Smt. Claude-Lila Parulekar vs M/S. Sakal Papers Pvt. Ltd. & Ors on 18 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 4074, 2005 AIR SCW 1892, 2005 CLC 544 (SC), (2005) 3 JT 523 (SC), 2005 (4) SRJ 486, 2005 (3) JT 523, 2006 (1) CTLJ 465, 2005 (2) UJ (SC) 1103, 2005 (4) COM LJ 193 SC, 2005 (3) SCALE 365, 2005 (11) SCC 73, 205 (3) SLT 380, (2005) 3 SUPREME 46, (2005) 3 SCALE 365, (2005) 3 GCD 2129 (SC), (2005) 124 COMCAS 685, (2005) 2 SCJ 753, (2005) 65 CORLA 317, (2005) 2 BANKCAS 542, (2006) 3 BOM CR 429, 2005 (2) BOM LR 818, 2005 BOM LR 2 818

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Bench: Ruma Pal, P.Venkatarama Reddi

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           CASE NO.:
Appeal (civil)  698-700 of 1995

PETITIONER:
Smt. Claude-Lila Parulekar

RESPONDENT:
M/s. Sakal Papers Pvt. Ltd. & Ors.

DATE OF JUDGMENT: 18/03/2005

BENCH:
Ruma Pal & P.Venkatarama Reddi

JUDGMENT:
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J U D G M E N T RUMA PAL, J.

In 1933 Dr. N. B. Parulekar and his wife Shanta, started a Newspaper called Sakal. In 1948, Dr. Parulekar and Shanta promoted a company known as M/s. Sakal Papers Pvt. Limited, which is the respondent No.1 and is referred to hereafter as 'the company". Dr. Parulekar died in 1973. Shanta died during the pendency of the appeal before this Court. The appeal which is now being prosecuted by the daughter of Dr. Parulekar and Shanta, arises out of proceedings initiated by Shanta and the appellant under Section 155 (as it stood in 1986) of the Companies Act, 1956 (referred to hereafter as 'the Act') in the Bombay High Court.

The appellant was brought on record as Shanta's only legal heir and representative. As Shanta was alive during the proceedings before the High Court, to avoid unnecessary verbiage, the appellant and Shanta are referred to hereafter as 'the appellants'.

One of the matters in dispute in this appeal relates to the transfer of 3417 shares in the company belonging to the estate of late Dr. Parulekar by three of the four executors of the will of Dr. Parulekar. The executors named in the will were Shanta, the respondent No. 2, the respondent No. 3 and the respondent No. 4. There is also a challenge to the transfer of 93 shares by the respondent Nos. 3 and 4 in the company. The basis of the claim of the appellant and Shanta with regard to the 3417 and 93 shares was the failure to allow the appellants to exercise their undisputed right of preemption in respect of the shares. The second branch of the appellants' grievance pertains to the issue and allotment of 17,666/- shares of the company. The beneficiary of these transfers/allotments is the respondent No.5 and his group represented by the respondents Nos. 6 to 16 (hereafter referred to collectively as the Pawar Group). According to all the respondents briefly speaking, the appellants were precluded from exercising any right of preemption and had in any event failed to exercise their right of preemption in respect of the 3417 and 93 shares. As far as the issue of 17,666/- shares are concerned it is submitted that it was validly done and the allotment of the shares was duly made to the Pawar group.

The learned Single Judge held that the transfer of the 3417 shares was made contrary to the appellants rights of preemption. He also held that the transfers had been made in violation of the provisions of the Section 108 of the Companies Act, 1956 and the Articles of Association of the Company. It was held that the respondent No. 5 and his group were not bonafide purchasers of the shares as they were aware of the preemptive right of the appellants to the shares. On the issue and allotment of 17,666/- shares the Trial Court held that they were invalid. Having effectively held in favour of the appellants on merits, the Trial Court did not set aside the transfer of the 3417 and 93 shares but set aside the transfer of 3417 and 93 shares to the respondent No. 5 and his group conditional upon the appellants depositing a sum or Rs.80,73,000/- in the Court within a period of six weeks. As far as the 17,666/- shares were concerned, it was directed that they should be allotted to such persons or persons at such price as the Board of Directors may decide. The Company was directed to pay back the Pawar group a sum of Rs.17,66,600/- in respect of the 17,666 shares. It was then said that in the event the appellants did not deposit a sum of Rs.79,86,110/- within six weeks the entire petition filed by the appellants would stand dismissed. The appellants filed an appeal from this order in so far as it was made conditional on the deposit of the sum of Rs.79,86,110/-. They also filed an application for extension of time for depositing the amount in terms of the Trial Court's order before the Trial Court. The application was dismissed.

In the meanwhile the Appellants filed two suits being CS 225 and 226 of 1988 before the Court in Pune against the respondents seeking specific performance of the contracts of sale of 3417 and 93 shares to them. Alternatively for damages by way of compensation of Rs.3 Crore or 4 Crore? The suits are pending. Also between the decision of the single Judge and the filing of the appeal by the appellants, the company became a Public Limited Company by virtue of Section 43A of the Act. At the time of admission of the appeal an interim order had been passed by the Division Bench on 21st December, 1989 directing that pending disposal of the appeal, the appellants' right of preemption was not to be disturbed and the company was directed not to issue or invite any fresh capital. The appeal filed by the appellants against the Judgment and order of the learned Single Judge as also cross appeals filed by the respondents were heard and disposed of by a common judgment. The Division Bench dismissed the appellants' appeal and allowed the cross appeals filed by the

respondents holding inter alia that the violation of S.108 was a mere irregularity which was curable, that the sale of 3417 shares had been validly made to the Pawar group and that although there was some irregularity in issuing the 17,666 shares, the irregularity had been cured by the subsequent ratification of the decision. At the instance of the appellants the interim order passed by the High Court on 21st December, 1989 was directed to continue for 8 weeks.

Before the eight weeks expired, the appellants filed the present appeal and an interim order was granted on 16th September, 1991 in terms of the order passed by the High Court on 21st December, 1989. That interim order is operating till today. The matter has been pending before this Court since 1991 and has been heard in part by different Benches from time to time. Efforts for an amicable settlement were not fruitful. In the meantime several of the parties including Shanta died. The applications for substitution were allowed. The respondents have raised a preliminary objection questioning the entertainment of the appellant's application under Section 155 of the Act in the first place. It is submitted that complex questions of fact were involved and the ordinary procedure of a civil suit as opposed to the summary remedy available under Section 155 was more appropriate. This was more so because not only had the appellant and Shanta reserved their right to file a suit for transfer of the disputed shares to them in the Section 155 application, they had in fact filed suits being CS No. 225 of 1988 and 226 of 1988 before the Courts in Pune claiming specific performance of the contract alleged to be existing in favour of the appellants for transfer of the 3417 and 93 shares. It is submitted that the issues involved in the Civil Suits and the proceedings under S. 155 overlapped in so far as the 3417 shares are concerned and that this appeal should be considered only with regard to the challenge to the issuance and allotment of the 17,666 shares. The appellants have submitted that they had no alternative but to file the Company Petition for rectification of the company's Register of Members by deleting the names of the respondents No.5 and his group under Section 155 of the Companies Act. Reliance has been placed on the decision of this Court in the case of Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. & Ors. 1998 (7) SCC 105 in which this Court said that:-

> "So far as exercising of power for rectification within its field there could be no doubt the court as referred under Section 155 read with Section 2(11) and Section 10, it is the Company Court alone which has exclusive jurisdiction".

It is also submitted that even if the jurisdiction under Section 155 was not exclusive and the Company Court had concurrent jurisdiction with Civil Courts, this Court should not relegate the appellants to the alternative remedy of a Civil Suit having regard to the facts of this case, especially, the pendency of the matter before the different Courts from 1986. The Trial Court had rejected the preliminary objection and held that it was open to the parties to choose any one of the remedies available to such party and that the remedy under Section 155 of the Companies Act was equally "efficacious, definitely more speedy and certainly appropriate". The Division Bench did not go into the issue having held in favour of the respondents on the merits.

Section 155 of the Act (as it stood in 1986) provided inter alia as follows:-

> S.155, Power of Court to rectify register of members-- If

(a) the name of any person

(i) is without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register is, without sufficient cause, omitted therefrom;

or

(b) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either reject the application or order rectification of the register, and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved.

In either case, the Court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the Court

(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the ground mentioned in Section 100 of the Code of Civil Procedure 1908 (V of 1908)

(a) if the order be passed by a District Court, to the High Court;

(b) if the orders be passed by a single Judge of a High Court consisting of three or more Judges, to, a Bench of that High Court.

(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members".

The power of the Court under Section 155 is limited to the rectification of the register of members of a Company in three situations (a) when the name of a person is wrongly entered in such register (b) when the name of a person, whose name having been entered in the register is omitted therefrom and (3) when default is made in entering the name of any person who has already become or who

has ceased to be a member. None of the three situations envisaged under sub-section (1) of Section 155 would allow the person whose right as a member qua the disputed shares is yet to be established to apply for rectification by inclusion of such person's name. The appellants could not, therefore have applied for transfer of the disputed shares in their favour under Section 155 of the Companies Act. They would have to establish that right by way of a separate suit or otherwise. The appellants in paragraph 26 of the Company Petition correctly reserved their right to file appropriate action for transfer of the 3,417 shares to themselves.

The relevant prayers in the appellants Company Petition 476/86 were as follows:-

> " (a) That this Hon'ble Court be pleased to order the rectification of the Register of Members of the 1st respondent Company and order that the names of be removed from the Register of Members of the 1st Respondent Company in respect of 3,417 shares belonging to the estate of Dr. N.B. Parulekar and 93 shares belonging to the 2nd Respondent;
>
> (b) That this Hon'ble Court be pleased to order rectification of the Register of Members of the 1st Respondent Company and do order that the names be removed from the Register of Members of the 1st Respondent Company in respect of 17,666/- shares;
>
> (c) That Respondent Nos. 5,6,8,11,12,13 and 14 be ordered and directed by a mandatory order and injunction of this Hon'ble Court to deliver up to the 1st respondent the share certificates in respect of the said 3417 shares and 93 shares for removal of their names there from;
>
> (d) That the Respondent Nos. 11,12,13,15 and 16 be ordered and mandatory injunction of this Hon'ble Court to deliver up to the 1st Respondent the share certificates held by them in respect of 17,666 shares allotted on 16.11.1985 to the 1st Respondent for cancellation";

As had been noted by the learned Single Judge, there was no prayer for transfer of the disputed shares to the appellants. The only prayers related to the cancellation of the impugned transfers and the rectification of the Register of Members of the Company by removal of the names of the Respondent 5 and his group.

The prayers in the appellants' suits pending in Pune are inter alia as follows:

> " (a) that this Hon'ble Court be pleased to declare that there is a valid and subsisting contract entered into between the Plaintiffs, on the one hand and the Defendants 2,3 and 4 on the other for the sale by the Defendants 2,3 and 4 and purchase by the Plaintiffs of 3417 shares of the 1st Defendants bearing distinctive numbers more particularly described in Exhibit ' -'

(b) that the Defendants 2,3 and 4 be directed to specifically perform the said contract by executing the necessary Transfer Forms and doing all other acts necessary to effectually carry out the said transfer;

(c) that the 1st Defendant be directed to register the said shares upon such transfer under prayer (b) in favour of the 2nd Plaintiffs;

(d) that in the alternative to prayer (b) above, the Defendants 2,3 and 4 be ordered and decreed by this Hon'ble Court be pay to the Plaintiffs a sum of Rs. 3 Crores or such other sum as this Hon'ble Court may determine as damages for breach of the contract."

Similar prayers were made in respect of the 93 shares. Clearly the reliefs prayed for in the Company Petition were different from for the reliefs claimed in the Civil Suits filed by the appellants. The Civil Suits arose out of and were consequent upon the findings of the learned single Judge on the petition under Section 155 that there was a concluded contract between the holders of the 3417 and 93 shares and the appellants for transfer of those shares to the appellants. The learned single Judge correctly held that " This suit was necessary as even if the Petitioners had managed to deposit the amount and got an order of rectification of the register in their favour, there was still no order of any Court which directed the respondents to deliver these shares to the petitioners".

If there is any issue in the suit which was required to be and has been determined in the Company Petition, the effect of that determination would no doubt be the subject matter of consideration by the Civil Judge, Pune, before whom the suits are pending. But the possibility of overlapping of such issues does not preclude the filing of the suits by the appellants. The appellants advisedly did not pray for the transfer and registration of the disputed shares in their favour in the proceedings under Section 155. They could not have done so. That the Court exercising jurisdiction under Section 155 of the Companies Act was competent to entertain the applications filed by the appellants cannot be disputed. The only question is whether the discretion to do so was properly exercised. Despite the respondents' submissions to the contrary, we do not consider this case as an appropriate one to decide whether this Court's decision in Ammonia Supplies Corporation (supra) was correct in so far as it has held that the jurisdiction to grant relief provided under Section 155 was exclusive. It may be noted that the view has been reiterated by a larger Bench in Canara Bank vs. Nuclear Power Corporation of India Ltd. & Ors. JT 1995 (3) SC 42 (para 31). But assuming that the decision is wrong and that jurisdiction of the Company Court under S. 155 of the Companies Act and the Civil Court under Section 9 of the Code of Civil Procedure is concurrent, there is no reason for us to refuse to entertain the application under Section 155 of the Companies Act. The questions raised in the petition for rectification were determined on the basis of the material available both by the Single and the Division Bench. Neither of the Courts were of the view that the materials were inadequate or that the disputes were such which could not be resolved under Section 155. Apart from any other circumstance, the fact that the matter has been awaiting disposal by the Courts at the different levels for almost 18 years would render it grossly inequitable and be an improper exercise of judicial discretion if we were to turn the appellants away at this stage to pursue an alternative remedy (if any) available under the general law. The preliminary objection raised by the

respondents is accordingly rejected.

Moving to the merits of the appeals the various issues raised relate to the appellants' right to purchase the disputed shares; the transfer of 3417 and 93 shares and the issue and transfer of 17,666 shares.

I.1 The preemptive right which is being claimed by the appellants arises from Article 57A of the Articles of Association of the Company. The right is admitted by the respondents, but as the extent of the right is in dispute, it is quoted verbatim.

> "57-A. In the event of any member of Company desires to transfer his shares he shall be bound to offer the same either to Dr. N.B. Parulekar or to Madame Shanta Parulekar or such other person or persons as Dr. N. B. Parulekar or Madame Shanta Parulekar may direct or may nominate and in which event the transferee or transferees shall pay such price as may be certified by the Auditors of the Company."

I.2 Analysed, the right contains four elements which are cumulative:

> (i) the desire of any member to sell his shares.
>
> (ii) the offer by such member of the shares to Dr. Parulekar or to Shanta or to their nominee.
>
> (iii) the certification of the price by the Auditors of the Company.
>
> (iv) The payment of such price by the Transferee / transferees.

I.3 The other relevant Articles are Articles 58 to 64. All these articles are under a group entitled "Transfer and transmission of shares". Article 57-A is the first of the group. The remaining articles read as under:-

> 58. Subject to Cl.57A no shares shall be transferred so long as any member or any person selected by the Directors as one to whom it is desirable in the interest of the Company to admit to membership, is willing to purchase the same at the fair value as mentioned herein below.
>
> 59. Except where the transfer is made pursuant to Article 58 here of, the person proposing to transfer any share shall give notice in writing to the Company that he desires to transfer the same. Such notice shall constitute the Directors his agents for the sale of the share to any member or persons selected as aforesaid, at a fair value to be agreed upon between the Transferor and the purchaser and in default of such agreement to be fixed by the Auditors of the Company. The notice may include several shares and in such case shall operate as if it were a separate notice in respect of each share. The notice shall not be revocable except with the Sanction of the

Directors.

60. If the Directors, shall, within the space of 30 days after being served with the Transfer Notice, find a purchasing member or a person selected as aforesaid willing to purchase the share and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the fair value fixed as aforesaid to transfer the shares to the purchaser.

61. In case any differences arises between the Transferor and the Purchaser as to the fair value of a share, the Auditors of the Company shall certify in writing the sum which in their opinion is the fair value and the same be binding on the transferor and the purchase. Provided however that the Auditors so certifying shall not be considered to be acting as Arbitrators and the Indian Arbitration Act 1940 shall not apply. The Auditor shall be considered to be acting as an expert.

62. If in case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Directors may receive the purchase money and shall there upon cause the name of the purchaser to be entered in the Register as the holder of the share and shall hold the purchase money in trust for the Transferor. The Directors may appoint any person to execute a transfer of the said share on behalf of the defaulting transferor. The receipt of the Directors for the purchase money shall be a good discharge to the purchaser and after his name has been entered in the Register in purported exercise of the aforesaid power the validity of the transfer shall not be questioned by any person.

63. If the Directors, shall not, within the time prescribed as aforesaid after being served with the Notice, find a purchasing member or select a person as aforesaid willing to purchase the shares or any of them and give notice in manner aforesaid, the transferor shall at any time within 30 days thereafter be at liberty subject to Article 65 thereof to sell and transfer the shares to any person and at any price.

64. Every share specified in the Notice given pursuant to the Article 59 hereof shall be offered to the members in such order as shall be determined by the Directors and in such manner as the Directors think fit. If no member is ready and willing to take up such shares the same may be offered to any person selected by the Directors as one to whom it is desirable in the interest of the company to admit to its membership".

I. 4.1 The Articles give the hierarchy of the persons entitled to purchase shares upon transfer. The first right is given to the preemptors under Article 57-A. Next in the hierarchy is any member who is willing to purchase the shares at a fair value. This follows from a reading of Article 58 with Article 64. The third category is of any person or persons selected by the Directors as being desirable in the interest of the company to admit to membership. The last category is the person to whom the transferor may choose to sell the shares. As long as there is any person in a higher category, there is no question of sale or purchase by a person in a lower category. Thus for example the right of a

member or a person in the 2nd category to purchase shares can arise only in the event there is a default or refusal on the part of the preemptor and so on. A person may fall within any one or more of these four categories and would, by virtue of these articles have distinct and separate rights to purchase the shares in each of the four categories. So even if a preemptor or a nominee of a preemptor does not exercise his/her right under Article 57-A to purchase the shares at a price certified by the company's Auditors, such person may choose to exercise the right as an ordinary member and purchase the share at a fair value or the transferor may choose to sell the shares to such person under Article 63.

I. 4.2. In the case of a transfer to a person in the 2nd and 3rd categories of putative purchasers, the Directors are appointed agents of the transferor. The notice of transfer is required to constitute the Directors as the transferor's agents. This notice is distinct from the other required to be given under Article 57-A. In respect of these two categories, the price of the shares is at first to be negotiated with the transferor. It is only in the case of a default in such agreement being reached that the company's Auditors step in and fix a "fair price". The third distinctive feature of these two categories is that upon refusal/default of the preemptor , the transferor is required to give a notice in writing of his desire to transfer. Giving of this notice must necessarily be subsequent to the failure of Article 57-A for whatever reason, as the Directors are required to find a willing person either in the 2nd and if not the 3rd category within a period of 30 days. There is no time limit specified for the completion of the preemptive transfer under Article 57-A. Therefore unless the transferor gives a separate notice of the failure of Article 57-A how would a willing member know whether he/she has a right or when the period fixed for intimating their willingness to purchase was to lapse? Article 60 also requires the Directors to give a notice to the transferor after finding a willing purchasing member or selectee under Article 58. Giving of this notice is important because if 30 days expires without such notice by the Directors, Article 63 would come into play and the transferor would be at liberty to sell the shares to any person and at any price, albeit also within a period of 30 days from the expiry of the first period of 30 days. It follows that a notice issued prior to the preemptor exercising or failing to exercise the right under Article 57-A would not be in keeping with Articles 59 and 60 as this would make the period of 30 days uncertain if not illusory. Thus the notice by the transferor under Article 58 must succeed the factual failure of Article 57-A and notice, if any, under Article 60 must follow the failure of Article 58.

I.4.3 Assuming there is a willing purchaser under Article 58, there is no time limit fixed either for the parties to arrive at a negotiated price or for the Auditor to fix a fair value. But Article 63 indicates that the entire transaction envisaged by Articles 59, 60, 61 and 62 would have to be completed within a period of 60 days after Article 57-A failed to operate.

I.4.4. Section 36 of the Companies Act, 1956 makes the Memorandum and Articles of Company, when registered, binding not only on the company but also the members inter-se to the same extent as if they had been signed by the company and by each member and covenanted to by the company and each shareholder to observe all the provisions of the Memorandum and of the Articles. The Articles of Association constitute a contract not merely between the shareholders and the company but between the individual shareholders also. The Articles are a source of powers of the Directors who can as a result exercise only those powers conferred by the Articles in accordance therewith.

Any action referable to the Articles and contrary thereto would be ultra vires.

I.4.5 Thus in Hunter vs. Hunter (1936) A.C. 222, the shareholders in a private company challenged the transfer of shares by another shareholder to 3rd parties without compliance with the provisions of Articles of Association. In terms of the articles a member could not transfer his shares until he had given notice to the Secretary offering to sell the shares at a price to be fixed by the auditor and until the Secretary had offered them to the other members. It was found that in violation of this article, one of the shareholders had sold the shares to nominees of a bank from which that shareholder had obtained loans. The application for rectification of the share register was resisted by the purchaser in whose favour the shares had already been registered with the company. The House of Lords came to the conclusion that the purchase was not in terms of the Article and that the transfer in violation of the Articles was inoperative.

I.4.6 A similar situation arose in the case Lyle and Scott Ltd. Scott's Trustee (1959) 2 All ER 661. There was a similar article which provided for inter alia the preemptive right in the existing shareholders to purchase shares. There was no dispute that the article had been violated.

> "The purpose of the Article is plain: to prevent sales of shares to strangers so long as other members of the appellant company are willing to buy them at a price prescribed by the Article. And this is a perfectly legitimate restriction by the Article. And this is a perfectly legitimate restriction in a private company". (p.667) The House of Lords was of the view that the Article would have to be complied with in order to effect a valid transfer. [See: Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd. (1971) 1 SCC 50, 107; H.P. Gupta vs. Heera Lal (1970) 1 SCC 437, 440 and 441). With this prefatory statement of the relevant law we may now look at the facts.
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> II Facts II.1 The narration of facts starts with the will of Dr. Parulekar by which he appointed the four Executors, viz. Shanta and the respondents 2,3 and 4 as Executors and Trustees of the will. The will inter alia empowered the Executors and Trustees to sell or to postpone the sale from time to time of all the properties vested in them by the will for payment of estate duty and to invest the same as the Executors and Trustees thought fit. After providing for specific legacies, the Executors and Trustees were directed to hold the rest and residue of the estate on trust (1) for the spread of education through newspapers, magazines and periodicals (2) for effecting improvement of the quality and standard of journalism and training of personnel in journalism (3) for purchase of shares of concerns, firms, companies or from persons or persons interested in or concerned with newspapers, magazines, periodicals and otherwise in journalism (4) for publication of books and literature for masses at low and reasonable prices, and (5) for such other objects and acts that may be necessary to bring about improvement of information amongst the masses and also which may be incidental or conducive to the above objects. The trust was to be known as "Sakal Papers Trust". Although the probate of the will had been granted in 1975 to the four Executors and all four of them had been entered in the register of members of the

company as joint shareholders of the 3417 shares belonging to the estate of late Dr. Parulekar on 26.4.1977, no steps were taken by the Executors to convert the shares into money till 1984.

II.2 It is the claim of the respondent Nos. 2, 3 and 4 that in 1984 a company by the name of M/s. Jain Plastic Pvt. Ltd. offered to purchase the 3417 and 93 shares at a price of Rs.2250/- per share. The offer is not on record. What is on record is a letter dated 10.11.1984 written by the respondents Nos. 3 and 4 as the holders of 93 shares to Shanta as well as the Board of Directors of the Company offering to sell those shares to Shanta or her nominee under Article 57-A at a price of Rs.2250/- per share. The letter further stated that in the event Shanta was not agreeable to pay the price, the letter should be treated as notice to the Directors within the meaning of Article 57-A to Article 61 who were called upon to take steps to get the price fixed under Article 61. It was further stated that if Shanta did not exercise her rights under Article 57-A or was not willing to pay the price or not willing to complete the transactions in accordance with Article 61, then the respondent Nos.3 & 4 would be free to sell the shares to any other person in accordance with Articles of the company. Article 61, as we have already seen, pertains to the valuation of shares when a shareholder expresses his or her willingness to purchase the shares.

II. 3 On 27.11.1984 the Board of Directors resolved that the 93 shares held by the respondent Nos. 3 & 4 should be offered to the other members of the company subject to the preemptive right of Shanta under Article 57-A. II. 4 As far as the 3417 shares are concerned, a similar resolution was taken that if Shanta did not exercise her rights or did not pay the shares at a price fixed under Article 61 then the Executors could sell the shares to any other person or persons for the price of Rs.2250/- per share. It was also resolved that any one of the Executors was authorized to implement the resolution and also to take steps to execute the transfer forms and complete the transaction.

II.5 Notice was given on 29.11.1984 by the Executors to Shanta with the respondent No.2 signing on behalf of all the Executors. The contents of the notice are materially the same as the notice given by the respondent Nos. 3 & 4 in respect of the 93 shares. The company similarly issued a notice to all share holders to indicate whether they were willing to purchase the shares subject to Shanta's right under Article 57-A. II.6 On 14.12.1984 the appellants wrote a letter accepting the offer to sell the 3417 shares. The letter stated that Shanta was agreeable to buy the shares by herself/or her nominee and that her nominee was her daughter, now the sole appellant. Shanta stated that she was agreeable to pay such price as may be certified by the Auditors of the company as stipulated in Article 57-A. A copy of the letter was sent by Shanta to the Board of Directors and countersigned by her daughter signifying her assent.

II.7 The Company's Chartered Accountant gave notice to Shanta on 20.1.1985 stating that he had received several documents from the company pertaining to the valuation

of the shares. A list of such documents was given. Shanta was also called upon to submit any documents that she may desire in that connection within seven days. Shanta asked for an extension of time to submit such information. This was granted by the Auditors upto 20.2.1985. By a letter dated 20.2.1985 Shanta called upon the Auditors to submit a draft report and draft certificate within seven days in order to enable her to make her submissions in respect thereof. By a letter written on the next date, Shanta asked for copies of the documents submitted by the Company to the Auditors. There was no response to either of these letters by the Auditors who straightaway issued a certificate on 21.2.1985 certifying that the price of the 93 shares was Rs.2,10,273/- and of the 3417 shares Rs.77,25,837/-. II. 8 The respondent Nos. 3 & 4 then wrote to Shanta on the same date calling upon Shanta to pay the sum of Rs.2,10,273/- in respect of 93 shares on or before 2.3.1985 "time being of the essence" failing which they would dispose of the shares in such manner as they thought fit.

II.9 In the meanwhile, the appellants had protested against the certification to the Auditors both with regard to the procedure followed as well as the value certified. The allegation against the Auditors was that the valuation had been fixed collusively and was not just, fair or reasonable according to the recognized principles of valuation. The appellants called upon the Auditor to fix a fair valuation after giving the appellants a proper opportunity of being heard. They also wrote to the respondents Nos. 3 and 4 contending that there was no question of time being of the essence either under Article 57-A or under the offer letters. It was alleged that the stipulation of time could not be imposed unilaterally. They also stated that the time fixed was unreasonable and that in any event the certificate issued by the Auditor could not be treated as a final certificate. It was also stated that there was a final and concluded contract between the parties for the purchase of the said shares. Without prejudice to all that was stated and also without prejudice to their legal rights to take actions relating to the Certificate dated 21.2.1985 issued by the Auditors, the appellants wrote:

"We are willing to deposit with any stakeholders of our mutual choice an amount of Rs. twenty lacs as an earnest of our bonafides and genuine desire to purchase the said shares. The said amount will be paid to the stakeholders within three days from the receipt of your confirmation that you are ready and willing to accept this interim arrangement. The stakeholder shall hold these monies until such time, but not later than one month within which we hope the Company's Auditors will submit a just, fair and impartial Certificate and it will be accepted by us. In case a just, fair and impartial Certificate is not issued by the Company's Auditors, within the said period, then the stakeholder shall return the said monies to us without any objection immediately on a written demand by us".

The appellant also protested against the threat held out in the letter dated 21.2.1985, to sell the shares to third parties. II.10 In response to this letter a telegram was sent by respondent No.3

stating "Will communicate action nothing in your letter deemed as admitted".

II.11 On 2.3.1985 and 1.4.1985 two suits were filed by the appellants before the Civil Judge, Pune praying for a permanent injunction to restrain the respondents Nos. 2, 3 and 4 from selling the shares contrary to the concluded contract with the appellants. The suits were rejected on 5.8.1985 by the Civil Judge on the application of the respondents Nos. 2, 3 and 4 on the ground that the subject matter involved in the suit was outside the pecuniary jurisdiction of the Court.

II.12 According to the respondents, the 3417 and 93 shares were then sold to the respondent No.5 and his group on 9.9.1985. There is no record when the offer of the respondent No.5 or his group had been made either to respondent Nos. 3 or 4 or to the Executors prior to the sale nor of any further notice being given in respect of the sale of the shares to the respondent No.5 and his group to the appellant.

II.13 On 16.9.1985 a notice was issued by the Board of Directors of the Company that a meeting would be held on 21.9.1985. The appellants' claim that the notice was given by a telegram late in the night on 16.9.1985. On the next date, the appellants sent a telegram to the Company protesting against holding the meeting of the Board of Directors at such short notice and requesting for postponement. This was followed by a letter dated 21.9.1985 written by the appellants. The day before the meeting was held, on 20.9.1985, the respondent No.5 and his group lodged transfer forms in respect of the 3417 and 93 shares with the company. The request of the appellant for adjournment of meeting was not heeded to and the meeting was held on 21.9.1985 as scheduled. At the meeting, despite there being no item in the agenda relating to the registration of the shares sold, a resolution was passed to register the transfer of the 3417 equity shares standing in the name of the four Executors as well as the 93 shares to the respondent No.5 and his group which included the respondent Nos. 11 to 16, all private limited companies. The respondent No.5 himself was appointed as an Additional Director of the Company together with another member of the respondent No.5's group. The respondent No.2 was appointed as a Chairman upon the retirement of the respondent No.3. II.14 On 1.10.1985 the appellant wrote to the respondent Nos. 2, 3 and 4 stating that they were willing to purchase the shares at the price fixed by the Company's Auditors and would pay the same immediately upon the modalities for such payment being intimated. No reason was put forward for this volte face by the appellant In response to this letter, two letters dated 2.10.1985 and 3.10.1985 were written by respondent No.2 on behalf of the Executors and by the respondent Nos. 3 and 4 as holders of 93 shares intimating the appellant that the shares had already been sold. It was however not intimated as to whom the shares were sold.

II.15 On 13th October, 1985 a Board Meeting was held at which the appellants were present. The appellants affirm that they came to know of the transfers of the shares to the Pawar group only when the Minutes of the earlier Meeting held on 21.9.1985 were put up for approval. Despite their protest the Minutes were approved.

II.16 It was in these circumstances that the application under Section 155 of the Companies Act, 1956 was filed by the appellants.

II.17 Before we close this chapter of facts on the transfer of 3417 and 93 shares, it may be noted that the District Court at Pune recalled its order rejecting the plaints in the two suits which had been filed by the appellants on a review application filed by them. The respondents challenged the order before the High Court. The High Court set aside the order of the District Court and remanded the matter to the Trial Court for re-deciding the appellant's application for review afresh.

III. Submissions III.1 According to the appellants once Shanta had exercised her rights under Article 57-A, there was a binding contract in respect of the 3417 and 93 shares. With the exercise of the right, notice to the other shareholders as required under Article 58 being a conditional one ceased to operate. It is submitted that there was no question of the respondents Nos. 2, 3 and 4 fixing a time frame for the implementation of the concluded contract unilaterally. It is the case of the appellants that the contract had never been repudiated. The conduct of the appellants spoke to the contrary. Furthermore there was no acceptance of the repudiation by the respondent Nos. 2, 3 and 4. While denying the alleged repudiation of the contract, the appellant contended that in any event in accordance with Article 63, the Directors had to find a willing member or desirable outsider to purchase the shares within 30 days. Only after that could the transferor sell to any person within 30 days. The sale to the respondent No.5 and his group was beyond that date. As far as Shanta's right to purchase the shares offered, despite the fact that she was herself one of the Executors/Trustees of the 3417 shares, it is the appellant's contention that Section 153 read with Article 29 showed that the Company was not bound to recognize any interest in shares other than that of the registered shareholder. It is further averred that Dr. Parulekar did not by his Will, seek to deprive Shanta of her right to preemption by appointing her Executor/Trustee. In any event there was nothing which deprived the present appellant of her right to purchase the shares independently, not only as a nominee under Article 57-A but also as a "willing member" under Article

58. According to the appellants there was no bar either under the Bombay Public Trust Act, 1950 or under the Indian Trusts Act, 1982 allowing Shanta to exercise her right under Article 57-A. It is contended that the three trustees could not by themselves make any offer of sale of the 3417 shares to the Pawar group. The power of the Executor was not delegatable under the Will and the authorization, if any, by Shanta to transfer the shares stood revoked once she had exercised her option under Article 57-A. It was argued that the transfer to the Pawar group by three of the four joint shareholders of the 3417 shares was in any event contrary to Section 108 of the Companies Act which mandatorily required all the joint shareholders to execute the transfer forms. It is said that the respondent No.5 and group were not bona fide purchasers. This had been so held by the Learned Single Judge which finding was not challenged before the Division Bench.

III. 2 According to the respondents, as far as Article 57-A is concerned, it is said that the article could not be construed to provide for a concluded contract merely upon the acceptance of the offer because in such event it would be open to the transferee to file a suit challenging the price and effectively subverting the transfer of shares as a result of which the transferor would be deprived of the immediate use of the funds. According to the respondents, the contract under Article 57-A would be concluded only after payment of the price. It is conceded that this particular argument had not been raised in the Courts below but being an argument on the interpretation of Article 57-A, it is submitted that it should not be excluded from consideration. According to the respondents the

appellant's conduct clearly showed repudiation of the contract. The appellants had failed to perform their obligation by challenging the certificate of the Auditor. It was submitted that the respondent Nos. 2, 3 and 4 were entitled to fix a time for the performance of the contract not only under Section 32 of the Sales of Goods Act but also under Article 57-A. By not paying the certified price for the shares, the contract came to an end. The respondents have said that by the resolution of the executors dated 7.11.1984, the three executors had been authorized to transfer the shares to a 3rd party under Section 108 (1) of the Companies Act. The transfer could be made by or on behalf of a shareholder. In fact the respondent Nos. 2, 3 and 4 need not have signed the transfer forms and any one of them could have done so. The transfer was in keeping with Article 63. The respondents then submitted that Shanta was a trustee and she could not under any principle of law applicable to trusts either herself or through a nominee purchase any trust property as this would invariably lead to a conflict of duty and interest. In fact by challenging the price fixed in the shares by the Auditor and contending that it was too high, the conflict between the interest of the beneficiary and the interest of the trustee was manifest. IV. Conclusion IV.1 In our opinion the entire transaction of sale is riddled with illegalities.

IV.1.1 The notices issued in respect of the 93 and 3417 shares were not in keeping with the Articles as far as Articles 58 to 63 were concerned. As we have already observed, notices to willing members or to selected persons under Article 58 must succeed and not precede the actual operation of Article 57-A. The notices issued by the respondent Nos. 2, 3 and 4 also did not constitute the Directors as the transferor's agents for the purposes of selling the shares in terms of Article 59. There was, in the circumstances, no question of the transferors selling their shares to any 3rd party under Article 63 unless proper notice had been issued to the 2nd and 3rd category of persons if any. There was also no question of the transferor invoking Article 61 bypassing the right of a willing member or selectee, if any, to negotiate a fair price.

IV.1.2 The Division Bench held that the notices dated 29.11.84 and 10.11.84 issued by the respondent Nos. 2,3 and 4 in respect of the 3417 shares, and the 93 shares respectively, were valid notices under Articles 57-A and 58 to the other shareholders in the company. But the Division Bench erred in holding that none of the other shareholders showed any interest in purchasing the shares. In fact the conclusion of the Division Bench is contradictory. If the notices could be combined notices under Article 57-A and Article 58, then the appellants' acceptance of the offer as made in the notices should also be construed as a combined assent under both the Articles. The Division Bench erred in holding that there was no material before the Court to indicate that the second appellant had at any time informed the company that she proposed to exercise her rights as a shareholder to purchase the shares. The Division Bench should have considered whether there was any offer to the second appellant as a shareholder to purchase the shares. If there was not an offer to the shareholders, obviously, there was no question of the second appellant accepting the offer. But whatever offer was made whether under Article 57-A or under Article 58 by the two notices, that offer was accepted by the appellant. And upon such acceptance, there was a concluded contract between the respondent Nos. 2,3 and 4 on the one hand and the second appellant on the other. IV.1.3 The learned Single Judge correctly held that:-

> "The offers being both under Article 57-A and Articles 58 to 64, the acceptance by the second petitioner must be deemed to be not only as a nominee, but also as a member of the first respondent-company entitled to take up the shares in her own right.
>
> There is a concluded contract to sell the shares to the second petitioner. The second petitioner was and is not an executrix or a trustee. This contract cannot, therefore, be said to be void or unenforceable".

IV.2.1 Article 57-A does not by itself indicate when the contract is concluded between the offeror and offeree. It was concurrently held by the Single Judge and the Division Bench that with the acceptance of the offers of the respondent Nos. 2, 3 and 4 by the appellants, the contract to purchase the shares under STA was concluded. Having regard to Section 9(1) of the Sale of Goods Act, 1930 we see no reason to differ from this conclusion. Section 10(1) of the Sale of Goods Act also speaks of avoidance of an agreement if the third party valuer either cannot or does not fix the price of the goods to be sold. Apart from the fact that the third party valuer in this case did in fact make the valuation, the section proceeds on the basis that the agreement is already concluded otherwise there would be no question of avoidance. Section 32 of the Sale of Goods Act provides:

> "32. Payment and delivery are concurrent conditions Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods".

The section has no relevance to the question whether there was a contract at all between the parties. It pertains to a condition which is to be implied, unless there is a provision to the contrary, in a contract. Indeed the section assumes the existence of a contract in respect of which such a term may or may not be read in.

IV.2.2. The respondents' argument that a contract could not be said to be concluded until the price was in fact paid because it would then be open to an offeree like the appellants to stall the transfer of shares to a third party buyer and hold the offeror to ransom, is ingenious but not an argument which is legally acceptable. The legal consequence of a concluded contract will remain irrespective of how a particular party in a given situation might abuse the rights flowing from it. It is platitudinous that the possibility of abuse of a right cannot determine whether the right exists as a matter of law. Such arguments are normally met by the aphorism "hard cases make bad law".

IV.2.3 In Sudbrook Trading Estate Ltd. v. Eggleton & Ors. (1982) 3 All ER 1, 64 a clause in the lease gave the lessees an option to purchase the reversion in fee simple at a price to be agreed by two valuers, one to be nominated by the lessors and the other by the lessees and, in default of agreement, by an umpire to be appointed by the valuers, a minimum purchase price being specified in the clause. When the lessees sought to exercise the option in December 1979 the lessors claimed that the option clauses were void for uncertainty and refused to appoint a valuer. The lessors also contended that the options were unenforceable as there was no contract of sale since the purchase

price had not been fixed. It was held that since the contract between the parties provided that the price was to be determined by valuers, it necessarily followed that the contract was a contract for sale at a fair and reasonable price assessed by applying objective standards, and " on the exercise of the option clauses a complete contract for the sale and purchase of the freehold reversion was constituted". IV.2.4 There was thus a concluded contract which was breached by the respondent Nos. 2, 3 and 4 when they purported to sell their shares to the Pawar group. IV.2.5 If the notices issued by the respondent Nos. 2,3, and 4 were not under Article 58, then it was not open to the respondent Nos. 2,3 and 4 to have sold the shares to the Pawar Group without issuing such notices. Hence irrespective of whether there was a concluded contract between the appellants and the respondent Nos. 2,3 and 4 in respect of the 3417 and 93 shares, the shares could not have been sold to the Pawar Group. Apart from the lack of notice under Article 58, as we have already noticed, the right of a transferor in terms of the Articles of the company to sell the shares to a person of the transferor's choice is required to be exercised within the period specified in the Articles. This is clear from Article

63. According to the respondents the appellants had repudiated the contract by challenging the certification of the auditor in February, 1985. If that were so then the Directors were required to give the notice to the transferor or if no such notices were given, the transferors could sell within the period of 30 days thereafter. Those 30 days had long since expired much before the date on which the sale of the shares is said to have taken place between the respondent Nos. 2,3 and 4 and the Pawar Group. IV.3 We are of the view that there was also no repudiation of the contract by the appellants as contended by the respondents on account of the appellants alleged failure to pay the price within the time fixed by the respondent Nos. 2, 3 and 4 by their notices dated 21.2.1985. IV.3.1 Section 11 of the Sale of Goods Act, 1930 expressly says:

> "11. Stipulation as to time. - Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract".

IV.3.2. As there was no time fixed either under Article 57-A or in the offer letters, the question of time being of the essence did not at all arise. As was held in S.C.Gomathinayagam Pillai v. Palaniswami Nadar 1967 AIR 1967 SC 868 "the stipulation must show that the intention was to make the rights of the parties depend on the observation of the time limits prescribed in a fashion which is unmistakable." If there is no stipulation as to time, it is not open to a party to unilaterally stipulate a time and then cancel the contract because of an alleged failure of the other party to act within the time stipulated. [See: National Co-operative Sugar Mills Ltd., Alanganallur v. M/s. Albert & Co. AIR 1981 MAD 172 (D.B.) IV.3.3. Of course if time is fixed by the contract but it is not originally of the essence, a party could by notice served upon the other call upon him to complete the transaction within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled (ibid p.872). But where no time is fixed for completion, it is not open to either the vendor or purchaser to serve notice limiting a time at the expiration of which he will treat the contract as at an end.

IV.3.4 In the circumstances, the contract for sale of the shares to the appellants could not be avoided by reason of any alleged failure on the part of the appellants to pay the price fixed by the Auditor.

IV- 4 Furthermore for an act to constitute a repudiation of a contract it must be " .such an act as indicated an intention to refuse to perform the contract and to set the other party free from performing his part. an act by which the party renounced all intention to perform his part of the contract, and thereby set free the other party or an intimation that it was no use for you to go on, because I tell you that I do not mean to keep to the contract" . [See: Freeth v. Burr (Lord Coleridge, CJ (1874- 80) All ER.753]. The question to be asked is " is the act to be relied on as rescission, an act which on the part of the person doing it amounts to an abandonment, or refusal by him to perform his part of the contract?" (ibid at pg.754) IV.4.I Repudiation of a contract is " a serious matter, not to be lightly found or inferred". From the facts as narrated earlier, it is clear that there was no such repudiation on the part of the appellants. The letters exchanged, the suits filed do not show that the appellants were renouncing the contract nor that they were absolutely refusing to perform the contract. The question is not whether the valuation by the company's auditors was correct. The Division Bench held that it could not be said to be incorrect. But the question which should have been asked was, was the challenge permissible in law and if so was it made bonafide? The Division Bench did not answer this question in the negative. There was in fact no refusal to perform the contract, but a questioning of the mode of performance. It may be that they were mistaken in their challenge to the Auditors' certificate, but that is a long way from saying that they were unwilling to pay. As was said in Sweet & Maxwell Ltd. vs. Universal News Services Ltd. 1964 QBD 699 (CA) 179 "their view might have been a wrong one, but that does not justify it being treated as a repudiation of the contract" . " .If A and B, parties to a contract, form different views as to the construction and effect of their contract, and A demands performance by B of some act which B denies he is obliged to perform upon the true interpretation of the contract, then, if B says "I am ready and willing to "perform the contract according to its true tenor, but I contend that what you, A, require of me is not obligatory upon me "according to the true construction of the contract," and if in so saying he is acting in good faith, he does not manifest the intention to refuse to perform the contract. On the contrary, he affirms his readiness to perform the contract, but merely puts in issue the true effect of the contract."(ibid pg.737) IV.4.2 There would have been no point in the appellant challenging the valuation of the shares by the auditors if they were not interested in completing the transaction. There would have been also no point in their offering to deposit Rs.20 lakhs as proof of their continued interest in purchasing the shares. The filing of the suit in Pune is not conduct in keeping with an intention of not performing the contract. If the offers were in terms of Article 58, as is now contended by the respondents, then, as we have said, the acceptance of that offer must also be understood to be under Article 58. In that case it was for the parties to negotiate the price for the shares and not for the auditors to determine. The challenge to the certification may be taken as a method of negotiating a fair value under Article 58. Be that as it may, the appellants in fact accepted the price as certified by the auditors on 1st October, 1985.

IV.5 The respondents have relied on the resolution at the Executor's meeting on 27.11.1984 at which it was determined that the sale of the shares would be made. The resolution of the executors was that one of the executors could implement the sale and execute the transfer forms but did not name anyone. Before the sale of the 3417 shares was made to the Pawars by the Executors, it was

abundantly clear from the conduct of Shanta (i) that she had revoked consent she may have given qua Executor and Trustee to the sale of the 3417 shares to third parties and (ii) that the appellants were desirous of purchasing the shares themselves in whatever capacity.

IV.5.1 In any event the Executors' resolution dated 27.11.84 authorizing one of them to effect the transfer of the shares could not override the provisions of Section 108 of the Companies Act which prohibits a company from registering or transferring of shares in the company "unless a proper instrument of transfer duly stamped and executed by and on behalf of the transferor and by and on behalf of the transferee and specifying the name, address and occupation if any of the transferee, has been delivered to the company.

IV. 5.2 For the purposes of registration of the transfer under Section 108 the instrument of transfer must be executed by the transferor or it must be executed on behalf of the transferor. But there must be execution. The learned single Judge has found as a fact that the instrument of transfer had been signed by only three of the joint shareholders. Shanta had not signed. There were three signatures on the transfer deed. Each transferor had therefore, executed qua shareholders in respect of their own interest. There was no 4th signature on behalf of the 4th joint shareholder. This was also the finding of the Division Bench. But the Division Bench held that it was a mere irregularity which did not vitiate the registration. It was also held that the irregularity could be cured by one of the Executors signing on his behalf.

IV.5.3 But compliance with the provisions of Section 108 was and is mandatory. As held in Mannalal Khetan & Ors. vs. Kedar Nath Khetan & Ors. (1977) 2 SCC 424:-

> "The words "shall not register" are mandatory in character.. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasized by the negative language. Negative language is worded to emphasise the insistence of compliance with the provisions of the Act ..The provisions contained in section 108 of the Act are for the reasons indicated earlier mandatory. The High Court erred in holding that the provisions are directory".

(See also: Halsbury's Law of England 4th edn.Vol.7 para 1632, Palmers Company Law 24th Edn. Pg.638, Jarnail Singh Vs. Bakshi Singh (1960) 30 C.C. 192., L. Janakirama Iyer Vs. P.M. Nilkanta Iyer and Others (1962) Supp.1 SCR 206.) IV.5.4. The power to act by majority qua executors and authorizing someone to act as a shareholder on another's behalf are distinct. There is no question of transferring shares by signature of a majority. Whatever the agreement between the executors was inter-se, the agreement could not over-ride the provisions of the Companies Act and under Section 108 the Company is bound to recognize only those transfers for the purpose of registration which are executed in terms of that section. It is true that they were in fact executors, and that, with regard to the beneficiaries mentioned in the will, they would be trustees of the stock, but the company does not take notice of any trust, and must act in accordance with the Act of Parliament, under which it is constituted, with regard to placing persons upon the register." [See: Barton v. London and North Western Railway Co. 1889 (24) QBD 77 (CA)].

IV.5.5 Even if the four executors had wanted registration only in the capacity of executors and the company also acquiesced in it, the four executors would continue to be ordinary share holders and the limitation would be illegal and of no effect. Being on the register as joint share holders, there is no escape from the proposition that a transfer by one of them only would be an invalid transfer. [See: Barton v. London and Northern Western Railway Co. (1889 24 QBD 77)] IV.5.6 As far as the company is concerned, the requirement of execution of the transfer form by each of the joint share holders could not be met by execution of the transfer form by one of the shareholders even though between the share holders inter-se there was an agreement that one share holder could sign on behalf of all the other share holders unless the executant signs for himself and for on behalf of the other share holders/transferors. It would be of no consequence as far as Section 108 is concerned to exclude the reluctant share holder on the ground that the share holder had refused to execute the form. The remedy of the other joint share holders to compel the reluctant share holder to sign the transfer form would lie elsewhere and not in a breach of the requirement of Section 108 of the Companies Act.

IV.5.7 Here the instruments of transfer had admittedly been improperly executed. Both the Courts have so held. It was therefore not lawful for the company to register the transfer. The principle that a Court will not interfere in the affairs of the company if the defect complained of can be cured would apply if the defect is a technicality and is curable. The non-compliance of Section 108 is not a technicality.

IV.6 Apart from the violation of Section 108 as far as the registration of shares is concerned, the meeting of the Board of Directors at which the company recorded the transfer was invalidly held.

IV.6.1. According to the Article 93 of the Articles of the Association of the Company:-

> "Every notice of a meeting of the Company shall specify a place, date and hour of the meeting, and shall contain a statement of the business to be transacted thereat. No General Meeting, Annual or Extraordinary, shall be competent to enter upon, discuss or transact any business which has not been specifically mentioned in the notice or notices upon which it was convened. In every notice there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy or, where one or more proxies are allowed, to attend and vote instead of himself and that the proxy need not be a member of the Company".

IV.6.2 In the notice for the meeting held on 21st September, 1985, there was no mention whatsoever, let alone a statement, relating to the transfer of the 3417 and 93 shares to the Pawars. At the same meeting, the respondents Nos.5 and 10, were appointed as Additional Directors although their shares were not yet entered in the Company's register of members.

IV.7 As we have found several legal infirmities in the sale of the 3417 and 93 shares to the Pawars, it is not necessary to consider whether the respondent No.5 and his group were purchasers of the shares.

IV.8. The Division Bench erred in holding that the violation of Section 108 was ratified at the Board Meeting held on 13th October, 1985. Ratification is possible in respect of an act which is incompetent, by a person who would have been competent to do such act. The violation of Section 108 could not be ratified by the Board of Directors as the act was one which the Board was incompetent to allow. The Board of Directors never had the legal capacity to direct the registration of shares invalidly transferred. IV.9 It is the respondent's final submission that neither of the appellants could have purchased the shares under Article 57A because Shanta was one of the named executors and trustees of inter alia shares of Dr. Paruleker under his will.

IV.9.1 A trust is created under Section 6 of the Indian Trust Act, 1882 ".. when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his party to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust- property to the trustee." According to the appellant no valid trust was created as the beneficiaries had not been named. We do not propose to go into this question in these proceedings.

IV.9.2 Under Sections 51 and 52 of the 1882 Act a trustee may not use or deal with trust property for his own profit or any other purpose in connection with the trust. And no trustee whose duty it is to sell trust property may directly or indirectly buy the same or any interest therein, on his own account or through his agent or third person. IV.9.3 Article 57-A does not envisage Shanta purchasing the shares through her nominee. One of hers rights under Article 57-A was no doubt to purchase the shares herself. But she could also nominate any other person to purchase the shares. The transferor then would have to make an offer to such other person who would then, independently of Shanta, be entitled to a transfer of the shares. In the latter case there is no question of any conflict of interest between Shanta in her capacity as trustee under the will of Dr. Paruleker and as a nominator under Article 57-A. Here, Shanta was not purchasing the shares. It is true that she could have done so in exercise of her preemptive right under Article 57-A, but she did not and only nominated her daughter as the person to whom shares should be sold.

IV.9.4. This was also how the parties understood the situation as the correspondence exchanged between the parties evidences. As we have noted the resolution relied upon by the respondents authorizing one of them to sell the trust shares, was taken of a meeting held on 27th November, 1984 which was attended only by two of the four Executors. Shanta could not attend because she was ill. Her prayer for adjournment was rejected by the two executors on the ground that her interest would not be jeopardized since she would be given notice under Article 57-A. It was then resolved that notice should be given under Article 57-A to Shanta. If she exercised her right under that Article, the executor was to sell the shares to her at Rs.2,250 per share. If she did not agree to purchase the shares at the price of Rs. 2,250 then the price should be fixed in accordance with Article 61. The resolution further records that only if Shanta did not buy the shares at such fixed price then the executors "do sell the shares to any other person or persons at or for the price of Rs. 2,250 per share". Since the meeting was not adjourned because Article 57-A protected Shanta, it follows that if Shanta's rights were not to be protected under Article 57-A, then the meeting should have been postponed.

IV.9.5. Indeed the matter was referred to the company's auditors in purported compliance with Article 57-A. Certification of the price was made by the auditors also under that Article. The notice of the respondent Nos. 2,3 and 4 calling upon the appellants to pay the certified price was also under Article 57-A. The present stand of the respondent Nos. 2,3 and 4 with regard to the disqualification of Shanta as a purchaser of the shares under Article 57-A is thus wholly inconsistent with their conduct ante litem.

IV.9.6. The respondents now say that Article 57-A has no application. If it does not then Article 58 would. In that event, the certification by the auditors was entirely premature as the willing shareholder (the appellant No.2 in this case) would be at liberty to negotiate the price with the respondent Nos. 2,3 and 4 and it would only be in default of any agreement being reached that a "fair value"

> would have to be fixed by the auditors. In the circumstances the principle that the trustee not directly or indirectly buying the trust property as contained in Section 57-A of the 1882 Act would also not have any application because irrespective of her right as a nominee of Shanta, the present appellant could undoubtedly have purchased the shares being in the second category in the hierarchy of purchasers provided under Articles 57-A to 64.
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> V. This bring us to the second branch of the appellant's challenge viz. the issuance of 17,666 equity shares.
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> V.1 The decision to raise the issued capital of the company and to allot the shares at par was taken at an Annual General Meeting held on 16.11.1985. It was resolved at that meeting to immediately issue increased share capital of Rs.17,66,600 of 17,666 equity shares of Rs.100/- each to any person whether a member of the company or not. It was further resolved that the decision would be ratified by convening a general body meeting preferably in the month of January/February, 1986 after giving proper notice and explanatory statement.
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> V.2 The notice of the Annual General Meeting was given on 13.10.1985. Although details of ordinary business and special business were given, there was no indication whatsoever that there would be any decision taken with regard to the increase in the issued capital and allotment of shares in the notice. According to the respondents, after the notice of the Annual General Meeting had been issued on 13.10.85, on 5.11.85, the Ministry of Finance gave notice to the company extending the validity of a sanction for foreign exchange loan to 30.11.85 and stating that no further extension would be granted. On 9.11.1985 a letter dated 7.11.1985 was sent to the company by Modular Finance and Consultancy Private Limited (the respondent No.12 before us and a member of Pawar Group) proposing that the share capital of the company be increased and requesting the issue to be decided at an ensuing AGM. On 11.11.1985 a letter was also received by the company from the United Western Bank advising the company in view of its expansion programme, to increase its share capital. V.3

According to the respondents, the increase was by reason of the urgent need of the Company to purchase machinery. We are unable to agree. The purchase of the machinery was in contemplation of the company from much prior to the date of the notice. The alleged letter from the Ministry of Finance was not produced before the High Court and we are not prepared to allow the same to be brought on record at this stage.

V.3.1 The Division Bench affirmed the finding of the learned Single Judge that the need to increase the issued capital from Rs.7,33,400 to Rs.25 lakhs was not established. Indeed the Division Bench went on to find that the action of issuing the increased share capital clearly indicated that the respondent No. 5 and his group who were in control of the company, had decided to make a fresh issue of share capital to themselves at par so as to strengthen their control over the company.

V.4. We have already noticed that Article 93 specifically provides inter alia that every notice of a meeting of the Company shall contain a statement of the business to be transacted thereat and no General Meeting, Annual or Extraordinary, shall be competent to enter upon, discuss or transact any business which has not been specifically mentioned in the notice or notices upon which it was convened.

V.4.1 Additionally, in terms of Article 94, the relevant extract whereof is quoted hereunder:

"94 (a) In the case of an Annual General Meeting all business to be transacted at the meeting shall be deemed special except ..

b) xxx xxx xxx xxx

c) Where any item or business to be transacted at the meeting is deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning ach special item of business, including in particular the nature and extent of the interest, if any, therein, or every Director, Secretaries and Treasurers, if any, and the manager, if any.

V.4.2 The increase in issuance of share capital does not fall within the exceptions carved out in Article 94 as not being special business. Article 94 reflects the substance of Section 173 of the Companies Act, 1956 and it was therefore, incumbent for notice to be given not only indicating the issuance of the share capital as a special item of business but also giving a statement setting out all material facts relating thereto. The violation of this Article by the company is patent and the Annual General Meeting is to the extent of the violation vitiated thereby.

V.4.3 In Pacific Coast Coal Mines Ltd. vs. Arbuthnot & Ors. (1917) AC 607 PC, the Privy Council was of the opinion;

" that to render the notice a compliance with the Act under which it was given it ought to have told the shareholders, including those who gave proxies, more than it did. It ought to have put them in position in which each of them could have judged for himself whether he would consent, not only to buying out the shares of directors, but to releasing possible claims against them. Now this is just what it did not do and therefore, quite apart from the fact that the meeting was held in half an hour from the time the Act passed and before the shareholders could have had a proper opportunity of learning the particulars of what the Legislature had authorized, their Lordships are of opinion that the notice was bad, and that what was done was consequently ultra vires". (pg.282) V.4.4. Again in Baillie vs. Oriental Telephone and Electric Company Ltd., (1915)1 Ch.D.503 (CA) it was said by the Court of Appeal;

" I feel no difficulty in saying that special resolutions obtained by means of a notice which did not substantially put the shareholders in the position to know what they were voting about cannot be supported, and in so far as these special resolutions were passed on the faith and footing of such a notice the defendants cannot act upon them."

(See also LIC vs. Escorts (1986) 1 SCC 246 at pg. 343] .

V.5.1 The respondents have relied on Article 94 (e) which says that " the company shall also carry out the requirements of Section 188 of the Act" to contend that due notice was given under Article 94 because the letter of Modular Finance had been forwarded to the shareholders.

V.5.2. Section 188 provides that a meeting could be requisitioned by the prescribed number of members, after notice of any resolution which may properly be moved and is intended to be moved at a meeting together with a statement with respect to the matter referred to in any proposed resolution. Assuming that Modular Finance's letter was in fact circulated, this could hardly be termed to be compliance with the requirement of Section 188 of the Act which deals with meetings called at the instance of requisitionist and circulation of a statement by the requisitionist of a proposed resolution and a statement in support thereof. Moreover, such a notice in terms of the proviso of Sub Section 3 of Section 188 is required to be given "in the same manner and, so far as practicable, at the same time as notice of the meeting, and where it is not practicable for it to be served or given at that time, it shall be served or given as soon as practicable thereafter". Further it is clear from Article 94(e) that compliance with Section 188 was in addition to the requirements with the other parts of Article 94 which admittedly have not been complied with.

V.5.3 The Division Bench found that there was no explanatory statement annexed to the notice and held that the respondents certainly committed an irregularity in not mentioning the proposal to increase and allot the share capital on the agenda of the annual general meeting. However, it went on to hold that the irregularity did not vitiate the decision because it could be cured since the Pawar group already had majority control and also because the decision had been taken at the annual general meeting that an extraordinary general meeting would be called after proper notice to ratify the fresh issue of 17666 shares at Pawars.

V.5.4 We are unable to accept the reasoning of the Division Bench. The two grounds which persuaded them not to interfere with the fresh issue are questionable . For one, we have already come to the conclusion that the sale of 3417 and 93 share to the Pawar Group was bad. The Pawar group did not legally have the majority to push through the decision to increase the share capital or to allot the further shares to themselves. For another, the majority cannot be permitted to ride rough shod over the provisions of the Articles and the Companies Act merely because they could if they so desired follow the proper procedure. The haste with which the Pawar Group sought to ensure their position in the company is evident from the fact that a Board Meeting was held immediately after the Annual General Meeting on 16.11.1985 at which the Board resolved to issue the additional 17,666 shares at par to the Pawar Group. There was no notice given of the Board meeting at all.

V.6.1 The Respondent Company was bound to offer the further shares on a fresh issue of capital to the existing equity share holders in proportion to the capital paid up on the shares at that date. The Division Bench noted that this was provided in Section 81 of the Companies Act. However, because Section 81(3) does not apply to a private limited company (which the company was at that stage) and since according to the Division Bench, the Articles of Association did not require such further issue of shares to be allotted in any particular manner to the existing share holders, the allocation of the further issue to the respondent No. 5 and his group was not illegal or contrary to law.

V.6.2 As a matter of fact the finding as to the absence of such a requirement in the Articles of Association of the Company was erroneous. Increase of share capital is dealt with in Articles 14 and 15 . Article 15 says:

> " Subject to the directions that may be given by the meeting that sanctions the increase of capital (i) such new shares shall be offered to the persons who are at the date of the offer members of the Company in proportion as nearly as circumstances admit to the capital paid up on their shares at that date, (ii) the offer aforesaid shall be made by notice specifying the number of shares to which the member is entitled and limiting a time not less than fifteen days from the date of the offer, within which the offer, if not accepted, will be deemed to have been declined, (iii) after expiry of the time specified in the notice aforesaid or on the earlier intimation from the member to whom such notice is given that he declines to accept the shares offered, the Directors may dispose of the same in such manner as they think most beneficial to the Company." (emphasis added) V.6.3 No offer was made by notice in writing in terms of this Article. The fresh shares were, as we have seen, allotted on the day they were issued before the expiry of 15 days without waiting for the expiry of the period. The allocation of shares to the Pawars' group contrary to this Article was invalid.
>
> V.6.4 No court could possibly object to a decision on merits provided it is taken in accordance with law. The decision to issue all the additional shares to the Pawar Group at par may not by itself have warranted interference were it not for the manner in which the entire exercise was undertaken.

V.6.5 During the course of the hearing both before the Division Bench and before this Court, the respondents offered to make an allotment of the issued capital to the appellants to participate prorata in the additional issuance. The offer did no more than what the company's articles required to have been undertaken. VI Having effectively held in favour of the appellants, the question finally to be determined is what reliefs can be granted to them.

Reliefs VI.1 The respondents contended that the relief of cancellation of 17,666 shares cannot be granted in a petition under Section 155 petition as any reduction of capital must be made strictly in accordance with Sections 100 to 104 or Section 402 of the Companies Act.

VI.2. The issue need not detain us as there was no such prayer made by the appellants. They have asked only for rectification of the share register by deletion of the names of the Pawar Grpoup as shareholders in the company. The learned Single Judge merely directed the Board of Directors to dispose of the fresh shares, one can only assume, in accordance with the Articles of the Company and the Act.

VI.3. Having effectively held on all issues in favour of the appellant the question remains as to whether we should, in exercise of our discretion under Section 155, grant the appellant the relief of rectification of the shares as claimed. Although the logical conclusion of our findings would be to set aside the transfers and restore the status quo ante, the question is should the share register of the company be directed to be rectified now in respect of shares, the impugned transfer of which took place more than 20 years ago? The respondents have submitted in the course of the hearing that this Court should not in any event disturb the status quo but should mould the relief by awarding compensation, if necessary as prayed for by the appellant. They have referred to the decision in Needle Industries (India) Ltd. V. Needle Industries (Newey) India Holding Ltd. 1981 (3) SCC 333 in support of this submission. We agree. There has been a sea change in the factual scenario. Shantha has died. The company has become a public limited company. The respondents have been at the helm of the company more than, two decades during the legal struggle. Many decisions must of necessity have been taken and implemented. The situation cannot now be unscrambled. It is a course of action which would make the company disfunctional harming the interests of the whole body of share holders, affect company's employees, its creditors and customers. It is not as if we are able to grant any relief directly to the appellant except to the extent of setting aside the transfer. The appellant will still have to pursue her remedies for effective relief in the two pending suits in the District Court of Pune in which the appellant has prayed for specific performance of the contracts for sale of the shares. The outcome of the suits is uncertain. What is certain is that whatever the outcome of the litigation it will be another long round of litigation. Yet another factor to be borne in mind is that the appellant had her own role to play in contributing to the situation which she had to face eventually. Admittedly, Shanta and the appellant ultimately accepted the

Chartered Accountant's report. As we have noted, no reason whatsoever was given for the sudden change of attitude. If they could agree subsequently to pay the price they could have done so earlier, paid the price and then challenged the value. Further, the Single Judge also gave the appellant and Shanta an opportunity of paying the share price into the Court within a period of six weeks. Had the appellant and Shanta done so, they might have been in a stronger position vis-`-vis- the Pawars in the appeal Court. VI.4 In these circumstances and weighing in the balance the comparative advantages and disadvantages of granting the appellant the relief of rectification, we are of the view that it would not be appropriate at this stage to exercise our discretion to grant the relief of rectification. However, the fact remains that the appellant has been wronged and she is entitled to be compensated. Section 155 of the Companies Act, allows the giving of damages in addition to or in lieu of rectification. In the pending suits, the appellant has put forward alternative prayers for payment of compensation of Rs. 3 crores on account of the 3417 shares and Rs. 1 crore for the transfer of the 93 shares in the event specific performance of the contracts was not grantable. It was pointed out by some of the respondents' counsel, without prejudice to their contentions on merits, that the figure specified in the plaint, though on the higher side, could form a rough and ready basis to quantify the compensation. Having due regard to these submissions and in order to give a quietus to the litigation we are of the view that the ends of justice would be met by directing that the appellant should be compensated with an amount of Rs.3 crores to be paid by the company to the appellant in full and final settlement of the appellant's claims in respect of the 3417 and 93 shares. Additionally, the company will also allot shares to the company out of the 17,666 shares on par proportionate with the appellant's present share holding. We are told that the appellant is at present employed by the company and is also a Director of the company. The appellant shall continue in this capacity for the appellant's life time. VI.5. The appeals are accordingly disposed of without any order as to costs.