articles is or is not for the benefit of the company, subject to the proviso that the decision is not such as no reasonable man could have reached.

(6) An alteration which is made bona fide and for the benefit of the company, if otherwise within the power, will be good, but it is not the case that it is necessary that shareholders should always have only the benefit of the company in view But though a shareholder may vote in his own interests the power of shareholders to alter articles is limited by the rule that the power must not be exercised fraudulently or for the purpose of oppressing a minority.

(7) When the validity of a resolution of shareholders is challenged, the onus of showing that the power has not been properly exercised is on the party complaining. The court will not presume fraud or oppression or other abuse of power. ... It cannot be the law that a resolution of shareholders is to be presumed to be invalid until the defendants in an action positively establish that it is valid.

If, however, the resolution was passed fraudulently or oppressively or was so extravagant that no reasonable person could believe that it was for the benefit of the company, it should be held to be invalid."

28. The Scottish decision relied on by counsel for the respondents for the following reasons, has no application here. (1) Even, according to the learned judges, there was no evidence that the alteration of the company articles in that case was required in the general interest of the company. A reference in this connection to the following excerpt from the judgment is profitable :

"The alteration come into force at its own date, and, if so, Section 50 is no authority for Mr. Sandeman's proposition. There is also this further element that the alteration was made, not so much because the directors deemed it to be an alteration required in the general interests of the company, but simply in order to meet the particular case of the petitioner's transfer."

(2) There was no dispute as regards the valid lodgment of the application for registration. A reference in this connection to the following findings is profitable :

"It is admitted that at the time when he presented the transfer for registration he was, according to the existing regulations of the company, entitled to have it registered."

29. Here in the case on hand there was no valid lodgment of the application for registration. If that be the position the question as to whether the transferee has the right to demand that the transfer shall be registered, does not arise. Under these circumstances, we are of the view that the Scottish case has no application to the facts of this case. It should, however, be borne in mind that the company will always be liable in damages in case the alteration of the article results in a breach of the contract the company had entered into with any persons. To put it differently, by effecting alterations in its articles a company cannot defeat or escape from its contractual obligation with any person. The power to alter the articles subject to what is stated above is indisputably very wide. But the article shall not be so altered as to deprive the minority of their rights (see Southern

Foundries (1926) Ltd. v. Shirlaw [1940] AC 701 : [1940] 2 All ER 445). That means that no majority of shareholders can, by altering the articles retrospectively, affect, to the prejudice of the non-consenting owners of shares, the right already existing under a contract, nor take away the right already accrued, e.g., after a transfer of shares is lodged, the company cannot have a right of lien so as to defeat the transfer (see paras 4 to 7 of Gore-Brown). Before we go into the ramifications of this power, we have to focus our attention on the meaning of the phrase "bona fide for the benefit of the company as a whole". It can be seen from the authoritative decision in Allen [1900] 1 Ch 656 that the court, instead of straightaway defining this phrase, have stated thus :

"A resolution constitutes a fraud on the minority if it is not passed "bona fide for the benefit of the company as a whole", or, its effect is "to discriminate between the majority share holders and the minority shareholders so as to give to the former an advantage of which the latter was deprived."

(See Greenhalgh v. Arderne Cinemas Ltd. [1950] 2 All ER 1120 (CA) and Rights and Issues Investment Trust Ltd. v. Stylo Shoes Ltd. [1965] Ch 250 , Sidebottom v. Kershaw, Leese and Co. Ltd. [1920] 1 Ch 154 of Palmer's Company Law, 23rd edition).

30. The above rules were evolved in the so-called "expropriation cases" in which the issue was whether a special resolution altering the articles of the company was valid. Sidebottom's case [1920] 1 Ch 154 provides an example of an expropriation case. Here, the company, which carried on the business of cotton spinners, passed a special resolution introducing a clause in the articles whereby a person carrying on "any business which is in direct competition with the business of the company" could be required to sell out his shares to nominees of the directors upon payment of the fair value of the shares at a price to be certified by the auditors. The resolution was plainly against the plaintiffs, but the Court of Appeal held that it was in the interest of the company as a whole to be protected against competition, and upheld the resolution. To appreciate the above principle one should refer to the decision of Astbury J. in Brown v. British Abrasive Wheel Co. Ltd. [1919] 1 Ch 290 where the learned judge held that the alteration was not for the benefit of the company but for the benefit of the majority who got the resolution passed. This view the learned judge formed at a time when the true meaning of the test "that the alteration must be "bona fide for the benefit of the company as whole" " was not yet ascertained. For the first time this view was expressed in Sidebottom's case [1920] 1 Ch 154. Taking all these aspects into account, Palmer has stated thus :

"The true distinction between these two cases is that in Sidebottom's case [1920] 1 Ch 154, the expropriating article was not discriminatory in character and, in appropriate circumstances, would likewise have operated against the majority, but that in British Abrasive Wheel Co.'s case [1919] 1 Ch 290, the article was plainly and unashamedly discriminatory". (See Para 58.16 of Palmer)

31. The power conferred on the company u/s 31 of the Act to alter the articles by special resolution, however, shall not be abused by the majority of shareholders so as to oppress the minority. A question immediately would arise, namely, what action the minority shareholders who contend that the resolution altering the articles cannot be said to be "bona fide for the benefit of the company as a whole" can initiate ? This question can be answered only if we keep in mind the difference between "qualified minority rights" and "individual membership rights" of a shareholder. The difference is this : The individual membership rights can be exercised by any individual shareholder. But to enforce the qualified minority rights the co-operation of the minority group of a specified size within the corporate body is required (Paras 59.02 and 58.04 of Palmer). What then is an "individual membership right" ? It can be defined thus : The right to maintain himself in full membership with all the rights and privileges pertaining to that status. This individual right implies that the shareholder can insist on the strict observance of the legal rules, statutory provisions and provisions in the memorandum and articles which cannot be waived by a bare majority of shareholders. The qualified minority rights enable the minority to preserve in important matters, the status quo which is founded on the original contract of shareholders and the company. Proceedings to enforce qualified minority rights under the Act can be initiated only u/s 397 or Section 398 read with Section 399 of the Act.

32. It is in this backdrop that we have to tackle the questions. Learned counsel for the transferees contended that inasmuch as the resolution altering the articles by incorporating Article 17 was passed only after the instrument of transfer had been delivered to the company along with the certificate relating to the shares, it should be said that the alteration was effected with a view to defeat their rights to get their names entered on the register. This argument both in law and in fact, counsel for the company submits, is not sustainable because pending registration the transferees have only an equitable right to the shares transferred to them. There is no substance in this counter-argument, counsel for the transferees submits, because when once the transfer is completed and recognised by the company it relates back to the time when the transfer was first made. In support of this argument he pressed into service the following rulings including a ruling of this court.

33. Killick Nixon Ltd. and others Vs. Dhanraj Mills Pvt. Ltd. and others, ; Travancore Electro Chemical Industries Ltd. Vs. Alagappa Textiles (Cochin) Ltd., and two decisions of the Supreme Court in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, and Vasudev Ramchandra Shelat Vs. Pranal Jayanand Thakar and Others,

34. The question, therefore, is : when would the transfer become effectual as between the company and the transferees ? The deed of transfer shall not have any effect so as to put the transferee into the position of the transferor until it has been lodged with the company, and it must be not only lodged, but accepted

by the company as properly lodged, because if the company finds that it does not comply with the provisions of the Act it is its duty to refuse to receive it (see the decision of the Chancery Division in *Nanney v. Morgan* [1888] 37 Ch 346). Until the lodgment, the transfer may be effective between the transferor and the transferee. The transfer, however, becomes complete and the transferee becomes a shareholder in the true and full sense of the term with all the rights of a shareholder, only when the transfer is registered in the company's register. In the same strain is the statutory mandate to the company discernible from Section 108, not to register the transfer of shares unless a proper instrument of transfer duly stamped and executed is delivered to the company. Until such time as registration is granted, the person whose name is found in the register alone need be treated as the shareholder by the company. During the interregnum, that is, from the date of the transfer till the date of lodgment the transferee no doubt, becomes the owner of the beneficial interest though the legal title continues with the transferor. This antecedent right in the transferee is enforceable, so long as no obstacle to it is shown to exist in any of the articles of association of a company or a person with a superior right or title, legal or equitable, does not appear to be there. This in brief is the law stated by the Supreme Court in the decision in *Vasudev Ramchandra Shelat Vs. Pranal Jayanand Thakar and Others*, and *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, The principles deducible from the above judicial pronouncements can be stated thus : Until the transfer of the shares is actually registered it should be held that the transferee's title to the share is inchoate, and that the legal title remains vested in the transferor (see *Colonial Bank v. Hepworth* [1887] 36 Ch 36). This line of reasoning is reinforced by Article 19 of Table A of Schedule I to the Act which provides that until the name of the transferee is entered in the register of members, the transferor shall be deemed to remain the holder of the shares transferred, thereby clearly stating that the legal title remains vested in the transferor. It is true that delay in the registration involves danger to the transferee if some already existing prior equity may come to light, as in the case in *Ireland v. Hart* [1902] 1 Ch 522, where a husband mortgaged shares of which he was trustee for his wife and, before the mortgagee had become the registered holder of the shares, the wife took proceedings claiming that her equitable title prevailed over that of the mortgagee, a claim which the court upheld ; or a second transfer may be passed and registered and thus the first transfer may be defeated (see para 39.07 of *Palmer*, 23rd edition). The position has been illustrated by *Palmer* thus :

"The rule on this point is that, as between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title (i.e., equitable title) prevails, unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he, the second claimant, has acquired the full status of a shareholder ; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains

to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith ; so that as between himself and the company he may be said to have acquired, in the words of Lord Selborrie, "a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title".

35. It, therefore, follows that the equitable right of the transferee gets metamorphosed into the absolute right of a shareholder only when the names of the transferees after the recognition of the transfer, are entered on the register. This can be viewed from another angle and it is this : when once the transferee does everything that he is required to do under law, to get his name entered on the register by proper lodgment of the instruments of transfer and no other obstacles remain in enforcement of the said right, the transfer becomes effective as against the company also. Thereafter, the company cannot unilaterally alter its articles affecting the aforesaid right of the transferee. Mere delay in the actual registration of the name of the transferee on the register provided there is a proper lodgment of the instrument of transfer cannot affect the above right of the transferee. If that be the position, the right of the transferee to get his name entered on the register gets crystallised when proper lodgment is effected and the transfer from the date of the proper lodgment becomes effective as against the company also, and such rights cannot be affected by subsequent actions of the company like amendment of articles, etc. Subject to what is stated above, the transfer, once the company after recognising the transfer enters the name on the register, relates back to the time when the transfer was first made (see *Howrah Trading Co. Ltd. Vs. Commissioner of Income Tax, Central, Calcutta.*, .

36. In the light of our finding that there was no proper lodgment and the transfer has not become effective as against the company, the transferees cannot be heard to contend for the position that the company in exercise of the power conferred on it u/s 31 of the Act cannot alter the articles to their detriment. It should in this connection be remembered that the right of a shareholder to transfer his shares is always subject to the provisions in the articles of association as well as Section 31 of the Act. The transferee, therefore, cannot have a better right than the transferor and, therefore, his right as a transferee until the transfer becomes effective as against the company will again be subject to the provisions in the articles of association and the relevant provisions of the Act. The alterations effected to the articles of association in exercise of the said power cannot, therefore, be challenged by the transferee on the ground of mala fide. The transferees in other words have no manner of right to challenge the resolution.

37. Now, we, shall consider the question as to whether the transferors have any right other than the one recognised under Sections 397 and 398 read with Section 399 to challenge the resolution amending the articles in a proceeding u/s 155. As answer to this question it can be conceded that they have certain rights which can be called as "individual shareholder's right". Such individual

shareholder's right pressed into service in this case by the transferors have been dealt with by the learned single judge in paragraphs 28, 29 and 30 of the judgment. They can be formulated thus : The questions that were considered in this connection are : Whether the notice and explanatory statement of the extraordinary general meeting are legal and valid, whether the resolution as passed was materially different from the resolution as proposed in the notice. The learned single judge, after considering the various aspects of these questions and also the relevant provisions contained in Sections 171, 172, 173(2) and 189 has found that the notice and explanatory statement of the extraordinary general meeting were legal and valid. We shall in this connection reproduce the findings as regards question No. 1.

"... As such, there was no suppression of any material fact. The personal concern or interest of the directors in the special resolution suggested by learned counsel for the petitioner is far-fetched. Sub-section (2) of Section 173 only mentions "the nature of the concern or interest, if any" of every director in the concerned item of business. By the alteration the power is conferred on the board of directors as a whole and not on any single director. In any view of the case the wording of the resolution itself was self-explanatory which did not require any further explanatory statement about the powers to be conferred on the board of directors. Accordingly I hold that the notice and explanatory statement of the extraordinary general meeting were legal and valid."

38. The findings based on which the learned single judge answered the second question in favour of the company are extracted hereunder :

"In the resolution as proposed in the notice there were two clauses in the new Article 17. Clause (b) related to forfeiture of equity shares. The minutes of the extraordinary general meeting (Annexure R-1(e) to the counter-affidavit on behalf of the first respondent in C. P. No. 29 of 1989 dated 9th November, 1989), shows that the alteration as proposed in the notice was proposed, duly seconded and the chairman said that the formal special resolution was before the meeting. Subsequently, Dr. N. V. Krishna Warriar as well as Sri P. Kumaranunni moved amendments to the special resolution. The amendment proposed by Sri Kumaranunni was supported by the transferors of shares as well as Sri P. R. Krishnamoorthy, Executive Director of the Times of India and Dr. Ram S. Tarneja, who were allowed to participate in the meeting on the basis of the powers of attorney in their favour. The amendment proposed by Sri Kumaranunni was rejected after putting it to vote. The amendment proposed by Dr. Krishna Warriar was approved by the general body. The proposed Clause (b) in Article 17 was accordingly not approved. There was also some variation in the wording of Clause (a) by which the board was given absolute discretion to decline to register the transfer without assigning any reasons. This was an amendment which was duly moved in the extraordinary general meeting in which the petitioners also participated. They cannot now be heard to say that the resolution as passed was different from the resolution as proposed in the original notice, even though the

power given to the board to decline to register transfer without assigning any reasons in its absolute discretion was not envisaged in the original proposal."

39. On seeing the evidence dealt with by the learned single judge we are of the view that there is little scope to interfere with the said finding. We accordingly concur with the said findings.

40. Learned counsel for the transferors, Mr. Pathrose Mathai, has then submitted that even if the amendment of the articles is held to be valid, Article 17 in so far as it confers absolute discretion on the board to reject transfers is void being repugnant to the provisions in section 82 read with section 9 of the Act. It amounts to an absolute restriction regarding transferability of shares. Further, he submitted that the article is opposed to public policy and as such void and inoperative and cannot be relied upon to reject the transfer applied for. We do not find any merit in the above contentions. The object of the provision is to arm the directors with power to be exercised in special and exceptional cases where the transfer of shares may be found to be undesirable in the interests of the company. The articles of association of almost all public companies vest in the board of directors absolute and uncontrolled discretion to decline to register any transfer of shares. The adoption of such an article does not mean that there is a restriction on the free transfer of shares as in the case of private company. Even though the articles may give the directors absolute and uncontrolled discretion to refuse registration of transfers, a fiduciary power of this sort must be exercised bona fide in the interest of the company and if it is misused certainly the court and, after the 1988 amendment, the Company Law Board has wide powers to interfere with such abuse of power by the board.

41. The conclusion, therefore, is that the validity of the resolution in dispute can be challenged by the transferors not by initiating proceedings u/s 155 meant only to enforce individual membership rights but only by initiating proceedings if so advised either u/s 397 or Section 398 read with Section 399.

42. We, therefore, are of the view that the rejection of the application to register transfer of shares on the ground that there was no valid lodgment of the application is beyond challenge. We, accordingly, answer questions (i), (ii) and (iii) in para 7 in favour of the appellant. Question No. (iv), in the circumstances, in our view, does not arise for consideration and, therefore, we are not going into the merits of the case covered by this question.

43. In the light of our answer to questions (i) to (iii), the cross-appeals are liable to be dismissed. They are, therefore, dismissed.

44. The appeals are allowed. But, in the circumstances, no order as to costs.

45. Learned counsel for the respondents, immediately after the passing of the judgment, made an oral application for certificate for appeal to the Supreme Court. We are satisfied that the case involves substantial questions of law of general importance and, therefore, we certify that the said questions need to be

decided by the Supreme Court.

46. Issue photostat copy on usual terms.