Bombay High Court Shailesh Harilal Shah And Others vs Matushree Textiles Ltd. And Other on 7 July, 1995 Equivalent citations: 1995 82 CompCas 5 Bom Author: M Pendse Bench: A Cazi, M Pendse JUDGMENT M.L. Pendse J. 1. Matushree Textiles Limited is a public limited company incorporated under the Companies Act, 1956 (hereinafter referred to as "the Act"), and the authorised share capital of the company is Rs. 1,50,00,000 only divided into 15,00,000 equity shares of face value of Rs. 10 each. The subscribed capital is Rs. 89,00,000 divided into 8.90 lakhs shares. The shares of the company are listed on the Bombay Stock Exchange and at the relevant time, the value quoted was Rs. 40 per share. The seventh annual general meeting of the company was held on September 30, 1989, for the year ending March 31, 1989, and, consequently, the eighth annual general meeting was statutorily required to be held as per section 166 of the Act latest by December 31, 1990. The meeting was not convened by the company within the stipulated time. The eighth annual general meeting for the year ending March 31, 1990, was convened on September 30, 1991, by notice under September 2, 1991. The notice to the shareholders was sent by post on September 7, 1991, and under section 53(2)(b)(i) the Act, the notice is deemed to have been effected at the expiration of forth-eight hours after the letter is posted and accordingly, the notice is deemed to have been served on September 9, 1991. 2. The plaintiffs instituted Suit No. 3002 of 1991 on September 21, 1991, for a declaration that defendants Nos. 1 to 4 are not entitled to convene the eighth annual general meeting on September 30, 1991, or any other date as calling of the said meeting is ultra vires and null and void. The plaintiffs sought a declaration that notice dated September 2, 1991, convening the annual general meeting is ultra vires, invalid and illegal. The plaintiffs sought a perpetual injunction restraining the defendants from holding and/or proceeding with the annual general meeting and from in any manner giving effect or acting upon in furtherance of implementation of the resolutions to be passed at the meeting. The plaintiffs are holders of 3,110 equity shares and their holding is 0.3 per cent. of the total equity subscribed. Defendant No. 1 is the company, while defendants Nos. 2 to 4 are the directors. The notice of the eighth annual general meeting sets out that the following subjects will be transacted at the meeting : 1. To receive and adopt the audited profit and loss account and the balance-sheet together with reports of directors and auditors thereon; 2. To appoint a director in place of Mr. Vimal Kumar Poddar who retires by rotation and is eligible for reappointment; 3. To appoint auditors and to authorise the board to fix their remuneration; 4. To pass an ordinary resolution appointing Mr. Santosh Kumar Poddar as a director, and 5. To pass in ordinary resolution appointing Rajnikant Mehta as director. 3. The plaintiffs complained that the eighth annual general meeting convened on September 30, 1991, was proposed to be held beyond the statutory period contemplated under section 166 of the Act and, therefore, the company is not entitled to call the meeting unless appropriate orders are obtained from the appropriate forum seeking extension of time. The plaintiffs further claimed that notice dated September 2, 1991, and which was deemed to have been served on September 9, 1991, for convening the meeting on September 30, 1991, does not comply with the requirement of

section 171 of the Act as the duration of notice is less than 21 clear days. The plaintiffs further claimed that defendant No. 2, Santoshkumar Poddar, ceased to be a director of the company as from January 1, 1991, and his appointment as additional director pursuant to the resolution of the board of directors was bad in law. The plaintiffs claimed that on retirement of defendant No. 2, the board was not properly constituted as the minimum number of directors required is three in number. The plaintiffs further claimed that the quorum required was two and defendants Nos. 2 and 3 being real brothers and closely related, it was not open for defendant No. 3 to participate in the meeting for appointment of defendant No. 2. The plaintiffs claimed that the resolution appointing defendant No. 2 as additional director was vitiated as there was no quorum required by the Act. The plaintiffs further claimed that if the appointment of defendant No. 2 was illegal and bad, the notice convening the annual general meeting signed by defendant No. 2 is bad in law and inoperative. The plaintiffs further claimed that the company had deliberately circulated an abridged balance-sheet so as to cover up the acts of misconduct, misfeasance and malfeasance indulged in by defendants Nos. 2 to 4. The plaintiffs claimed that a perusal of the auditor's report and notes on accounts makes it very clear that the substratum of defendant No. 1 has disappeared and defendants Nos. 2 to 4 are mismanaging the company. 4. The plaintiffs instituted Suit No. 3003 of 1991 in respect of the ninth annual general meeting for the year ending March 31, 1991, convened on September 30, 1991, by notice dated September 2, 1991. The notices were issued by the company to convene both the eighth and ninth annual general meetings on the same date and both the meetings were also to be held on the same date, i.e., September 30, 1991. Suit No. 3003 of 1991 challenges the right of the company to hold the ninth annual general meeting for identical reasons as set out in companion Suit No. 3002 of 1991. The notice for convening the ninth annual general meeting sets out the following agenda : 1. To receive and adopt the audited profit and loss account for the year ended March 31, 1991; 2. To declare a dividend; 3. To appoint a director in the place of Mr. Rajnikant Mehta, who retires by rotation and being eligible offers himself for reappointment; 4. To appoint auditors and authorise the board to fix their remuneration; 5. To consider whether the authorised share capital of the company be increased from Rs. 1,50,00,000 to Rs. 2,00,00,000 divided into 20,00,000 shares of Rs. 10 each; 6. To issue 8,90,000 rights shares at the face value of Rs. 10 to the existing shareholders, and 7. To authorise the board of directors to make loans to any body corporate from time to time and on such terms and conditions as the directors may deem fit, provided that the aggregate of the loans outstanding at any one time made to the company shall not exceed 30 per cent. of the aggregate of the subscribed share capital of the company. 5. Suit No. 3139 of 1991 was instituted on September 30, 1991, by Arunkumar Poddar and Rajkumar Bajaj and to whom the plaintiffs in other two suits are closely related and/or are friends. Arunkumar Poddar is the real brother of defendants Nos. 2 and 3, Santoshkumar and Vimalkumar Poddar, respectively. Arunkumar Poddar and Rajkumar Bajaj claimed that initially, they were directors of the company but defendants Nos. 2 to 4 illegally claimed

that they had ceased to be directors by virtue of section 283(1)(g) of the Act by operation of law. It was claimed that the contention of defendants Nos. 2 to 4 that Arunkumar Poddar and Rajkumar Bajaj failed to attend the meetings and, therefore, ceased to be directors is not correct. Arunkumar Poddar and Rajkumar Bajaj, apart from seeking a declaration that they continue to be the directors of the company and all meetings of the board of directors held without their presence were illegal and invalid and resolutions non est, sought relief in respect of the eighth and ninth annual general meetings convened on September 30, 1991. The relief in respect of these two meetings was based on the same averments which were made in the two companion suits. It hardly requires to be stated that the dispute between Arunkumar Poddar and his two brothers had led to the institution of the three suits. It is required to be stated at this juncture that at one stage, the dispute between the three brothers was referred to a spiritual leader in whom the brothers had confidence but the decision of the spiritual leader was not accepted by Arunkumar Poddar and the parties decided to fight out the litigation in court. 6. Two notices of motion being Notice of Motion No. 2131 of 1991 and Notice of Motion No. 2132 of 1991 were taken out by the plaintiffs in Suits Nos. 3002 and 3003 of 1991, respectively, seeking interim relief restraining the company from holding and/or proceeding with the eighth and ninth annual general meetings convened on September 30, 1991. The plaintiffs also sought relief restraining the defendants from implementation of the resolution and business proposed to be transacted at the said annual general meetings. Notice of Motion No. 2158 of 1991 was taken out by Arunkumar Poddar in Suit No. 3139 of 1991 for identical reliefs. The plaintiffs applied for grant of ad interim relief pending of the disposal of the notice of motion, but the learned trial judge declined to grant any ad interim relief. The plaintiffs thereupon preferred appeals before the Division Bench of this court and the Division Bench granted ad interim relief only in respect of the prayer restraining the defendants from implementing the resolutions to be passed at the two annual general meetings. As the court declined to restrain the defendants from holding and proceeding with the two annual general meetings, it is not in dispute that the meetings were held on September 30, 1991. Though Arunkumar had lodged proxies prior to the date of the meetings, neither Arunkumar Poddar, nor any of the plaintiffs in the three suits attended the meetings. The resolutions proposed in the meetings were passed unanimously. 7. The notices of motion were taken up for hearing by the learned single judge after the date of the two meetings and the question which survived for consideration was whether the company should be restrained from implementing the resolutions which were passed. The resolutions providing for increase of share capital and issuance of rights shares and distribution of dividend could not be implemented because of grant of ad interim order. The defendants resisted the relief sought by the plaintiffs in respect of implementation of the resolutions by urging that the contentions urged by the plaintiffs in respect of the validity of the notice convening the two annual general meetings cannot be sustained. The defendants pointed out that though the statutory period contemplated by section 166 of the Companies Act for convening the annual general meeting had expired, still there is no prohibition

under the Act to convene the meeting and the company at the most would be liable to a penalty for convening a meeting beyond the statutory period. The company did not seriously dispute that notice under section 171 of the Act was not of 21 clear days but of 20 days only, but urged that the provisions of section 171 of the Act are not mandatory but merely directory and the business transacted at the two meeting should not be struck down unless the plaintiffs establish any prejudice. The defendants pointed out that the plaintiffs have not even pleaded prejudice due to the shorter duration of the notice. The defendants also pointed out that the appointment of defendant No. 2 as additional director could not be invalidated and there is ample power under the Act for the existing members of the board to make the appointment. The contention of the plaintiffs that quorum was not available and, therefore, the appointment of defendant No. 2 is invalid was controverted and it was asserted that even though defendant No. 3 was related to defendant No. 2, there was no prohibition for defendant No. 3 to vote at the meting because the appointment of defendant No. 2 as additional director did not amount to contract or any other arrangement as prescribed by section 300 of the Act. The trial judge, by order dated October 15, 1991, found prima facie merit in the contentions urged to behalf of the defendants and held that the convening of the two annual general meetings did not suffer from any defect and it was not necessary to prevent the company from implementing the resolutions which were unanimously passed at the two annual general meetings. As a result of this finding, the trial judge dismissed the two motions. The third motion taken out by Arunkumar Poddar also ended in dismissal by a separate order dated October 15, 1991. It is required to be stated that in the notice of motion taking out by Arunkumar Poddar only two grounds were urged; one being that the dividend was declared in contravention of provisions of section 205 of the Act, and the second that the directors' report does not set out the true, fair and correct picture of the company and window dressing is attempted to make a show that the company is making profits, while, in fact, the company is a sick unit. The trial judge did not find favour with the contentions of the plaintiffs. 8. Appeals Nos. 1001 and 1002 of 1991 are filed by the plaintiffs in Suits Nos. 3003 and 3002 of 1991, respectively, while Appeal No. 1082 of 1991 is filed by Arunkumar Poddar from order passed on Notice of Motion No. 3139 of 1991. 9. After the appeals were argued for some time, counsel realised that though the appeals are against orders declining to grant interim relief pending the suit, the decision would affect the result of the suit. Counsel thereupon informed that the parties do not wish to lead any evidence in Suits Nos. 3002 and 3003 of 1991 and requested that the decision in the appeals should be treated as binding on the parties as decisions in the suit and the suit should be disposed of accordingly. In Appeal No. 1082 of 1991 counsel stated that the decision in the other two appeals would be conclusive as between the parties in respect of the challenge to the holding of the eighth and ninth annual general meetings and Suit No. 3139 of 1991, will proceed in respect of the other reliefs sought by Arunkumar Poddar. We called upon the parties to file statements in writing duly signed by the parties and accordingly, the parties have filed the statements. The statements in Appeals Nos. 1001 and 1002 of

1991 are taken on record and marked as "X" in the appeals, while the statement in Appeal No. 1082 of 1991 is taken on record and marked "X-1". It is obvious that the parties adopted this course as the contentions raised in the plaint and on the strength of which interim relief was sought, were argued at length and the decision, one way or the other would conclude the parties at the trial and which trial is unlikely to be held within a short time. In accordance with the desire of the parties, we have heard the appeals and the decision would dispose of two suits being Suits Nos. 3002 and 3003 of 1991 while the decision would be conclusive as between the parties in the third suit, viz., Suit No. 3139 of 1991. 10. Shri Kapadia, learned counsel for the plaintiffs in the two suits and Shri Thakkar, learned counsel appearing for the plaintiffs in the suit instituted by Arunkumar Poddar and Rajkumar Bajaj, raised four or five contentions to urge that the eighth and ninth annual general meetings held by the company were illegal and contrary to law. The first contention urged by learned counsel is that the notice signed by defendant No. 2 as chairman and convening the meeting was illegal as the appointment of defendant No. 2, Santoshkumar, was illegal and consequently, the notice convening the meeting was not valid. It was contended that defendant No. 2 had vacated the office as director on December 31, 1990, in accordance with section 255 of the Act. The section, inter alia, provides that the directors shall retire by rotation unless the articles provide for the retirement of all directors at every annual general meeting. The meeting of the board of directors was held on January 1, 1991, and the minutes of the meetings disclose that defendants Nos. 2 to 4 were present. The fact that Santoshkumar retires on December 31, 1990, by rotation was noticed and the minutes establish that defendant No. 3 who is the real brother of Santoshkumar requested the board that Santoshkumar be appointed as an additional director for reasons set out in the minutes. The resolution appointing Santoshkumar Poddar, defendant No. 2, as additional director was passed unanimously by the two remaining directors being defendants Nos. 3 and 4. Shri Kapadia submitted that defendant No. 2 could not have been appointed as additional director at a meeting in which defendant No. 3 was present and voted because defendant No. 3 was interested in the resolution for appointment of defendant No. 2 and, therefore, was not entitled to participate in accordance with the provisions of section 300 of the Act. It was also contended that if defendant No. 3 is excluded from the meeting in respect of the resolution of appointment of defendant No. 2 as additional director, then the meeting could not have been held for want of quorum. Shri Kapadia further submitted that once defendant No. 2 retired by rotation, then the remaining two directors could not be considered as constituting a valid board of directors, the minimum number to constitute the board being three in accordance with section 252(1) of the Act. It was urged that the meeting held was invalid and the balance-sheets and notices signed by defendant No. 2 were contrary to law and, consequently, the two annual general meetings were not properly convened. Shri Cooper, learned counsel appearing on behalf of the defendants, controverted the submissions by claiming that the challenge to the appointment of defendant No. 2 as additional director is without any merit because the participation of defendant No. 3 was not in contravention of

the provisions of section 300 of the Act. It was urged that the appointment of defendant No. 2 as additional director is neither a contract nor an arrangement entered into by or on behalf of the company. Shri Cooper further submitted that the contention that the board was not properly constituted is not correct but even otherwise, it amounts only to an irregularity and the notice convening the annual general meetings or the resolutions passed in those meetings cannot be invalidated in view of the provisions of section 290 of the Act and regulation 85 of Table 'A' of Schedule I to the Act. Shri Cooper further submitted that the challenge to the appointment of defendant No. 2 as additional director cannot be entertained at the behest of the plaintiffs and it is only the company who may be able to challenge it in an action instituted by the shareholders on behalf of the company. The suits instituted by individual shareholders cannot nullify the resolutions passed at annual general meetings and the plaintiffs cannot be permitted to defeat the rights of the shareholders for their own grievances against the board of directors. 11. Section 252 of the Act, inter alia, provides that every public company shall have at least three directors and section 287(2) of the Act sets out that the quorum for a meeting of the board of directors shall be one-third of the total strength or two directors, whichever is higher. Section 300(1) prescribes that no director of a company shall as a director take any part in the discussion of, or vote on, any contract or arrangement entered into by and on behalf of the company if he is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement. Sub-section (4) of section 300 provides that every director who knowingly contravenes the provisions of sub-section shall be punishable with fine which may extend to five thousand rupees. Shri Kapadia submitted that a director of the company is an agent and consequently, the appointment of the director amounts to a contract, the contract being between the principal and the agent. In support of the submission, reliance is placed on the decision in R. K. Dalmia v. Delhi Administration . In the case before the Supreme Court, Dalmia and another were prosecuted for an offence under section 409 of the Indian Penal Code and it was contended on behalf of the accused that they were not entrusted with dominion over the funds. While examining the contention, the Supreme Court referred to passages from Palmer's Company Law and observed that directors are not only agents but they are in some sense and to some extent trustees and consequently, the accused were entrusted with dominion over the funds. Reference was also made to the decision of this court in Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd. [1971] 41 Comp Cas 377 (Bom) where it was held, while examining the provisions of section 300(1) of the Act, that it is immaterial whether the interest is a personal interest or arises out of a fiduciary capacity and actual conflict is also not necessary and the possibility of conflict is enough. It was further held that the interest or concern need not be direct, but may be indirect as the object intended to be attained by the enactment is to prevent the conflict between interest and duty which might otherwise inevitably arise. Shri Kapadia submitted that even assuming that the appointment of an additional director does not amount to a contract, still there is no escape from the conclusion that it amounts to an arrangement and referred to the decision of the Madras High

Court in Madras Tube Co. Ltd. v. Hari Kishon Somani [1985] 1 Comp LJ 195. The learned single judge of the Madras High Court referred to the decision in Foster v. Foster [1916] 1 Ch 532 and held that mere appointment as the director on the board does not amount to a contract between the company and the person to be appointed. It was held that the additional director is appointed in exercise of the powers reserved with the board in that behalf in the company's articles and consequently, the appointment would not make it a contract. The learned single judge then proceeded to examine as to whether the appointment to an arrangement and explained the earlier decision of the Madras High Court in Public Prosecutor v. T. P. Khaitan [1957] 27 Comp Cas 77, where Justice Rajagopala Ayyangar, as he then was, held that any interest in an arrangement within the meaning of the section, although elastic in expression, must, in the context, receive the interpretation that it must be of such a nature as to involve a conflict between interest and duty of the same type as would arise in the case of a personal pecuniary interest in the contracts of the company. The learned single judge felt that the arrangement cannot be equated with the contract and the arrangement denotes all kinds of legal relationship which are not covered by a contractual relationship and all kinds of concern or interest arising out of such an arrangement. Shri Kapadia relying upon the observations of the learned judge submitted that the appointment of additional director should be treated as an arrangement falling under section 300 of the Act and, consequently, defendant No. 3, who is the real brother of defendant No. 2, had interest in the appointment of defendant No. 2 and was, therefore, not entitled to discuss or vote on the resolution. It is not possible to accede to the submission of learned counsel. It is undoubtedly true as held by the Supreme Court that the director is an agent of the company but the assumption of the plaintiffs that the relationship of principal and agent can be created only by contract is not accurate. The relationship can be created by operation of law and in such cases, the relationship cannot to be treated as a contract. The director is treated as an agent or a trustee by operation of law and not because the company or shareholders have entered into contractual relationship with the person purposed to be appointed as a director. We are in agreement with the view expressed by the learned single judge of the Madras High Court that the appointment of additional director does not amount to a contract as contemplated by section 300(1) of the Act. It is also not possible to accede to the submission of Shri Kapadia that in any event the appointment of a director amounts to an arrangement under section 300(1). The observation of Justice Rajagopala Ayyangar that the arrangement within the meaning of section must receive the inter-relation that it must be of such a nature as would arise in the case of personal pecuniary nature in the context of the company is accurate and the expression "arrangement" must bear the meaning of it as in sections 209 and 301 of other Act. Section 301 demands that every company shall keep one or more registers in which shall be entered separately particulars of all contracts or arrangements and the particulars to be entered are the date of the contract or arrangement, the names of the parties thereto, the principal terms and conditions thereof, etc. It is impossible to accept that the appointment of the director amounts to an arrangement and it is

required to be entered in the register maintained by the company under section 301 of the Act. Shri Cooper pointed out that none of the companies have entered such appointments in the register maintained under section 301 of the Act because the arrangement contemplated under section 300 though directly not a contract must take the colour from the context of contractual relationship contemplated under the section. The arrangement is something skin to a contract though not strictly a contract as contemplated by the Contract Act. There is one more aspect which cannot be overlooked. What section 300(1) prescribes is a contractual arrangement entered into "by or on behalf of the company" and it is impossible to suggest that appointment of an additional director is by and on behalf of the company. The section postulates that the contract or arrangement is by the company or on behalf of the company and that means that the company is one of the contracting parties or parties to the arrangement. The company is not a party for making an appointment of a person as director; nor is the appointment on behalf of the company. To accept the submission that the appointment of an additional director amounts to a contract or arrangement, it would be necessary to conclude that such a contract or arrangement is by or on behalf of the company, and it is not possible to do so. In our judgment, the contention that defendant No. 3 could not have participated in the discussion or vote on the resolution to appoint defendant No. 2 as additional director in view of the prohibition of section 300(1), therefore, cannot be accepted. 12. Shri Cooper, in this connection, submitted that in spite of the fact that defendant No. 3 was a relation of defendant No. 2 and even assuming that the appointment of defendant No. 2 as an additional director amounts to a contract or arrangement, still the participation of defendant No. 3 in the appointment can at the most be treated as an irregularity. It was urged that such an irregularity cannot be questioned by an individual shareholder but it is permissible only for the company to challenge the action or acts done in pursuance of such an irregularity. In support of the submission, reliance was placed on the decision in Narayandas Shreeram Somani v. Sangli Bank Ltd. . The Supreme Court was examining the scope and object of section 91B of the Indiana Companies Act, 1913, which, inter alia, provided that a director shall not vote on any contract or arrangement in which he is directly or indirectly interested, unless authorised by the company's articles. The Supreme Court held that in case such a director casts his vote, the same should not be counted and his presence would not count towards the quorum. It was further held that if an interested director votes and without his vote being counted, there is not quorum, the meeting would be irregular, and the contract sanctioned at such meeting would be voidable by the company against the director and any other contracting party who has notice of the irregularity, The Supreme Court held that the company may, however, waive the irregularity and affirm the transaction. The Supreme Court then observed (headnote of ) : "The contract becomes liable to be avoided by the company against the directors and any other contracting party having notice of the irregularity. The object of section 91B is to protect the company; and the company may, it is chooses, waive the irregularity an affirm the contract." 13. Shri Cooper submits and in our judgment, with considerable merit, that

the participation of defendant No. 3 and casting of the vote to elect defendant No. 2 as an additional director at the most was an irregularity and that cannot vitiate the appointment of defendant No. 2 or his acting as director and signing the balance sheet and notice convening the annual general meeting. The irregularity cannot to be questioned by an individual shareholder as long as the company does not question the appointment of defendant No. 2. 14. Shri Cooper then submitted that the acts done by defendant No. 2 as a director in signing the balance-sheet and convening the two annual general meetings are valid in spite of the alleged defect in the appointment of defendant No. 2 and relied upon the provisions of section 290 of the Act and regulation 80. Section 290 of the Act, inter alia, provides that acts done by a person as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification by virtue of any provision contained in the Act or in the articles, Regulation 80, inter alia, prescribes that all acts done by any meeting of the board or by any person acting as a director, shall, notwithstanding that it may afterwards by discovered that there was some defect in the appointment be valid as if such director had been duly appointed. Shri Cooper submits that in view of then provisions of section 290 and regulation 80, even assuming that he contention of the plaintiffs in respect of appointment of defendant No. 2 is correct, still the acts done by defendant No. 2 in convening the two annual general meetings are required to be treated as valid. Reliance was place don the decision in Boschock Proprietary Co. Ltd. v. Fuke [1906] 1 Ch 148. Article 84 of the company in that case was almost in identical terms with regulation 80. There was a challenge to the resolutions passed convening the annual general meeting on the ground that the meeting was convened by de facto directors. The contention was that there was no duly constituted board which could validly convene the annual general meeting of the company, as the meeting was called by persons who were merely de facto directors. It was held that the resolution for calling the meeting was passed at the board meeting; notice of it was duly sent to every shareholder, and one of the objects of the meeting was to confirm the acts therefore done by persons purporting to act as directors, and in these circumstances, any informality in convening the meeting should be treated as a mere irregularity, and not sufficient to invalidate any resolution passed at the annual general meeting. The decision refers to several earlier decisions In Seth Mohan Lal v. Grain Chambers Ltd. , the scope of regulation 94 of Table 'A' to the First Schedule to the Indian Companies Act, 1913, and which is similar to regulation 80 of Table 'A' of Schedule I to the Companies Act, 1956, came up for consideration and it was decided that in the absence of evidence that the directors were aware of the disqualification that would be incurred by entering into contracts of sale or purchase or supply of goods with the company, the resolution passed by the directors in respect of such contracts cannot be invalidated. In our judgment, even assuming that the resolution appointing defendant No. 2 as additional director amounts to a contract or an arrangement as covered by section 300 of the Act, still the appointment of defendant No. 2, the most, would be irregular due to the participation of defendant No. 3, but the acts done by defendant No. 2 and

especially in convening the annual general meeting cannot the struck down at the behest of some shareholders. 15. Shri Kapadia contended that the meeting held on June 1, 1991, by the directors of the company and at which matting, defendant No. 2, Santoshkumar, was appointed as an additional director was illegal and invalid as the board was not properly constituted. It was urged that section 252 of the Act demands that every public company shall have at least three director and on retirement of defendant No. 2 on December 31, 1990, there was no existing board as defendants Nos. 3 and 4 were the only directors left. In the absence of at least three directors, claims Shri Kapadia, there was no validly constituted board and consequently, the meeting held on January 1, 1991, was invalid and so also the resolution passed by the two directors, i.e., defendants Nos. 3 and 4, to appoint defendant No. 2 as an additional director. Shri Kapadia submitted that the trial judge was in error in referring to the provision of regulation 75 of Table 'A' of the First Schedule to the Act. Regulation 755 reads as under : "The continuing director may act notwithstanding any vacancy in the board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the board, the continuing directors or director may act for other purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company, but for no other purpose." 16. It was contended that regulation 75 comes into the picture when the number of continuing director is reduced below the quorum and the continuing directors can act for the purpose of increasing the number of directors to that fixed for a quorum or of summoning a general meeting Shri Kapadia submitted that on retirement of defendant No. 2, the continuing director were only defendants Nos. 3 and 4 and to constitute a quorum in accordance with section 252(2), there must be at least two directors, but defendants Nos. 3 and 4 could not constitute a quorum because defendant No. 3 was interested in the appointment of defendant No. 2 as additional director and, therefore, not entitled to participate. It was further submitted that regulation 75 can be attracted provided the continuing directors act for the purpose of increasing the number of directors to constitute a quorum or for summoning an annual general meeting and neither of those purposes was in existence on January 1, 1991, and consequently, the meeting held and at which defendant No. 2 was nominated as additional director was illegal. Shri Cooper controverted the submission by urging that notwithstanding the fact that the strength of the continuing directors has fallen to less than the minimum number prescribed by section 252(1) of the Act, it is open to the continuing directors to co-opt more directors. In support of submission, reliance was placed on the case of Sly, Spink and Co., In re [1911] 2 Ch 430. The provisions of article 88 of the articles of association of the company, in that case, enabled the continuing directors to act notwithstanding any vacancy in their body of the purpose of increasing the number of directors for constituting a quorum or of summoning a general meeting of the company but of no other purpose. The question as to whether article 88 was attracted arose for determination. The article of the company provided that the number of directors should not be less than four. The learned judge found that there were never more than three directors and the three directors carried on the business

of the company from its inception. Reliance was placed on article 88 to claim that the three continuing directors could summon the meeting. The contention was not accepted by reliance on two earlier decisions where a clear distinction has been made between cases where directors too few in number could not act as continuing directors. It was observed (at page 437) : "In one case you have a board insufficient in number from the first, and notwithstanding the continuing clause it was held that the board could not transact business. In the other case you have a board which was originally competent to transact business but was diminished by retirement to a number less than that provided for by the articles. The continuing clause was held to apply and those directors were held to be competent to transact the business of the company." 17. The decision undoubtedly supports the contention of the defendants that the continuing directors, i.e., defendants Nos. 3 and 4, were entitled to nominate defendant No. 2 as additional director and the board was properly constituted. Reference can be usefully made to the decision in Ananthalakshmi Ammal (A.) v. Indian Trades and Investments Ltd., where Mr. Justice Venkatarama Aiyar, as he then was, held that the power to co-opt a director might be exercised notwithstanding that the strength of the directorate has fallen below the minimum required and below the quorum prescribed by the articles of association. In that case, the contention was that there was only one director, there was no board of directors as required by article 75 and that, therefore, there could be no valid co-option as the power to co-opt could only be exercised by the board. In answer to the contention, reliance was placed on article 81 which provided that the continuing directors may act notwithstanding any vacancy in their body out only to ensure that number does not fall below the minimum an except in emergencies. The learned judge, after considering a large number of English decisions, referred to the decision in Sly, Spink and Co., In re [1911] 2 Ch 430 with approval. We are in respectful agreement with the view taken by the Division Bench of the Madras High Court. An identical view was taken in Fatech Chand Kad v. Hindsons (Patiala) Ltd. [1957] 27 Comp Cas 340 (Pepsu). It is, therefore, not possible to accede to the submission of Shri Kapadia that the board of directors was not properly constituted at the meeting held on January 1, 1991, and the continuing directors could not have nominated defendant No. 2 as an additional director. 18. Shri Kapadia referred to an unreported decision, delivered by a single judge of this court in Ketan Champaklal Bakshi v. Mrs. Sheela Sidhdharth Baksi (AFO No. 929 of 1990-15-1-1991). The decision has no application because in that case, the board was never validly constituted at any stage. The learned judge held that the principle that acts done by any person acting as director are valid when the appointment was afterwards found to be defective has no application to a case where there has been total absence of appointment or fraudulent usurpation of authority and referred to the decision in Morris v. Kanssen [1946] 1 All ER 586 (HL). The decision of the House of Lords in Morris v. Kanssen [1946] 1 All ER 536 (HL) has no application to the facts of the present case, as it is not the claim of the plaintiffs that the board of directors was not properly constituted prior to January 1, 1991, In our judgment, the meeting held on January 1, 1991, was legal and valid and the action of defendants Nos.

3 and 4 as continuing directors in nominating defendant No. 2 as additional director does not suffer from any infirmity. The contention of the plaintiffs that the signing of the balance-sheet and the notices convening the eighth and ninth annual general meetings of the company by defendant No. 2 was vitiated and, therefore, the resolutions passed at the meetings should be struck down cannot be accepted. 19. The second contention urged by Shri Kapadia is that the notices dated September 2, 1991, issued under section 171 of the Act of convening the eighth and ninth annual general meetings on September 30, 1991, were not of sufficient duration and, therefore, the resolutions passed at the meetings are illegal and inoperative. It is not in dispute that section 171(1) of the Act provides that the general meeting of the company may be called by not less than 21 day's notice in writing. Sub-section (2) of section 171 provides that the general meeting may be called after giving shorter notice if consent is accorded thereto by all the members entitled to vote thereat. Sub-section (3) of section 171 provides that the accidental omission to give notice to, or the non-receipt of notice by, any member or other person to whom it may be given shall not invalidate the proceedings at the meeting. The two notices convening the two meetings are dated September 2, 1991, but were posted on September 7, 1991, and were received by the plaintiffs on September 12, 1991. In view of the deeming provision under section 52(b)(i) of the Act, the notice is deemed to have been served on the shareholders on September 9, 1991. Shri Kapadia submitted that the notice did not provide for clear 21 days' period before convening of the annual general meetings on September 30, 1991. Learned counsel urged that although none of the plaintiffs attended the annual general meetings and the resolutions were passed unanimously, the provisions of sub-section (2) enabling the company to give shorter notice is not attracted because consent is not given by all the shareholders entitled to vote and that cannot be construed as only those shareholders who were present at the meeting. Shri Kapadia submitting that the provisions of sub-section (1) of section 171 of the Act are mandatory and non-compliance automatically vitiates the meetings as well meetings as well as the resolutions passed therein. Shri Cooper, on the other hand, submitted that the provisions of section 171(1) of the Act are merely directory in nature an unless and until it is established that the shorter duration of the notice has caused prejudice to substantial number of shareholders, it is not permissible to declare the meeting illegal and strike down the resolutions passed therein. The rule as to whether a particular provision can be regarded as mandatory or directory is set out in a celebrated passage from Maxwell on the Interpretation of Statutes in the following terms (at p. 364 of 11th edition of Maxwell) : "It has been said that no rule can be laid down for determining whether the command (of his statute) has to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justices in R. v. Ingall [1876] 2 QB 199 at page 208, per Lush J, and, when

that result would involve general inconvenience or injustice to innocent parsons or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." 20. The rule has been applied in several cases in India by the Supreme Court and it is necessary to bear in mind the object, purpose and scope of the provision to determine whether it is mandatory or merely directory. Even if a penalty is prescribed for non-compliance, that itself is not sufficient to treat the provision as mandatory. The Supreme Court in Hari Vishnu Kamath v. Ahmad Ishaque, , observed (at page 245) : "It is well-established that an enactment in from mandatory might in substance be directory, and that the use of the word 'shall' does not conclude the matter. This question was examined at length in Julius v. Bishop of Oxford [1880] 5 AC 214, and various rules were laid down for determining when a statute might be construed as mandatory and when as directory. They are well-known and there is no need to repeat them. But they are, all of them, only aids for ascertaining the true intention of the Legislature which is the determining factor, and that must ultimately depend on the context." 21. It is, therefore, necessary to examine the object, purpose and scope of section 1171 of the Act to determine whether the requirement is mandatory or directory. The recommendation of the Company Law Committee in paragraphs 75(i) and 78 of the report indicates that the period of 21 days was provided instead of 14 days as earlier fixed to enable the shareholders to campaign and canvass the proxies if they so desired. The shareholders required reasonable time to canvass opinion in favour or against the particular resolution proposed to be considered at the meeting of the company. The object, therefore, is obviously to give proper and reasonable opportunity to the shareholders for participating effectively in the meetings. The length of notice, the contents and the manner of service of notice have all been prescribed with this end in view. The fact that sub-section (2) of section 171 of the Act enables the shareholders to consent to a shorter duration of notice is an indication that the Legislature never thought the length of notice sacrosanct. Sub-section (2) of section 171 of the Act indicates that it is for the shareholders to consider and decide whether they have got necessary opportunity of properly participating in a meeting. Sub-section (3) of section 172 of the Act is and indicator that the Legislature never desired that the proceedings of the meeting should be invalidated merely because notice as prescribed under sub-section (1) of section 171 is of insufficient duration. Sub-section (3) of section 172 of the Act provides that the accidental omission to give notice to, or the non-receipt of notice by, any member not invalidate the proceedings and that clearly indicates the anxiety of the Legislature not to invalidate the proceedings, even though no prejudice whatsoever is caused to the interest of the shareholders. To hold that the provisions of section 171(1) of the Act are mandatory would lead to very unusual results making it difficult for large public companies to effectively function. A couple of shareholders cannot be permitted to defeat the interest

of a large body of shareholders by raising the contention that the duration of notice was not sufficient and even though such complaints do not indicate any prejudice by service of notice of shorter duration. In our judgment, looking to the object, purpose and scope of provisions of section 171(1) of the Act, the conclusion is inescapable that the provision is merely directory and not mandatory. 22. Shri Kapadia relied upon some decisions in support of the submission that the provision is mandatory and absolute compliance is necessary and it is wholly irrelevant that any prejudice is caused by non-compliance. The first decision relied upon in Mannalal Khetan v. Kedar Nath Khetan , the Supreme Court examined the question whether the provisions of section 108 of the Act are mandatory or directory. Section 108 deals with transfer of shares or debentures and provides that the company shall not register the transfer unless a proper instrument of transfer duly stamped and executed by the transferor and by the transferee has been delivered to the company along with the certificate relating to the shares or debentures or along with the letter of allotment of the share certificate. The Supreme Court observed that negative, prohibitory and exclusive words are indicative of the legislative intend when the statute is mandatory. The words "shall not register" are mandatory in character and that is strengthened by the negative from of the language. The Supreme Court held that the merely because the non-compliance is not declared as an offence cannot lead to the conclusion that the section is directory. We are unable to appreciate how the decision will advance the case of the plaintiffs in claiming that section 171(1) of the Act is mandatory. The object, scope and intent of the two sections are totally different and distinct. The share or debentures constitute property and the Legislature was particular that the transfers should not be effected unless the requirements of the section are strictly complied with. The reason is obvious that such holder of the share or debenture certificate should not be deprived of the properly right without the company being satisfied that the transfer is genuine. The decision of the Supreme Court has no application while examining the provisions of section 171(1) of the Act. Shri Kapadia then referred to a decision of a single judge of this court in Balwant Singh Sethi v. Sardar Zorawarsingh Hushnak Singh Anand [1988] 63 Comp Cas 310, but the reliance on this decision is not appropriate. In the case before the learned single judge the issue was whether the notice was of sufficient duration and the learned judge, after holding that the notice was not of sufficient duration, proceeded to pass the order. Neither the question as to whether the provision of section 171 of the Act was mandatory or directory nor whether the party complaining has suffered prejudice was either argued or considered and consequently, the decision has no application to the submission that the provisions of section 171 of the Act are mandatory. Such is the case with the decision in Homi Cawasji Bharucha v. Arjun Prasad [1957] 27 Comp Cas 6 (Patna) on which reliance was placed. In the absence of consideration as to whether the provisions are mandatory or directory, the mere fact that the decision proceeded to invalidate the meeting on the ground of duration of notice is not sufficient to infer that the provision was held to be mandatory. 23. Shri Kapadia also submitted that the trial judge was in error in concluding that the provision was directory by

reference to sub-section (3) of section 172 of the Act. It was urged that the sub-section refers only to accidental omission or non-receipt of notice by any member and reference was made to English decisions to urge that the omission should be accidental and not intentional. Reliance was also placed on the decision in Pearce, Duff and Co. Ltd., In re [1960] 3 All ER 222 (Ch D) to urge that all shareholders must consent to the shorter duration of notice. It is not necessary to examine this line of cases as it is not the claim of the defendants that there is an accidental omission in giving notice of shorter duration or that all the shareholders and consented to the notice being of shorter duration. 24. Shri Kapadia heavily relied upon the decision in N. V. R. Nagappa Chettiar v. Madras Race Club [1949] 19 Comp Cas 175; ILR 1949 Mad 808 and this judgment requirement closer scrutiny. The Madras Race Club is a body corporate registered under the Companies Act of 1913 and the business and the object of the club is to carry on business of the race club and to provide amenities to the members. There were 260 club members of whom 23 were living outside British India. On October 16, 1947, notice was issued to the club members of the extraordinary general meeting convened on November 7, 1947. The Notice was posted at Guindy on October 16, 1947. The meeting held on November 7, 1947, and the resolutions passed therein were challenged by two members of the club by filing a suit for themselves and on behalf of other members of the club after obtaining permission under Order I, rule 8 of the Code of Civil Procedure. A declaration was sought that the meeting was invalid and void and all business transacted thereat was invalid, null and void and one of the contentions in support of the declaration was that the notice of the meeting contravened the provisions of section 81(2) of the Companies Act, 1913, at 21 days were not allowed between the date of the meeting and the receipt of the notice. The trial judge concluded that though there was some irregularity at the meeting. there was no illegality in the proceedings of the meeting and the resolutions were validly passed. The plaintiffs carried an appeal and the Division Bench held that the provision was mandatory and the meeting was not legally convened. The contention that the plaintiffs had not remained present at the meeting and, therefore, must be deemed to have waived the objection was turned down on the ground that such a plea was not specifically raised in the written statement, nor was any issue framed. While examining the contention that the shareholders by agreement can dispense with the duration of the notice, it was observed that the agreement must be of all the members of the club and it was not enough that the members present at the meeting either expressly or impliedly consented to or acquiesced in the shortening of the period of notice. According to the Division Bench of the Madras High Court, express consent of all the members to waive the notice must be established and even if the members present at the meeting agreed to waive the defect, that would not cure the defect and the meeting would not be invalid. Shri Kapadia that the decision of the Madras High Court, entirely supports the submission and it should be concluded that the two annual general meetings convened were not valid meetings and the resolutions passed therein are ineffective. With respect. We are unable to share the view of the Madras High Court. 25. A contrary view

has been taken by two Calcutta decisions and to which we will immediately refer. The first decision is in Surajmull Nagarmull v. Shew Bhagwan Jalan [1973] ILR Cal 207, Mr. Justice A. N. Sen, as he then was, by a detailed judgment examined the ambit and scope of sections 171 and 172 of the Act. The learned judge held that sections 171 to 186 of the Companies Act apply to meetings of the company and have been enacted for the proper holding of the meetings, the object being to ensure that the members of the company get the necessary and proper opportunity of attending and presenting their views effectively at the meetings. Examining the ambit of section 171(2) of the Act, the learned judge held that notice of a short duration in breach of provisions of sub-section (1) of section 171 of the Act does not necessarily lead to the voiding of the meeting and rendering the proceedings illegal, ineffective and void. The learned judge disagreed with the observations of the Madras High Court and held that prior consent of the members would completely render sub-section (2) of section 171 nugatory and seeking such prior consent may make waste of valuable time. The learned judge held that the consent referred to need not necessarily be obtained before calling any meeting and the consent may be obtained before or after the calling of the meeting and also at the meeting. The consent need not be express or in writing and may be implied and inferred from the conduct of the members. The learned judge then examined the provisions of section 171 and held that the provision is clearly directory and not mandatory. It was observed that the provision is not so imperative that the requirement thereof cannot be waived at all and is not mandatory in the sense that any breach thereof will necessarily and invariably invalidate the meetings and the proceedings thereat. The learned judge observed that non-compliance with the statutory requirement of section 171(1) of the Act may render the proceedings voidable an in appropriate cases any such breach may have the effect of invalidating the meeting and the proceedings thereat. We are in entire agreement with the reasoning and the conclusion reached by the learned judge in regard to the ambit of sections 171, 172 and 173(2) of the Act. The decision of the learned judge was considered and followed by the Division Bench of the Calcutta High Court in the case of Calcutta Chemical Co. Ltd. v. Dhiresh Chandra Roy [1985] 58 Comp Cas 275. An identical view was also taken by the Delhi High Court in the decision in Maharaja Exports v. Apparels Exports Promotion Council [1986] 60 Comp Cas 353. In our judgment, the Calcutta decision lays down the correct law and the view of the Madras High Court is very technical and would lead to very drastic problems in running the affairs or public limited companies. It hardly requires to be stated that public limited companies have large number of shareholders and if a couple of shareholders are permitted to challenge the legality of the proceedings of meetings on the ground of insufficiency of notice, and that too without inditing any prejudice, then it would be impossible to efficiently run the administration of public limited companies. The view taken by the Madras High Court while considering the case of members of the race club, who were few in number, did not consider the serious repercussions which would follow in the case of public limited companies having a large number of shareholders. 26. Shri Kapadia sounded an apprehension that in case the provisions of section

171(1) of the Act are held to be directory, then every company would hold the annual general meetings by service of notice of any duration and this would defeat the object of service of notice. The submission is not accurate because even if the provision is held to be directory, that does not confer a charter on the company to serve notice of any duration according to their choice. Even if the provision is directory, it does not permit the company to bypass the statutory requirement and in every case where a breach is complained of, the court will have to examine whether the proceedings should be invalidated or otherwise. Learned counsel felt that a company may give notice of four or five days and will try to sustain the validity of the proceedings. It is impossible to assume that the court will close its eyes to the reality and accept the claim that notice of even one day is enough. The court will not proceed to invalidate the proceedings on the ground of insufficient duration of notice only when it is established that defect is not intentional or deliberate and no prejudice whatsoever is caused too a particular case by shorter duration of notice. It would be necessary for a party complaining of insufficient duration of notice to plead prejudice caused and in case such prejudice is established, then even though the provision is directory, the court would grant the relief. 27. Shri Kapadia then submitted that in the present case, the notice was short by one day it has caused prejudice to the plaintiffs because the plaintiffs did not have sufficient time to canvass. In support of the submission, reference was made to a letter dated September 18, 1991, addressed to the company by attorneys of the plaintiffs. The letter demands supply of balance-sheets and profit and loss accounts. The letter sets out that Santoshkumar was appointed as additional director improperly and copies of the minutes of the meetings were sought for. On September 20, 1991, the company informed the attorneys that in view of ongoing litigation between Arunkumar Poddar and defendants Nos. 2 and 3, the attorneys should forward letters of authority of the clients authorising the attorneys to represent them. On September 25, the demand was reiterated on behalf of the plaintiffs and on September 27, 1991, the company informed the plaintiffs to come and take inspection of all the documents. From this correspondence, it was contended by Shri Kapadia that the company deliberately suppressed the relevant documents from the plaintiffs and that has caused prejudice to the plaintiffs as the plaintiffs did not have sufficient time to canvass against the proposed resolutions to be moved at the annual general meetings. Shri Cooper controverted the submission by pointing out that apart from the fact that none of the plaintiffs remained present at the annual general meetings and raised any objection to the resolutions which were unanimously passed, no complaint of prejudice whatsoever is made in the plaints. The only averment in paragraph 11 of the plaint in Suit No. 3002 of 1991 is that the defendants have deliberately circulated an abridged balance-sheet so as to prevent acts of misconduct, misfeasance of the defendants coming to light. It is further averred that revenue a glance at the auditor's report and notes on accounts makes it clear that the substratum of the company has disappeared and defendants Nos. 2 to 4 are mismanaging the company and treating the company as their private assets. It is obvious that the plaintiffs never complained of any prejudice suffered because of shorter duration of notice

and the contention urged by Shri Kapadia with reference to the correspondence is imaginary. In Parashuram Detaram Shamdasani v. Tata Industrial Bank Ltd., AIR 1928 PC 180, it was held that the shareholders knowing the work to be transacted at the meeting and remaining absent cannot subsequently complain about insufficiency of notice for convening the meeting. In out judgment, the plaintiffs have not suffered any prejudice whatsoever by the notice being of only 20 clear days instead of 21 clear days and it is obvious that the plaintiffs are set up by Arunkumar Poddar who has personal quarrels with defendants Nos. 2 and 3 who are his real brothers. The shareholding of the plaintiff is extremely negligible being 0.3 per cent. and it would be entirely unreasonable to invalidate the business transacted at the annual general meeting at the behest of these few shareholders and to the detriment of a large body of shareholders who had unanimously approved the resolutions moved at the meetings. We enquired from learned counsel as to which resolution passed at the meeting affects the interest of the plaintiffs and the grievance seems to be only about the issuance of right shares after increasing the authorised share capital and conferring power on the board of directors to make loans to any body corporate. The issuance of the right shares to all the existing shareholders can by no stretch of imagination affect the interest of the shareholders, nor would it change the controlling pattern of shareholding of the company. The grievance about conferring power upon the board of directors to make loans to bodies corporate is the apprehension that the directors may give loans to firms and companies in which they have interest. More about it at a later stage, but the prejudice complained of seems to be only of Arunkumar Poddar who has personal complaints against defendants Nos. 2 and 3 and we are not at all impressed by the claim made by learned counsel that service of notice of 20 clear days has caused prejudice. 28. Shri Kapadia then submitted that the proceedings held at the two annual general meetings should be invalidated because there was no strict compliance with the provisions of sub-section (3) of section 217 of the Act. The sub-section, inter alia, provides that there shall be attached to every balance-sheet laid before a company in general meeting, a report by its board of directors, with respect to the state of the company's affairs. Sun-section (3) demands that the board shall give the fullest information and explanation in its report on every reservation, qualification or adverse remark contained in the auditor's report. Referring to the eighth annual report, learned counsel urged that the auditors had made certain remarks and the information supplied by the company was not sufficient and, therefore, it was not possible to pass the accounts at the annual general meeting. We are unable to find any merit in the contention. The directors' report clearly recites that information as per section 217 of the Act is supplied and notes Nos. 5 to 8 on which counsel laid stress refer to estimated gratuity and liability, sundry debts, and interest on overdue bills and, in our judgment, the information supplied cannot be said to be insufficient so as to make it impossible for the shareholders to pass the accounts. 29. Shri Kapadia then submitted that section 173 of the Act demands that in the case of an annual general meeting, a statement setting out all material facts connected with each item of the business should be annexed to the notice of the

meeting. It was contended that the provisions that the explanatory statement should be annexed to the notice is mandatory as held by the single judge of this court in Laljibhai C. Kapadia v. Lalji B. Desai [1973] 45 Comp Cas 17 (Bom) and the decision in Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. . Learned counsel urged that item 8 of the ninth annual report sets out a resolution conferring power upon the board of directors to make any loan to any body corporate from time to time on such terms and conditions as the directors may deem fit provided that the aggregate of the loans outstanding at any one time made to the company shall not exceed 30 per cent. of the aggregate of the subscribed share capital. The explanatory note to item No. 8 sets out that in the course of business, the company may have to make loans or deposits, etc., to bodies corporate in excess of the limits and section 370 of the Act provides that no company shall make any loan or loans to any body corporate in excess of the limits fixed by the Central Government unless making of such loans has been previously authorised by a special resolution of the lending company. The explanatory note recites that the company may have surplus funds during off season which the board of directors may utilise for giving loans and it is, therefore, advisable in the interest of the company to obtain the consent of the members by special resolution. Shri Kapadia complains that the explanation is a tricky one because the claim that the company may have surplus funds is totally false. Reference was made to the minutes of the meeting held on January 1, 1991, at which meeting Santoshkumar was appointed as additional director. One of the reasons set out for appointing Santoshkumar was that the business of the company of manufacturing cotton printed sarees and texturised/twisted yarn and P.O.Y. was undergoing recession and the company under the circumstances of the crisis has trying times ahead and Santoshkumar can help the company to come out of the crisis. Shri Kapadia submits that this reason is indicative of the fact that the financial state of the company was not healthy and if that is so, it is impossible to imagine that the company may have surplus funds as set out in the explanatory statement. It was urged that the power was sought by the board of directors only with a view to siphon away the funds of the company to the concerns in which defendants Nos. 2 and 3 have control and interest. Learned counsel urged that the fact that the company did not give a truthful explanation is sufficient to invalidate the resolutions passed at the meetings. It is not possible to find any merit in the contention for more than one reason. In the first instance, the claim that the financial health of the company was not sound cannot be accepted merely because in the meeting held on January 1, 1991, one of the reasons given for nominating Santoshkumar was to overcome the recession in the market and which was due to the Gulf War and money conditions being tight. It is not correct that the financial condition of the of the company was not sound because one of the resolutions at the ninth annual general meeting was to declare a divided. Shri Kapadia submitted that the company wants to disburse the dividend not out of the profits but out of the assets of the company and declaration of dividend was a ruse to mislead the shareholders. It is not possible to accept the claim made on behalf of the plaintiffs because nothing prevented the plaintiffs from remaining present at the

annual general meeting and raising objections or to impress upon other shareholders the claim of mismanagement. Secondly, the assumption of the plaintiffs that the board of directors would siphon off the funds to the concerns of defendants Nos. 2 and 3 is without any foundation. There is not a whisper of complaint in the plaints that defendants Nos. 2 and 3 have previously siphoned away the funds of the company or had given loans to bodies corporate in which these defendants have any interest. Save and except the averment made in paragraph 11 to which reference is made hereinabove, the plaintiffs have not pointed out any act of defendants Nos. 2 and 3 to create suspicion that resolution No. 8 at the ninth annual general meeting was for the purpose of enabling the board of director to grant loans to the own concerns. Thirdly, the explanatory statement also recites that the surplus funds may be available during the off season and the conferring of a power cannot necessarily lead to the inference that the power was to be misused by the board of directors. Again, it is not permissible for the plaintiffs who were fully conscious of the business to be transacted at the annual general meeting to remain absent and thereafter complain of insufficiency of information or tricky explanation. In our judgment, the challenge to the business conducted in the meetings is without any substance and there is no reason to nullify the resolutions passed at the annual general meetings. 30. It is required to be mentioned that though the plaintiffs had claimed before the trial court that the company had no authority to convene the eighth annual general meeting after December, 1990, the said contention was not pressed by Shri Kapadia the during the arguments. The trial judge negatived the contention by holding that there is no prohibition on holding annual general meeting after the statutory period and the only consequence is of penalty payable by the company. In the absence of any arguments on this aspect, it is not necessary to examine the finding. In our judgment, the plaintiffs have not made out any case for grant of relied and accordingly, the appeals as well as Suits Nos. 3002 and 3003 of 1991 must fail in accordance with the consent statements field by the parties. 31. Accordingly, Appeals Nos. 1001 1002 and 1082 are dismissed with costs. In view of the consent statement filed by the parties in Suits Nos. 3002 and 3003 of 1991 both the suits are dismissed with costs. The findings recorded by this judgment are binding upon the plaintiffs in Suit No. 3139 of 1991 in view of the consent statement filed by the parties to this suit. 32. At this stage, Shri Kapadia orally applies for leave to appeal to the Supreme Court. Prayer refused. Shri Kapaida applies for continuation of interim relief on the ground that the interim relief has continued from September, 1991. We are not inclined to continue the interim relief because the complaint about enforcement of the resolutions passed at the two annual general meetings is principally in respect of only two items, viz., (a) issuance of rights shares, and (b) conferring power upon the board of directors to give loans. We do not find that even if these two resolutions are enforced, any prejudice whatsoever will be caused to the plaintiffs. The rights shares are issued to the existing shareholders at par and issuance of such shares is not likely to affect the controlling pattern of the company. The apprehension that the shareholders may transfer the shares and interests of third parties may come in is without any merit. The conferring

of power on the board of directors to grant loans to bodies corporate also is not going to affect the interests of the plaintiffs as there are several restrictions prescribed under the Act on the granting of loans. Accordingly, the prayer for continuation of interim relief is rejected.