
(1979) 11 BOM CK 0002

In the Bombay High Court

Case No : Miscellaneous Petition No. 794 of 1978

Vijaykumar Berlia and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-11-1979

Acts Referred:

Companies Act, 1956 — Section 108, 108A, 108D, 108D(1), 155

Citation : (1982) 52 CompCas 437

Hon'ble Judges : P.S. Shah, J

Bench : Single Bench

Advocate : K.S. Cooper, for the Appellant; B.R. Zaiwala and T.R. Andhyarujina, for the Respondent

Judgement

P.S. Shah, J.—The petitioners, who are a group of shareholders of respondent No. 3-company, National Rayon Corporation Ltd., who will hereinafter be called as "the Berlitas", have filed this petition under art. 226 of the Constitution challenging the order dated June 17, 1978, passed by respondent No. 1, the Union of India, under the provisions of s. 108D of the Companies Act, 1956 (1 of 1956).

2. Prior to July 11, 1977, the petitioners, 1 and 2 and their group, owned and were registered owners of 39, 065 shares in respondent No. 3 company. On July 11, 1977, the Board of Company Law Administration, respondent No. 2 herein, acting under the provisions of s. 408 of the Act, appointed respondents Nos. 4 to 11 as the directors of the company for a period of three years. Respondent No. 13 is the nominee-director of ICICI. Respondent No. 14 has been co-opted by the other directors as the director of the company. Respondent No. 12 was also appointed as the director of the company at its meeting held on April 3, 1978. Prior to April 3, 1978, there were three directors on the board of directors from the Kapadia group. However, on April 3, 1978, when they were to face a resolution for their removal, they resigned. The petitioners 1 and 2 were proposed to be elected in the place of two of the directors who were being

removed. Prior to July 13, 1977, the petitioners had purchased additional 29,633 shares in respondent No. 3 company and these shares were lodged with the company for registration between July 13, 1977 and July 19, 1977. It appears that despite several meetings, the question of registration of these shares in the name of the petitioners was not considered and, therefore, petitions 1 and 2 filed two suits bearing Suits Nos. 6991 and 6992 of 1977 in the city civil court. It appears that while the suits were pending, the petitioners were told that the question of registration of these shares in their names will be considered. However, ultimately on September 14, 1977, the company sent letters rejecting the application with regard to the said 29, 633 shares. The ground given for rejecting the applications was that respondent No. 3 company had applied to the Central Govt. for investigation into the affairs of the company under s. 187C and s. 247 of the Act, and pending consideration of this application by the Central Govt. it was decided to reject the application. The petitioners, therefore, filed Company Petitions Nos. 607 and 737 of 1977 in this court under s. 155 of the Act for rectification of the register of members in respect of the said 29,633 shares. During the pendency of these petitions, on September 21, 1977, this court passed an interim order that the meeting to be held on September 23, 1977, should not proceed with the business of election of directors till the disposal of the petitions. Thereafter, on December 8, 1977, the matter was settled on an agreement between the parties. Respondent No. 3 company agreed to register the shares and the petitioners also agreed to withdraw the suits and the petitions filed by them. It appears that the company did not give back to the petitioners the share certificates duly transferred in their names, and, thereafter, on April 18, 1978, they, the petitioners, gave a notice to respondent No. 3, and on April 26, 1978, they were informed that the shares were ready. In the meanwhile, the adjourned meeting of September 23, 1977, was notified to be held on April 3, 1978. A notice for an extraordinary meeting to be held on the same day for the removal of the three directors of the Kapadia group was also given. As pointed out above, petitioners 1 and 2 were proposed to be elected in the place of the two directors being removed. For this meeting, the petitioners lodged proxies numbering in all 1,74,500 which included the shares of the original holding and also the shares purchased by the petitioners and various other shares. However, as the three directors resigned in the meeting itself, the elections could not take place in that meeting held on April 3, 1978. At the same time, the petitioners were also informed by the company that the transfer of the said 29,633 shares was conditional on certain donations being returned to the company by the two charitable trusts of Berlia group. On some further correspondence, however, the said shares were ultimately transferred and the petitioners were informed about it by letter dated April 26, 1978, by the company. Up to this stage, therefore, the petitioners' group became registered owners of 68,698 equity shares which corresponded to about 13 per cent. of the total holding. Thereafter, between May 9, 1978 and June 5, 1978, the petitioners lodged for registration further shares aggregating to 16,346 shares which they had purchased. It appears that respondent No. 3, the company, rejected all the applications for the transfer of

these shares. After the present petition came to be filed, the petitioners have filed applications for rectifying the register of members in respect of these irregularities under s. 155 of the Act. These petitions under s. 155 are pending. It is the case of respondent No. 3 that between April to June, 1978, shares aggregating to 27,263 were purchased by the petitioners in the names of their nominees and such shares were lodged for acceptance of transfer and registration with the object of gaining control over the affairs of the company. It appears that prior to June 17, 1978, there was some correspondence between respondent No. 4, the chairman of the company, and the Board of Company Law Administration, respondent No. 2, regarding the alleged attempts made by the Berlia Group to gain the control of the affairs of the company by various means. My attention has been drawn to two of these letters dated April 28, 1978, the June 6, 1978. It was in this background that on June 17, 1978, the impugned order under s. 108D of the Act came to be passed by the control Govt.

3. It is necessary to set out the order in extenso which runs as under :

"EXHIBIT "E"

No. 11/33/78-C IVI Government of India, Ministry of Law, Justice & Company Affairs, Department of Company Affairs "A" Wing, Shastri Bhavan, Dr. Rajendra Prasad Marg, NEW DELHI-1.

dated the 17th June, 1978.

ORDER

WHEREAS the National Rayon Corporation Limited, a company within the meaning of the Companies Act. 1956 (1 of 1956), and having its registered office at Ewart House, Homi Modi Street, Bombay - 400023 (hereinafter referred to as "the said company") is a body corporate owning an undertaking to which the provisions of part A of Chapter III of the Monopolies and Restrictive Trade practices Act, 1969 (54 of 1969), apply :

AND WHEREAS it has been brought to the notice of the Central Government that Sarvashri Vijaykumar Berlia, Om Prakash Berlia, both of whom are residing at Rang Mahal, Second Floor, 212/216, Samuel Street, Bombay-400003, Berlia Chemicals and Traders (Private) Limited and others belonging to the Berlia Group, who are at present holding 68,853 equity shares in the said company, are making concerted efforts to gain controlling interest in the company;

AND WHEREAS it has been brought to the notice of the Central Government that certain persons alleged to belong to the aforesaid Berlia Group have lodged transfer of 27,263 shares in bulk with the said company in order to gain controlling interest in the said company;

AND WHEREAS it has been brought to the notice of the Central Government that in furtherance of their bid to acquire controlling interest in the said company, the said Berlia Group have lodged proxies numbering over 1,74,500 for the

extraordinary general meeting of the company held on 3rd April, 1978, for the appointment of two of their nominees as directors of the company;

AND WHEREAS it has been brought to the notice of the Central Government that the said Berlia Group had been involved in a number of irregularities committed by the Kapadia Group in the affairs of the said company, prior to the appointment by the Central Government, of persons to hold office as directors of the said company u/s 408 of the Companies Act, 1956 (1 of 1956);

AND WHEREAS the Central Government is satisfied, on the facts enumerated hereinbefore, and on the report received from the said company that as a result of the transfer of any share or block of shares of the said company, a change in the controlling interest in of the said company is likely to take place and that such change is prejudicial to the interests of the said company;

NOW, THEREFORE, in exercise of the powers conferred by subsection (1) of section 108D of the Companies Act, 1956 (1 of 1956), the Central Government hereby directs the said company not to give effect to the transfer of any such share or block of shares and -

(a) where the transfer of such share or block of shares has already been registered, not to permit the transfers of any nominee or proxy of the transferee to exercise any voting or other rights attaching to such share or block of shares;

(b) where the transfer of such share or block of shares has not been registered, not to permit any nominee or proxy of the transferor to exercise any voting or other rights attaching to such share or block of shares.

Sd/- (S. C. Mittal)

Joint Secretary to the Government of India.

4. No hearing was given to the petitioners nor any notice was issued to them prior to the passing of the abovesaid order. Even after the passing of the order, a copy thereof, was not given to the petitioners. However, it appears that only the company and the Registrar of Companies were informed of the said order by about June 19, 1978. This order was passed hardly 12 days, prior to June 29, 1978, on which day the annual general meeting of the company was convened, and it is in respect of this meeting that the petitioners had gone to the office of the company on June 26, 1978, to lodge the proxies. It was at this stage that the petitioners seem to have come to know that their voting rights have been frozen by reason of some order passed by the Central Govt. the petitioners then made attempts to obtain a copy of the order both from the company and the Registrar of Companies. It is the case of the petitioners that they were kept deliberately in the dark by not supplying the copy though asked for nor was any proper information given to them. It is in this background that on June 27, 1978, a couple of days prior to the scheduled meeting, this petition came to be filed in this court. The petitioners also gave a notice to the company informing them that the petitioners will move for an interim relief. After the petition was filed, on that

very day, the petitioners received a letter from respondent No. 3 company forwarding the photostat copy of the impugned order.

5. The petitioners contend that the said impugned order is illegal, void mala fide and unjust, having been passed in total violation of the principles of natural justice. According to them, they have nothing to do with the transfer of the said 27,263 shares mentioned in the order. It appears that the said shares have been purchased by them different persons other than the petitioners. The petitioners contend that the impugned order apart from being passed without hearing them and in flagrant violation of the principles of natural justice and fair play, the order lacks application of mind and is also vague, because the order does not even mention the names of the persons to whom the said shares have been transferred, not the numbers of these shares are mentioned in the order. The petitioners have also challenged the constitutional validity of s. 108D, as according to them, the provisions thereof violate their fundamental rights under arts, 14 and 19 of the Constitution.

6. On behalf of the Union, Chandrakant Kushaldas, who is the Director, Department of Company Affairs, New Delhi, in the Ministry of Law, has filed his affidavit dated June 28, 1979, in reply. Besides denying the allegations of the petitioners, it was asserted by him that the order was passed by the Central Govt. after being satisfied that as a result of the transfer of the shares lodged for registration by the Berlia group in their favour, a change in the controlling interest of the company was likely to take place and that such change would be prejudicial to the interests of the company. A reference is also made to two letters dated April 28, 1978, and June 6, 1978, written by the chairman of respondent No. 3 - company addressed to the Chairman, Company Law Board, New Delhi, and the other written jointly by the Chairman of the Unit Trust of India and the Chairman of the General Insurance Corporation of India both of whom are major shareholders of the company. In the first letter of April 28, 1978, the chairman of the company alleged that the Berlia group was attempting to gain should not be permitted to do so. This apprehension, as mentioned in the letter itself, was because at the meeting held on April 3, 1978, the chairman had announced that proxies numbering over 1,74,500 favouring Berlins were received for the extraordinary general meeting to be held on June 29, 1978. The chairman stated in this letter that the receipt of the proxies numbering over 1,74,500 favouring Berlins were received for the extraordinary general meeting which confirmed the suspicion which they had expressed in their previous letter to the chairman dated February 3, 1978, that the Berlins had, besides 68,723 shares already standing in their names, acquired controlling interest in a further very large number of shares either through badly transactions or through nominee holdings or through friends. He quoted some instances of irregularities committed in the affairs of the company under the management of the Kapadias, it was alleged that these irregularities were sought to have been committed by the Berlins in collusion with the Kapadias. It is not necessary for the purposes of this petition to make a detailed reference to the irregularities said to have been

committed by the petitioners enumerated in the said letter.

7. In the joint letter of June 6, 1978, by the Chairmen of the Unit Trust of India and the General Insurance Corporation of India respectively to the Chairman, Company Law Board, New Delhi, the two Chairmen brought to the notice of the Company Law Board that the petitioners had issued four circulars purported to have been signed by various prominent persons recommending to the shareholders the candidature of petitioners Nos. 1 and 2 for the office of directors of the company. It is also mentioned that the said signatories had denied that they had signed the circulars. Then it was pointed out in the letter that if the Berlia group which had helped in the mismanagement of the company was allowed to grab power, the whole purpose of appointing the Government directors would be frustrated and the affairs of the company would go from bad to worse and interests of several public institutions, nationalised banks and small shareholders would be jeopardised. For these and other reasons mentioned in the letter, the two Chairmen urged the Company law board that the Central Govt. should exercise its powers under ss. 108A and 108D of the Act by giving directions to the company not to give effect to transfer the shares or block of shares set out in annex. A to the letter; and where the transfer of such shares had already been registered not to permit the transfer or any nominee proxy of the transferee to exercise any voting or other rights attaching to such shares; and where the transfer of such shares or the block of shares has not been registered, not to permit any nominee and/or proxy of the transferor to exercise any voting or other rights attaching to such shares or block of share or any of them; and, finally, regardless of whether such transfer of shares has taken place or not, the voting right in respect of the shares shown in annex. A should be frozen so as to disbar the registered holders of the said shares, whoever they may be, from exercising such right, "with a view to" preventing the Berlrias from gaining control of the company or from having any of their nominees or agents on the board of directors either at the forthcoming annual general meeting of the shareholders on the 29th June, 1978, or at any other general meeting.

8. It appears from the affidavit of Shri Khushaldas that the impugned order was passed on the basis of the representations made in the said two letters dated April 28, 1978, and June 6, 1978. Then it has been pointed out in this affidavit that the petitioners' group had been associated with and had in fact abetted and participated in the mismanagement of the earlier management by, namely, the Kapadia group, before the directors were appointed by the 2nd respondent by its order under the provisions of s. 408(5) of the Companies Act. It was not disputed that no hearing was given to the petitioners before the passing of the impugned order. However, it was explained that the matter was urgent as the meeting was to be held shortly on June 29, 1978, and it was apprehended that the Berlia group would gain a controlling interest of the company. It must be mentioned that the allegation regarding the attempt to gain a controlling interest is based on the possibility of petitioners Nos. 1 and 2 being elected as directors on the basis of the proxies filed by them.

9. Mr. Cooper, the learned counsel appearing for the petitioners, assailed the impugned order on diverse grounds. He submitted that the order has been passed in flagrant violation of the principles of natural justice without giving any hearing whatsoever to the petitioners whose legal rights have been severely affected by the order. He submitted that the order under s. 108D involves grave civil consequences to a citizen and seriously affects his rights to property and if an order is passed without given a hearing to the parties whose rights are affected or sought to be affected, such an order is a nullity and deserves to be quashed on that ground alone. He also contended that it was incumbent on the government to disclose to the petitioners the material on which the order is based. He also maintained that, in the present case, there was no question of the petitioner acquiring a "controlling interest" within the meaning of s. 108 at the general meeting. The mere fact that there was a possibility of a couple of directors belonging to the petitioners group being elected cannot be a ground of holding that the petitioners were acquiring a controlling interest in the company. Even assuming that the two directors belonging to the petitioners' group or supporting them would have been elected by reason of their acquiring the shares in question, that by itself could not enable them to acquire a controlling interest in the company in view of the fact that the majority of the directors at least for two more years. Moreover, the appointment of the government nominated directors could be continued indefinitely even after July, 1980, by the Government by passing appropriate orders under the Act. Even otherwise, the appointment to the office of the director has got to be confirmed by the Central Govt. under s. 408(5) of the Act, and till such confirmation, the elected directors could not hold their office. It was further contended that the order on the face of it displays a complete lack of application of mind and merely recites the ingredients of s. 108D in proof of the alleged satisfaction reached by the government. He emphasised that the order does not disclose any relevant material on the basis of which the satisfaction is arrived at, nor does it give any reasons, nor does it show as to in respect of which particular share or shares the order is directed. He submitted that, apparently, the order is directed against the 27,263 shares said to have been purchased by persons belonging to the Berlia group,, but even in that regard, the satisfactions is solely based on a mere allegation as is clear from the wording of the order itself. He submitted that the impugned order which does not even record a finding that the persons who had purchased the said 27,263 shares were the nominees of the Berlia group cannot be sustained as there was no material on which the so-called satisfaction recorded in the order was reached. It was also pointed out by the learned counsel that it was only in the month of September, 1978, that the Government had decided to investigate the allegations that the persons in whose favour the said 27,263 shares were transferred were the nominees of Berlitas, and if that is so, it is impossible to hold that the Government was satisfied before passing the order by the Central Govt. that the said shares were purchased by the Berlitas group in the names of their nominees. According to the learned counsel, controlling interest within the meaning of the provisions implies at least over 50

per cent. control over the voting rights, while admittedly in this case even with all their shares including the shares purported to have been purchased by them benami in the names of their nominees, they could have at the most about 20% of the total voting rights; on the other hand, the holding of the financial institutions controlled by the government accounted for 23% of the voting rights. I did not think it necessary to hear Mr. Cooper on the challenge to the constitutional validity of the provisions of s. 108D, as, in my view, the petitioners were entitled to succeed on the other points raised by them.

Section 108D of the Companies Act invests the Central Govt. with the power to direct companies not to give effect to the transfer of any share or block of shares. It provides as under :

"(1) Where the Central Government is satisfied that as a result of the transfer of any share or block of shares of a company, a change in the controlling interest of the company is likely to take place and that such change is prejudicial to the interests of the company or to the public interest, that government may direct the company not to give effect to the transfer of any such share or block of shares and -

(a) where the transfer of such share or block of shares has already been registered, not to permit the transferee or any nominee or proxy of the transferee to exercise any voting or other rights attaching to such share or block of shares.

(b) where the transfer of such share or block of shares has not been registered, not to permit any nominee or proxy of the transferor to exercise any voting or other rights attaching to such share or block of shares.

(2) Where any direction is made by the Central Government under sub-section (1), the share or the block of shares referred to therein shall stand retransferred to the person from whom it was acquired and thereupon the amount paid by the transferee for the acquisition of such share or block of shares shall be refunded to him by the person from whom such share or block of shares was acquired by such transferee.

(3) If the refund referred to in sub-section (2) is not made within a period of thirty days from the date of the direction referred to in sub-section (1), the Central Government shall, on the application of the person entitled to get the refund, direct, by order, the refund of such amount and such order may be enforced as it were a decree made by a civil court.

(4) The person to whom any share or block of shares stand re-transferred under sub-section (2) shall, on making refund under sub-section (2) or sub-section, (3), be eligible to exercise voting or other right attaching to such share or block of shares."

10. It would be clear that the power of the Government to issue directions to the company not to give effect to the transfer of the Central Govt. and the existence

of certain facts as mentioned in the said section. The section requires, firstly, that there should be a transfer of any share or block of shares; secondly, such a transfer of any share or block of shares must result in the likelihood of a change in the controlling interest of the company taking place; and, thirdly, that such a change must be found to be prejudicial to the interests of the company or to the public interest. The sine qua non for the applicability of the exercise of the power, therefore, is an apprehension or the likelihood of the change of shares. What is to be prevented, therefore, is a transfer of shares. The section further provides the consequences of such a direction being given to the company. Both the situations, viz., a share or a block of shares having been already registered or having not been registered on the date of the order have been taken care of. In the first case, viz., where the transfer has already been registered, the transferee of the nominee or a proxy of the transferee is prevented from exercising any voting or any other rights attached to any such share or block of shares. In the other case, where the share or the block of shares has not been registered, the nominee or proxy of the transferor also is prohibited from exercising any vote or other rights attached to the share or such block of shares. Sub-section (2) then provided for the further consequences of such a direction being given by the Central Govt. The consequences are that the transferor or a transferee are related to their original position before the transfer. The share stands transferred to the person from whom it was acquired and the transferee gets a refund of the amount paid by him for the acquisition of such shares. Sub-section (3) provides for the machinery to refund the amount to the transferee by the transferor. These are, undoubtedly, drastic provisions which seriously affect the rights of shareholders, and any directions passed by the Central Govt. entails civil consequences. The provisions of s. 108D by themselves do not specifically provide for any hearing being given or any particulars being given to the persons who are sought to be affected by the order. Equally so, there is no prohibition contained in the said section against granting any opportunity for hearing the affected persons before the direction is given by the Central Govt. The legislation permitting such orders without hearing would be arbitrary and void as being in contravention of the provisions of art. 14, but then it is well settled that there is a presumption of constitutionality of statutes unless the contrary is established. Therefore, when there is nothing in the statutory provisions which debar the application of the principles of natural justice while the authorities exercise the statutory powers under the Act, and as the principles of natural justice would apply unless the statutory provisions point to the contrary, the statutory provisions themselves are not unconstitutional. (See *The Government of Mysore and Others Vs. J.V. Bhat and Others*, In such case, the court would consider such legislation valid by reading into the section an implied obligation to give a hearing. It would, therefore, follow that although s. 108D does not specifically provide for a hearing being given to the affected party, the petitioners whose valuable rights are being adversely affected were entitled to a hearing before passing the order. On the face of it, there is a clear violation of the principles of natural justice in this case which renders the order illegal and void.

11. Mr. Zaiwala, the learned counsel appearing for the Union of India, did not dispute the proposition that ordinarily the petitioners would be entitled to a hearing before an order under s. 108D is passed. He, however, submitted that in the peculiar facts and circumstances of this case, and the urgency of the matter, the Government was justified in passing the order even without giving a prior hearing to the petitioners. According to him, the proper course to be adopted in case like this would be to give a post facto hearing to the petitioners, and he stated that even now Government was prepared to give such a hearing to the petitioners. In other words, he contended that the order is not void and need not be set aside merely because the principles of natural justice were not followed before the passing of the order in this case but could be varied or even set aside after the post facto hearing, which the Central Govt. is prepared to give to the petitioners. In support of his submission, Mr. Zaiwala relied on the decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, .

12. As I shall presently show, on the face of the order as well as on the material placed before me, it is impossible to hold that the Central Govt. had either applied its mind or was satisfied in this case that as a result of the transfer of the 27,263 shares in question, a change in the controlling interest was likely to take place, and that such a change was prejudicial to the company or to the public interest. On a bare perusal of the order, it is clear that there is a total non-application of mind. Mr. Zaiwala insisted before me that the impugned order is intended to affect not only the 27,263 shares but also the original holding of the petitioners, viz., 68,853 shares. Mr. Zaiwala was at pains to submit that in view of the concluding part of the order, it must be held that the Government's satisfaction related to both the holdings of shares. The contention that the Central Govt. contemplated inclusion even with regard to the holding of 68,853 equity shares is made only in the context of the alleged attempt of the petitioners to acquire further shares in the name of the persons belonging to their group for the purpose of gaining the controlling interest in the company. Undoubtedly, the last paragraph of the order does not specify and particular share or shares but merely quotes the section, and if that part alone is to be read, each one of the shares belonging to the petitioners could be brought within the mischief of the order passed by the Government. But on a bare reading of the order as a whole, it is patently clear that it was not within the contemplation of the Government to cast its net so wide as to affect each one of the petitioner's share. When it is now seriously contended that the entire holding of the petitioners was intended to be covered by the order, this contention by itself which goes was a total non-application of mind on the part of the Government. Then even as regards the block of 27,263 shares, the order shows that there was merely an allegation that they have been lodged for effecting transfer by persons alleged to belong to the Berlia group. How could an authority be satisfied merely on the basis of an allegation that some persons said to be belonging to the Berlia group had lodged shares in a bulk with the company in order to gain a controlling interest in it ? Neither the names of the persons not the numbers of the shares

have been mentioned. There is absolutely no evidence to show that there was any material whatsoever placed before the authority to show that the said 27,263 shares were lodged by persons belonging to the Berlia group. The affidavit-in-reply mentions only the two letters dated April 28, 1978, and June 6, 1978, as the sole material on which the satisfaction was reached. No other material was produced. Not only that, the affidavit of Shri Khushaldas does not indicate any other, material on the basis of which the order could be passed but the respondents could not lay their hands on the material even at the stage of hearing. The learned counsel for the respondents, however, strongly relied on annex. A to the letter of June 6, 1978, which gave a list of the shares regarding which the order could be passed. This list does not specify which of the shares mentioned therein are purchased by persons alleged to belong to the Berlia group and which were lodged with the company in order to gain in controlling interest. Annexure A refers to about over 1,75,000 shares. It is now common ground that the petitioner possessed an original holding of 68,000 odd shares. They have also purchased 16,000 odd shares as mentioned above and then even with the addition of the dispute 27,263 shares, the total comes to much less. On what basis, therefore, the Central Govt. could reach this satisfaction regarding the existence of the conditions laid down in the section or the necessity of the order thereunder ? It is now pointed out that these 27,263 shares are said to have been transferred in the name of ten different persons other than the petitioners. If it is the case of the Government that these ten persons are the nominees of Berlia, then they could not rely merely on the basis of the allegations in that behalf.

13. The satisfaction could not be reached unless and until the Central Govt. applied its mind to the question as to whether the allegations were true or not. In fact, there was neither any inquiry nor was any material placed before the government on the basis of which the satisfaction could be reached.

14. In the letter of April 28, 1978, by the 4th respondent to the Chairman of the Company Law Board, it was mentioned that in the meeting held on 3rd April, 1978, the chairman had announced that proxies numbering over 1,74,500 favouring the Berlitas were received for the extraordinary general meeting, and that confirmed the suspicion which they had expressed in their previous letter to the Company Law Board dated 3rd February, 1978, that the Berlitas have, besides 68,723 shares already standing in their names, acquired controlling interest in a further very large number of shares either through badla transactions or through nominee-holding or through friends. Beyond raising a suspicion, no material such as the names of the transferors, the names of the transferees, the names of the alleged nominees, the number of the shares, or the connection between the transferors and the Berlitas was mentioned in the letter. There is only an apprehension expressed that having regard to the irregularities and improprieties committed during the regime of the Kapadias, in which it is said that the Berlitas also had a hand, if the Berlitas are allowed to gain controlling interest in the company or their nominees are allowed to be elected as directors on the board,

that would cause serious prejudice to the interest of the company. Nowhere in the letter, details regarding particular shares in respect of which an action under ss. 108A and 108D should be taken, has been pointed out. In the last but one paragraph of the letter, it is suggested that action under s. 247 of the Companies Act for investigating into the membership of the company to ascertain whether the Berlia group either indirectly through their nominees or through badla transactions have acquired control of over 25% of the equity share capital of the company involving a breach of s. 108 of the Companies Act, 1956, should be taken. In other words, the letter merely gives vent to an apprehension without furnishing any specific material to enable the government to take action under s. 108. The letter would at the most afford a basis for starting an enquiry and nothing more.

15. The next letter dated June 6, 1978, makes a general allegation that since the appointment of the government directors on the board of the company, the Berlia group have concerned a large block of equity shares of the company from the market which they have either transferred in their own names or in the names of their nominees or have kept them in badla transactions, and a request is made that directions should be given to the company not to give effect to the transfer of the block of shares set out in Annex. A to the letter. Apart from this the government was also requested that, regardless of whether such transfer of shares had taken place or not, the voting right in respect of the shares shown in annex. A should be frozen so as to debar the registered holders of the said shares, whoever they may be, from exercising such right, and consequentially preventing the Berlials from gaining control of the company or from having any of their nominees or agents on the board of directors either at the forthcoming annual general meeting of the shareholders on the 29th June, 1978, or at any other general meeting. As indicated earlier, it is not possible to identify the 27,000 odd shares from Annex. A which covers about 1,75,000 shares; nor could the annexure form the material for reaching the satisfaction contemplated under s. 108 of the Act. The learned council for the respondent also could not show how annex. A could be useful for reaching the satisfaction under s. 108D.

16. Indeed, Mr. Zaiwala gave up his attempt to show that the said two letters could form the material on the basis of which the government could reach its satisfaction under the said provisions and tried to contend that because an urgent situation was created by reason of the possibility of the two directors belonging to the Berlia group being elected, an interim preventive action, pending an order after due enquiry, was contemplated by the impugned order. According to him, the government had the power to prevent such a mischief by passing the prohibitive order pending the consideration of a final order being passed by the government under the said provisions. It is not possible to accept this submission, because s. 108D does not confer any power on the government to pass a temporary order of this nature. The section clearly contemplates that there must be in existence some relevant material, and that the government must be satisfied on the material placed before it that as a result of the transfer

of a share or a block of shares of the company, a change in the controlling interest of the company is likely to take place and that such a change is prejudicial to the interest of the company or to public interest. It is only when the government is satisfied about the existence of the said basic conditions that the drastic order under s. 108D could be passed by it. That the government did not possess the material or any other facts to enable it to reach its satisfaction within the meaning of s. 108D is clear from the circumstance that as late as September, 1978, the government by its letter dated 11th September, 1978, directed an inspector to investigate into the ownership of 68,853 shares held by the Berlia group as well as the 27,263 shares in question, the voting right whereof was frozen by the government. It is crystal clear that on the date of the impugned order, the government had merely acted on an allegation as regards these shares numbering 27,263, and the sole intention was to forestall the election of the two directors belonging to Berlia group, without being satisfied that the conditions for taking action existed. In the impugned order, it is stated that the "government is satisfied on the facts enumerated and on the reports received from the company". It is not disputed by Mr. Zaiwala that the report mentioned therein is nothing but the two letters dated April 28, 1978, and June 6, 1978. Having regard to all these aspects discussed above, it must be concluded that the impugned order has been passed without any application of mind, nor is it based on any relevant material. The order, therefore, is void and without jurisdiction, apart from the fact that it was passed without giving any hearing to the petitioners and their alleged nominees whose rights were adversely affected.

17. Both Mr. Zaiwala appearing for respondents Nos. 1 and 2, and Mr. Andhyarujina appearing for respondents Nos. 3 and 14 relied on the decision in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, and contended that the petitioners' grievance about their not being given a fair opportunity of being heard before passing the order can be redressed by giving the petitioners a post facto hearing. It was contended that the government was ready and willing to give a post facto hearing to the petitioners even at this stage and would consider any representation they would like to make in support of their grievance. They also submitted that it would not be proper to set aside the order or to declare it void and illegal at this stage, but the ends of justice would be met by directing a post facto hearing, because, in the event of the government accepting the contentions that may be raised by the petitioners, the government would itself set aside the order.

18. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, the petitioner's (Mrs. Maneka Gandhi's) passport was impounded, and the Govt. of India "in the interest of the general public" declined to furnish the reasons for its decision. She then filed a petition under art. 32 of the Constitution of India, challenging the said order. The Supreme Court held that a fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring the giving of such an opportunity to the person concerned can and should be read by implication in the

Passports Act, 1967. The court further held that the order impounding the passport of the petitioner was clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem*, and it was not in conformity with the procedure prescribed by the Passports Act, 1967. At the time of the hearing of the petition, a statement was made by the government that it was agreeable to consider a representation that might be made by the petitioner and to give her an opportunity of hearing in the matter. The court held that the statement made on behalf of the government removed the vice from the order impounding the passport.

19. Assuming that the principles laid down in the abovesaid Supreme Court decision can be made applicable to an order under s. 108D of the Companies Act, having regard to the facts of the present case, I do not think that the vice could be cured by a post facto hearing in this case. In the first place, the impugned order in this case has been passed without any application of mind and without reaching the requisite satisfaction. The government must have before it some material or facts on the basis of which it could have reached the satisfaction as contemplated by the provisions of s. 108D of the Act. As pointed out above, the government is not even sure as to in respect of which share or block of shares, the impugned order is intended to operate. The order obviously stems out of suspicion and is based on mere allegation and not satisfaction. The affidavit in reply of Shri Kushaldas and the arguments advanced in this case indicate that the government was not and is not clear in its mind whether the order relates to a particular share or block of shares. The government's attempt to support the order on the ground of urgency and of a temporary prohibitive action to be followed by the regular order under s. 108D also leads to the only inference that neither any satisfaction was reached nor any valid order was passed under s. 108D of the Act. The order is thus null and void independently of the question as to whether the principles of natural justice were violated before passing the order. The post facto hearing offered must be in respect of a definite order passed after due consideration and satisfaction. Under the circumstances, it is not possible to extend the principles laid down in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, to the case in hand. In my view, the said decision of the Supreme Court cannot assist the government.

20. It is needless to state that the setting aside of the impugned order would not preclude the government from passing a fresh order under s. 108D of the Act after proper investigation and collecting proper material and after following the principles of natural justice by giving the petitioners a fair opportunity of hearing to rebut the allegations.

21. In the result, the petition succeeds, the impugned order dated June 17, 1978, Ex. E. to the petition, is quashed and set aside. Rule is made absolute in terms of prayer (a); the interim order dated June 28, 1978, stands vacated and the chairman of the meeting is directed to declare results relating to items 1 and 3 on the agenda of the meeting of June 29, 1978.

22. The chairman is permitted to withdraw the report of the meeting which has been deposited by him in this court. As desired by both sides, I direct that the sealed report be opened by the chairman in the presence of the attorneys of the parties.

23. The respondents to pay the costs.