(1974) 09 CAL CK 0009

In the Calcutta High Court

Case No : Company Petition No. 136 of 1974

Shyamdhan Chakraborty APPELLANT

Vs

Presidency Nursing Home Pvt. Ltd. RESPONDENT

Date of Decision : 04-09-1974

Acts Referred:

Companies Act, 1913 — Section 2(13)
Companies Act, 1956 — Section 155, 27(3), 3(1)

Citation : (1975) 2 ILR (Cal) 219

Hon'ble Judges : Ramendra Mohan Datta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ramendra Mohan Datta, J.—This is an application for rectification of the share register of a private company named Presidency Nursing Home Pvt. Ltd. The company was incorporated in the month of October 1947 under the Indian Companies Act, 1913. It is a private company within the meaning of Section 3(1)(iii) of the Companies Act, 1956.

2. The facts shortly are that on or about June 2, 1972, Sm. Monica Rati Mallick, a member of the company, the Respondent No. 5 herein, agreed to sell her 250 shares of this company to the Petitioner Shyamdhan Chakraborty at the rate of Rs. 80 per share. The company was informed and was requested to have the shares transferred in the name of the said Shyamdhan Chakraborty. The Petitioner Shyamdhan Chakraborty, at all material times, was and still now is a member, a director and the secretary of the company. The company by its letter dated June 12, 1972, informed the member proposing the transfer that under Article 13 of the articles of association of the company it was incumbent upon the Respondent No. 5 to offer her shares to the members of the company in accordance with their holdings and if the company did not secure any purchaser of the said shares within 28 days of the service of the said notice of transfer, the Respondent No. 5 might then become entitled to transfer her shares to a person

of her choice. The member proposing the transfer by her letter dated June 27, 1972, again requested the company to have the transfer recorded and the shares mutated in the name of the Petitioner as and when the transfer deed would be submitted. The company ultimately did not accede to the request or demand. Subsequently on or about March 7, 1973, the Petitioner paid Rs. 20,000 to the transferor and obtained the transfer deed duly signed by the transferor and submitted and/or caused the same to be submitted to the company and/or to its directors for mutation in favour of the Petitioner It is to be mentioned here that the company did not dispute and in fact, accepted the valuation at which the transferor intended to sell her shares but contended that the said shares should be sold, as would be directed by the directors, in terms of the provisions of the articles of association of the company.

3. The short and the important point involved is whether the articles would-permit such transfer. Hence, the articles have to be construed to find out the nature of the right involved in the transferor in transferring her shares in favour of another member. The following articles are relevant for the Court''s consideration in this application:

(2) The company shall be a private limited company within the meaning of Section 2(13) of the Indian Companies Act, 1913-36 and accordingly:

(i) No invitation shall be issued to the public to subscribe for any share, debenture or debenture stock of the company.

(ii) Number of members of the company shall be limited to fifty, provided that for the purpose of this provision where

two or more persons hold one or more shares jointly they shall be treated as a single member.

(iii) The right to transfer the shares of the company is restricted in manner and to the extent hereinafter appearing.

(4) No share shall save as provided in these presents be transferred to a person who is not a member so long as any member or any person selected by the Directors as one whom it is desirable in the interest of the company to admit to membership, is willing to purchase the same at a fair value to be determined in the manner hereinafter provided.

(5) Any share may be transferred at any time by a member to his son, daughter, brothers, son, brother, father, mother or to his wife and in case of female to her husband and any share of a deceased member may be transferred by his Executors or Administrators to the said relations of the deceased member to whom the deceased may have specifically bequeathed the same or who by operation of law of succession may be entitled thereto and shares standing in the name of the Executors or Trustees of the will of any member may be transferred upon any change of Executors or Trustees to the Executors of Trustees for the time being of such will and any share standing in the name of any firm may be

transferred to any member of such firm and Article 4 shall not apply to any transfer authorised by this clause.

(7) Any person becoming entitled to transfer shares in consequence of the death, bankruptcy or lunacy or other legal incapacity or insolvency of any member or in consequence of marriage of any female member or otherwise than by transfer, upon producing the share certificate and upon such evidence of title as the Directors think sufficient, may subject to the regulation as to transfer in these presents contained be registered as a member himself or may transfer such shares.

(8) In order to ascertain whether any member or person selected under Article 4 as aforesaid is willing to purchase a share, the person proposing to transfer the share (hereinafter called the ''proposing transferor'') shall except where the transfer is made pursuant to Article 5 as aforesaid give notice in writing (hereinafter called the ''transfer notice'') to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value and shall constitute the company his agent for the sale of the share to any member of the company or person selected as aforesaid at the price so fixed or at the (option of the purchaser at a fair value to be fixed in accordance with these articles.

(9) If the company shall within the space of 28 days after being served with such notice find a member or person selected as aforesaid willing to purchase the share (hereinafter called the purchasing member) and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the price fixed by him or the fair value, as the case may be, to transfer the shares to the purchasing member who shall be bound to complete the purchase within 7 days from the service of such last mentioned notice.

(10) In case of difference between the proposing transferor and the purchasing member as to the fair value of a share, the Directors or, if the purchasing member be a Director, the Auditor of the company for the time being shall on application of either party certify in writing the sum which in his opinion is the fair value and such sum shall be deemed to be the fair value and in so certifying the Directors or the Auditors, as the case may be, shall be considered as experts and not as arbitrators.

(11) If in any case the proposing transferor, after having become bound as aforesaid, make default in transferring the shares, the company may receive the purchase money and shall cause the name of the purchasing member to be entered in the register as the holder of the share and shall hold the purchase money in trust for the proposing transferor to be paid to him on delivery of his certificate for the said shares without interest. The receipt of the company for the purchase money shall be good discharge to the purchasing member and after his name has been entered in the register in purported exercise of the aforesaid power, the company may issue to him a certificate for the shares purchased and

thereupon the purchasing member shall become indefeasibly entitled to such share and the validity of the proceedings shall not be questioned by any person.

(12) If the company shall not within 28 days after being served with the transfer notice find a purchaser for all or any of the shares comprised therein and give notice in manner aforesaid or if through no default of the proposing transferor the purchase of any shares in respect of which such last mentioned notice shall be given, shall not be completed within 28 days from the service of such notice, the proposing transferor shall at any time within 3 calendar months afterwards be at liberty hereof to sell and transfer the shares comprised in his transfer notice or such of them as shall not have been sold to a purchasing member or to any person and at any price.

(13) Any shares specified in the transfer notice shall be offered to the members as nearly as may be in proportion to the existing shares of the same class held by them respectively and the offer shall in each case limit the time within which the same if not accepted will be deemed to be declined and may notify to the members that any member who desires an allotment of shares in excess of his proportion should in his reply state how many excess shares he desires to have and if all the members do not claim their proportion the unclaimed shares shall be used for satisfying the claim in excess. If any shares shall not be capable without fraction of being offered to the members in proportion to their existing holdings, the same shall be offered to the members or some of them in such proportions and in such manner as may be determined by lots to be drawn under the direction of the Directors.

(14) The Directors may without assigning any reason decline to register any transfer of share upon which the company has a lien or of shares which are not fully paid up or to any transferee whom the Directors do not consider desirable to be admitted as a member, provided such transferee is not already a member but such right of refusal shall not be exercisable in the case of any transfer made pursuant to Articles 5 and 7 except for the purpose of ensuring that the member of members does not exceed fifty.

4. Prior to the said transfer the share holdings of the issue shares of the company amongst its members were as follows :

(i) Shyamdhan Chakraborty Sm. Monorama Chakraborty 450 shares

(ii) Rabindra Nath Chakraborty Sm. Bela Chakraborty 475 shares

(iii) Birendra Nath Sett Sm. Arati Sett 250 shares

(iv) Sudhi Ranjan Ganguly 600 shares

(V) Sm. Monica Rati Mallick 250 shares

(vi) N.K. Jhajharia 1 share

(vii) B.K. Ghosh 1 share

(viii) K.C. Sarbadhikary 1 share

5. On behalf of the Petitioner it is contended that the restrictions imposed by Article 4 do not in any way affect the right of the members to effect the transfer of shares amongst the members. The restrictions are only in respect of such transfer to a person who is not a member. In other words, so long as the members would be willing to purchase the shares proposed to be transferred to a person who is not a member at a fair value, the same would have to be kept confined amongst the members and in case nobody would be willing within the time stipulated by the articles, the transferor would be at liberty to sell the shares to an outsider. On behalf of the Respondent it is contended that the restrictions affect the members as well, particularly, in view of Article 13 of the articles of association of the company. It is further submitted that u/s 3(1)(iii) of the Companies Act, 1956, it is provided that in respect of a private company there must be restrictions, inter alia, as to the transferability of the shares of the company and u/s 27(3), which is a new provision under the Companies Act, 1956, it has become mandatory on the part of the private companies to provide for such restrictions, inter alia, as to the transferability of shares in its articles of association. Mr. Chatterjee contends that under the English law such a provision has not been enacted and accordingly, the Indian law on this point should be considered from a different aspect and the principles laid down by English decisions are not applicable to the question of the transferability of the shares in respect of private companies. The further point which has been urged by Mr. Chatterjee, appearing on behalf of the Respondents, is that in view of such mandatory provisions in the Indian statute the articles of association of a private company have to be construed in such a manner that unless the right of transferability of shares amongst members would be expressly provided in the articles such a right should not be implied and that such right of transferability of shares would be considered as non-existent. Lastly, Mr. Chatterjee contends that no case u/s 155 of the Companies Act, 1956, has been made out and in any event, the order being discretionary and no equity having been established, in the facts and circumstances of this case, the transfer should not be allowed j to be effected in favour of the Petitioner

6. I shall now deal with the various articles of association of the company. Under Article 1, Table A, in the first schedule to the Indian Companies Act, 1913, has been applied subject to the modifications contained in the articles. Under Article 2, the company has been described as a private company and the restrictions imposed have been set out firstly with the condition that no invitation would be issued to the public to subscribe for any share, debenture or debenture stock of the company; secondly, to the effect that the number of members must be limited to 50 and thirdly, that the right to transfer the shares in the company would be restricted as mentioned in the articles.

7. As stated above, the company was incorporated under the 1913 Act as amended upto 1936 and to make it a private company, all the formalities as

provided therein were complied with. Under the new Section 27, Sub-section (3) of the Companies Act, 1956, the additional thing that has been provided therein is that the restrictions as provided in the definition clause were required to be incorporated in the articles of association of the company. In respect of the transferability of shares, what would be the scope and extent of such restrictions has not been indicated in the said Sub-section (3) of Section 27 of the Act of 1956 and accordingly, the Court would be justified to hold that the minimum restrictions, which are required to be imposed therein, could extend only upto the restrictions mentioned in the definition section as provided in Section 3(1)(iii) of the Act of 1956. Such restrictions are that the members of the public would not be invited to participate in its affairs or to become interested in its management. Secondly, the number would not exceed fifty and thirdly, there should be restrictions in the matter of transferability of shares to the extent as provided in the articles of the company. In other words, these are the special characteristics of a private company and if any of those would be missing, then instead of it being a private company it would be a public company. The basic idea is to preserve its corporate character and at the same time to run it as a family or a private concern amongst its members on the principles followed in a partnership concern.

8. The next relevant article is Article 4 which has been set out above. According to the Petitioner, this article has been provided for the purpose of restricting the right of free transferability of shares in case such transfer is proposed to be made to a person who is not s a member. It is only when that question would arise, that the members would have the opportunity to get such shares transferred in their favour at a fair value and in implementing the same, the directors have been given powers to select such member or person in whose favour the same would be transferred in the manner as provided therein. This is the restrictive clause imposing the restrictions with regard to the transferability of shares and is in compliance with requirements provided by the above sections. In other words, the ordinary right of the transferor to freely transfer the shares to a person of his choice has been curtailed in the manner as provided therein. The expression ''save as provided in these presents'' refers to the clauses under which such transfer could be effected in favour of a person who is not a member. In other words, there is no absolute bar to an outsider coming in by such transfer. The right that has been provided under Clause 4 is the right in the nature of pre-emption which comes into play only when it is sought to be transferred to a person who is not a member.

9. Unlike Article 4, in Article 5 the right to transfer shares has been provided in a direct and a positive way under certain circumstances. Under that article any share is transferable by a member to such of his relations as are mentioned therein and in case of death of any member the executors or administrators, as the case might be, of such member have also been given the right to transfer such shares to such relations if such relations would be entitled thereto by operation of law or by bequests, as the case might be. It is expressly made clear

therein that in the matter of such transfer Article 4 would not apply. To my mind Article 5 confers right in favour of outsiders directly and in a positive manner and the framers of the articles of association thought it necessary to confer such right under this article because otherwise such transfer would be hit by Article 4, the persons concerned being persons who are not members of the company. The general restrictions put on the outsiders by Article 4 are removed by Article 5 in respect of a particular class of persons who are not members and that was why it was necessary to specifically mention that Article 4 would not apply to any transfer authorised by Article 5,

10. Article 7 is also to some extent relevant for the consideration of this case inasmuch as the unrestricted right of transferability of shares of a member is restricted and such persons are required to transfer their shares subject to the regulations as to transfer contained in the articles. The obvious intention is that if such class of persons would be allowed to exercise the same right of transferability of shares, the interest of the company might suffer prejudice. Although such persons have become members by such operation of law, yet in relation to the other existing members of the company such persons might not be placed in the same footing in the interest of the company. Accordingly, such persons should not have the same privilege and right as those of the existing members or promoters or the founder members of the company. In other words, a distinction is sought to be maintained as between the existing members and the members who would become members by operation of law as provided in Article 7. In respect of this class of persons the restriction has been put in direct and a positive manner. It follows that Article 4 would be applicable in respect of such transfer as regards the persons covered by Article 7. Under this article also the right is conferred on a class of persons for transfer of such shares subject to the restrictions as provided in the articles. This right is also a right to transfer such shares to a member or to a non-member, but the restrictions have been expressly imposed in respect of such transfer. In other words, although such persons are also registered as members of the company, yet their right to transfer shares would be different from the right which a member would enjoy, viz., the free transferability of the shares without any restrictions as provided in the articles.

11. Article 8 requires special consideration for its construction. Mr. Chatterjee contends that the general scheme of transferability of shares applicable to members and to persons who are not members has been provided under this article read with Article 13 and that even a member who proposes to transfer his shares to another member would be obliged to give a notice in writing to the company expressing his desire to transfer such shares under those articles. In my opinion, that is not the correct way of construing this article. It is significant that Article 5 has been specifically excepted in the matter of giving notice to the company as provided under this article. That shows the intention of the framers of these articles that the restriction is not to apply to the class of persons mentioned in Article 5. If that be so, then how can the restrictions apply to a

member who intended to transfer his share to another member? Moreover, the opening words of this article, viz., "In order to ascertain whether any member or person selected under article as aforesaid is willing to purchase the share", would go to show that this article is to be read along with Article 4 which provides for transfer of shares to a person who is not a member of the company. Accordingly, it is only when such a transfer under Article 4 would be involved, then only this Article 8 would be attracted and the machinery for transfer of shares as provided under this article would have to be followed.

12. Similarly, Articles 9, 10, 11 and 12 provide for the machinery in respect of transfer of shares in case the same has to be made in favour of a person who is not a member.

13. The basic idea to restrict the free right of transferability of shares of a private company is to ensure that, before any share would be transferred to any person who is not a member, every attempt must be made to have it transferred amongst members so that, as far as practicable, persons who are not members of the company might not come in freely to interfere with the management and affairs of the company thereby endangering the existence of the private company or the family business. That is, to my mind, like that of partners in a partnership, the primary concern of every member of a private company. Of course, outsiders are bound to infiltrate if members would not be willing to buy such shares but that is allowed to be done as a last resort. The restrictions under the articles cannot provide for an absolute fetter in the matter of transferability of shares. The right of free transferability of shares can be restricted upto a limit, but there cannot be a total restriction in stopping the outsiders from coming in.

14. To my mind, the primary object for such restriction on the transferability of shares is not concerned with equal distribution of shares amongst the members but to stop the outsiders, as far as practicable from coming in by enabling members, if they so desire, to acquire the shares if any of the members would be willing to sell his shares, but in case of such purchase of shares by such member or members under such circumstances, the principle of equal distribution must be observed and that is why the machinery has been provided to deal with the situation in such events so that nobody''s interest might suffer any prejudice in the hands of the directors.

15. Article 13 provides the scheme of equal distribution of shares, as nearly as may be, in proportion to the Existing shares of the same class, but such principle of proportionate distribution of shares can only be resorted to if under Article 8 a notice in writing for the transfer of shares would be required to be given. I have already observed that such a transfer notice would be required only in the case provided under Article 4, i.e., in the case of transfer of shares to a person who is not a member. In my opinion, all those articles, viz. 4, 8, 9, 10, 11, 12 and 13 come into play only in the case of proposed transfer of shares by member to a person who is not a member. In Article 7 the same machinery, as provided under the aforesaid articles, have been specifically made applicable by express words

although in respect of Article 5 the class of persons mentioned therein have been exempted from the operation of Article 4.

16. Mr. Chatterjee''s contention that the restriction provided under Article 4 shall apply also to the purchase of shares by member, to my mind, is not acceptable. From the language it clearly appears, particularly from the words, ''save as provided in these presents'', that the restriction imposed is not absolute. All that it conveys is that in case of proposed transfer of shares by member to a person who is not a member, the machinery provided under the articles have to be followed. It does not, in any way, touch the free transferability of shares in so far as proposed transfer of shares from a member to another member is concerned. Indeed, no restriction has been put in respect of such transaction. Section 3(1)(iii) of the Companies Act, 1956, or Section 27(3) of the Companies Act, 1956, does not in any way require that the restriction must be imposed in so far as the proposed transfer of shares from a member to a member is concerned. It obviously contemplates restriction relating to transferability of shares from a member to a person who is not a member.

17. I do not see how the new provision in Section 27(3) of the Companies Act, 1956, the equivalent whereof is not to be found in English Act, can in any way alter the principle applicable to free transferability of shares amongst members of the company. All that Section 27(3) requires is that it has now made it mandatory for a private company to provide in its articles all such restrictions as are contemplated under the definition Section 3(1)(iii) of the Companies Act, 1956. Any restriction not provided in the articles would not be recognised. It, follows that if the mandatory provision of Section 27(3) would not be complied with then the private company would lose its character as a private company and would become a public company and consequently, the privileges or exemptions provided under the statute in respect of a private company would not be available to such a company.

18. This is how I construe and read the articles of this company. Under those circumstances, in my opinion, the principles enunciated in the English cases relating to transferability of shares in respect of private companies may safely be applied if facts of the case would otherwise so permit.

19. In the case of Delavenne v. Broadhunt L.R. (1931) 1 Ch. 234 the articles therein which were of similar nature as those of Articles 4 and 8 herein, were considered. Such articles were as follows:

Article 5 : The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares and Clause 20 of Table A shall be modified accordingly, No shares shall in any circumstances be transferred to any infant, bankrupt or person of unsound mind. Save as hereby otherwise provided no share shall be transferred to any person who is not a member of the company so long as any member or, failing such member, any person selected by the directors is willing to purchase the same at the fair value which shall be determined as hereinafter provided.

Article 6 : In order to ascertain whether any member or person selected as aforesaid is willing to purchase shares at the fair value, the person whether a member of the company or not proposing to transfer the same (hereinafter called ''the retiring member'') shall give notice in writing (hereinafter described as a ''sale notice'') to the company that he desires to sell the same and until otherwise determined by the company in general meeting the same shall be offered among the holders of ordinary shares in proportion as near as may be to their existing holdings thereof and any not accepted by them shall be offered to such other persons as the directors shall determine. Such notice shall constitute the company the agent of the retiring member for, the sale of such shares to any member of the company or a person selected as aforesaid at the fair value. No sale notice shall be withdrawn except with the sanction of the directors.

In that case also the question arose whether or not the shares were liable to be offered under the articles to all the members of the company at a fair value and in proportion to their shares. In construing the said articles it was observed that there was an absolute prohibition on a share-holder of the right to transfer a share to an infant, a bankrupt, or a person of unsound mind and that there was also prohibition against the transfer to any person who was not a member of the company, so long as a member of the company failing any such member, a person selected by the directors, was willing to take the shares. It was, further, observed that there was no express prohibition of the right of any member to transfer shares to another member. It was only as a matter of implication that such a prohibition could be read into the articles. But construing the said Article 6 in the said case it was held that the said article was a mere machinery provided for the purpose of enabling a member to transfer shares to some person who was not a member of the company. It was a machinery for the purpose of ascertaining whether or not there was a member of the company who was willing to purchase at a fair value or a person to be selected by the directors who was willing to purchase at a fair value. The learned Judge observed:

I am unable to find in that article anything which gives rise to the necessity of implying any restriction upon the right of a member of the company to transfer shares therein to another member.

20. In the case before me also no restriction has been put upon the right of a member of the company to transfer shares to another member and I do not think I should be acting justly in implying such restrictions therein to create a fetter to the right of transferability, inherent in the ownership of shares, where the framers of the articles have not chosen to impose such restrictions by express words. I feel I should accept the principle of construction laid down in the said English case.

21. In the case of Greenhalgh v. Mallard and Ors. (1943) 2 All E.R. 234 the articles provided that no shares in the company should be transferred to a

person not a member of the company so long as any member of the company might be willing to purchase them at a fair value in, accordance with para. (b). Paragraph (b) began by providing that, if any member desired to sell or transfer any of his shares, he should notify his desire to the directors by sending them notice in writing to that effect. One of the questions argued therein was whether or not the restrictions on transfer applied to sales to members as well as to non-members. It was contended therein that since the shares had not been offered to the members as a whole, the transfers were invalid. It was held that the language of Article 10, para, (b) was not sufficiently clear to cut down the right of transfer inherent in the ownership of shares and the restriction must, therefore, be taken to apply only to cases of sales to non-members.

22. Mr. Chatterjee wanted to draw a distinction between that English case and the case before me by contending that the saving-clause, viz. ''save as provided in these presents'' would be found absent in the said article in the English case. In the case before me, it is contended by Mr. Chatterjee, Article 13 of the articles provides the principle of equal distribution of shares in case of such a proposed transfer, but such an article is non-existent in the English case. Lastly, it is contended by Mr. Chatterjee that there is no corresponding provision in the English statute as that the provision of Section 27, Sub-section (3) of the Companies Act, 1956 and accordingly, the principle of that English case should not be applied in the facts of the case before me. In my opinion, these are distinctions without difference. I have already given my reasoning regarding the scope of Article 13. To my mind, Article 13 does not come into play in deciding the point before me. I have also indicated the scope and effect of Section 27(3) of the Companies Act, 1956, by observing that the provision of Section 27(3) only requires that the articles must provide for all the restrictions as mentioned in the definition clause of a private company and any restriction outside the articles would not be recognised.

23. In the case of Jarnial Singh Harjit Singh and Another Vs. Bakshi Singh Sham Singh and Another, the principle of construction of the articles of the association in respect of such transferability of shares was gone into and it was held that the Court should hesitate to place an interpretation on the articles which might have the effect of imposing restrictions on transferability which might be in restraint of trade and therefore opposed to public policy. The Court should lean in favour of an owner''s right to deal with his property at pleasure, unless such a right had been abridged in a particular manner and in that case too only to the extent of abridgment. That was also a case where the articles of a private company were construed and the above principle of construction was applied.

24. On behalf of the Petitioner Mr. Hirak Mitter relies on the case of In re Hackney Pavilion Ltd. AIR 1960 P&H. 455 and on the basis of the principles of the said decision argues that at the meeting of the board of directors no decision was arrived at as to the registration of the said shares and as such the board could not exercise its right of declining registration with the result that the Petitioner''s

absolute right to the registration remained intact and the register, accordingly, must be directed to be rectified. Relying on Section 155(b) it is argued that the company has made default in entering on the register the name of the Petitioner as a holder of the said shares and as such, the provision of Section 155 enables the Petitioner to obtain an order for rectification of the share register.

25. Mr. Mitter also relies on a passage of Gore-Browne on Companies (p. 358) which reads thus:

A pre-emption clause will be strictly construed, in particular, the Court will be reluctant to hold that such a clause fetters the right of a member to transfer his shares to another member at any price that may be agreed upon between them. On the other hand, the Court will be prepared to construe a pre-emption clause with sufficient liberality to prevent its obvious purpose being thwarted.

26. Mr. Chatterjee relies on the House of Lords case of Hunter v. Hunter and Anr. L.R. (1936) A.C. 222 but, in my opinion, that case is distinguishable from the case before me. That was a case where under Article 17 of the articles of association the transfer of shares were totally restricted except in accordance with the machinery provided thereunder; but that is not the case before me. The general right to transfer the shares has not been restricted but certain restrictions have been imposed under the articles as discussed above.

27. The only point that remains to be decided is whether the discretion of the Court should be exercised in the facts and circumstances of this case in making an order in this application. As observed above, there is no dispute about the valuation at which the shares are proposed to be transferred. The company has accepted such valuation. The other members who have expressed their desire to purchase the shares in proportion to their holdings are also agreed to the said valuation. Accordingly, in my opinion, the Petitioner is not acquiring the shares at a bargain but at a proper value. I have also considered the point that the Petitioner is a secretary and a director of the company and as such, whether the transfer should be allowed to be effected or not, but this is a private company and the holdings of the issued shares of the company are restricted to about eight sets of share-holders. That being so and there being no equity standing in the way of a director or a secretary acquiring such shares, I do not see why the discretion should not be exercised in favour of the Petitioner Under those circumstances, the principle laid down in the case of Bellerby v. Rowland and Marwood''s Steamship Company Ltd. L.R. (1901) 2 Ch. 265, in my opinion, cannot be applied in the facts of this case. The correspondence reveals that the directors were not sure of the position on this point. They obtained legal opinion and I am told that opinion could not convince them of the actual legal position and the Petitioner, accordingly, made the application to clear up the position on this point. Accordingly, I should think that the discretion should be exercised in favour of the Petitioner.

28. For all these reasons, in my opinion, the articles of association of this

company do not, in any way, restrict the right of a member to transfer his or her shares to another member and under such circumstances the company has no right to refuse to have the shares registered in the books of the company.

29. I make an order in terms of prayer (a) of the petition directing the company, the board of directors and all persons concerned to rectify the share register by transferring the shares bearing Nos. 2001 to 2250 in the Respondent company standing in the name of Monica Rati Mallick in favour of the Petitioner as share-holder in respect of the said shares and to make necessary mutation in the share register of the company. In the facts and circumstances of this case, the prayer for damages is not allowed and is refused. On the question of costs all the parties appearing submit that the same should come out of the funds of the company because the point involved required clarification by construing the articles of association of the company. Under those circumstances, I think that should be the proper order and I make an order that the costs of all parties be paid by the company from out of its funds.