Sangramsinh P. Gaekwad & Ors vs Shantadevi P. Gaekwad (Dead)Thr.Lrs. & ... on 20 January, 2005

Equivalent citations: AIR 2005 SUPREME COURT 809, 2005 AIR SCW 790, 2005 CLC 277 (SC), (2005) 1 SCALE 493, 2005 (1) UJ (SC) 284, (2005) 1 JT 581 (SC), 2005 (2) SRJ 350, 2005 (1) JT 581, 2005 (3) COM LJ 385 SC, 2005 (11) SCC 314, 2005 (1) SLT 644, (2005) 2 GCD 1122 (SC), (2005) 123 COMCAS 566, (2005) 2 SCJ 346, (2005) 64 CORLA 364, (2005) 1 RECCIVR 561

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Bench: N. Santosh Hegde, S.B. Sinha

CASE NO.:
Appeal (civil) 6359 of 2001

PETITIONER:
Sangramsinh P. Gaekwad & Ors.

RESPONDENT:
Shantadevi P. Gaekwad (Dead)thr.Lrs. & Ors.

DATE OF JUDGMENT: 20/01/2005

BENCH:
N. Santosh Hegde & S.B. Sinha

JUDGMENT:

J U D G M E N T W I T H CIVIL APPEAL NOS. 6360 AND 6361 OF 2001 S.B. SINHA, J :

These appeals are directed against a judgment and order dated 9.8.2000 passed by a Division Bench of the High Court of Gujarat at Ahmedabad in O.J. Appeal Nos. 6, 7 and 8 of 1995 whereby and whereunder the judgment and order dated 17.12.1994 passed by a learned Single Judge of the said Court dismissing Company Petition No. 51 of 1991 filed by the First Respondent herein, was set aside.

BACKGROUND FACTS :

Sir Pratapsinghrao Gaekwad was the Ruler of Baroda. Maharani Shantadevi Gaekwad was his wife. They had eight children. For certain reasons with which we are not concerned, the estate of Gaekwad came into the hands of their elder son, Fatesinghrao P. Gaekwad (FRG) even during the life time of Sir Pratap Singh. FRG floated several companies, three of which are Baroda Rayon Corporation Ltd. (BRC),

Gaekwad Investment Corporation Company Ltd. (GIC) and Alaukik Trading & Investment Corporation Pvt. Ltd. (Alaukik). BRC came into existence in 1958. At the outset, it was being run under Managing Agency System which was abolished in or about 1968 and later on the same was being managed by the Board of Directors with the assistance of professional executives. Appellant No. 1 herein, the youngest son of Pratapsinghrao Gaekwad, joined the said company in 1968. He was the Director of Managing Agents till 31.12.1969 whereafter he became the Additional Director with effect from 1st January, 1970. He in the same year became Joint Managing Director. In April 1976, he became the Managing Director of BRC. He was reappointed as Managing Director for two periods of five years each with effect from 19th February, 1980 and 19th February, 1985. FRG passed away on 1st September, 1988, whereafter he was appointed as Chairman and Managing Director on 23.9.1988.

GIC was a small investment company. Its equity capital consisted of 425 shares of Rs. 100/- each. The said shares were mainly held by the family members. A large chunk of shares was held by Jaisingh Ghorpade Trust of which FRG was a trustee. The beneficiaries of this Trust are said to be outsiders. Some shares of GIC were held by outsiders also. The share holding pattern of the Company was as under:

Sr. No. Name No. of Shares

1.

Shrimant Fatesinghrao Gaekwad

2. H.H. Maharani Shantadevi Gaekwad

3. H.H. Maharani Padmavatidevi Gaekwad

4. Prince Ranjitsingh P. Gaekwad

5. Shrimant Sangramsinh P. Gaekwad

6. Princess Shubhanginidevi Gaekwad

7. H.H. Mrunalinidevi Puar

8. Shrimant Lalitadevi Kirdatt

9. Shrimant Shivrajkumar

10. H.H. Padmavatidevi Gaekwar & H.H. Maharani Shantadevi Gaekwar

11. Shrimant Pramila Raje of Jasdan

12. Shrimant Asharaje Gaekwad

13. Shrimant Ajaysinh Murarrao Ghorpade

14. Shrimant Vasundhara Raje Murarrao Ghorpade

15. Shrimant Ashokraje Gaekwad

16. Shrimant Vimala Raje Gaekwad

17. Shrimant Devayanidevi Gaekwad

18. Shrimant Ajitsinh Gaekwad

19. Shri Jaysinghrao M. Ghorpade & H.H. Maharani Padmavatidevi Gaekwad

20. Shrimant Dilipsinh G. Desai & Smt. Kusumben D. Desai

21. Smt. Kusumban D. Desai & Shri Dilipsinh G.Desai

22. Capt. V.S.Hazare

23. Smt. Pramilabai Hazare

24. Shri Malhari N. Khade

25. Shri Rameshchandra V. Dhaibar Total equity shares Alaukik was a subsidiary of GIC. Respondent No. 12, Mrs. Mrunalini Devi Puar was its Managing Director.

Allegedly, GIC suffered a loss during the financial years ending 31st March, 1987 and 31st March, 1988 as a result whereof substantial parts of the equity and reserves were wiped out. It could not even pay off the loans and credits. It had no funds to subscribe for the rights issue made in 1989 by BRC. Its share holding in BRC was likely to fall with which its forged fortunes were closely linked as the dividend from the shares of BRC was the major source of income of the company. GIC came into financial trouble when BRC did not declare dividend in 1986-87. The value of BRC shares also declined and, thus, it became difficult to avail of an overdraft facility from the Banks. It was then decided to raise funds from the existing members. The Board of Directors of GIC in a meeting held on 10.11.1987, decided to broad-base the company, whereafter an extraordinary general meeting was convened on 17.12.1987. In the said EGM, a decision was taken to increase the capital by issuing 25000 equity shares of Rs. 100/- each. The matter was again placed in a Board Meeting of GIC on 8th January, 1988. In the said Board Meeting presided over by Appellant No. 1 and attended by Mr. P.U. Rana and Mr. P.H. Chinoy, a resolution was passed that 15000 equity shares of Rs. 100/- each be issued at par to the members of the company. The said resolution reads as under:

"Resolved that out of 25000 equity shares of Rs. 100/- each, 15000 equity shares of Rs. 100/- covering Rs. 15,00,000/- be issued at par to the members of the Company at present and the balance as and when required.

Further Resolved that the Management Committee of the Company be and is hereby authorized to issue equity shares to members in such proportion as it deems fit.

Further Resolved that the Management Committee be and is hereby authorized to do all such acts, deeds and things necessary for the purpose."

Pursuant to or in furtherance of the said resolution, the Company Secretary, Mr. M.N. Khade issued a circular letter dated 12.2.1988 to all the existing shareholders requesting them to subscribe for the equity shares at par wherefor a time limit of three weeks was fixed. It was stated that if no reply is received by 10th March, 1988 it would be presumed that the concerned shareholder was not interested in the offer. The said circular letter reads as under:

"12th February, 1988 Shrimant Fatehsinhrao Gaekwad Hoechest House, Nariman Point Bombay 400 021 It has been decided to increase the equity capital of the Company by the issue of 15000 equity shares of Rs. 100/- each at par, to the members of the Company.

You are hereby requested to convey your acceptance for the number of shares for which you would like to subscribe, along with a cheque covering the full amount at the rate of Rs. 100/- per share, within three weeks from the date of receipt of this letter. If no reply is received by 10th March, 1988 it will be presumed that you are not interested in the offer and the shares will be offered to the other members.

Thanking you, Yours faithfully, For Gaekwad Investment Corporation Pvt. Ltd.

(M.N. Khade) SECRETARY"

On or about 13th February, 1988, another meeting was convened which was chaired by FRG wherein the resolution passed in the meeting dated 8th January, 1988 was confirmed. The Managing Committee, having regard to the fact that no offer was received from the existing shareholders, in its meeting dated 21st March, 1988 extended the time for the aforesaid offer. It was further decided that out of 15000 shares, 8000 shares be kept apart for the time being for FRG and the balance 7000 shares be kept apart for other existing members. Allegedly, on instructions of Appellant No. 1 herein, the Company Secretary gave first option to the other family members to subscribe for shares according to their request and the remaining were put in the name of Appellant No. 1 and his family; pursuant whereto only two persons, Mrs. Puar asked for allotment of 500 shares and Mrs. Shubhanginidevi Gaekwad for 25 shares respondent and, thus, the remaining 6475 shares were allotted to Appellant No. 1 and family.

It is further alleged that FRG became disinterested in the 8000 shares allotted to him. The contention of the Appellants herein is that the balance 7500 shares were renunciated by FRG in his favour and in favour of his children in June, 1988 as the same remained unallotted as other members specifically refused to take up any share. His sons and daughters applied for further 3000 shares through Appellant No. 1 as guardian and the same was allowed. The remaining 4500 shares, however, remained unallotted. The issue is said to have been closed on 10.12.1988.

Respondent No. 12, Mrs. Puar who was the Managing Director of Alaukik in a meeting held on 12.10.1989 which was chaired by her issued to herself 1500 shares without allegedly issuing any notice to the existing shareholders and wherefor allegedly no payment was even made. It is contended that by reason of such overt act, the Respondent No. 12 herein, came in majority of Alaukik as a result thereof it would cease to be a subsidiary company of GIC. GIC had 84% shares in Alaukik but by reason of the said allotment in favour of Respondent No. 12, its share holding therein was diluted to 32%. The account of the Company was also said to have been transferred to a current account.

On 1.9.1990, a Civil Suit being No. 675/90 was filed by GIC against Alaukik questioning inter alia the allotment of 1500 equity shares of Rs. 100/- each to the defendant No. 2 therein.

In the said suit, Mrs. Puar filed her written statement on 29.11.1990 wherein inter alia a stand was taken that 8000 shares kept apart for FRG devolved on Shantadevi as a Class I heir of FRG. She incidentally applied for allotment of the said shares also on 29.11.1990. A contention was also raised in the said written statement that if the said shares are allotted, Respondent Nos. 1 and 12 would be holding the majority shares in GIC and Alaukik even if allotment of 1500 shares in Alaukik is held to be bad in law.

It is also not in dispute that Indreni Holding Pvt. Ltd. (Indreni) was a wholly owned company of the Appellants herein. Allegedly, by way of tax planning, the Appellants herein decided to transfer 9415 shares in favour of the said company wherefor allegedly a letter was prepared by the Company Secretary on or about 15.11.1989 which reads as under:

> "November 15, 1989 To All the Shareholders.
>
> The Company has received intimation from existing shareholders about their intention to sale some of their shares of Gaekwad Investment Corporation the details of which are attached herewith.
>
> Pursuant to the provision of the Articles, it is hereby brought to your notice about the sale of the shares by the existing shareholders. You are therefore requested to intimate to the Company about your interest in purchasing the share before 20th December, 1989.
>
> Please note that in case if the company does not hear from you within stipulated period it will be construed that you are not interested in purchasing ..of the

same as board deem fit.

Yours faithfully, For Gaekwad Investment Corporation Pvt. Ltd.

(M.N. Khade) SECRETARY"

It, however, stands admitted that the said letter was not circulated.

The Appellants herein were allegedly under a belief that the said notice had been circulated and as no response thereto was received, they transferred 9415 shares out of 9481 shares to Indreni. Questioning the said transfer, three suits came to be filed by different shareholders marked as Suit No. 305/90, 867/90 and 872 of 90. Suit No. 305/90 was filed by Pramilaraje Khacchar on 28.11.1990 in the Rajkot Civil Court wherein inter alia following reliefs were sought for:

"A. it be declared that the purported sales and transfers by the defendants Nos. 3 to 7 of the 9415 equity shares owned by them in the first defendant company in favour of the second defendant company are ultra vires their powers, illegal, null and void ab initio and that the said shares continue to be of the ownership of the respective defendants Nos. 3 to 7 as if no such sale or transfer was ever made.

B. a decree for permanent mandatory injunction be passed in favour of the plaintiff and against the first defendant directing it to offer and transfer the said 9415 equity shares in the first defendant company to the plaintiff and other remaining members.

C. a decree for permanent mandatory injunction be passed in favour of the plaintiff and against the defendant No. 2 restraining the second defendant from exercising or enjoying any voting or other rights in respect of the said 9415 equity shares in the first defendant company.

D. that a decree for permanent mandatory injunction be passed in favour of the plaintiff and against the second defendant directing the second defendant to repay the first defendant company dividend, if any, paid to the second defendant with interest at 24 per cent per annum.

E. any other relief that the Hon'ble Court deems fit in the circumstances of the case be granted."

Suit No. 867/90 was filed by Shubhangini Gaekwad in Baroda Civil Court on 12.12.1990 praying for identical reliefs.

Suit No. 872 of 1990 was filed on 19.11.1990 by Ajit Singh Gaikwad, the Respondent No. 8 herein, wherein one additional relief was claimed which is in the following terms:

> "it be decreed and first defendant be directed to offer and transfer 9415 equity shares with distinctive numbers mentioned in para 18(a) to the plaintiff and other remaining members of the first defendant company in pursuance of the Articles of Association."

In Suit No.867 of 1990, concededly an order of injunction was passed on 28.11.1990, as prayed for by the plaintiffs, restraining Indreni from exercising or enjoying any voting or other rights in respect of the said 9415 equity shares in GIC.

A similar order of injunction was passed by Civil Judge, S.D. Vadodara in Suit No. 867 of 1990 in the suit filed by Mrs. Shubhanginidevi Gaekwad on 12.12.1990.

In their replies filed in the suits, the Appellants herein inter alia contended that a Board Meeting was convened on 13.7.1990 for reconsidering the transfer of shares to Indreni. They also sought for legal opinion in view of the fact that the notice dated 15.11.1989 was not circulated to the members. The purported resolution passed in the said meeting reads as under:

> "Resolved that the transfer of 9415 equity shares in favour of Indreni Holdings Pvt. Ltd. approved by the Board on 30.3.90 be reconsidered and that the matter be referred to Transferors and Transferees.
>
> Resolved further that the legal opinion be sought in the matter of captioned transfer of 9415 equity shares of the company in favour of Indreni Holdings Pvt. Ltd."

The Respondents herein, however, contend that the said resolution was a fabricated one as no Board Meeting was held on the said date. On or about 20th July, 1990, the Appellant No. 1 issued a letter to the Board of Directors that if the transfer of shares was found to be irregular, he should be permitted to remove transfer notice as per articles. On 9.8.1990, allegedly, a Board meeting was held and the shares transferred to Indreni were rescinded. The Respondents contend that the said plea is by way of an afterthought inasmuch as dividend had been paid to Indreni and TDS on the amount of dividend was deposited in State Bank of India after 9.8.1990.

The said suits are still pending.

Indisputably, Respondent Nos. 1 and 12 herein took inspection of the Registers of Members and other documents on 10.12.1996 and the relevant extracts were taken and notarised.

An Annual General Meeting was allegedly held on 20.12.1990 wherein except for appointment of auditors all other resolutions e.g. seeking appointment of Directors in favour of Appellant No. 1, his wife (Appellant No. 2) and his group were rejected. In the said meeting the share holdings said to have been acquired by Indreni i.e. 9415 shares was not taken into account and the voting rights of the Appellants were kept confined to 66 shares. It is also not in dispute that prior to the said meeting, Appellant No. 1 lodged a First Information Report apprehending trouble in the said meeting.

Respondent No. 1 filed an application under Sections 397 and 398 before the Gujarat High Court on or about 4th March 1991 wherein she initially prayed for the following reliefs:

> (A-i) Declaration that she is allottee of 8000 equity shares of respondent No. 6 company.
>
> (A-ii) Direction to issue share certificates immediately to her of these 8000 shares.
>
> (B) Declaration that issue and allotment of 3000 shares in excess of 6475 shares to respondent No. 1 (present Appellant No. 1) or nominees of respondent No. 1 to 5 (present Appellant No. 1 to 5) is null and void ab-initio.
>
> (C) Declare that she is sole heir of Late F.P.G. and as such she is entitled to be in majority and control of respondent No. 6 company. (D) Declare respondent No. 1,2 (present Appellant No. 1&2) 9, 10 and 11 (present Respondent No. 9,10,11) have ceased to be directors in respondent No. 6 company.
>
> (E) Restrain by injunction respondent No. 1,2 (present Appellant No. 1&2) 9, 10 & 11 (present Respondent No. 9,10,11) from acting as director, officer of respondent No. 6 company. (F) Declare any act deed or thing done after A.G.M. of 20-12-1990 by respondent No. 1,2 (present Appellant No. 1&2)9,10&11(present Respondent No. 9,10,11) as null and void. (G) Declarations in regard to resolutions passed at the E.G.M. dated 14-1- 1991.
>
> (H) Appointment of receiver.
>
> (I) Pending Admission respondent No. 1 & 2 (present Appellant No. 1 &
>
> 2) be directed to produce before this Hon'ble Court or receiver all documents, papers, etc. (J) Pending admissions interim injunction against respondent No. 1,2 (present Appellant No. 1&2) 9, 10 & 11 (present Respondent No. 9,10,11) from acting as directors or officers of the company. (K) Ad-interim relief's in terms of para H, I & J above.

However, the said reliefs were subsequently amended and the following additional reliefs were also prayed for :

> "A-1 That this Hon'ble Court be pleased to declare that all allotments of shares in Respondent No. 6 company made beyond the original paid up capital consisting of 425 equity shares as existing on 23rd March 1988 are null and void and illegal and of no legal effect whatsoever and be pleased to set them aside;
>
> A-2. In the alternative to prayer A-1 and in any event, this Hon'ble Court be pleased to declare that the allotments of 6475 equity shares to Respondent Nos. 1 to 5 and/or

to their nominees or to the members of their nominee or to the members of their family is subject to the simultaneous allotment of 8000 equity shares to petitioner no. 1. 500 equity shares to Smt. Mrunalinidevi Puar, 25 equity shares to Smt. Shubhangini Devi Gaekwad and that the allotment of any further shares including the said 3000 shares to Respondent No. 4 and 5 is null and void and illegal and be pleased to set them aside.

A-3. In the event that this Hon'ble Court holds that the allotment of 6475 shares to Respondent Nos. 1 to 5 and of 3000 shares to Respondent Nos. 4 and 5 is valid, this Hon'ble Court be pleased to declare that the said 9475 shares were transferred to M/s. Indrani Holdings Pvt. Ltd. and shall be offered and transferred by Respondent No. 6 to the shareholders holding pro rata on the basis of the original shareholding of 425 equity shares.

A-4. That this Hon'ble Court be pleased to direct Respondent No. 6 by an order of mandatory injunction to forthwith transmit 300 equity share registered in the name of late Fatehsinhrao Gaekwad as the then trustee of the Jaysinhrao Ghorpada Trust in favour of the present trustees. Petitioner No. 1 and Smt. Mrunalidevi Puar;

A-5. That this Hon'ble Court be pleased to transfer (1) Special Civil Suit No. 675 of 1990 pending before the Court of the Civil Judge (Senior Division) at Baroda, (ii) Special Civil Suit No. 305 of 1990 pending before the Court of the Civil Judge, Senior Division, at Rajkot (iii) Special Civil Suit No. 867 of 1990 pending before the Court of the Civil Judge (Senior Division) Baroda, at Baroda (iv) Special Civil Suit No. 872 of 1990 pending before the Court of the Civil Judge (Senior Division) at Baroda and (v) Special Civil Suit No. 63 of 1991 pending before the Court of the Civil Judge Senior Division (Surat) at Surat, to the file of this Hon'ble Court for hearing and disposal along with the present company petition;

A-6. In the alternative to prayer A-5, this Hon'ble Court be pleased to stay all interim or ad interim orders passed in the suits mentioned in prayer A-5 above;"

Sections 397-398 of the Companies Act were amended in 1990 in terms whereof the jurisdiction of the High Court in that behalf vested in the Company Law Board pursuant whereto the Respondent No. 12 herein filed a purported application under the said provisions before the Company Law Board, Special Bench, New Delhi which was marked as Company Petition No. 7 of 1992 on the ground of alleged continued mis-management of the Company and oppression. Allegedly, with a view to avoid simultaneous proceeding before two forums Respondent No. 1 herein sought permission before the Gujarat High Court to withdraw the proceedings being C.P. No. 50 of 1991 but the said request was opposed by the Appellants herein and was ultimately rejected by the High Court by an order dated 21.4.1992. An appeal thereagainst was preferred before the Division Bench which was marked as 22 of 1992. The Appellants, on the other hand, sought stay of the proceedings before the

Company Law Board whereupon an order was passed appointing Mr. Justice C.T. Dighe as an independent Chairman. Mr. Ranjitsinh Gaekwad, Respondent No. 4 herein was also appointed as a Director of GIC and the proceedings were stayed. Against the said order an appeal was preferred by Respondent No. 12 herein before a Division Bench of the Gujarat High Court which was marked as Appeal No. 20 of 1992 wherein the following interim order was passed:

"Rule Returnable on 19.1.1993. Ad-interim injunction restraining the company from raising its share capital, confirmed or undertake sale or purchase and/ or mortgage fixed assets/ investments of the Company by way of its shares in its holding or subsidiary company, start new businesses and decide the matters relating to policy decisions of material bearing, without placing the agenda to that effect before the Board of Directors and without holding a meeting presided over by an independent Chairman appointed by the Company Law Board by its order dated 28th September, 1992."

A question as regard the efficacy of simultaneous proceedings, one before the High Court and another before the Company Law Board arose for consideration and by an order 9.3.1993 the Division Bench directed that in view of the nature of controversy it would be in the interest of the parties if the matter was finally heard and disposed of. The Appellants herein allegedly took a stand that if the said petition under Section 397 was heard on merits and disposed of expeditiously they would have no objection to the matter being heard either before the Company Law Board or before the learned Company Judge. Upon obtaining liberty from the Division Bench, the matter was mentioned before the learned Company Judge enquiring as to whether it can be disposed of expeditiously whereupon a schedule of hearing was worked out. Respondent Nos. 12 and 13 herein were also added as parties in the said proceedings. The affidavits filed by the parties in all the proceedings were permitted to be brought on records and they were further permitted to file replies and/ or rejoinders thereto.

The learned Company Judge disposed of the matters on the basis of said affidavits.

JUDGMENT OF THE SINGLE JUDGE:

N.J. Pandya, J. by reason of his judgment dated 17.12.1994 dismissed the said Company Petition opining:

(i) Allotment of 6475 shares having been admitted, no dispute could be raised as regard thereto. Further allotment of 3000 shares was in terms of the resolution adopted by the Board Meeting which was preceded by the offer of shares to others. Such allotment was made in terms of the decision of the Managing Committee which was authorized therefor by the Board of Directors. No time was specified for the Managing Committee to take appropriate decision in that regard. FRG renounced his shares and 3000 shares out of 8000 shares which were to be allotted to the appellants was also valid.

(ii) As regard the transfer of 9415 shares by the Appellants in favour of Indreni lifting the corporate veil thereof, the learned Judge held that the shareholders of Indreni being the Appellants only; any transfer made in its favour did not affect the company. Assuming such transfer was bad in law, the voting rights in relation thereto continued to remain vested with the transferors.

(iii) In a petition under Sections 397 and 398 of the Companies Act, the Court is concerned with the question as to whether the control of the company slipped from one party to the other and as the Appellants, in any event, continued to form majority and, thus, any transfer made in favour of Indreni did not amount to oppression.

(iv) Shifting of registered office from Baroda to Bombay although was questionable, no relief was granted on the ground that the same would amount to putting the clock back and would invalidate the entire AGM and subsequent events which would not be in public interest and furthermore would result in unnecessary expenditure to the parties.

(v) Shantadevi did not have a right to 8000 shares by inheritance. An adhoc allotment of shares was merely an invitation which did not culminate in a right and, thus, no case could have been built thereupon.

(vi) On the question of mismanagement, it was opined "there was hardly any mismanagement and only an apprehension that the change in control may amount to mismanagement" would not be acts of mismanagement.

Three appeals were filed against the said judgment before the Division Bench of the said High Court which came to be allowed by reason of the impugned judgment.

JUDGMENT OF THE DIVISION BENCH The Division Bench, on the other hand, held that the allotment of both 6475 and 3000 shares was invalid. As far as 6475 shares are concerned, it was held that the allotment was solely motivated by self- interest and the minutes confirming such allotment were not acceptable. As far as 3000 shares are concerned, the Division Bench did not accept the authenticity of the letter by the Company Secretary of FRG renouncing the shares. Transfer of 9415 shares to Indreni was held to be invalid as no transfer notice was given to the company as required in terms of Article 8 of the Articles of Association. As the transfer was duly recorded, to undo any such transfer, a resolution by the Board of Directors of Indreni would be required. In the absence of any such resolution the transfer being complete, only Indreni could have transferred the shares back to the Appellants.

The Division Bench further held that there was a breach of fiduciary duty on the part of the Appellant No.1. It opined that the relief that may be granted by the Courts is equitable though originating from a statutory provision. Since the actions of the respondents were designed to wrest control of the company by improper means, the minority shareholders could approach the courts for relief which may be granted by the courts.

RELIEFS :

The reliefs granted to the Respondents by the Division Bench are as under :

"1. It is hereby declared and ordered that all the allotments of shares from the additional share capital increased pursuant to the resolution of the Extra-ordinary General Meeting held on 17.12.1987 and the resolution of the Board of Directors dated 8.1.1988 and the decisions for such allotments, of the Managing Committee be treated as invalid and ineffective for all purposes and the shareholdings of all the members of the respondent No. 6 company hereby stand restored to the original 425 shares held by the members ignoring such subsequent allotments. The Register of members and other records of the company will stand rectified accordingly.

2. The Registered Office of the respondent No. 6 company is hereby declared to be continuing at the same place i.e. "Indumati Mahal" at Baroda, irrespective of the resolution to shift it to Surat and the respondent Nos. 1 and 2 are directed to forthwith restore the entire record of the company to its Registered Office at Baroda.

3. All the Directors or purported Directors of the respondent No. 6 company stand removed forthwith. They will from today, not deal with the affairs of the company in any manner.

4. An Extra-ordinary General Meeting of the shareholders of the company will be convened on 14th October, 2000 at 11.00 A.M. at the Registered Office of the Company at Baroda, for appointing Directors of the Company on the basis of the existing share-holding of 425 shares of the members of the company, in accordance with the Article of Association.

5. The aforesaid meeting scheduled to be held on 14th October, 2000 will be conducted under the Chairmanship of the Additional Registrar of the High Court Shri V.B. Gandhi. All the share-

holders of 425 shares including the petitioner No. 1 as the sole hair of the deceased Shrimant Fathesinhrao P. Gaekwad in respect of the shares which stood in his name in the register of the members of the company at the time of his demise out of the said 425 shares in respect of which he had voting rights, will be entitled to vote by themselves or through their proxies at the said meeting for appointing the Directors of the Company. No outsider will be allowed to remain present at the meeting except the Additional Registrar who will Chair and conduct the meeting with his official assistants. The Additional Registrar will be assisted by a Section Officer of the High Court of his choice in the said work.

6. All the share-holders who are parties to the present proceedings are hereby put to notice about the date of the said Extra-ordinary General Meeting to be held on 14.10.2000 at 11.00 AM at company at "Indumati Mahal", Baroda. The Additional Registrar will, however, get published the notice of the meeting in one English daily and one Gujarati daily having circulation in the area. The Additional Registrar will also immediately issue individual notices of the said meeting to the share-holders. The Additional Registrar is authorized to seek assistance for conducting the meeting

from all or any of the parties to these proceedings and/ or the officials of the company who shall be bound to assist him in that regard.

No adjournment motion will be entertained at the said meeting.

7. The Additional Registrar will on completion of the said meeting, prepare and sign the minutes of the meeting recording its outcome and declare in writing the names of persons who are appointed by the share-holders as the Directors of the respondent No. 6 company at the said meeting, and thereupon such directors shall assume the management of the company on such declaration being made.

8. The remuneration of the Additional Registrar is fixed at Rs. 10,000/- and the remuneration of the Section Officer will be Rs. 3,000/- for the said purpose. The respondent No. 6 is permitted to withdraw the said amount and also a further amount towards the expenses for publishing notice etc. totaling Rs. 30,000/- from its Banks for the purpose of depositing it in the registry. The learned Counsel for the respondent No. 6 company states that the respondent No. 6 will deposit the amount of Rs. 30,000/- in the Registry of this Court within 15 days.

Company has agreed to supply the names and present addresses of all the share-holders of the 425 shares of the Company, to the Additional Registrar on or before 19th August, 2000."

SUBMISSIONS ON BEHALF OF THE APPELLANTS:

> Submissions were made on behalf of the Appellants by Mr. Harish Salve, learned senior counsel and Mr. Kailash Jethmalani. In assailing the judgment of the Division Bench, the learned counsel at the outset would draw our attention to the fact that the concerned companies were family companies, having been floated by FRG and the affairs of several of them were being managed by his brothers and sisters. Appellant No. 1 had been put incharge of the BRC and GIC for a long time. It was urged that no dispute was ever raised as regard the decision of the Board of Directors to broad-base the company by floating 25000 shares out of which 15000 shares were to be allotted at the first instance. The pattern of share allotment pursuant to or in furtherance of the decision of the Board of Directors i.e. 8000 shares were allotted to FRG and 6475 shares were allotted to the Appellants stood admitted. It was urged that the Division Bench of the High Court committed a manifest error insofar as it failed to take into consideration the admission of Respondent No. 1 and Respondent No. 12 herein that 6475 shares were allotted pursuant to the Resolution of the Board during the life time of FRG. Such allotment was in fact admitted in the company petition filed by the Respondent No. 1. The learned counsel would contend that only at a later stage when the Respondent No. 12 herein filed a company petition before the Company Law Board, Delhi a challenge as regards allotment of 6475 shares was also made. In the Company Petition although the reliefs were later on amended, pleadings were not. On a fair and reasonable reading of the pleadings, it was submitted that only inference that can be drawn was that the subject matter of challenge centered round the

allotment of 3000 shares only and transfer of their shares by the Appellants to Indreni on the premise that it being an outsider it was impermissible in terms of the relevant provisions of the Articles of Association.

Mr. Salve would argue that as the Appellants had acquired 6475 additional shares, there was indisputably no question of their abusing any position to take over the company as they had all along been incharge thereof.

Respondent Nos. 1 and 12, Mr. Salve would contend, having taken inspection of the documents on 10.12.1990 and company petition having been filed on 4.3.1991 as well as the relevant documents having been annexed thereto would clearly demonstrate that reliance thereupon had been placed by the Respondent No. 1 herein and, thus, on the admitted fact, the Division Bench committed a manifest error in issuing the impugned directions insofar as it failed to take into consideration that the company was a family concern in respect whereof a completely different standard should be applied. In this case, it has not been found that the Respondents had been thrown out of the Management or they were deprived of the shares of BRC. It was contended that the company was not in active business and had held only some shares in Alaukik and BRC. Furthermore, there was no lack of probity or acts of misfeasance of company property on the part of the Appellants. The composition of the parties would not change even if allotment of 3000 shares as also the transfer of Indreni are held to be invalid inasmuch as by reason of the shareholding pattern the Appellants would continue to be in the majority. The learned counsel would contend that the dispute arose only after Mrs. Puar transferred 1500 shares of Alaukik to herself and by reason thereof the mother and daughter intended to take over Alaukik and consequently BRC. Only as a face saving measure, Respondent No. 1 claimed 8000 shares which were allotted to FRG on 29.11.1990 and not prior thereto. It was pointed out that Respondent No. 1 applied for succession certificate on 28.11.1989 wherein she disclosed the assets of FRG but except 22 shares in GIC she did not lay claim on any other share of GIC, far less 8000 shares. Before filing their respective company petitions both Respondent Nos. 1 and 12 were aware about the entire state of affairs and their purported ignorance about the internal affairs of the company is not borne out of records. In this connection, our attention has been drawn to paragraphs 7 and 8 of the statements made in the company petition by the Respondent No. 1. It was pointed out that identical statements were made by the Respondent no.12 in her Company Petition before the Company Law Board., Delhi.

Even therein no allegation as regard fabrication of document or any aggrandizement on the part of the Appellant was raised. Respondent Nos. 1 and 12, it was urged, prevaricated their stand from time to time and as such their plea should not have been accepted by the Division Bench.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS Mr. Ashok Desai and Mr. P.V. Kapoor, learned senior counsel appearing on behalf of Respondent Nos. 1 and 12

respectively, on the other hand, would submit:

(i) Appellant No. 1 being in fiduciary position as the Director of GIC as also a family member was required to act in utmost good faith, make full and honest disclosure to other shareholders and thus he could not have made any profit by allotting shares to himself and his family members directly or indirectly and was furthermore required to inform the shareholders as regard the benefits arising therefrom so that they could participate therein. Such a fiduciary position remains, despite non-applicability of Section 81 of the Company Act.

(ii) Appellant No. 1 in breach of said fiduciary duty aggrandized himself by transforming himself from a miniscule minority of 1.86% to 86% and failed to explain as to how he got such advantages to the detriment of other shareholders. The explanations offered by him as regard allotment of shares are wholly inconsistent and contradictory as conflicting versions had been set out which do not clearly and cogently explain as to how the different shares were (a) decided to be issued, (b)offered for subscription, (c) allotted to Appellant No. 1 and (d) allotted to non-members. Transfer to Indreni was a device to put the shares beyond the reach of the original shareholders and the said company actually received the benefits thereof by getting dividends.

(iii) It is true that Respondents came out with a different case but that was because of the fact that they had no knowledge about the complete affairs of the company to start with having regard to the fact that the Appellants were in control of the relevant documents. The total constellation of the circumstances would show that the Appellant No. 1 had aggrandized himself and his conduct had led to oppression of other members.

(iv) The power of the company court under Sections 397 and 398 being of widest amplitude the reliefs granted by the Division Bench were permissible in law.

(v) Each share of GIC was a valuable one keeping in view of the share price of BRC, Alaukik and other properties possessed by it. The value of each share of GIC which was floated at the rate of Rs. 100 would have been worth more than Rs. 900 and furthermore by investing nine lakhs, the Appellants received more than 30 lakhs of rupees by way of dividend.

(vi) As BRC had declared dividend and was a profit making company;

there was no need to broad-base company. The burden to prove bonafide was on the Appellants.

REPLY:

Mr. Salve in reply would inter alia contend that the question of aggrandizement had neither been pleaded nor proved. The learned counsel furthermore urge that there was no factual foundation as regard the allegation of fraud or self-aggrandizement. He would contend that a distinction has to be borne in mind as regard fiduciary relationship with the company and with the shareholder.

POINTS FOR CONSIDERATION:

(i) Whether the Appellant No. 1 in his capacity as Director of the Company had a fiduciary duty towards the shareholders.

(ii) Whether there has been a valid decision to broad-base the company by issuing additional shares.

(iii) Whether the allotment of 6475 shares and 3000 shares in favour of the Appellants herein was valid in law.

(iv) Whether the Respondent No. 1 herein could claim title in respect of 8000 shares in the petition filed under Sections 397 and 398 of the Companies Act.

(v) Whether transfer of 9415 shares in favour of Indreni by the Appellants was valid and if not the effect thereof.

(vi) Whether the issue of oppression and/ or mis-management on the part of the Appellant No. 1 herein in running the affairs of the Company towards the Respondent Nos. 1 and 12 have been proved.

FIDUCIARY DUTY:

Chapter IX of the Indian Trusts Act provides for certain obligations in the nature of trusts. The Trust Act recognizes various kinds of trusts including resulting trust. An express trust, however, may be created by reason of an agreement between the parties. [See Barclays Bank Vs. Quistclose Investments [1970] AC 567] By reason of Section 88 of the Indian Trusts Act, a person bound in fiduciary character is required to protect the interests of other persons but the heart and soul thereof is that as between two persons one is bound to protect the interests of the other and if the former availing of that relationship makes a pecuniary gain for himself; Section 88 would be attracted. What is sought to be prevented by a person holding such fiduciary benefit is unjust enrichment or unjust benefit derived from another which is against conscience that he should keep. When a person makes a pecuniary gain by reason of a transaction, the cestui qui trust created thereunder must be restored back.

The purported breach of trust on the part of Appellant No. 1 herein relate to :

(i) Issuance of additional 15000 shares;

(ii) Allotment of 6475 shares to himself and his family members as also an HUF; and

(iii) Allotment of 3000 shares out of 8000 shares which had been allotted to FRG in favour of his minor children.

(iv) Transfer of 9415 shares in favour of Indreni.

Issuance of equity based capital shares under the Companies Act in relation to a private company would be governed by its Memorandum of Association and Articles of Association. It has not been pointed out that in terms of Memorandum of Association the Board of Directors acted ultra vires in adopting a resolution as regard issuance of 25000 capital shares; out of which 15000 shares were to be issued at the first instance. Section 81 of the Companies Act indisputably has no application in relation to a private company, the pre-requisite thereof is, thus, not attracted in the instant case. Appellant No. 1, therefore, apart from Section 88 of the Indian Trusts Act in the event of its applicability did not have any statutory obligation to discharge as a trustee in this behalf.

A Director of a Company indisputably stands in a fiduciary capacity vis-`-vis the Company. He must act for the paramount interest of the company. He does not have any statutory duty to perform so far as individual shareholders are concerned subject of course to any special arrangement which may be entered into or a special circumstance that may arise in a particular case. Each case, thus, is required to be considered having regard to the fact situation obtaining therein and having regard to the existence of any special arrangement or special circumstance.

The question came up for consideration as far back in 1901 in Percival Vs. Wright [1902 (2) Ch. 421]. In that case, the shares of the company were in few hands which were transferable only with the approval of the Board of Directors. The shares did not carry any market price and were not to be quoted at the stock exchange. The plaintiffs therein intended to dispose of certain shares wherefor they offered 12 l.5s. per share purported to be based on a valuation which they had obtained from independent valuers a few months prior thereto. The said offer was accepted. The transaction pertaining to the said agreement was entered into but it was later on discovered by the plaintiffs that prior to and during their own negotiations for sale the Chairman and the Board were approached by one Holden with a view to the purchase the entire undertaking of the company with a view to resell the same at a profit to a new company. The question of fiduciary obligation on the part of the Directors arose therein when the plaintiff brought an action against the Chairman and the two other purchasing Directors asking for setting aside the sale on the ground that the defendants as Directors ought to have disclosed the feature of negotiations with Holden when negotiating purchase of their shares. The question therein posed was: Assuming that directors are, in a sense, trustees for the company, are they trustees for individual shareholders? The Chancery Division despite holding that the Directors must act bonafide and for the best interest of the company did not accept the argument that the relationship between the shareholders inter se are the same as that of partners in an unincorporated company holding :

> " The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of the opinion that directors are not in that position.
>
> There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors, and named the price at which they were desirous of selling."

Percival (supra) was noticed by a 4-Judge Bench of this Court in Nanalal Zaver and Another Vs. Bombay Life Assurance Co. Ltd. and Others [1950 SCR 391] in the following terms:

> " It is clear that until the Singhania group get their names entered in the register of the members they are not shareholders but are complete strangers to the company. It has been held in Percival v. Wright [L.R. (1902) 2 Ch. 421] that ordinarily the directors are not trustees for the individual shareholders. Even if the directors owe some duty to the existing shareholders on the footing of there being some fiduciary relationship between them as stated in some cases [see for example In re Gresham Life Assurance Society] [L.R. 8 Ch. App. 446 at p. 449] I see no cogent reason for extending this principle and imputing any kind of fiduciary relationship between the directors and persons who are complete strangers to the company. In my judgment, therefore, the conduct of the respondents 2 to 9 cannot be judged on the basis of any assumed fiduciary relationship existing between them and the Singhania group. In my opinion, the respondents 2 to 9 owed no duty to the Singhania group and, therefore, the motive to exclude them cannot be said to be mala fide per se."

The Court further held that having regard to Regulation 42 read with Section 105-C of 1936 Companies Act vis-`-vis Regulation 27 of 1882 Act, the directors exercise a larger power to issue additional capital shares.

It is true that while referring to 'Percival', the court used the expression 'ordinarily', but if a special situation arises, it would be for the person complaining to plead and demonstrate the same.

We, however, do not intend to put our seal of approval on Percival (supra) in its entirety. The situation may be different when a special contract, special relationship or special circumstances arise. Percival (supra) may not also be applicable in a case of take over bid (Gelting vs. Kilner, 1972 (1) All ER 1166) or when the general body of shareholders is only two of them (Glavanies vs. Brurning hausen (1996) 19 ACSR 204) In Palmer's Company Law, 23rd edition, page 848, it is stated:

> "64-02. Relationship is with company: The fiduciary relationship of a director exists with the company: the director is not usually a trustee for individual shareholders. Thus, a director may accept a shareholder's offer to sell shares in the company although he may have information which is not available to that other, and the

> contract cannot be upset even if the director knew of some fact which made the offer an attractive proposition. So in Percival v. Wright a person who had approached a director and sold him shares in the company, afterwards, upon discovering that the director had known at the time of the contract that negotiations were on foot for the purchage by an outsider of all the shares in the company at a higher figure, could not impeach the contract. In his judgment Swinfen-Eady J. said "there is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors and named the price at which they were desirous of selling."

In Pennington's Company Law 6th Edn. at page 608-09, it is stated :

> "Directors owe no fiduciary or other duties to individual members of their company in directing and managing the company's affairs, acquiring or disposing of assets on the company's behalf, entering into transactions on its behalf, or in recommending the adoption by members of proposals made to them collectively. If directors mis-manage the company's affairs, they incur liability to pay damages or compensation to the company or to make restitution to it, but individual members cannot recover compensation for the loss they have respectively suffered by the consequential fall in value of their shares, and they cannot achieve this indirectly by suing the directors for conspiracy to breach the duties which they owed the company. However, there may be certain situations where directors do owe a fiduciary duty and a duty to exercise reasonable skill and care in advising members in connection with a transaction or situation which involves the company or its business undertaking and also the individual holdings of its members."

In Dawson International plc vs. Coats Patons plc [1988 SLT 854] Percival (supra) was relied upon holding that the Directors are, in general, under no fiduciary duty to shareholders and in particular current shareholders with respect to the disposal of their shares in the most advantageous way as directors are not their agents and as such are not normally entrusted with the management of their shares. It was, however, observed that if the directors take it upon themselves to give advice to current shareholders they have a duty to act in good faith and not fraudulently nor can mislead the shareholders whether deliberately or carelessly, in which event, they may have a remedy.

A distinction, thus, has been carved out as regards the fiduciary duty of the directors with regard to the property and funds of the company as contra-distinguished from the duty of directors to current shareholders as sellers of their shares. In case of conflict between two interests, the company's interest must be protected. The directors, however, will have a fiduciary relation if they have taken unto themselves the burden of giving advice to current shareholders.

The aforementioned principles of law found favour with the Court in Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others [(1981) 3 SCC 333] wherein it was held:

> "Where directors of a company seek, by entering into an agreement to issue new shares, to prevent a majority shareholder from exercising control of the company, they will not be held to have failed in fiduciary duty to the company if they act in good faith in what they believe, on reasonable grounds, to be the interests of the company. If the directors' primary purpose is to act in the interests of the company, they are acting in good faith even though they also benefit as a result."

In Needle (supra), this Court furthermore noticed Punt vs. Symons [(1903) 2 CH 506] and opined in the following terms :

> "105. In Punt v. Symons ((1903) 2 Ch 506 : 72 LJ Ch 768 : 89 LT 525 : 52 WR 41), which applied the principle of Fraser v. Whalley (71 ER 361 : 11 LT 175), it was held that :
>
> Where shares had been issued by the Directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power, they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.
>
> But Byrne, J. stated :
>
> There may be occasions when Directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised.
>
> 106. Peterson, J. applied the principle enunciated in Fraser (71 ER 361 : 11 LT 175) and in Punt (((1903) 2 Ch 506 : 72 LJ Ch 768 : 89 LT 525 : 52 WR 41) in the case of Piercy v. S. Mills & Company Ltd. ((1920) 1 Chancery 77 : (1918-19) All ER Rep 313 (Ch D) : 122 LT 20 : 35 TLR
>
> 703). The learned Judge observed at page 84 :
>
> "The basis of both cases is, as I understand, that Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders What is considered objectionable is the use of such powers merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the Company. .."

In Needle Industries (supra), Nanalal Zaver (supra) was affirmed stating the sole test is whether the issue of shares is simply or solely for the benefit of the Directors holding:

> "If the shares are issued in the larger interest of the company, the decision to issue shares cannot be struck down on the ground that it has incidentally benefited the Directors in their capacity as shareholders."

Fiduciary duty of the Directors to the company should not be equated with the duty to the shareholders.

In Peskin and Another Vs. Anderson and Others [2001] 1 BCLC 372, Percival (supra) as also other decisions taking similar or contrary view were noticed by the Court of Appeal including the judgment of the Court of Appeal in New Zealand in Coleman vs. Myers as also Court of Appeal of New South Wales in Brunninghausen vs. Glavnics (1999) 46 NSWLR and held that the directors had no fiduciary duty to the shareholders in the facts and circumstances obtaining therein. However, observations were made therein that such duties may arise in special circumstances demonostrating the salient features and well-established categories of fiduciary relationship such as agency which involves duties of trust, confidence and loyalty.

Absence of special circumstances or special reasons as pointed out hereinbefore normally would not bring in the concept of fiduciary relationship in a director vis-`-vis the current shareholders. However, in Coleman (supra) and Brunninghausen (supra) it was held that the fiduciary duties of directors to the shareholders exist in the specially strong context of the familial relationships having regard to their personal position of influence in the company concerned.

We may at this stage consider the case laws replied upon by Mr. Desai.

M/s. Dale & Carrington Invt. P. Ltd. & Anr. Vs. P.K. Prathapan & Ors. [2004 (7) SCALE 586] requires a closer scrutiny.

In that case one P.K. Prathapan (Prathapan), an NRI through his mother induced Ramanujam to promote a company by making initial investment of Rs. 5 lakhs in shares. Prathapan, the principal shareholder of the Company came to know that the Board of Directors in its meeting held on 24th October, 1994 and chaired by Ramanujam, adopted a resolution on the premise that a sum of Rs. 6,86,500/- stood to the credit of said Ramanujam and in lieu thereof equity shares of Rs. 100/- each would be allotted in his favour. Prathapan was not intimated about the said meeting. By reason of the said act, Prathapan who was a majority shareholder in the Company was reduced to a minority. The case of Prathapan was that Ramanujam did not contribute any money from his own resources for the purpose of starting the company and he all along drew a handsome salary for working as Managing Director thereof. The charge of oppression and mismanagement against Ramanujam by Prathapan before the Company Law Board succeeded. However, the only relief which Prathapan obtained was a direction upon him to sell his shares to Ramanujam which was questioned by him. This Court held that the directors act on behalf of a company in a fiduciary capacity and their acts and duties are to be exercised for the benefit of the company. It, however, while analyzing the acts of a director as an agent of the company observed that in a limited sense they are also trustees for the shareholders of the company. However, without discussing the limitations of such fiduciary relationship, it was observed:

> "15 The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows from their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives."

Evidently, therefore, the ratio which emerges from the decision is that the duty to disclose as regard issue of additional shares is relatable to proper purpose thereof. If the purpose is proper and the action of the director is bonafide, the ratio should not be extended so as to hold that such a duty of the director towards the shareholder is absolute despite the fact that there is no legal requirement therefor. Duty of disclosure to shareholders in that case had a strong nexus with the affairs of the company. Dale & Carrington (supra) is not an authority for the proposition that the purported fiduciary duty of a director towards the shareholder is absolute although the transaction in question may not have a direct co-relationship with the affairs of the company.

Moreover, the Bench did not have the advantage of considering the 4- Judge Bench decision of this Court in Nanalal Zaver (supra). It furthermore did not have the advantage of noticing the decisions of other jurisdictions which had been noticed hereinbefore.

The Court, it is interesting to note, noticed Needle Industries (supra) as regards the power of the company to issue new shares but the legal effect thereof was not considered in details. The directors have a power to issue additional capital shares and in the process may obtain some pecuniary gain but only when such pecuniary gain is obtained through ulterior motive, they would be answerable to the shareholders.

It is also interesting to note that while applying the 'extraneous purpose test' or 'ulterior motive test', the Court noticed Piercy Vs. S. Mills & Co. Ltd. (1920) 1 Ch. 77 wherein it was held:

> "The basis of both cases is, as I understand, that Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders."

The expression 'merely' assumes significance.

Significantly, in Needle Industries (supra) it was categorically held that the Directors have power to issue shares at par even if their market price is higher being primarily a matter of policy. (See para 120) 'Proper purpose' doctrine and the doctrine of 'fairness' vis-`-vis the doctrine of 'bona fide' was considered in view of its findings that the allotment of all additional shares was gained by Ramanujam through manipulations and commission of acts of frauds upon becoming the Managing Director of the Company with a view to gain sole control of the management thereof and to the exclusion of Prathapan.

The ratio in Dale and Carrington (supra), thus, must be understood to have been rendered in the fact situation obtaining in that case. It does not lay down a law that fiduciary duty of a director to the company extends to a shareholder so as to entitle him to be informed of all the important decisions taken by the Board of Directors. Such a broad proposition of law, if understood to have been laid down in Dale and Carrington, would be inconsistent with the duty of a director vis-`-vis the Company and the settled law that the statutory duty of a direction is primarily to look after the interest of the company.

In Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc. [(1970) 2 SCC 550], the Court was concerned with the discretionary exercise of power by the Directors in terms of Section 111(3) of the Companies Act. In the light of refusal by director to register a transfer, the Court held that it is necessary for the directors to act bonafide and not arbitrarily in the following terms:

> "12. Article 52 of the appellant company provided that the Directors might at their absolute and uncontrolled discretion decline to register any transfer of shares. Discretion does not mean a bare affirmation or negation of a proposal. Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the Directors will Act for the paramount interest of the company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive."

(emphasis supplied) This Court therein also applied the bona fide test of the Director and for the benefit of the company as a whole. In that case, the directors assigned reasons which were tested from three angles view, viz., (i) whether the directors acted in the interest of the company; (ii), whether they acted on a wrong principle; and, (iii) whether they acted with an oblique motive or for a collateral purpose. It was observed in M/s. Harinagar Sugar Mills Ltd. Vs. Shyam Sunder Jhunjhunwala & Others [(1962) 2 SCR 339] that the action of the directors must be set aside if the same was done oppressively, capriciously, corruptly or in some other way malafide. In this case, this Court is not faced with such a situation.

In Coleman and Others Vs. Myers and Others [(1977) 2 NZLR 225] the gist of the complaint made by the appellants against the first respondent was that he planned to acquire total control of the company at virtually no cost to himself by means of selling the Strand-Coburg and other properties of the company and making use of its liquid capital reserves; that his inside knowledge of the

company's affairs and the advice he obtained showed him that there were good prospects of accomplishing this, leaving him sole owner of an unencumbered asset worth some millions; and that he not only refrained from disclosing to the shareholders generally his plan and the magnitude of his potential gain, but also made misrepresentations tending to conceal the plan.

In the aforementioned factual backdrop while holding that mere status of a company director would not create any responsibility towards a shareholder but it was observed that the standard of conduct required from a Director in relation to dealings with them will depend upon all the surrounding circumstances and the nature of responsibility which in a real and practical sense he has assumed.

In Pennington's Company Law, at page 609, on Coleman (supra), it is commented:

> "It is uncertain whether this reasoning can be extended to other situations where directors owe duties to the company but the relevant decision has to be made by its members individually or collectively, and the directors advise them as to the decision they should make. Such situations would include a proposed sale or disposal of the company's assets and undertaking, a proposed merger or division of the company, a proposed reorganization of the company's share capital affecting existing members and a proposal for the voluntary liquidation of the company."

No law in absolute terms, thus, had been laid down therein. In the instant case, there had been no transaction of sale and purchase of shares between the director and the shareholder.

The said decisions, therefore, have no application in the instant case. In a way it instead of supporting the contention of Mr. Desai, counters his views.

It is interesting to note that in Needle Industries (supra), this Court said even in certain cases the Directors attempt to maintain their control over the company or in newly acquiring may not amount to abuse of their fiduciary power stating:

> "Applying this principle, it seems to us difficult to hold that by the issue of rights shares the Directors of NIIL interfered in any manner with the legal rights of the majority. The majority had to disinvest or else to submit to the issue of rights shares in order to comply with the statutory requirements of FERA and the Reserve Bank's directives. Having chosen not to disinvest, an option which was open to them, they did not any longer possess the legal rights to insist that the Directors shall not issue the rights shares. What the Directors did was clearly in the larger interests of the Company and in obedience to their duty to comply with the law of the land. The fact that while discharging that duty they incidentally trenched upon the interests of the majority cannot invalidate their action. The conversion of the existing majority into a minority was a consequence of what the Directors were obliged lawfully to do. Such conversion was not the motive force of their action."

No argument in this case was advanced as regard the purported breach of fiduciary duty on the part of the Appellant No. 1 in the matter of increase of shares during the life time of FRG before the learned Single Judge; on the other hand it was admitted that FRG during his life time was controlling the company, and, thus, the Appellants herein in no way can be held to have any fiduciary liability towards other shareholders in respect of issuance of 6475 shares in their favour.

Directors may have a fiduciary duty where a take over bid is made for a company and its directors advise its shareholders whether to accept or reject the bid as they owe a duty to advice honestly. The standard of conduct expected of a director in relation to transaction with the shareholders will differ and would necessarily depend upon the circumstances and the nature of the responsibility.

It is, thus, not possible to lay down a law which will have universal application. No authority has been brought to our notice which states that there exists a duty in a director to advise the shareholder as to whether they should purchase the share of the company or avail the benefit of an offer. In an appropriate case, a fiduciary relationship may come into being having regard to the responsibility undertaken by the directors towards the shareholders by way of a special contract.

The law which emerges from the discussions made hereinbefore is that the directors do not have any fiduciary duty to advice shareholders as to when and in what manner they should enter with the transactions with the company including acceptance of offer of additional shares. Such a fiduciary duty would arise inter alia in exceptional situations when the directors take upon themselves the task of advising the shareholders who may be his family members or when a transaction of purchase or sale is entered into by and between the director and the shareholders wherein the former taking undue benefit or having ill or improper or ulterior motive or malafide act solely to make pecuniary benefit and gain for himself and to the detriment of such shareholders. If a general fiduciary duty of a director vis- `-vis shareholders is laid down the same would lead the directors to the risk of multiple legal actions by dissenting minority shareholders.

BURDEN OF PROOF:

> According to Mr. Desai, however, the burden to prove his bona fide was upon the Respondent No.1. The learned counsel in support of the said contention has referred to Section 111 of the Evidence Act and also relied upon a decision of this Court in Krishna Mohan Kul Alias Nani Charan Kul and Another Vs. Pratima Maity and Others [(2004) 9 SCC 468]. In Krishna Mohan (supra), this Court was considering a transaction resulting in execution of a deed of settlement by one Dasu Charan Kul. The said deed was executed in presence of the witnesses although they were not in existence. The executant in that case was more than 100 years of age. He was paralytic and his mental and physical conditions were found to be not in order. Though his left-thumb impression was stated to have been affixed on the document, there was no witness who could substantiate that he had in fact put his thumb impression.

> In the aforementioned fact situation, provisions of Section 111 of the Indian Evidence Act was invoked holding that the burden of establishing perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed and the rule applies to all persons standing in confidential relations such as agents, trustees, executors, administrators, auctioneers, etc. It was, however, clarified that in term of Section 111 of the Evidence Act, the person concerned should have been in a position of active confidence where fraud is alleged.
>
> In this case no transaction took place between the parties and, thus, the ratio of Krishna Mohan (supra) is not applicable to the fact of the present case. In view of our findings that having regard to the nature of transactions as the Appellant No. 1 did not have any fiduciary duty towards the contesting Respondents, the question of invoking the provisions of Section 111 of the Evidence Act does not arise in the instant case.

In Regal (Hastings) Ltd. Vs. Gulliver and Others [(1967) 2 AC 134], an action was brought by the Appellants therein against the Respondents who were defendants to recover the amount specified therein towards profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by the Appellant. The said action was also brought against the company's solicitor for recovery of the amount specified therein being profits made by him in similar dealings in the shares. The action was based on claim for damages and misfeasance and for negligence on their part. It is in that situation, the doctrine of trust was applied. In the fact of the present matter neither a case of trust nor negligence nor misfeasance has been made out.

The ratio which can be carved out from this case is that the Directors must not derive personal profit from information acquired by them as Directors. Such is not the case here.

In Needle Industries (supra), this Court observed that Section 397 "warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view". For the said purpose, the test required to be adopted is the true character of the company. The initial burden was upon the Respondent No. 1 but nothing had been shown so as to hold that the burden shifted to the Appellants herein.

ISSUE OF ADDITIONAL 15000 SHARES AND 6475 SHARES TO THE APPELLANTS :

> An Extraordinary General Meeting of the GIC was to be convened pursuant to the Board meeting dated 10.11.1987 wherein a resolution was adopted in the following terms:
>
> "Resolved that an Extra-Ordinary General Meeting of Gaekwad Investment Corporation Private Limited be convened to consider increase/ issue the capital of the company on Thursday the 17th December 1987 at 11.00 A.M. in the registered office of the company."

Pursuant to or in furtherance of the said resolution an Extraordinary General Meeting of the GIC was held wherein a resolution was passed to increase the equity shares by 25000 shares at the rate of Rs.100/- to the members of the company in the following terms :

> "Resolved that Clause V of the Memorandum of Association of Gaekwad Investment Corporation Private Limited be changed as under:-
>
> That the authorised capital of the company shall consist of Rs. 1,00,00,000/- (Ruepes One Crore) divided into 25,000 equity shares of Rs. 100/- each and 75,000 four percent Non-cumulative Irredeemable Preference Shares of Rs. 100/-
>
> Resolved that capital clause of the Articles of Association of Gaekwad Investment Corporation Private Limited be changed as under:-
>
> That the Authorised Capital of the Company shall consist of Rs. 1,00,00,000/- (Rupees one crore) divided into 25,000 equity shares of Rs. 100/- each and 75,000 four per cent Non-cumulative Irredeemable Preference Shares of Rs. 100/- each.
>
> Further Resolved that the Board of Directors of the Company be and is hereby authorized to issue 25,000 equity shares to any members they deem fit.
>
> Further Resolved that in the event of the company being wound up on reduction of capital or otherwise the holders of the said Irredeemable Preference Shares shall be entitled to the surplus assets of the company applied in the first place in repaying to them the amount paid up on the irredeemable preference shares held by them respectively but shall not be entitled to any further participation in such surplus assets. In case of reduction of capital of the equity share capital, the holders of equity capital shall not be entitled for repayment unless consent of the irredeemable preference share holders is obtained.
>
> Further Resolved that the holders of the said preference shares shall not have any right to vote on any resolution placed before the company unless if directly affects the rights attached to their preference shares even if the dividend is not paid for any number of years, however, will have a right to vote only on those resolutions which will affect their interests."

However, on 8.1.1988, the Board decided to issue 15000 shares out of 25000 shares to its members at that time. On or about 12.2.1988, a notice was issued asking the members for acceptance and remit cheque covering the full amount as regard shares allotted to them in three weeks, i.e., by 10th March, 1988.

Issuance of the aforementioned notice is not disputed. The Appellant No. 1 herein in the company petition filed by Respondent No. 1 alleged that prior to the Managing Committee meeting a Board meeting was also held. Similar assertion was made in his affidavit dated 11.4.1992 in C.P. No. 7 of

1992. Reference to the Managing Committee meeting, however, was not made by the Appellant No. 1 in his affidavit dated 10.12.1992 in C.P. No. 13 of 1992, but it is of not much consequence as would appear from the discussions made hereinafter. However, it appears that with a view to give effect to aforementioned letter dated 12.2.1988, a meeting of the Board of Directors was held on 13.2.1988 wherein FRG was present. In the said meeting, the following resolution was adopted:

> "(2) The Board confirmed the minutes of the Directors Meeting held on 8th January, 1988.
>
> (3) It was reported to the Board that necessary action has been taken on the Agenda of the Board Meeting held on 8th January, 1988.
>
> (4) The Financial Position of the Company was discussed at length. The Board was informed that letters have been addressed on 12th February 1988 to the shareholders informing them that the company has issued 15000 equity shares of Rs.

100/- each to the members and to convey their acceptance on or before 10th March 1988. The company would know the amount, the company would receive from them."

The said meeting bears the signature of the Secretary to the Chairman. However, although in her original pleadings the factum of issuance of such circular letter dated 12.2.1988 had not been denied or disputed but in her rejoinder to the reply, she said so. The said stand apparently was taken by way of afterthought and, thus, cannot be accepted.

We, moreover, do not see any reason to come to the conclusion as has been done by the Division Bench of the High Court that the said meeting was not held at all. The Company being a family company, the minutes of the said meeting, which bear the signature of the Appellant No. 1 herein, should not be discarded.

In the pleadings, it was accepted, as would appear from the discussions made hereinafter, that a decision had been taken to broad-base the company by the Board of Directors during the life time of FRG himself who participated in the meetings. His Secretary had furthermore endorsed the draft minutes of one of the meetings which was in the handwriting of N.K.K. Mohammed and the Chairman (FRG) had okayed the same. The said draft minutes are annexed to the company petition of the Respondent No.1 herself. Further Mr. M.N. Khade, Company Secretary had confirmed the facts relating to the issue of allotment of 15000 shares.

The 31st Annual General Meeting of GIC held on 30th September, 1989 in this situation assumes importance. In the said meeting the annual accounts together with Directors Report and Auditors Report for the year ended 31st March, 1989 were discussed at length and the following resolution was passed:

> "Resolved that the Directors Report and the Audited accounts of the Company for the year ended 31st March 1989 placed before the meeting be and the same are hereby

received and adopted."

The minutes of this meeting were signed by Mr. P.U. Rana, Director of the Company.

It appears that Balance Sheet as on 31.3.1989 clearly indicated the issue of additional equity share capital being 10,5000 equity shares of Rs. 100 each. The amount of loan of Rs. 15 lakhs from Shantadevi is clearly shown under unsecured loans, remaining amounts have also been advanced to the company by way of loan. No dispute was raised in the said meeting as regard the aforementioned transactions.

Furthermore, Annual Return of this meeting held on 30th September, 1989 was filed before the Registrar of Companies, Gujarat at Ahmedabad on 30.11.1989. Mr. H.A. Shinde wrote a letter to Registrar of Companies. The Annual Return was signed by Mr. P.U. Rana and Mr. H.A. Shinde. The details of equity shareholding reflected in the Annual Return was as follows:

Sr. No. Name Equity Shares

1.

Smt. Shantadevi Gaekwad

2. Shri F.P. Gaekwad

3. Late Smt. Padmavatidevi Gaekwad

4. Shri R.P. Gaekwad & Shri S.R.G.

5. Capt. V.S. Hazare

6. Shri Shivrajkuar Khacchar

7. Smt. Pramilabai Hazare

8. Shri Vimalaraje Gaekwad

9. Smt. Shubhangini R. Gaekwad

10. Smt. Lalitadevi Kirdatt

11. Smt. Mrunalinidevi Puar

12. Smt. Pramilaraje of Jasdan

13. Smt. Asharaje Gaekwad

14. Smt. Devyanidevi Gaekwad

15. Shri Ajitsinh Gaekwad

16. Smt. Mrunalinidevi Puar & Shri R.P. Gaekwad

17. Smt. M. Puar & Smt. Shantadevi G.

18. Shri Ajaysinh Ghorpade

19. Smt. Vasundraraje Gorpade

20. Shri Sangramsingh Gaekwad

21. Shri S.P. Gaekwad H.U.F

22. Shri S.P. Gaekwad F&NG of Shri Pratapsinh Gaekwad

23. Shri S.P. Gaekwad F&NG of Priyadarshini Gaekwad Total Shares 10,925 Thus, the above allotment of 10500 equity shares was confirmed and accepted in the 31st Annual General Meeting of GIC. All disputes which are now being raised about the issue of additional capital of 10,500 equity shares cannot be raised since the allotment is confirmed/ ratified in the said Annual General Meeting. We would, however, deal with the question as regard validity of allotment of 3000 shares in favour of the appellants and 500 shares allotted in favour of the Respondent No.12 separately.

Furthermore, taking a view of the admitted unequivocal stand taken by Respondent No.1 as also by Respondent No. 12 in Company Petition No. 7 of 1992, the High Court was not correct in holding that the party should be relegated back to the same position as if no additional shares other than 425 shares were issued and in that view of the matter the reliefs granted by the Division Bench appear to be self-contradictory and inconsistent with each other. If the only relief to which the Respondent Nos. 1,12 and 13 became entitled to that all additional shares over and above 425 original shares should be directed to be cancelled, the question of Respondent No. 1's entitlement to further 8000 shares from the additional 15000 shares would not arise. Her claim in this behalf is not only wholly inconsistent but also self-destructive.

It is difficult to believe that the contesting respondents herein were not aware of the decision of the Board of Directors to broad-base the company and allotment of 8000 shares in favour of FRG out of the same.

Mr. Desai assails the findings of learned Single Judge contending that if FRG was not inclined to subscribe to 8000 shares kept apart for him, there was absolutely no reason as to why he should acquire 22 shares belonging to the following:

"Shri Ashokraje Gaekwad 1 Shri R.V. Dhaibar 10 Smt. Kusum Desai & Shri Dilip Desai 5 Shri Dilip Desai & Smt. Kusum Desai 5 Shri M.N. Khade 1"

All the aforementioned shares are held by the outsiders.

The very fact that the Board had approved the transfer of aforementioned 22 shares is also indicative of the fact that had FRG been interested in subscribing 8000 shares, he would have applied and paid the requisite amount therefor and as he did not take any such step, it is difficult to hold that the offer became a firm one.

Furthermore, the very fact that some outsiders have transferred shares in favour of FRG also belies the argument of Mr. Desai to the effect that the intrinsic value thereof was Rs. 1 lakh or 2 lakh per share. Had this been so, there was no reason for the outsiders to transfer their shares in the name of FRG.

It was, therefore, not a case where FRG would try to consolidate his position by purchasing 22 shares. Some other considerations therefor must have weighed with him. One of them may be that he intended to oust the outsiders. FRG admittedly was Chairman of the company till his death. No dispute was raised by any member as regard allotment of shares during his life time. The findings of the Division Bench that he had full interest in the company shares may not be correct inasmuch as had that been the position, he would have definitely opted for allotment of 8000 shares in his name. In any event, he would have opposed allotment of 7500 shares in the name of Appellant and Respondent Nos. 12 and 13 if he intended to consolidate his position as had been opined by Division Bench of the High Court.

It is not necessary for us to dwell at length the question as to whether there had been an express renunciation by FRG in relation to 8000 shares allotted to him as the letter dated 11.6.1988 purported to have been written by Shri Khade to the Appellant No. 1 is disputed. Even if we proceed on the basis that there had been no express renunciation by FRG as regards 8000 shares allotted in his favour, there may not be any doubt whatsoever that in law, having regard to the fact that he acquired only a personal interest therein, the same came to an end with his death.

In absence of any documentary evidence, it is also difficult for us to accede to the contention raised on behalf of the Respondents herein that the Respondent Nos. 1 and 12 advanced a sum of Rs. 15 lakhs each without any interest and, thus, they were in a position to purchase 8000 shares. The fact remains that the same had not been done. The fact remains that advancement of loan by both Respondent Nos. 1 and 12 whether with or without interest stands accepted, which was done in November, 1988. However, the question as to whether an interest of 14% per annum was payable thereon or not is in dispute. According to the Appellants, however, TDS had been deducted on the interest amount and the certificates had been issued by GIC. There is also no gainsaying that at least Mrs. Puar was having full knowledge as regards floating of additional shares. She even in her affidavit did not explain as to under what circumstances she had applied for allotment of only 1000 shares and not more. It is inconceivable having regard the tenor of her letter of May 1988 that she was asked the Appellant No. 1 to send a sum of Rs. 1,00,000/- towards purchase of share by

Appellant No. 1 and she complied with the said request without knowing the implication thereof.

There is no allegation (much less proof) that she even made inquiries as regard the status of allotments. She being the managing director of a subsidiary of GIC, it is difficult to believe that she was entirely oblivious to the share issue of GIC having a very small capital base of 425 shares.

She had moreover sent two cheques of Rs. 80,000 and Rs. 20,000 respectively being dated 23rd March, 1988 and 10th May, 1988 and thereby categorically opted to purchase 1000 shares. There is no mention in the said letter that such offer was made at the instance of the Appellant No. 1 herein. It is not uncommon to advance loan on interest in preference to purchase of shares as a person may be certain about the return of money vis-`-vis the uncertainty as regard purchase of shares as in the case of latter, the person investing in the shares may lose if not entirely, to some extent. Similarly, the question as to why the Appellants herein did not advance any loan to the Company is again a matter of not much consequence, particularly, when the parties have not been examined on oath. It is furthermore not necessary for us to dwell at length the submissions of Mr. Desai as regard effect of absence of any notice of closure.

It is futile to go into the question as to whether 14% interest was to be paid on the amount of loan as admittedly Respondent Nos. 1 and 12 advanced the said amount by way of loan only. Only at a later stage, a claim was laid to utilize the amount towards the purchase of 8000 shares.

Significantly, although the Respondent No. 1 participated in the family meeting dated 23.3.1988 and had received the letter of offer dated 12.2.1988, did not opt for any share. As indicated hereinbefore, she had not claimed for allotment of any share even after the death of FRG which took place on 1st September, 1988. Even in November, 1988, she even did not subscribe for rights issue of BRC and in fact renounced such offer as had been admitted in her rejoinder affidavit filed in Company Petition No. 51 of 1991 to the reply filed by the Appellant No. 1 herein. In the said rejoinder, a story was made out for the first time that such renounciation was made so that BRC equity shares can be purchased by the family in the name of such persons as was decided.

In view of our findings that the Respondent No. 1 is estopped and precluded from questioning the allotment of 6475 shares to the Appellant herein. It may not be necessary for us to go into the details of alleged inconsistencies and contradictions in the three minutes of the meetings as also alleged three different versions of the Appellant No. 1 herein. Suffice it to point out that the Appellant No. 1 alone is not guilty, if at all, of taking inconsistent plea. The contesting Respondents are also guilty to that effect in equal measures. The Respondents herein, as discussed hereinbefore, have taken not only contradictory stand and inconsistent pleas but also prevaricated the same from stage to stage. Even before us different contentions have been raised which were not raised before the learned Single Judge nor were pleaded in the company petition.

It must also be placed on records that in the written submissions, several contentions have been raised which were not raised in oral submissions.

Moreover, the Respondent No. 12 was given power of attorney by the Respondent No. 1.

A transaction by a lady who is illiterate or a purdah-nashin and a transaction by a lady who looks after the family business/family property would be differently viewed. She, being the Managing Director of Alaukik, a subsidiary company of GIC would be presumed to know the affairs of the Company as Alaukik on her own showing would be vitally affected by the rights issue.

She also chaired a meeting of the Company on 12-10-89 It is, therefore, clear that the dispute was raised despite full knowledge about allotment of shares by different persons only after the Respondent No. 12 got 1500 shares of Alaukik allotted in her name as a result whereof the suit No. 675 of 1990 was instituted.

Even in the prayer portion, no relief has been prayed for to set aside the transfer, recession as regard allotment of 6475 shares.

In Paragraph (2) while dealing with the contentions of the Respondents purporting to be as regard alleged false statement relating to the issue of 15000 shares and related aspects, the Appellants herein had given in great details the manner in which:

> (i) the company was being managed;
>
> (ii) holding of Board meeting on 10th November, 1997 which was attended by FRG, Appellant No. 1 and Mr. P.H. Chinoy wherein it was resolved that an Extra-Ordinary General Meeting be convened on 17th December, 1987 to consider the increase/ issue of capital of the company .
>
> (iii) holding of Extra-Ordinary Genreal Meetng of the Company on 17th December, 1987 chaired by Mr. P.U. Rana and attended by Mr. Shinde and Mr. M.N. Khade wherein the financial position of the company in the absence of dividend income was discussed and resolution was adopted that company would issue 25000 equity shares to any members as the Board of Directors deem fit and subsequent thereto and as consequence of the authority given by the shareholders to raise capital, a Board Meeting of the Company was held on 8th January, 1988 wherein Appellant No. 1, Mr. P.H. Chinoy, Mr. P.U. Rana were present and after discussion, it was resolved that 15000 equity shares of Rs. 100 each be issued at par to the members of the company.
>
> (iv) The issuance of a circular letter dated 12.2.1988 pursuant to or in furtherance of the said resolution to all members of the company.

But in para 10 of her reply to the said affidavit, Respondent No. 12 stated:

> "What is stated in Paras II 2(ii)(iii)(iv) & (v) of the affidavit in reply is broadly true except that Shri Khade was not only then the Company Secretary of Respondent No. 6 Company but still continues to be the Company Secretary."

The Respondent No. 1, therefore, accepted and admitted the allegations made by the Appellant No. 1 herein by reason of non-traversal of the said pleadings.

It is interesting to note that the Respondent No. 1 in her rejoinder categorically stated that everybody received the circular letter and even Appellant No. 1 did not apply for the shares pursuant thereto but the same had not been replied to.

In the aforementioned situation, in our considered opinion, she cannot now be permitted to turn around and contend that there was no requirement to raise any fund or there was no valid reason to increase the capital of GIC by issues of shares.

Once it is held that the decision to issue 15000 additional shares was validly taken, out of which 6475 shares were allotted to the Appellants, the Appellants were in majority. Furthermore, there does not appear to be any reason as to why the Respondents herein despite knowledge did not object thereto.

No sufficient material has been brought on records to satisfy us that the minutes of the said Board meeting dated 13.2.1988 was a forged and fabricated one. However, it is not disputed that no offer was received upto 10th March, 1988. The stand of the Appellants herein is that the said date was later on extended. However, on 21.3.1988 6475 shares were allotted in terms of the said Resolution to Appellant No. 1 herein, 8000 shares were allotted to FRG, 500 shares to Mrs. Mrunalini Devi Puar and 25 shares to Mrs. Shubhangini Raje. Furthermore, it was an adhoc allotment and not a confirmed one.

Let us now consider the effect of three draft minutes of meetings which are placed on records by the parties.

Admittedly, on 21.3.1988, a meeting was held. Draft minute No. 1, although was unsigned and sent with a covering letter of Mr. Khade on or about 29.3.1988 in the following manner:

> "The Committee considered the allotment of 15000 Equity Shares of Rs. 100/- each of the Company recently offered to the members. After discussion the allotment was decided as under:
>
> S.No. Name No. of Shares Value of Shares
>
> 1.

Shrimant Fatesinh Gaekwad 8,00,000/-

2. Shrimant Sangramsingh Gaekwad 647500

3. Shrimant Mrunalinidevi Puar 50,000

4. Shrimant Shubhaginiraje Gaekwad Total 15000 15,00,000/-

The Shares would be allotted as and when the amounts are received. As there was no other business the meeting terminated."

The second draft minutes of the meeting are as under:

> "Total number of shares to be allotted worth Rs. 15 lakhs, i.e., 15000 at Rs. 100/-
>
> Requisitions so far
>
> 1. Chairman 8000 shares Rs. 8,00,000/-
>
> 2. Maharani of Dhar 500 shares Rs. 50,000/-
>
> 3. Princess Subhangini Raje Gaekwad 25 shares Rs. 2,500/-
>
> 4. Sangramsinh P. Gaekwad and others 6475 shares Rs. 6,47,500 Total 15000 shares 15,00,000/-
>
> The Shares will be allotted in the names asked for by the above parties."

This is the purported first version.

The third draft is said to be in the following terms:

> "A Committee Meeting of Gaekwad Investment Corporation Pvt. Ltd. was held on 21st March, 1988 at 3.00 PM at Hoechst House, Nariman Point, Bombay 400021 Present: 1. Shrimant Sangramsingh Gaekwad
>
> 2. Shri P.H. Chinoy Shri Sangramsingh Gaekwad was in the Chair. In terms of the Resolution passed at the Board of Directors meeting held on 8.1.1988 for issue of 15000 Equity Shares of Rs. 100/- each of the Company offer letter dated 12th February, 1988 have been sent to the Shareholders of the Company requesting them to convey their acceptance for the number of shares they would like to subscribe alongwith their cheques for the full amount of Share. Subscription accepted by them. Out of these additional Equity Shares it is decided to issue 51% additional Equity Share Capital to Lt. Col. Dr. Fatehsinghrao Gaekwad and the balance 49% to be issued to the existing members depending on the offer accepted by them. In case the existing members do not subscribe to the additional Share Capital offered to them in terms of the letter of offer dated 12th February, 1988 sent to all the members of the Company, it was decided to offer these Equity Share Capital remaining unsubscribed to the persons as the Committee deems fit. As there was no other business, the meeting terminated.

Sd/- Chairman"

The apparent difference between the first and second versions of the meeting is that whereas the words "and others" appear after the words "Chairman, Sangramsingh Gaekwad", in the second one the same is missing. However, having regard to the endorsement made therein; the genuineness whereof has not been doubted or disputed; and, moreover, as in sum and substance the contents of both the meetings are same, the fact that 6475 shares were allotted to Sangramsingh Gaekwad, the Appellant No. 1 herein is beyond any doubt particularly when such a fact stands admitted by the Respondent No1. in the company petition itself.

The purported third minute, however, had been filed by Mrs. Puar in her company petition, the correctness whereof is in question. Even in the second draft of the minutes of meeting, however, it was mentioned that the shares will be allotted in the name asked for by the above parties and, thus, there may not be in variance of substance in the two drafts.

According to Mrs. Shandadevi Gaekwad, Respondent No. 1 herein and others, it was a family meeting (para 6.5 of the company petition). She has also annexed the draft minutes of the meeting with the said petition and further annexed allotment ratio discussed at the meeting. The draft minutes forwarded by Mr. M.N. Khade had also been annexed in the company petition. It may, therefore, be safe to opine that the purported family meeting was in fact a Board meeting of which the parties were fully aware of. The minutes of the said meeting clearly suggest that the shares were to be allotted if an offer to that effect was made together with the tender of value thereof whereupon the shares would be allotted in the names of the persons as asked by the above parties. Liberty, thus, was given to all the parties named in the said minutes of the meeting to either apply for shares in their own names or in the names of any other person of their choice. In that view of the matter, the words written by hand "and others" as contained in the first draft of the meeting may not be of much significance.

Furthermore, as noticed hereinbefore, the said draft minute was sent by Mr. M.N. Khade with a covering letter. In the company petition, the issuance of the said letter and the ratio of allotment having not been denied or disputed, we have to proceed on the basis that the contents of the said minutes of meetings are correct. Even in law, shares can be allotted as and when the amounts were received. Admittedly, all the family members had participated in the issue even if the last date of offer dated 10.3.1988 had expired. The restriction as regard time of allotment, thus, may not be of much significance.

Another aspect of the matter also cannot also be lost sight of. 6475 shares were allotted in the name of the Appellants as also in the names of SPG, HUF were allotted between April and June, 1988. Mrs. Shubhanginidevi Gaekwad was allotted 25 shares and Mrs. Puar was allotted 1000 shares on or about 30.5.1988. All the share certificates had been issued which bear the signatures of Appellant No. 1 and Mr. H.A. Shinde, Directors of Company and countersigned by Mr. M.N. Khade. It is apparent from the records that Shri Shinde and Shri Khade are now siding with the Respondents and have filed affidavits in support of their case. It is also of some significance to note that out of two cheques of Rs. 80,000 and Rs. 20,000 issued by Respondent No. 12 for purchase of 1000 shares,

one is dated 23rd March, 1988 and the other is dated 10th May, 1988. It is, therefore, difficult to accept having regard to the aforementioned fact situation that the Respondent No. 12 was not aware of the affairs of the company. If she had no knowledge about the issue of the shares, we wonder how she could draw a cheque in March, 1988. We, therefore, are of the opinion that in relation to allotment of 7500 shares, Mrs. Puar and Mrs. Shubhanginidevi Gaekwad are estopped and precluded from questioning the allotment having received the benefit thereof and having full knowledge thereabout all along.

An attempt has been made by Mr. Desai to show that some contradictory and inconsistent statements have been made by the Appellant No. 1 herein in his affidavits dated 21st March, 1991, 10th April, 1992 and 10th December, 1992.

For the views we have taken, it is not necessary to go into the said question as also the question as to whether in fact time for actual payment towards allotment of shares had been extended or not.

Shantadevi in her company petition categorically stated that prior to filing of petition under Sections 397 and 398 of the Companies Act, she made inspection of the records of the company and obtained notorised copy thereof on 10th December, 1990. At the time of filing the said company petition concededly she had complete knowledge of the affairs of the company as reflected from the documents maintained at the Registered Office of the Company. On her own showing, Mr. P.U. Rana who was a director of the company had at her request gave her inspection of the registers including company registers, minute book, share registers, etc. Relying on or on the basis of the said documents, Respondent No. 1 herein categorically stated:

> "(6.5) It was decided and agreed in the said family meeting and also subsequently in a meeting of the Company's Board of Directors, that out of the 15,000 equity shares, 8000 equity shares would be allotted to Shri Fatehsinhrao Gaekwad, 500 equity shares to Shrimati Mrunalini Devi Puar, the sister of Shri Fatehsinhrao Gaekwad, 25 shares to Princess Shubhangini Raje and 6475 shares for Shri Sangramsinh Gaekwad, the First Respondent herein."

Despite such categorical admissions in the pleadings, a statement was made across the bar that at the time of filing of the Company Petition the Respondent No. 1 herein did not have all informations which came to light at a much later stage. It was urged that only with a view to obtain complete reliefs, prayers made in the company petition were amended and reliefs had been granted by the High Court keeping in view the pleadings and affidavits filed by the parties in all the three matters. We have our own doubts how far the procedure adopted were correct when in a case of oppression the court must strictly go by the pleadings made in the application. The provisions of the Civil Procedure Code do not envisage that pleadings in any other case should be the basis for grant of relief, particularly, when the plea taken in both the petitions are contradictory and inconsistent with each other. Before us affidavits from different proceedings made by the same person or by the other supporting or opposing the application have been placed. They have not been cross-examined. Their attention had not been drawn to their earlier statements which could be done only in terms of Section 145 of the Evidence Act. With the view to elicit the truth the court must have before it a clear

picture. In this case, unfortunately, the parties herein have not made any efforts to examine themselves in court so as to enable the other side to cross-examine them. Had the parties to the proceedings been examined and cross-examined, the could have been confronted with the earlier statements made by them in another affidavit.

In Needle Industries (supra), this Court has frowned upon such practices.

Similarly, Mrs. Puar in her rejoinder to the counter-affidavit filed by the Appellants herein in Company Petition No. 7 of 1992 accepted that during the life time of FRG and to his knowledge, a decision to broad-base company by issuing 25000 shares out of which 15000 at the first instance was taken. It also stands admitted from one or the other minutes of meetings referred to in her petition that out of the 15000 shares 6475 shares were to be allotted to the Appellants herein.

In view of the fact that the presence of FRG in the decision making process to broad-base the company, the authority of FRG as regards control of the company had never been disputed and his presence in one of the Board meetings, the plea of issuance of additional shares has sufficiently been established. A decision to which FRG is a party can only give rise to a question of oppression on his part and no one else. In any event, such a case has never been made out that FRG was guilty of commission of any acts of oppression or mismanagement had been committed while he was the chairman of the company.

We are, therefore, of the opinion that the Respondent No.1 failed to substantiate the charge of oppression on the ground of issuance of 6475 shares in favour the Appellants.

CLAIM OF THE FIRST RESPONDENT IN RESPECT OF 8000 SHARES :

> The First Respondent herein claimed 8000 shares evidently relying on or on the basis of such allotment on the sole ground that on the death of FRG, the same was inherited by her as a Class-I heir. She raised a grievance only as regards allotment of 3000 shares to the Respondents Nos. 3 and 4 herein, as would appear from a perusal of the allegations made in the company petition and on a reasonable construction thereof.
>
> The allotments made to the parties including 8000 shares were provisional in nature and as such shares were to be allotted on payment, as is evident from the minutes of the meetings. No other person except the Appellants herein, Mrs. Puar and Mrs. Shubhangini Devi opted for allotment of shares to the extent of 6475, 1000 and 25 shares respectively.
>
> It is not in dispute that upon demise of FRG, Respondent No. 1 applied for grant of succession certificate on 28.11.1989 wherein she disclosed the assets of FRG but except for his 22 shares in GIC, no claim for any other share was made far less her right as regard 8000 shares.

> It is also not in dispute that the matter relating to her claim to succeed FRG as his Class I heir is pending adjudication in Civil Suit No. 725/1991 in Baroda Civil Court. She claimed title in respect of 8000 shares by inheritance in terms of Hindu Succession Act. Indisputably, in terms of Section 15 of the said Act she is a Class I heir but the Appellants herein contend that the said provision has no application having regard to Section 5(2) thereof as inheritance in the family is governed by the rule of primogeniture. A pure question of title is alien to an application under Section 397 of the Companies Act wherefor the lack of probity is the only test. Furthermore, it is now well-settled that the jurisdiction of the Civil Court is not completely ousted by the provisions of the Companies Act, 1956. (See Dwarka Prasad Agarwal Vs. Ramesh Chander Agarwal [(2003) 6 SCC 220]) A dispute as regard right of inheritance between the parties is eminently a civil dispute and cannot be said to be a dispute as regards oppression of minority shareholders by the majority shareholders and/ or mismanagement.

Furthermore, in the said suit when an application for interim injunction was filed only, a prima facie observation was made to the effect that the succession was not to be governed by Hindu Succession Act. Such observations do not constitute a binding decision as no finality is attached thereto. The matter came upto this Court in S.L.Ps. (C) No. 17018/95 and 17020/95 which were disposed of observing:

> "We may also allay the fears of the petitioner regarding the observations made by the learned Single Judge of the High Court in his order now impugned while accepting the appeals against him. It is made clear that those observations are not meant to be final, but have obviously been made to dispose of the claim to temporary injunction which shall keep confined to that limited exercise without affecting the merits of the case.
>
> This disposes of the Special Leave Petitions."

Our attention has been drawn to an interlocutory proceedings in the suit relating to title, wherein allegedly a prima facie case was not found in favour of the Appellants herein but this Court is not concerned therewith as it has been accepted at the Bar that keeping in view of the fact that the question is subjudice, this Court would not go into the said issue. In fact, Mr. Desai, learned counsel appearing on behalf of the Respondent No. 1, has given up the same.

The finding of the Division Bench of the High Court to the effect that the Respondent No. 1 is entitled to get 8000 shares which was firm allotment made to FRG is, thus, not sustainable in law.

Moreover, the allotment in favour of the members of the Company was provisional in nature which would amount to invitation to offer and not an offer. A right to a share would fructify only when an offer made by the company is accepted. Only upon acceptance of such offer, a binding contract comes into being. A right, as is well known, fructifies only upon conclusion of a contract and not prior thereto. When a share is allotted in favour of a person as a member of the company, it becomes

his personal right. Such a personal right is not heritable. By reason of a mere provisional allotment without making any payment therefor no legal right in the shares was created. It would also be of some interest to note that even initial allotment of shares cannot be transferred.

In Canbank Financial Services Ltd. Vs. The Custodian and Ors [JT 2004 (7) SC 266], it has been held:

> "The allotment of CANCIGOS is not a transfer as thereby Canbank Mutual Fund had allowed the shares not as owner thereof. The Benami Transactions Act applies when there is a transaction in which the property is transferred. If allotment of CANCIGOS is not a transfer of property, the Act would not apply. [See Sri Raj Sachdeva Vs. Board of Revenue [AIR 1959 All 595] and The Swadeshi Cotton Mills, Co., Ltd. , In re. [1932 Comp. Cas 411].
>
> In Madura Mills Co. Ltd., In re. [1937 Comp. Cas 71], Varadachariar, J. stated the law thus:
>
> "As we have already observed, it is no doubt true that in the hands of a shareholder, a share is property and when a shareholder exchanges his shares with another it may be possible to regard the transaction as amounting to a transfer whether by way of exchange or conveyance: Cf. Coats v. Inland Revenue Commissioners (1897) 2 Q.B.
>
> 423. But when the company is for the first time issuing shares, it seems to us that there is no question of property already possessed by the company being thereby transferred to the allottee."

In Needle Industries (supra), this Court opined :

> "137. We see no substance in Shri Nariman's contention that the letter of offer could not have been sent to the Holding Company without first obtaining the RBI's approval under Section 19 of FERA. Counsel contends that under Section 19(1)(b), notwithstanding anything contained in Section 81 of the Companies Act, no person can, except with the general or special permission of the Reserve Bank, create 'any interest in a security' in favour of a person resident outside India. The word "security" is defined by Section 2(u) to mean shares, stocks, bonds, etc. We are unable to appreciate how an offer of shares by itself creates any interest in the shares in favour of the person to whom the offer is made. An offer of shares undoubtedly creates "fresh rights" as said by this Court in Mathalone v. Bombay Life Assurance Co. Ltd. (1954 SCR 117 : AIR 1953 SC 385 : (1954) 24 Com Cas 1) but, the right which it creates is either to accept the offer or to renounce it; it does not create any interest in the shares in respect of which the offer is made."

The Division Bench of the High Court treated the allotment to be a confirmed one purported to be relating to Regulation 28 of Table A of the Companies Act. The said provision has no application in

the facts and circumstances of this case.

ISSUE OF 3000 SHARES:

> The allotment of 3000 shares, however, stand on a different footing. The conduct of the Appellants in this regard would call for a closer scrutiny.
>
> There is no proof of express renunciation of his 8000 shares by FRG in favour of the Appellant.
>
> It is true that the Respondent No. 1 herein although questioned the allotment of 3000 shares given to the son and daughter of the Appellant Nos. 1 and 2 herein, no such challenge was made as regards 500 shares allotted to Respondent No. 12. It is also true that the dividend had been paid for the year ending 31.3.1991 at the rate of 10% and 300% respectively to both Respondent Nos. 12 and 13 in respect of 1000 shares and 25 shares held by them respectively. But this action on the part of the contesting respondents would not validate the transaction as regard issuance of 3000 shares in favour of the Appellants.

Even assuming that the children of the Appellant Nos. 1 and 2 became members, in relation to the shares originally allotted to Fatehsingh Gaekwad, as was submitted by Mr. Jethmalani, no further circular or notice to the shareholders about the availability thereof had been issued. Even the Appellant No. 1 in his affidavit has contradicted himself by making inconsistent statements.

Furthermore, in absence of any resolution by the Board of Directors, no offer could be made to the Respondent No. 12 as regard 500 shares out of 8000 shares which were allotted to FRG.

The Appellants herein have utterly failed to prove that there has been any renunciation of 8000 shares by Fatehsinh Gaekwad or any resolution was taken in this behalf by the Board. We have grave doubt about the authenticity of the letter of the Company Secretary of FRG renouncing his shares. Even allotment of 500 shares in favour of Respondent No. 12 out of said 8000 shares is invalid. In that view of the matter, the contentions of the Appellant No. 1 to the effect that his children, Pratapsinh S. Gaekwad and Priyadarshiniraje S. Gaekwad applied for further 3000 shares through him and in view of the availability of shares, the Board of the Company decided to issue and allotted the said 3000 shares to them cannot be accepted. It also does not appear that the Board of Directors or the Management Committee took any resolution to allot shares to the other members out of the said 8000 shares.

It is also difficult to accept that efforts had been made by the Appellant No. 1 to find out if any other member would like to offer subscription of shares of the company as alleged by him and that efforts had also been made to find out subscribers for those shares.

We, therefore, are of the opinion that the transactions relating to issue of 3000 additional shares in the names of the Appellant Nos. 3 to 5 and 500 shares to the Respondent No. 12 out of the 8000

shares originally allotted to FRG are bad in law.

TRANSFER IGNORING RIGHT OF PRE-EMPTION:

Article 3 of the Company states that the Company is a private company and the right of transfer is restricted in the manner provided for therein. Article 4 provides for capital of the Company. Article 5 provides that the share in the capital of the Company for the time being would be under the control of the Directors who may allot or otherwise dispose of the same to such persons in such proportion and on such terms and conditions and either at a premium or at par or at a discount. Article 6 provides that the transfer of shares shall be restricted in the manner to the extent provided in Articles 7 to 15 thereof.

Article 7 of the Articles of Association of the company provides for embargo in favour of a person who is not a member of a company and thus postulates the policy of transfer first to a member only.

Article 8 provides for a notice to transfer for a fair value. A transfer notice is not revocable except with the sanction of the Directors. Upon receipt of such notice, if the company finds out a person who intends to purchase the same, a notice of the Proposing Transferor shall be issued. Article 10 provides for valuation of shares by the auditors in case of any difference between the Proposing Transferor and Purchasing Member. Article 12, however, provides that if the company does not find a Purchasing Member and give notice in the matter stated in Article 9 with a period of 28 days after being served with a transfer notice, the Proposing Transferor shall at any time within three months afterwards be at liberty subject to Article 16 thereof to sell the share to any person and at any price.

Article 14 envisages transfer to a member of the family in respect whereof the embargo contained in Articles 7 to 13 would not apply. Only when a share is to be transferred by a member to an outsider being a person of his choice other than those specified in Article 14, the requirements contained in the aforementioned Articles are required to be complied with.

Article 15 provides for registration of transfer whereas Article 16 empowers the Directors to register any transfer or transmission of a share without assigning any reason except in a case where the transferee is a member of the company or in whose favour the transferee has been effected in terms of Article 14.

Indreni is a wholly owned company of the Appellants. Such a family company may be considered to be a quasi-partnership. The learned Single Judge lifted its corporate veil and held that having regard to the nature of the investment made by the family, the transfer may not be held to be illegal. However, in law no transfer could be made in favour of a body corporate having regard to the Articles of Association of the

Company.

In any event, when a notice to the company by a member is vitiated, the same can be withdrawn in law. Furthermore, a transfer in violation of Article is void [See Palmer's Company Law, 23rd Edition 22-14].

In the instant case, the actual notice of transfer has not been produced. However, a letter has been brought on record to show that Mr. Khade was asked to serve the notice to the members of the company which he did not.

Mr. Desai submitted that as notice of transfer had already been issued, the same become irrevocable which entitled the Appellants to opt for purchasing the shares on a pro-rata basis. The said submission of Mr. Desai cannot be accepted as it is not the case of the Respondents that the said notice was acted upon and the provisions of Articles 9 to 11 had been complied with.

It may be noticed that in the suits filed by the shareholders against the Appellant relating to transfer of shares in favour of Indreni, except in suit No. 872 of 1990, no prayer for pro-rata allotment thereof in favour of other members had been made.

The contents of the said circular letter appear to be vague inasmuch as how many shares are proposed to be transferred had not been stated therein. Furthermore, no action having been taken within a period of 28 days from the date of issuance of such notice, the proposed transferee is entitled to transfer the shares to any person of his choice.

It is now well-settled that only one pre-emptive offer is to be made which is otherwise to be accepted or not at all. The existing shareholders are not entitled to be given further pre-emptive rights in respect of those unaccepted shares. Even such a right can be waived or modified.

In any event, the transfer has been rescinded in terms of the resolution passed in a meeting dated 9.8.1990. At this stage, it is not necessary to consider the validity or otherwise of the said meeting as no sufficient materials except the factum of the payment to Indreni had been brought on records to show that the said resolution dated 13.7.1990/9.8.1990 adopted by the Board are forged and fabricated. In any event, it is not necessary to go into the details of the matter as the three suits filed by the Respondents are pending in different courts of law.

It has further to be borne in mind that a pre-emptive right is granted in favour of a member of a private company so that his right of control is not taken away. Exercise of such pre-emptive rights is particularly needed in relation to those private companies which are essentially incorporated partnerships. (See Gower and Davies' Principles of Modern Company Law, Seventh Edition, page 635) As the notice of

transfer itself was rescinded, we are of the view that 'Indreni' was not required to transfer the said shares back to the Appellants. In any event, the title in relation to the aforementioned shares is a matter between the Appellants and the Indreni and the Respondents herein cannot have any say therein.

For the foregoing reasons, we are of the opinion that the Division Bench of the High Court committed a serious error in holding that the transfer by the Appellants in favour of the said Indreni being bad in law, the members of the company were entitled to allotment thereof on pro-rata basis.

OPPRESSION AND MISMANAGEMENT:

Sections 397 of the Companies Act reads as under:

397. (1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section : provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under sub-section (1), the Company Law Board is of the opinion :

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Section 398 provides for relief in cases of mismanagement in the following terms :

"398. Application to Company Law Board for relief in cases of mismanagement.

(1).- Any members of a company who complain

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by

> an alteration in its Board of directors or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company;

may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks it."

Section 402 of the Companies Act provides for the reliefs which may be granted without prejudice to the generality of the powers of the court under the aforementioned provisions The expression 'oppressive', it is now well-settled, would mean burdensome, harsh and wrongful.

'Oppression' complained of, thus, must relate to the manner in which the affairs of the company are being conducted and the conduct complained of must be such as to oppress the minority members. By reason of such acts of oppression, it must be shown that the majority members obtained a predominant voting power in the conduct of the company's affairs.

The jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may seem fit and proper, is warranted. (See Bennet Coleman & Co. Vs. Union of India and Others [(1977) 47 Comp. Cases 92] and Syed Mahomed Ali Vs. R. Sundaramurthy and others [AIR 1958 Madras 587] But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analyzing the materials brought on records that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress a minority of the members including the petitioners vis-`-vis the shareholders which a fortiorari must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding of the company but such winding up order would be unfair to the minority members.

The interest of the company vis-`-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956. .

Mala fide, improper motive and similar other allegations, it is trite, must be pleaded and proved as envisaged in the Code of Civil Procedure. Acts of mala fide are required to be pleaded with full particulars so as to obtain an appropriate relief.

The remedy under Section 397 of the Companies Act is not an ordinary one. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The acts complained of may either be designed to secure pecuniary advantage to the detriment of the oppressors or wrongful usurpation of authority.

In Halsbury's Laws of England, 4th Edition, Volume 7, para 1011, it is stated:

> "1011. Conduct amounting to oppression. In this context, "oppressive" means burdensome, harsh and wrongful. It does not include conduct which is merely inefficient or careless. Nor does it include an isolated incident: there must be a continuing course of oppressive conduct, which must be continuing at the date of the hearing of the petition. Further, the conduct must be such as to be oppressive to the petitioner in his capacity as a member: whatever remedies he may have in respect of exclusion from the company's business by being dismissed as an employee or a director, he will have none under the provisions relating to oppression.
>
> On the other hand, these provisions are not confined merely to conduct designed to secure pecuniary advantage to the oppressors; they cover the case of wrongful usurpation of authority, even though the affairs of the company prosper in consequence."

It has to be borne in mind that when a complaint is made as regard violation of statutory or contractual right, the shareholder may initiate a proceeding in a civil court but a proceeding under Section 397 of the Act would be maintainable only when an extraordinary situation is brought to the notice of the court keeping in view of the wide and far-reaching power of the court in relation to the affairs of the company. In this situation, it is necessary that the alleged illegality in the conduct of the majority shareholders is pleaded and proved with sufficient clarity and precision. If the pleadings and/ or the evidence adduced in the proceedings remains unsatisfactory to arrive at a definite conclusion of oppression or mis- management, the petition must be rejected.

It may be true that the parties had agreed before the High Court that pleadings in all connected cases be treated as part of the records of the High Court but by reason thereof it cannot be inferred that although the High Court had no jurisdiction to adjudicate upon the company petition filed by the Respondent No. 12 herein filed before the Company Law Board, Delhi and the Company Petition filed by the Respondent No. 1 before the Company Law Board, Bombay, they would be the basis for grant of relief particularly in view of the fact that the reliefs claimed therein are different. After the amendment in the Companies Act, the Company Law Board alone had the jurisdiction to entertain an application under Sections 397 and 398 of the Companies Act, as the jurisdiction of the High Court was ousted thereby and, thus, the allegations made in the Company Petition filed by the

Respondent No. 12 being company petition No. 7 of 1992 could not have been the subject matter of adjudication by the High Court. It is trite that what cannot be done directly cannot be done indirectly. The conduct and the status of the parties vis-`-vis the company also assume significance. Whereas the Respondent No. 1 herein claimed relief inter alia as a sole class 1 heir of the FRG, the Respondent No. 12 claimed her relief on the basis of being a person involved in protecting the affairs of the Gaekwad family as also in her own right as a shareholder. It is significant, however, that in Suit No. 675 of 1990 pending in the court of Baroda, Gujarat in her written statement the Respondent No. 12 claimed that if her mother had been issued the 8000 shares, her holding together with that of her mother's would exceed 60%.

The Respondent Nos. 1 and 12 had initiated different proceedings in different forums to suit their own purposes. From the materials brought on records, it can safely be inferred that proceeding before the Company Law Board, Delhi was initiated by the Respondent Nos. 12 herein when it was discovered that the Respondent No. 1 may not obtain any relief in the Company Petition filed by her before the Gujarat High Court.

The Respondent No. 1 in her application did not disclose the grounds for challenging the issue of 6475 shares to the Appellants. In that view of the matter the relief granted by the High Court to the effect that issue of all shares beyond 425 shares is bad in law cannot be sustained having regard to the fact that a bald prayer was made in the petition without laying any foundation therefor in the company petition. Such reliefs evidently had been granted keeping in view the allegations made by the Respondent No. 12 in her company petition filed before the Company Law Board, Delhi which is impermissible in law.

We may at this juncture have a look to the case laws operating in the field with a view to find out as to what relief, if at all, could be granted to the Respondent No. 1 by the Gujarat High Court in the facts and circumstances of the present case.

In Shanti Prasad Jain Vs. Kalinga Tubes Ltd. etc. [AIR 1965 SC 1535], this Court quoted with the approval the following passage from the decision in Elder's Case, AIR 1952 SC 49, as summarized at page 394 in Meyer's case, AIR 1965 SC 381:

> "(4) Although the word 'oppressive is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are' treating the company and its affairs as if they were their own property' to the prejudice of the minority share-holders-and in which just and equitable grounds would exist for the making of a winding-

up order..... but in which the 'alternative remedy' provided by Section 210 by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority."

In Shanti Prasad Jain (supra) referring to Elder Case, it was categorically held that the conduct complained of must relate to the manner of management of the affairs of the company and must be

such so as to oppress a minority of the members including the petitioners qua shareholders. The court, however, pointed out that that law, however, has not defined what oppression is for the purpose of the said Section and it is left to court to decide on the facts of each case whether there is such oppression.

In Scottish Cooperative Wholesale Society Ltd. Vs. Meyer and Another [(1958) 3 WLR 404] it was categorically held that the conditions precedents contained in Section 210 of the Act of 1948 must be satisfied before any relief can be granted.

Yet again in H.R. Harmer Ltd., In re [(1958) 3 All ER 689 (CA)], the Court of Appeal held that 'the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the 'just and equitable' rule, but only to those cases of that character which have in them the requisite element of oppression'.

It was observed:

> " . It is not lack of confidence between share- holders per se that brings S. 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involved at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

In Needle Industries (supra), this Court observed:

> "44. Coming to the law as to the concept of 'oppression', Section 397 of our Companies Act follows closely the language of Section 210 of the English Companies Act of 1948. Since the decisions on Section 210 have been followed by our Court, the English decisions may be considered first. The leading case on 'oppression' under Section 210 is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer (1959 AC 324 : (1958) 3 All ER 66 (HL)). Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant-society could justly be described as having behaved towards the minority shareholders in an 'oppressive' manner, that is to say, in a manner "burdensome, harsh and wrongful". The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that Section 210 "warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view".

Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, "which is common to partnership, that there should be the utmost good faith between the constituent members". Finally, it was held that the court ought not to allow technical pleas to defeat the beneficent provisions of Section 210 (page

344, per Lord Keith; pages 368-69, per Lord Denning).

In Re Five Minute Car Wash Service Ltd. [1966] 1 All ER 242, the Court upon considering the nature of relief which can be granted under Section 210 of the Companies Act, 1948 observed that in a case falling under Section 210 of the Companies Act, 1948, relief will be granted if the petitioner establishes that at the time when the petition was presented the affairs of the company were being conducted in a manner oppressive of himself and if he fails to allege facts capable of establishing that the company's affairs are being conducted in such a manner the petition will disclose no ground for granting any relief and must be dismissed in limine.

It was observed:

> "Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. In Scottish Co-operative Wholesale Society, Ltd. v. Meyer (a case under s. 210) Viscount Simonds adopted a dictionary definition of the meaning of "oppressive" by, it is said, "burdensome, harsh and wrongful".

In Elder v. Elder & Watson, Ltd., also a case under s. 210, the Lord President (Lord Cooper) said:

> " the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Lord Keith said:

> " oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

The Court in an application under Sections 397 and 398 may also look to the conduct of the parties. While enunciating the doctrine of prejudice and unfairness borne in Section 459 of the English Companies Act, the Court stressed the existence of prejudice to the minority which is unfair and not just prejudice per se.

The Court may also refuse to grant relief where the petitioner does not come to court with clean hands which may lead to a conclusion that the harm inflicted upon him was not unfair and that the relief granted should be restricted. (See Re London School of Electronics, [1986] Ch. 211) Furthermore, when the petitioners have consented to and even benefited from the company being run in a way which would normally be regarded as unfairly prejudicial to their interests or they might have shown no interest in pursuing their legitimate interest in being involved in the company. (See Re RA Noble & Sons (Clothing) Ltd. [1983] BCLC 273].

In a given case the Court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties.

It is now well-settled that a case for grant of relief under Sections 397 and 398 of the Company Act must be made out in the petition itself and the defects contained therein cannot be cured nor the lacuna filled up by other evidence oral or documentary. (See In re Bengal Luxmi Cotton Mills Ltd. 1965 (35) CC 187).

In Shanti Prasad Jain Vs. Union of India [75 Bom. LR 778] it was held that the power of the company court is very wide and not restricted by any limitation contained in Section 402 thereof or otherwise In Shoe Specialities Ltd. vs. Standard Distilleries and Breweries (P) and Others [1997 (1) Comp. LJ 243], it is stated :

> "While exercising the powers under sections 397 and 402 of the Companies Act, the Court is considering not only the relief that is sought for but also considers as to what is the nature of the complaint and how the same has to be rectified. It is the interest of the company that is being considered and not the individual dispute between the petitioner and the respondent. If that be so, the interest of the company requires that the majority shareholders must have their say in the management "

In Jesner Vs. Jarrad Properties [(1993) BCLC 1032], a question arose as to whether the conduct and the background of the two companies (their informed way of doing business disregarding the Companies Act, etc.) could be taken into account to decide whether there had been unfair prejudice to one party in an application under Section 459 of the English Companies Act was answered in the affirmative.

When a decision is taken on a business consideration, it is trite, the court should not ordinarily interfere. [See Maharashtra Power Development Corporation Ltd. Vs. Dabhol Power Co. and Others, (2004) 3 Comp LJ 58 (Bom)] The burden to prove oppression or mismanagement is upon the petitioner. The Court, however, will have to consider the entire materials on records and may not insist upon the petitioner to prove the acts of oppression. An action in contravention of law may not per se be oppressive. Bhagwati, J. (as His Lordship then was) in Mohanlal Ganpatram and another Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. and others [AIR 1965 Guj. 96 at 103] stated the law, thus:

> " It may be that a resolution may be passed by the Directors which is perfectly legal in the sense that it does not contravene any provision of law, and yet it may be oppressive to the minority shareholders or prejudicial to the interests of the Company. Such a resolution can certainly be struck down by the Court under Section 397 or
>
> 398. Equally a converse case can happen. A resolution may be passed by the Board of Directors which may in the passing contravene a provision of law, but it may be very much in the interests of the Company and of the shareholders..."

The said decision has been referred to with approval in Needle Industries (supra). (Para 49). The conduct which is technically legal and correct, thus, may justify grant of relief on the application of the just and equitable jurisdiction and conversely that conduct involving illegality and contravention of the Act may not suffice to warrant grant of any remedy. Isolated act of oppression may not be sufficient to grant any relief but there should be a continued oppression therefor. The test of lack of bonafide should be applied in both for the winding up petition while determining an application under Section 397 of the Companies Act. [See Re Guidezone Ltd. (2000) 2 BCLC 321] We may at this juncture notice that the Respondent No. 1 in her application under Section 397 of the Companies Act did not complain of any act of mis-management. Complaints of mis- management were made by the Respondent No. 12 only.

For the purpose of grant of relief, the High Court could only consider the pleadings filed in Company Petition No. 5 of 1991. If no relief could be granted having regard to the pleadings contained therein, it is inconceivable in law that such relief would be granted on the basis of the pleadings made in other proceedings and totally ignoring the admissions made by the Respondent No. 1 herein in the proceedings initiated by her.

PLEADINGS AND PROOF LEGAL REQUIREMENTS :

> We may now consider the submissions of Mr. Desai that the Appellant No. 1 herein is guilty of commission of fraud. Application filed by the Respondent No. 1 before the Gujarat High Court does not contain the requisite pleadings in this behalf, the requirements wherefor can neither be denied nor disputed.
>
> It is not in dispute that having regard to Rule 6 of the Company Courts Rule, the provisions of the Code of Civil Procedure will be applicable in a proceeding under the Companies Act. In terms of Order 6, Rule 4 of the Code of Civil Procedure, the plaintiff is bound to give particulars of the cases where he relies on misrepresentation, fraud, breach of trust, etc. In Chief Engineer, M.S.E.B. & Anr. Vs. Suresh Raghunath Bhokare [2004 (8) Supreme 845], this Court held:
>
> " Thus, applying the basic principle of rule of evidence which requires a party alleging fraud to give particulars of the fraud and having found no such particulars the Industrial Court came to the conclusion that the respondent could not be held guilty of fraud "

It was observed:

> " In the absence of any such particulars being mentioned in the show cause notice or at the trial, attributing some overt act to the respondent, we do not think the Board can infer that the respondent had a role to play in sending a fraudulent list solely on the basis of the presumption that since respondent got a job by the said proposal, said list is a fraudulent one. .. "

In A.C. Ananthaswamy and Others Vs. Boraiah (Dead) By LRS. [(2004) 8 SCC 588], this Court held that the level of proof required for proving fraud is extremely high. [See also Maharashtra Power Development Corporation Ltd. Vs. Dabhol Power Co. and Others, (2004) 3 Comp LJ 58 (Bom)] Order 6, Rule 17 provides for amendment of the pleading whereas Order 8, Rule 9 provides for subsequent pleadings by a defendant. The company petitioners did not raise a plea as regard the value of the company share or commission of fraud by the Appellant No.1 herein and/or his fiduciary duty towards them either as a director or as a person looking after the interest of the family in the discharge of his duty under as a director.

Respondent No. 12 in her petition, alleged mismanagement of the Company on the part of the Respondent No.1. The Appellants in their reply while denying and disputing that the company was mismanaged alleged that it had earned profit. In Rejoinder to the said reply, Mrs. Puar questioned the correctness or veracity of the balance sheet of GIC contending that the so- called profit disclosed in the accounts is merely a book entry. A contrary stand, however, has been taken before us suggesting that the shares had been issued by the Appellants unto themselves at a gross undervalue. The question which arises is as to whether the Respondent Nos. 1 and 12 are bound by their own pleadings. It is neither in doubt nor in dispute that the Code of Civil Procedure being applicable to a proceeding of this nature, not only the plea of fraud is required to be specifically pleaded and proved. Even an amendment of pleadings could not have been permitted if thereby the Company Petitioner made an attempt to get rid of her admission.

Section 58 of the Indian Evidence Act reads as under:

> "58. Facts admitted need not be proved.-No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."

In terms of the aforementioned provision, things admitted need not be proved. In view of the admission of Respondent No. 1 alone, the issue as regards allotment of 6475 shares should have been answered in favour of the Appellants. The Company Petitioner at a much later stage could not be permitted to take a stand which was contrary to or inconsistent with the original pleadings nor could she be permitted to resile from her admissions contained therein.

Admissions made by the Respondent No. 1 was admissible against her proprio vigore.

In Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram and others [AIR 1974 SC 471], this Court held:

> "26 Admissions if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admission. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the rival as evidence are by themselves not conclusive. They can be shown to be wrong."

(See also Biswanath Prasad and Others Vs. Dwarka Prasad and Others, AIR 1974 SC 117) In Viswalakshmi Sasidharan (Mrs.) and Others Vs. Branch Manager, Syndicate Bank, Belgaum [(1997) 10 SCC 173], this Court held:

> " On the other hand, it is admitted that due to slump in the market they could not sell the goods, realize the price of the finished product and pay back the loan to the Bank. That admission stands in their way to plead at the later stage that they suffered loss on account of the deficiency in service..."

Judicial Admissions by themselves can be made the foundations of the right of the parties.

In M/s. Modi Spinning & Weaving Mills Co. Ltd. and another Vs. M/s. Ladha Ram & Co. [AIR 1977 SC 680], the law is stated in the following terms:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court."

In the instance case, the Respondent No.1 even did not amend the company petition by withdrawing the admissions or resiling thereform.

In Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust Vs. S.K. Viswanatha Setty [(2004) 8 SCC 717], this Court deprecated raising a plea for the first time before the appellate court without amendment of plaint holding that when materials to substantiate such plea had not been brought on record and, thus, it is impermissible to consider the same, stating:

> "13 However, there is no material placed on record by way of pleadings to show whether the appellant is a religious or charitable institution. The plaint was never amended. The appellant seeks exemption. Exemption needs to be alleged and proved. Opportunity is required to be given to the respondent to meet the plea of exemption. In the circumstances, we are in agreement with the view expressed by the High Court

> that the said plea was not open to the appellant at the stage of second appeal, particularly, in the absence of any material available to substantiate such plea."

In Heeralal Vs. Kalyan Mal and Others [(1998) 1 SCC 278] following Modi Spinning (supra), it was observed:

> "9 The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondents. Even that apart the said decision of two learned Judges of this Court runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram and Co., (1977) 1 SCR 728 : (AIR 1977 SC 680). In that case Ray, C.J., speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admissions from the defendants ."

It was also observed :

> "12. In our view, therefore, on the facts of this case and as discussed earlier, no case was made out by the respondents, contesting defendants, for amending the written statement and thus attempting to go behind their admission regarding 5 out of 7 remaining items out of 10 listed properties in Schedule-A of the plaint "

(See also M/s. ABL Ltd., Durgapur, Burdwan Vs. Radha Gobinda Ghatak & Ors., 1999 (1) CHN 645) and Krishna Gupta & Ors. Vs. Madan Lal & Ors , 2002 (96) DLT 829).

In view of our findings aforementioned, it must be held that having regard to the admission made by the Respondent No. 1 in her pleadings as regard broad-basing of the company and issuance of 6475 shares in favour of the Appellants herein and further in absence of any pleading of commission of fraud on the part of the Appellant No. 1 herein, the High Court committed a manifest error in issuing the impugned directions.

Once the aforementioned facts are not in question, the company petitioner cannot take a stand different from that raised in her petition simply on the ground that other and further reliefs were claimed by amending the reliefs portion. Reliefs could be granted by the court had the material facts necessary to prove her case been pleaded and proved. In absence of any pleading, no evidence would be admissible and the court as is well-known ordinarily would not grant any relief which has not been pleaded.

QUASI-PARTNERSHIP FAMILY COMPANY CORPORATE VEIL:

A company incorporated under Indian Companies Act is a body corporate. However, in certain situations, its corporate veil can be lifted. (See Kapila Hingorani vs. State of Bihar [(2003) 6 SCC 1]) The Court, however, has made a clear distinction between a family company, a private company and a public limited company. The true character of the company, the business realities of the situation should not be confined to a narrow legalistic view. [See Needle Industries (supra)] It is now well-known that principles of quasi-partnership is not foreign to the concept of Companies Act. For the purpose of grant of relief the principles of partnership had been applied even in a public limited company. (See Loch and another Vs. John Blackwood Ltd., 1924 AC 783, Ebrahimi Vs. Westbourne Galleries Ltd. and others, 1972 (2) All ER 492).

The principles applicable to the winding up of a company contained in Section 44(g) of the Indian Partnership Act was applied in a winding up petition under Section 433 (f) of the Companies Act by a 3-Judge Bench of this Court in Hind Overseas Private Ltd. Vs. Raghunath Prasad Jhunjhunwalla and another [AIR 1976 SC 565] following Ebrahimi (supra). However, it was observed that when more than one family or several friends and relatives together form a company and there is no right as such agreed upon for active participation of members were sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked.

In Kilpest Pvt. Ltd. and Others Vs. Shekhar Mehra [(1996) 10 SCC 696], it was stated:

"11. The promoters of a company. whether or not they were hitherto partners, elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Sections 397 and 398.

12. The present was a petition under Sections 397 and 398. The Division Bench exercised power under Section 402 to appoint Mehra as a Director to protect his interest and guard against mismanagement. It required Dubey to return to the company the sum of Rs 52,875 which he had wrongly appropriated to himself. It directed the Registrar of Companies to enquire into other allegations of misconduct in which it found, prima facie, substance; and we may say immediately that we have perused the report filed by the Registrar of Companies which shows that no substance was, ultimately, found therein. We agree with the Division Bench that this was no case for winding up the company and must dismiss the appeal filed by Mehra."

(See also Dabhol Power Co. (supra), para 43) Kilpest Pvt. Ltd. and Others Vs. Shekhar Mehra [(1996) 10 SCC 696], whereupon Mr. Desai placed strong reliance, thus, cannot be said to be an authority for the proposition that for no purpose whatsoever the principles of quasi-partnership can

be applied to an incorporated company. The real character of the company, as noticed hereinbefore, for the purpose of judging the dealings between the parties and the transactions which are impugned may assume significance and in such an event, the principles of quasi-partnership in a given case may be invoked.

The ratio of the said decision, with respect, cannot be held to be correct as a bare proposition of law, as was urged by Mr. Desai, being contrary to a larger Bench judgments of this Court and in particular Needle Industries (supra). It is, however, one thing to say that for the purpose of dealing with an application under Section 397 of the Companies Act, the court would not easily accept the plea of quasi-partnership but as has been held in Needle Industries (supra), the true character of the company and other relevant factors shall be considered for the purpose of grant of relief having regard to the concept of quasi partnership.

FINDINGS:

The upshot of our aforementioned discussions is:

(i) The Appellant No. 1 had no fiduciary duty to inform the Respondent Nos. 1, 12 and 13 herein as regard the benefit or otherwise of opting for allotment of shares.

(ii) The Respondent No. 1 herein in her company petition having admitted the factum of broad-basing of the company by issuance of 15000 additional equity shares and allotment of 6475 shares in favour of the Appellants herein cannot now be permitted to turn around and raise the correctness or validity thereof. However, allotment of 3000 shares in favour of the Appellants and 500 shares in favour of the Respondent No. 12 purported to be out of 8000 shares allotted to FRG are bad in law.

(iii) The Respondent No. 1 herein had not been able to prove any act of oppression as against the Appellant No. 1.

(iv) The claim of the Respondent No. 1 as regards declaration of her title and/ or allotment of 8000 shares is not tenable in law. The alleged right of the Respondent No. 1 to claim title over the said shares as a class 1 heir of Fatehsinh Gaekwad cannot be determined in an application filed under Sections 397 and 398 of the Companies Act and in particular having regard to the fact that the said question is pending adjudication in a duly instituted civil suit.

(v) Transfer of 9415 shares by the Appellants in favour of Indreni by itself was not an act of oppression keeping in view of the fact that the entire shares of the said company were held by the Appellants alone and in any event the notice of transfer having been rescinded, the Appellants continue to be the owner in respect thereof.

CONCLUSION:

For the reasons aforementioned, the impugned judgments of the Division Bench cannot be sustained which is set aside accordingly. The appeals are allowed in part and to the extent mentioned hereinbefore with the following directions:

(A) It is hereby declared that the allotment of shares from the additional share capital had been increased pursuant to the resolution of the Extraordinary General Meeting held on 17th December,1987 and the resolution of the Board of Directors dated 8.1.1988 shall be treated as valid and effective except the allotment of 3000 shares in favour of Pratapsinh S. Gaekwad and Priyadarshiniraje S. Gaekwad and 500 shares in favour of Respondent No. 12 herein. The register of the members and other records of the company will stand rectified accordingly.

(B) The Board of Directors shall consider the question as regard shifting of the office of the Company to Surat from Baroda. The records of the company, if any, in possession of any of the members or any other director shall be restored to the Registered Office of the Company failing which it would be open to the company to initiate appropriate proceedings before appropriate forum. An Extraordinary General Meeting of the Shareholders of the Company will be convened on 26th February, 2005 at 11.00 a.m. at Baroda for appointment of the directors of the company on the basis of the shares respectively held by them as also the Articles of Association and in accordance with this order of this Court.

(C) The aforesaid meeting will be conducted under the Chairmanship of a nominee of the Registrar of the Companies.

(D) All the shareholders will be entitled to vote by themselves or through their proxies at the said meeting for appointment of the directors of the company.

(E) The Registrar of the Companies shall for the purpose of holding the said meeting shall issue notices thereof to the shareholders and may get the said notice published in newspapers one in English and one in Gujarati for circulation in the area.

(F) Costs of publication and issuance of such notice shall be borne by the company. Appellant No. 1, however, shall deposit a sum of Rs. 30,000/- before the Registrar of the Companies within two weeks from date for meeting the requisite expenditure thereof. The said sum of Rs. 30000/- shall be reimbursed to Appellant No. 1 by the company within four weeks from the date of the meting.

(G) The Appellant No. 1 shall further supply the names and addresses of the shareholders of the company to the Registrar of company within two weeks from date.

(H) The Registrar of the Companies or his nominee shall be entitled to seek assistance for peaceful conducting of the meeting from such authority or authorities

as may be considered necessary.

(I) No adjournment motion may be entertained.

(J) Let a copy of this order be forwarded to the Registrar of Companies by the Registry of this Court forthwith for appropriate action.