Calcutta High Court
Pradip Kumar Sarkar And Ors. vs Luxmi Tea Co. Ltd. And Ors. on 6 July, 1988
Equivalent citations: 1990 67 CompCas 491 Cal
Author: A K Sengupta
Bench: A K Sengupta
JUDGMENT Ajit Kumar Sengupta, J.

1. In this interlocutory application, the plaintiffs have, inter alia, asked for the following reliefs :

(i) Appointment of an administrator and/or special officer over the defendant-company, the Luxmi Tea Co. Ltd. to take over its management;

(ii) For certain orders of injunction,--

(a) restraining defendants Nos. 2 to 8 from holding out or acting as directors ;

(b) restraining defendant No. 9 from holding out or acting as the secretary of the defendant-company ;

(c) restraining the defendants from dealing with or alienating or encumbering the company's assets or parting with its possession or from entering into any further contracts or operating the company's bank account or selling the company's tea except by public auction and restraining the defendant-company from allowing Carritt Moran and Co. P. Ltd. ("Carritt Moran") to act as tea-broker of the defendant-company and allowing one Debu Chatterjee to act as manager of the defendant-company's Narayanpur Tea Estate both pursuant to the company's board resolutions ;

(d) injunction restraining the defendant-company from giving effect or further effect to the transfer of any of the 1,348 shares mentioned in annexure 'A' to the petition and from allowing any right to be exercised in respect of such shares including the voting rights or receiving any dividend ;

(e) injunction restraining defendants Nos. 2 to 9 from using any funds of the defendant-company for the purpose of defending the pending proceedings under Section 155 of the Companies Act, 1956 (Companies Act), and appeal pending before the Central Government under Section 111 of the Companies Act;

(iii) An order directing the administrator and/or special officer to be appointed to conduct and preside over the company's seventy-fourth annual general meeting which was for the financial year ended on March 31, 1986, with ancillary directions upon the administrator and/or special officer regarding such meeting ;

(iv) And for ad interim orders in terms of the aforesaid.

2. On the said interlocutory application which was moved on September 16, 1986, R.N. Pyne J. (as his Lordship then was) made an interim order directing that the resolution passed at the said annual

general meeting due to be held shall be subject to and would abide by the results of the application and the advocates-on-record of the plaintiffs and the defendants were appointed as joint special officers for the purpose of making an inventory of the share register, share transfer register and transfer deeds relating to the said 1,348 shares.

3. Pursuant to the said order, the inventory has been completed in the month of September, 1986. It appears that the plaintiffs preferred an appeal. It is alleged that the company, while contesting the said application filed by the plaintiffs in the said appeal, contended that the disputed shares were not 1,348 but were only 779 shares which were described as "dead shareholders". It may be mentioned that the said 1,348 shares and 779 shares constitute 8.4% and 4.8% respectively of the paid-up capital of the company.

4. Orders were passed by the appellate court from time to time adjourning the said annual general meeting and eventually by an order of the appellate court dated January 28, 1987, the said adjourned annual general meeting was directed to be held on March 7, 1987, and a retired judge of this court, Mr. C.K. Banerjee, was appointed as chairman of the meeting. Direction was also given by the appellate court that votes, if cast in the abovementioned meeting in respect of the said 779 shares, would be separately shown in the chairman's report. The chairman has since then filed a report.

5. The suit having been instituted with leave under Order 1, Rule 8 of the Code of Civil Procedure, an advertisement was published in newspapers on September 29, 1986. By several orders passed by justice Mrs. Pratibha Bannerjee in the months of November and December, 1986, on applications made under Order I, Rule 8 of the Code of Civil Procedure, eleven persons who had purchased 716 shares constituting about 4.4% of the company's paid-up capital and who had made applications under Section 155 of the Companies Act, five other persons who had purchased 1,149 equity shares constituting about 7.18% of the company's paid-up capital and nineteen other persons who had purchased 1,143 equity shares constituting 7.1% of the defendant-company's paid-up capital, were added as parties to the suit. As a result of the said order, persons having purchased shares constituting about 18.7% of the paid-up capital of the company were added as parties to the suit supporting the plaintiffs. Supplementary affidavits have been filed by or on behalf of such persons putting on record their support to the plaintiffs.

6. On September 4, 1986, the learned company judge passed an order on one of the applications made under Section 155 directing rectification of the register of members of the defendant-company in respect of 56 shares purchased by one Champalal Dharewa. It is contended by the plaintiffs that in spite of such order, no rectification has been made and an application for contempt is pending in respect of the same.

7. On the eve of the annual general meeting, the applicants whose applications under Section 155 were pending, obtained orders from Justice Mrs. Monjula Bose in the said company proceedings appointing special officers, to exercise voting rights in respect of the shares purchased by them but not registered by the company in accordance with their wishes, at the ensuing adjourned annual general meeting. The said special officers have exercised their voting rights at the annual general

meeting to which I shall refer presently.

8. According to the plaintiffs, 49 applications under Section 155 of the Companies Act were pending in respect of more than 3,000 shares constituting about 20% of the company's paid-up capital, purchased by some of the present plaintiffs and their supporters.

9. The present application is opposed by the company, its directors and secretary. Two sets of affidavits-in-opposition have been filed. Supplementary affidavits have also been filed by the parties in the present proceeding.

10. The contention of the plaintiffs is that the company was incorporated in the year 1912 with its liability limited by shares and on February 6, 1963, a new set of articles was adopted by the company following the amendment of the Companies Act in 1960, inter alia, of Section 111 of the Companies Act. Under the amended articles, the board of directors of the company has no power to refuse registration of the transfer of fully paid-up shares over which the company has no lien. It is nobody's case that the company is claiming any lien over the shares which were awaiting registration in the pending proceedings under Section 155 of the Companies Act or otherwise.

11. According to the plaintiffs, the first plaintiff purchased 12 equity shares on February 7, 1986, and the second plaintiff purchased 12 equity shares on January 24, 1986, and another 12 shares on February 9, 1986, which were registered by the company on March 5, 1986. The first, second and third plaintiffs are the registered shareholders in respect of 12, 24 and 26 equity shares respectively ; the first plaintiff claimed to have subsequently purchased a further two equity shares and lodged the same with the company for registration. The fourth plaintiff purchased six equity shares from one Durga Prasad Agarwalla and seven others who were joint-holders in respect of the said six shares and had lodged the same with the company for registration. The fifth, sixth and seventh plaintiffs claimed to have purchased respectively, 309, 210 and 546 fully paid-up equity shares arid lodged the same for registration with the company, but the registration has been refused by the company, The fifth, sixth and seventh plaintiffs have already filed applications under, Section 155 of the Companies Act. According to the plaintiffs, 44 persons have filed three separate affidavits through three deponents, Nav Ratan Surana, Suresh Kumar Kanoi and Jagadish Chandra Ghosh claiming to have purchased 3,369 shares. The plaintiffs rely on an affidavit of the first plaintiff affirmed on January 6, 1987, filed before the appellate court showing that the plaintiffs have the support of persons holding 6,157 shares.

12. Two main disputes are involved in this application. The first dispute relates to transfer of shares and non-registration thereof. The second dispute relates to the alleged mismanagement of the affairs of the company and oppression of the plaintiffs and their supporters who have purchased shares and have allegedly failed to obtain registration thereof in alleged breach of the provisions of the Companies Act and the company's articles of association. I shall deal with these two controversies separately.

13. The broad facts relating to the first dispute as regards the transfer of shares and the alleged non-registration thereof are as follows :

The board of directors of the company comprised the Sahas holding only 3,690 shares out of the total paid-up capital of 16,000 shares of Rs. 100 each and the said 3,690 shares constituted only 23.06% of the total paid-up capital. Thus, the Sahas were in management on the basis of only a minority shareholding. One Dipankar Chatterjee, the second defendant, in the month of January, 1986, obtained control of 1,652 shares held by the then director, Arun Kumar Saha, and the said shares constituted 10.3% of the total paid-up capital. According to the plaintiffs, the said Dipankar Chatterjee was in a position to dominate the board of the company and he was in de facto control of the company since January, 1986, although he became a director only on April 28, 1986. He also purchased the shares of other directors and their relatives. The allegation is that the said Dipankar Chatterjee is deemed to be a director since January, 1986, and rather even prior thereto and he has cornered a large number of shares by misrepresentation immediately after coming into the management. In January, 1986, the said Dipankar Chatterjee started transferring a large number of shares in his favour and in favour of his nominees even though dividends in respect of such shares remained unclaimed since 1976. The said Dipankar Chatterjee was formally co-opted as a director in the board meeting held on April 28, 1986, and at this board meeting, the transfer of a large number of shares out of the said 1,348 shares was approved. It may be mentioned that 12 shares purchased by the first plaintiff were also approved at the said meeting. The case of the plaintiffs in substance is that directors have acquired shares in their own names and in the names of the nominees by dubious and illegal methods.

14. In January, 1986, the shareholding in the defendant company was scattered. A large number of shareholders were either dead or not traceable or have not responded to the notices of the company for annual general meetings. For a number of years, they have not attended such meetings. According to the plaintiffs, the dividends in respect of the disputed 1,348 shares have not been encashed since last several years and are lying in deposit in the account of the Central Government under Section 205A of the Companies Act, 1956.

15. It is also the grievance of the plaintiffs that in January, 1986, Dipankar Chatterjee and his supporters have resorted to a device for illegally acquiring the said 1,348 shares so as to create an ostensible majority in their favour. Such devices, inter alia, were issue of advertisements by the defendant company in various newspapers, stating that the original share certificates have been "reported to be lost" and if no objection was received within 15 days, duplicate share certificates would be issued. Such advertisements were issued in respect of 152 shares held by 16 shareholders. Before issuance of such advertisements, no request was made to the defendant company by the registered shareholders stating that the share certificates have been lost and duplicate share certificates should be issued in their favour. Nonetheless, such advertisements were issued in newspapers by the defendant company. It is further contended by the plaintiffs that issuance of duplicate share certificates are in violation of the Companies (Issue of Share Certificates) Rules, 1960. No board resolution of the company has been disclosed showing any authority of the board to issue either such advertisements or duplicate share certificates and yet on the basis of such duplicate share certificates transfer of about 152 shares in favour of the present management and their nominees are shown to have taken place. On these transfers, in some cases, the company claims to have taken indemnity from the persons concerned but the validity of such indemnities are in dispute by reason of lack of adequate stamp, without any affidavit, etc.

16. The case of the plaintiffs made in the affidavit-in-reply is that although transfers of 586 shares have been alleged by the company to have taken place prior to January, 1986, the said transfers have been deliberately antedated. In view of such allegations having been made in the affidavit-in-reply, the company, with the leave of the court, filed a supplementary affidavit through one Sukhendu Bikash Saha affirmed on March 28, 1987. The company, however, denied the allegation of antedating in the supplementary affidavit and did not rely on any records to refute the allegation or to establish that approvals of transfers of such shares in fact took place prior to January, 1986. It is also alleged that the company did not even make any reference in its pleadings in the annual return. The plaintiffs, in their supplementary affidavit-in-reply, have contended that in respect of the shares transferred in favour of Dipankar Chatterjee and his nominees in the year 1986, no dividend has been collected by the original shareholders and the same have been transferred to the account of the Central Government as late as September 20, 1986, long after the date of the transfer of shares. According to the plaintiffs,' this would indicate the ante-dating of the transfer of many shares.

17. The further contention of the plaintiffs is that the records of the company have been fabricated and in order to conceal their detection, the same have not been referred to in the pleadings of the company. The plaintiffs have been kept at bay by refusing inspection of such records without which the plaintiffs cannot demonstrate further the wrongful acts complained of. The plaintiffs have given some illustrations regarding the alleged illegal acquisition of shares by Dipanker Chatterjee by alleged dubious methods.

18. One Durga Prasad Agarwalla and seven other persons jointly held six shares in the company bearing distinctive numbers 7,008 to 7,010 and 15,129 to 15,131. The fourth plaintiff purchased the said shares on May 29, 1986, from the said Durga Prasad Agarwalla and the said joint holders who executed the transfer deed lodged with the company on June 2, 1986, together with the share certificates, but the company, however, sent to the fourth plaintiff a copy of the letter addressed to Durga Prasad Agarwalla questioning the transfers and as to the reasons for not withdrawing the dividend for the year 1983-84 and lack of response to the advertisements in newspapers.

19. The attitude of the company, however, remains unexplained. The failure of the registered shareholder in not collecting the dividend or encashing the dividend warrant cannot be a relevant consideration in dealing with an application for transfer of shares by the company particularly having regard to the fact that even according to the company, the registered shareholder was alive and was still a member. It prima facie appears to me that this is an irrelevant consideration for the board of directors in exercising their powers of refusal to transfer the shares. Whether the defendant company and its board have power under Clause 39 of the company's articles of association to refuse approval of transfer of the fully paid-up shares over which the company has no lien is a matter for the company court to decide. Suffice it to say at this stage that deciding the question about the balance of convenience, the court may take into account what would be the effect if these applications under Section 155 are allowed and the applicants are treated as members of the company who would be supporting the plaintiffs. But the advertisements in newspapers can be issued only upon receipt of an application by the registered shareholder or in case of his death by his heir and legal representatives stating loss of original share certificates and asking for issue of duplicate share certificates. Prima facie the advertisements were issued unauthorisedly.

Accordingly, the absence of response to such unauthorised issuance of advertisements in newspapers cannot justify such application and cannot make the issue of duplicate share certificates valid or proper particularly when the registered shareholder is alive at the time the company is considering the approval of transfer of shares by him.

20. The company contended that an application was made by one Madanlal Agarwalla representing himself to be the son and heir of the said Durga Prasad Agarwalla and on the basis of the said application, the shares were mutated in the name of Madanlal Agarwalla after obtaining an indemnity from him. The company has not disclosed before this court as to what steps have been taken by it to enforce such indemnity in view of the unassailable claim of the fourth petitioner to such shares by purchase. No affidavit has been affirmed by the said Madanlal Agarwalla and the supposed application of Madanlal Agarwalla has not been produced before this court Even the supposed indemnity has not been produced. The said Madanlal Agarwalla is shown to have subsequently sold the said six shares to one Rabin Malakar who, according to the plaintiffs, is a nominee of Dipankar Chatterjee. The said Durga Prasad Agarwalla and the seven joint holders are still alive or at least are not claimed by the company to be dead, There is no explanation as to why an enquiry was not made by the company with the other seven joint holders before issuing the duplicate share certificates. The company has not produced before this court the transfer deed in favour of Rabin Malakar showing that the same was signed by the joint holders as well.

21. The company subsequently filed an interpleader suit in the City Civil Court, Calcutta, and obtained an order of injunction restraining the parties including the fourth plaintiff from initiating any proceedings against the company and its officers relating to the transfer of the said six shares. The transfer of the said shares in favour of Rabin Malakar is thus prima facie not tenable in view of the circumstances in which the duplicate share certificates were issued and on the basis of which the transfer in his favour was made and approved. No doubt the number of shares involved is small. It will not tilt the balance one way or the other. But the method by which the transfer of the said shares has been brought about discloses a serious mismanagement in the affairs of the company. This fact has to be taken into account in dealing with the allegations regarding mismanagement in the affairs of the company. It also lends support to the grievance of the petitioner that Dipankar Chatterjee, by illegal methods, has been trying to acquire more shares in the company and bring about registration thereof in his name and in the name of his nominees with a view to create a semblance of majority in his favour.

22. The company, in its affidavit-in-opposition filed before the appellate court, produced a list of transfers of 286 shares which, according to the company, were approved by the board and mutation took place in the year 1986. A copy of the said list has been included in the affidavit-in-reply to the present application. This list, however, was not filed by the company in its affidavit-in-opposition to the instant application. According to the plaintiffs, the said list discloses the transfers of shares in two cases and their approval by the board in the year 1986, but even in such cases, they suffer from incurable infirmities undecided hereinafter.

23. Pritheswar Misra and nine others held 12 shares in the company. On the basis of two affidavits affirmed by Saileswar Misra and six others on December 13, 1985, and Nikhileswar Misra also on

the same date and the death certificate of Pritheswar Misra, the transmission of the said shares in the name of one Asha Misra was approved by the board on January 7, 1986. In the first affidavit, it has been alleged that out of ten persons, six persons were dead and yet the death certificate of only one person has been disclosed. There is no indispensable death certificates in the case of the other five persons. The indemnities obtained by the company from the so-called legal heirs, according to the plaintiffs, are understamped and are liable to be impounded. The company has, however, contended that Smt. Asha Misra sold the said 12 shares to Arun Kumar Sana and Purnima Saha on December 16, 1985. The plaintiffs in their supplementary affidavit-in-reply have challenged the factum and validity of such transfer on the ground of lack of competency of Smt. Asha Misra to sell the said shares on December 16, 1985, when she was not a registered shareholder in respect of the said 12 shares, the said shares having been mutated in her favour by reason of transmission only on January 7, 1986. No transfer deed executed by the said Asha Misra has been produced before this court.

24. Four shares previously standing in the name of Smt. Durga Bewa were transmitted in favour of one Ram Lal Agarwalla and were approved by the board on April 21, 1986, which, in turn, has transferred the shares to one Rabindra Nath Malakar who, according to the plaintiffs, is a nominee of Dipankar Chatterjee. The said Ram Lal Agarwala has affirmed an affidavit on the abovementioned impugned transaction on the basis of which the transfer of the said shares in his favour was approved by the board. In my view, no reliance can be placed in the said affidavit. It is alleged in the said affidavit that share certificates in respect of the said four shares were "issued" to the said Ram Lal Agarwala and the same were "lost or destroyed" "though those were returned" to him by the company. The said Ram Lal Agarwala has further stated in the said affidavit that he has "filed a request to the company" for issuance of duplicate certificate for the said shares. The meaning of such statements is not at all clear. A company can issue share certificates or even duplicate share certificates only to a registered shareholder and that too only if the duplicate share certificates have been issued lawfully and properly, of which there is no proof or evidence in the instant case. It is not also clear as to why the share certificates should have been returned to Ram Lal Agarwala which necessarily indicates that the share certificates were previously made over to the company. If so, by whom and its purpose is not at all clear. This document purports to give an indemnity and is understamped and liable to be impounded,

25. The contention of the defendants is that the first, second and third plaintiffs held only 62 shares. The other plaintiffs are not yet members of the company and have filed applications under Section 155 of the Companies Act which were pending. Hence, until the names of such other persons are mutated, they can have no cause of action in the plaint. There is no prayer for rectification of the share register in respect of the impugned transfer of the shares nor is there any decree for cancellation of the transfers of shares. There is only a prayer for prospective injunction in respect of the impugned transfers of 1,348 shares in the plaint. As most of the shares in question have already been transferred and mutated in the books of the company, no relief can be asked for in respect of the shares already mutated.

26. It is also the contention of the defendants that the instant application was moved on September 16, 1986, and the order was passed on the following day. The plaintiffs took a chance by preferring

an appeal against the ad interim order and the appellate court also directed that the votes cast in respect of 779 shares need to be shown separately. Even according to the report of Mr. P.K. Jhunjhunwala the advocate-on-record of the plaintiffs, as to the results of the voting, the defendants have won at the election and hence there is no room for restraining the elected majority from managing the affairs of the company. Ultimately, the minority has to sell their shares to the majority and the defendants constituting the majority are prepared to purchase the shares of the plaintiffs at a fair price.

27. It is also contended that the plaintiffs alleged that the 1,348 shares are ineffective shares. The advertisements were published in relation to only 16 shareholders who, according to the plaintiffs, held only 159 shares. Thus, the dispute is not as to 1,348 shares but only to 159 shares.

28. Although the plaintiffs suspected foul play with regard to the transfers of the shares, some of them wrote letters offering very high prices of Rs. 3,000 per share.

29. Mr. Dipankar Chatterjee became a director of the company only in April, 1986, and has nothing to do with the transfers which took place in 1984 or 1985. The complaint in the suit is confined to transfer of shares which took place in the affidavit-in-reply of the plaintiffs that the transfers have been ante-dated. It is a matter of record that in 1986, only 286 shares out of 1,348 shares were transferred and approved and the annual returns would also support this. The transferors of such shares have voted at the annual general meeting after mutation of the said shares and it is not possible to ante-date the transfer of such shares as alleged by the plaintiffs. It may be mentioned that the plaintiffs took objection to this contention that the annual return, not referred to in any pleadings of the defendants, would support the contention of the company.

30. The appellate court directed the votes in respect of 779 shares to be recorded separately. One does not know how the votes in respect of the balance 569 shares out of 1,349 shares were cast, inasmuch as the report of the chairman is silent on this point. In any event, only 286 shares had been transferred during the year 1986. It may be mentioned here that the plaintiffs have taken serious objection to this contention inasmuch as the defendants did not disclose any records of the company in support of this contention.

31. Regarding the shares of Durga Prasad Agarwalla and seven other joint holders, it was contended that only a small lot of six shares was involved in the transaction and under the articles, the directors had a discretion to approve the transfers without a succession certificate. Madanlal Agarwalla, claiming to be the son of Durga Prasad Agarwalla, approached the company and the company, relying on his representation, accepted the transmission of the shares in his favour. Thereafter, Smt. Iva Bose, plaintiff No. 4, contacted the company. The company wrote to everybody. It was accepted by the defendants that some foul play had been done by somebody and hence the inter-pleader suit has been filed in the city civil court. The defendants laid stress on the fact that the said Smt. Iva Bose purchased the shares after advertisement. According to the defendants, apart from the above, no other incident has been complained of by the plaintiffs.

32. Regarding the ten shares of one Swapan Kanti Bagchi purchased by Dipankar Chatterjee, the allegation is merely that he was induced to sell the shares at a low price but there was no dispute regarding the ownership of the shares.

33. Regarding the shares purchased by Smt. Asha Mishra, it was contended that there was nothing wrong in a transmission and a transfer taking place on the same day. The application for transmission of the heirs of Pritishwar Misra in favour of Asha Misra having been entertained by the company, thereafter the sale was approved. It was further contended by the defendants that this procedure has been followed in all cases where transmission of shares was accepted and followed by transfer of the shares and its approval by the board.

34. Regarding Durga Bewa, the submission was that it involved only four shares.

35. The company, in its supplementary affidavit-in-opposition, has referred to three cases where applications for transmission of shares were made and approved and applications were also made for issue of duplicate share certificates on the basis of which transfers of shares were made and approved by the company, viz., Pijush Kanti Datta, Debendra Nath Roy and Chanchal Biswas. The plaintiffs have joined issue as to the validity of transmission of such shares.

36. In the case of Pijush Kanti Datta, the plaintiffs contend that the identity, included at page 31 of the supplementary affidavit-in-reply, is under-stamped, stamp of only Rs. 5 having been put although a stamp of Rs. 30 was necessary and, as such, the said identity is liable to be impounded. Further, the document has not been affirmed before any Magistrate or a notary public and does not bear any date and is without any jurat. The plaintiff's further complaint is that it appears from the endorsement made on the said document that the company has issued duplicate share certificates on the basis of the said illegal and improper document.

37. One Bhabesh Chandra Roy made an application to the company on February 27, 1987, for mutation of two shares standing in the name of his deceased father, Debendra Nath Roy, but he could not produce the original share certificate along with his application for transmission on the ground that the same was mislaid. Strangely enough, he subsequently forwarded the share certificates to the company after he came to know that the notice sent by the company in the year 1982 by registered post with acknowledgment due had been returned by the post office to the company on February 26, 1987, with the remarks "addressee deceased". A strong comment was made on behalf of the plaintiffs on this letter to the effect that by no stretch of imagination, the said Bhabesh Chandra Roy could come to know of the return of the said letter by post office to the company and particularly on February 26, 1987, and on the very next day, i.e., on February 27, 1987, he could not have sent the share certificate in support of his previous application made nearly five years earlier on September 20, 1982, for transmission. This shows that the said shares remained inactive for about five years and suddenly came to life on the basis of inspired correspondence.

38. One Chanchal Biswas made an application to the company on the basis of a succession certificate for mutation of two shares that stood in the name of Kalipada Biswas, a deceased member, and the mutation of the said shares has taken place. The plaintiffs' comments with regard

to the transfer of these shares are that the said two shares are not included in the list of 286 shares which are claimed to have been transferred during the year 1986, although the succession certificate is dated August 28, 1986. No votes were exercised in respect of the said two shares at the said annual general meeting and significantly, the said two shares were valued at Rs. 50 only and the company has accepted the said valuation. The company, however, has taken a point of inadequate stamping of the transfer deeds in respect of many of the shares of the plaintiffs and their supporters that were the subject-matter of the applications under Section 155 of the Companies' Act.

39. Having considered the submissions of the learned advocates appearing for the parties and in the light of the facts and circumstances narrated herein-above, I am prima face satisfied that the conduct of the company makes it clear that many of the transfers have been improperly executed. No documents were disclosed by the company in support of its contention that only 286 shares were transferred in the year 1986. The company and its board appear to have taken a partisan attitude in the matter of approval of the transfer of such shares. The allegation of the plaintiffs that, with regard to the shares transferred in favour of Dipankar Chatterjee and his supporters, the documents were always found to be in order notwithstanding the serious infirmities indicated, has substance. In the case of transfer of shares in favour of the plaintiffs and their supporters, it appears that the company found it unable to approve the transfer of the shares. Even when an order has been passed in one application under Section 155 allowing rectification, the mutation has not taken place resulting in a contempt application.

40. The results of voting at the annual general meeting can have no bearing on the question as to the legality and validity of the impugned transfers of the shares. The appellate court did not enter into any controversy as to the legality and validity of the impugned transfers of the shares. The said question has been left open to be decided by the trial court at the time of hearing of the suit. At this stage, I am only concerned with whether the impugned transfers and/or transmissions of shares are valid and legal. The appeal court directed the votes to be recorded separately in the case of disputed transfer of shares. At this stage, it cannot be decided finally as to whether the transfers and transmissions of shares are valid and legal or not The direction of the appeal court, as it appears is to ascertain, pending the prima facie adjudication of the question as to the legality and validity of the impugned transfer of shares, whether the management in office has a clean and substantial majority to warrant their continuance in office. This exercise is more relevant for the purpose of considering the balance of convenience rather than the prima facie adjudication of the question of legality and validity of the transfer of shares.

41. It appears from the scrutineer's report by Mr. P.K. Jhunjhunwala, accepted oh behalf of the company for the purpose of argument, that votes in respect of 7,518 shares excluding part of the disputed 779 shares were cast in favour of Dipankar Chatterjee. Out of these 7,518 shares, 14 shares are also disputed on other grounds and 569 shares form part of the 1,348 shares disputed by the plaintiffs. If the aggregate of 583 shares are deducted from 7,518 shares, it would appear that Dipankar Chatterjee and his group have the support of only 6,935 shares.

42. It has been argued on behalf of the respondents that the present management has the support of one Tushar Baran Saha who holds 350 shares and his votes were rejected by the scrutineer

nominated on behalf of the petitioners on the ground that the signature on the ballot paper differed from the admitted signature. At the hearing, it was also submitted that if necessary, the present management can file an affidavit of Tushar Baran Saha to the effect that he is supporting the present management. It is, however, significant to note that the chairman has not made any comments on this aspect. In view of conflicting reports, the chairman has not decided whether the votes cast by Tushar Baran Saha should be accepted or not No attempt has been made on the part of Tushar Baran Saha to intervene in the present proceedings. Except a verbal submission made at the hearing, there is nothing on record to show that Tushar Baran Saha supports the present management or that his votes were wrongly rejected by the scrutineer. In that view of the matter, the votes cast by Tushar Baran Saha cannot be taken into consideration. In the premises, the present management has the support of only 6,935 undisputed shares. The petitioners, however, claimed that they have the support of persons holding 7,007 shares. It has been contended on behalf of the respondents that the said shares include 144 shares in respect of which the Custodian of Enemy Property has cast votes and about 4,278 shares in respect of which the special officer had exercised voting rights. In so far as exercise of voting rights by the Custodian of Enemy Property is concerned, the chairman has merely raised a doubt but has not decided the matter. It has been urged on behalf of the petitioners that the Custodian of Enemy Property is lawfully entitled to exercise voting rights in respect of the shares, although his name may not be recorded in the register of members.

43. Under Section 5 of the Enemy Property Act, 1968, the enemy property vests in the Custodian of Enemy Property. It is, therefore, seen that the Custodian of Enemy Property is the legal owner of the shares. Reliance has been placed by the petitioners on the articles of the company and more particularly Article 78 read with Articles 44 and 45, whereunder, the executor and legal representative of a deceased member, any committee or guardian of a lunatic or minor member or any person entitled to transfer in consequence of death, bankruptcy or insolvency of any member, is entitled to exercise voting rights, although not a member. On the same analogy, the Custodian of Enemy Property is also entitled to exercise voting rights since the property in the shares vests absolutely in him. There is no infirmity in the Custodian of Enemy Property exercising voting rights in respect of the said 144 shares.

44. There is also no infirmity in the special officer exercising voting rights. The special officers have exercised voting rights in pursuance of various orders passed in company proceedings to which the respondent company is a party. The company judge must have been satisfied as to the right, title and interest of the respective applicants and, thereafter, the orders were passed. In any event, and it is well-settled that equity exists between transferor and transferee and the transferor is obliged to exercise voting rights in accordance with the wishes of the transferee. In this connection, reference may be made to the decision of the Supreme Court in R. Mathalone v. Bombay Life Assurance Co. Ltd. , where the Supreme Court held that on the transfer of shares, the transferee becomes the sole beneficial owner of those shares sold by the transferor the legal title to which is vested in him. Thus, the relation of trustee and "cestui que trust" is thereby established between them. The transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy the demands of Section 94, Indian Trusts Act, 1882. As the transferee holds the whole beneficial interest and the transferor has none, the transferor must comply with all reasonable directions that the transferee may give. In this situation, if he becomes a trustee of dividends, he is also a trustee of the right to

vote because the right to vote is a right to property annexed to the shares and as such the beneficiary has a right to control the exercise by the trustee of the right to vote.

45. The relationship arises by reason of the circumstance that till the name of the transferee is brought on the register of shareholders, in order to bring about a fair dealing between the transferor and the transferee, equity clothes the transferor with the status of a constructive trustee and this obliges him to transfer all the benefits of property rights annexed to the sold shares to the "cestui que trust". That principle of equity cannot be extended to cases where the transferee has not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime, certain other privileges or opportunities arise for purchase of new shares in consequence of the ownership of the shares already acquired.

46. It has been further argued on behalf of the respondents that the constituted attorney of one Nityananda Saha holding 351 shares voted in favour of the petitioners and the said Nityananda Saha having renounced the world, the power of attorney executed by Nityananda Saha stood revoked and extinguished and his constituted attorney was not entitled to exercise voting rights. In this context, it may be mentioned that the chairman has not decided on the validity of the votes cast by the said constituted attorney of Nityananda Saha. It has not been conclusively proved that Nityananda Saha has renounced the world ; on the other hand, the petitioners have contended that Nityananda Saha, although a Sanyasi, has not renounced the world. Dividends are being received and collected by Nityananda Saha and there is no reason why the votes cast by Nityananda Saha should be rejected.

47. The next head of grievance of the plaintiffs is mismanagement of the affairs of the defendant company by Dipankar Chatterjee and the members of his group. According to the plaintiffs, the working results of the defendant company have deteriorated since the assumption of control by Dipankar Chatterjee and his group. This would be apparent even from the partially disclosed working results of the company and from the previous audited balance-sheets of the defendant company. For the year ended March 31, 1984, the company made a profit of Rs. 57 lakhs and declared dividends at the rate of 30 per cent. For the following year ending on the March 31, 1985, the profits fell to Rs. 47.36 lakhs but the dividend went up to 40 per cent. For the next year ended on March 31, 1986, the profits dropped to Rs. 17 lakhs and the dividend fell to 15 per cent. According to the plaintiffs, Dipankar Chatterjee became a de facto director of the defendant-company in or about the month of January, 1986, and the accounts for the said year ending March 31, 1986, were finalised after he and his nominees became directors.

48. In the course of the hearing of the interlocutory application, the company applied for appointment of auditors and submitted that the accounts for the year ended on March 31, 1987, were ready. The plaintiffs contend that the company deliberately suppressed the results for the year ended on March 31, 1987, and the accounts remained unpublished obviously because the results were poor. By an order passed on May 20, 1987, on an agreed basis on this application, Price Waterhouse and Co. were appointed as auditors to audit the accounts of the said year ended on March 31, 1987. But subsequently, upon mentioning by the company, the order has been kept in abeyance. The results thus appear to be that the accounts for the financial year ended on March 31, 1987, remained unaudited, unpublished and unapproved by the members. In the meantime, another

financial year has run by, viz., the financial year ended on March 31, 1988. Although the company obtained or agreed to the order for the appointment of Price Waterhouse and Co. for auditing the accounts for the year ended on March 31, 1987, the same were not placed before the court for its perusal and for refuting, if possible, the allegations of depressing the working results of the company. In the absence of such accounts being produced before the court, prima facie, the allegation of mismanagement of the working results stand approved and remains unrebutted.

49. It is contended by the company that the manager of the tea gardens has been changed only since the last two months and the replacement of the broker of the company for selling tea by Carritt Moran shows better working results. The claim of the company remains unsupported by any tangible evidence. The company contends that the former brokers of the company, Tea Brokers P. Ltd., was involved in company proceedings under Section 397 but the implication of this contention is not at all clear. It is accepted by the defendants that the said Carritt Moran have given loans to Dipankar Chatterjee for buying shares in the company and one finds that the said Carritt Moran has replaced the previous tea brokers. Such replacement has been rewarding and profitable for the new tea broker, Carritt Moran. The satisfaction of Carritt Moran as to the solvency of Dipankar Chatterjee for the loans incurred is no answer to the allegation of mismanagement of the affairs of the defendant company. The allegation is not that the company has received any loans from Carritt Moran without having the means to repay. Hence, the satisfaction, if any, of Carritt Moran as to the solvency of Dipankar Chatterjee to repay the loans is beside the point.

50. As a further instance of mismanagement, the plaintiffs have contended that the value of 21,633 kgs. of tea dust lying in stock during the year 1984-85 has been valued in the balance sheet for the year ended on March 31, 1985, at Rs. 1,29,798, but the value of the stock of 10,548 kgs. of tea dust in the following year 1985-86 has been shown to be nil in the balance-sheet for the said year. There is no explanation for such a state of affairs and strangely enough, the auditors of the company, Lovelock and Lewes, have also failed to ask for any explanation for qualifying their report. The abovementioned balance-sheets were produced before this court by the plaintiffs and no explanation could be given by the defendants. In view of such absence of explanation, the criticism of the defendants as to the defective verification of the petition or failure of the plaintiffs to identify records of the company which will substantiate the charges in the petition is not at all meritorious and is not acceptable. Further, as laid down by the Supreme Court in Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 (SC), even if the charge of oppression is not made out, the court is not powerless to do substantial justice between the parties and technical objections indicated above cannot be permitted to defeat the exercise of equitable jurisdiction.

51. In this interlocutory application, the court is concerned with the broad question as to whether there are reasonable grounds to come to a prima facie finding as to the manipulation of the transfer of shares which would justify an order for investigation and at the trial of the suit pending such investigation, the supersession of the board. It is no doubt true that 1,348 shares are the balance shares and if the transfer of such shares impugned by the plaintiffs is ultimately upheld at the trial, the present management cannot be said to have the support of the majority. In view of the rival contentions of the parties and pending such investigation, it is difficult to prima facie accept the

claims of the defendants that they have the support of the majority.

52. Thus, the balance of convenience cannot be said to be in favour of the defendants for allowing them to continue in office in the face of serious prima facie infirmities of several transfers and transmissions of shares followed again by transfers resulting in mutation. The complaint of the plaintiffs in this respect requires further probe and investigation and cannot be dismissed as frivolous. Pending such investigation which is possible, at the trial of the suit, the question arises as to what further interim protection can and should be granted. The first ad interim order passed on September 17, 1986, has left the question of the validity of the annual general meeting to abide by the results of this application. In view of the absence of prima facie evidence being produced by the company in support of the impugned transfers of 1,348 shares and having regard to the unsatisfactory evidence produced in respect of the transfers and/or transmissions of some of the shares, it cannot be said that the votes in respect of the said 1,348 shares or a part thereof, in favour of the present management, were validly cast. As a result, the support of the majority, claimed by the management, cannot be upheld. Hence, it is not possible to allow the defendants to give effect to the results of the said annual general meeting as claimed by them at this stage.

53. In view of the aforesaid facts and circumstances, it is just and proper that the interest of the petitioners, their supporters and all other shareholders of the company should be protected. Sections 397 and 398 of the Companies Act, 1956, confer a right on the shareholders who have the requisite qualification under Section 399 of the said Act to apply to the court for appropriate reliefs. These sections do not oust the jurisdiction of the civil court to entertain suits on the same subject-matter and where shareholders complain of mismanagement or oppression and of acts prejudicial to the interest of the company or prejudicial to public interest, the civil court may entertain a suit by shareholders and grant appropriate reliefs. On a construction of the provisions of Section 2(11) and Section 10 of the Companies Act, 1956, it has been held by the Division Bench of this court in Asansol Electric Supply Co. v. Chunnilal Das, [1972] 75 CWN 704, that the Companies Act does not exclude the jurisdiction of the civil court. Moreover, unless a statute, by express provision or by necessary implication, ousts the jurisdiction of the civil court, the civil court will have jurisdiction to try all suits of a civil nature. The ouster of jurisdiction of the civil court shall not be readily inferred. Sections 397 and 398 of the Act do not exclude, either expressly or by necessary intendment, the jurisdiction of the civil court.

54. It is the complaint of the petitioners that a large number of shares have been purported to be transferred and/or transmitted in violation of Section 108 of the Companies Act. These transfers have been effected in favour of the present management, that is to say, the group of Dipankar Chatterjee. Any transfer effected in violation of Section 108 of the Companies Act is illegal and void.

55. In Mannalal Khetan v. Kedar Nath Khetan , an agreement was entered into for exchange of blocks of shares in the company. A contention was raised that the transfer of shares in the company's register had been made illegally and without authority because no proper instruments of transfer duly stamped and executed by and/or on behalf of the appellants were delivered to the respondent company. It was contended before the High Court of Allahabad that the transfers were in contravention of the mandatory provisions of Section 108 of the Act. The High Court held that the

provisions contained in Section 108 of the Act were directory because non-compliance with Section 108 of the Act is not declared an offence. The Supreme Court repelled that contention and held that the provisions contained in Section 108 of the Act are mandatory. It was also held that where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give effect to it. Therefore, the company, by registering the transfer of shares, was obviously permitting the transfer and such action on the part of the company, being in violation of the prohibition, is contrary to law.

56. It is an admitted fact that a large number of shares have been transmitted and, thereafter, transferred on the same day. It appears that the persons in whose favour the shares were transmitted executed the transfer deeds even prior to their becoming registered members although they had no absolute interest in the shares on the date when the transfer deeds were executed. Such transfer deeds are, therefore, invalid and not in compliance with the provisions of Section 108 of the Companies Act, 1956. In this connection, the case of Asha Misra may be referred to. On the date of execution of the transfer deeds, Asha Misra had no absolute title to the shares in question and consequently the transfer of shares in favour of Arun Kumar Saha and Purnima Saha is invalid and void.

57. On the one hand, the persons in management are increasing in strength day by day by execution of several invalid and/or void transfers and, on the other hand, are deliberately refusing registration of transfer of large number of shares purchased by the petitioners and their supporters. It has been prima facie established that the register of members of the company does not reveal the true and correct state of affairs and calls for further probe and investigation.

58. The petitioners and their supporters, on being wrongfully refused by the company to be registered as shareholders, had to apply under Section 155 of the Companies Act for the rectification of the register of members. Prior to the holding of the last annual general meeting of the company, these petitioners had to apply for appropriate directions from the court for appointment of special officers to exercise voting rights in respect of the shares purchased by them.

59. The question, therefore, is what order will protect the interests of the two groups. The contention that the present management is wrongfully seeking to remain in power and is arbitrarily and wrongfully seeking to refuse registration of transfer of shares in order to perpetuate their control over the company cannot be said to be without substance. The allegation of mismanagement, although not proved to the hilt, are allegations and these allegations cannot be determined finally one way or the other until the accounts are audited. In the circumstances, the court has the power to restrain the board or supersede the board or otherwise to change the management of the company. The contention that the directors represent the majority shareholders and, therefore, hold a sacrosanct position is wholly untenable in facts and in law in the instant case. In a proper case, there is no impediment in the exercise of power by the court to supersede the board which has the support of the majority if it is found that they are acting illegally, mala fide or in a manner oppressive to the minority shareholders or in a manner prejudicial to the interests of the company or prejudicial to public interest. The court always has jurisdiction to prevent abuse of majority power. In fact, it is incumbent on the court to interfere in such matters and to temporarily take over the management of

the company until the legitimate grievances of the shareholders regarding the management of the affairs of the company are set right.

60. In the case of T.S. Sivaprakasa Mudaliar v. K.M. Samarapuri [1949] 19 Comp Cas 292 (Mad), the Division Bench of the Madras High Court held as follows (at page 294 of 19 Comp Cas) :

"Very many points have been argued on behalf of respondent No, 3 and the two members of his faction who filed I. A. No. 54 of 1949. The first is that the court had no jurisdiction to appoint a receiver in a going concern like Ramaswami and Co. Their learned advocate seeks as authority for that contention a brief dictum to be found at the conclusion of the judgment of Greaves J. in Kailashchandra Dutta v. Saddar Munsif, Silchar [1925] ILR 52 Cal 513 at page 521 ; AIR 1925 Cal 817. There, the learned judge said without giving arty reasons :

'. .. there is no jurisdiction in a court to appoint a receiver of a company. If it is necessary to protect the assets of a company, other means must be sought which are provided by the provisions of the Companies Act,' We find no provision in the Companies Act which excludes the jurisdiction of a court to appoint a receiver ; though since the Companies Act makes provision for dealing with the circumstances in which a company is mismanaged, it should not be necessary in the vast majority of cases to appoint a receiver. It might even be improper to do so in certain circumstances. Our attention has been drawn to a number of instances in which receivers have been appointed ; and although the particular case that we are here considering does not fall within one of the categories of cases in which receivers have been appointed by courts, we think this is a case in which, if the allegations are accepted, the appointment of a receiver would be the most satisfactory way of dealing with the temporary difficulty that exists during the pendency of the suit. If the allegations of respondent No. 1 be true, he is kept out of possession and management by respondent No. 3 and seeks in his suit to have it declared that he is entitled to participate equally with respondent No. 3 in the management of Ramaswami and Co. Ltd.."

61. In the case of Raghunath Prasad Tandon v. Budaun Electric Supply Co. Ltd., AIR 1949 All 112, the Division Bench of the High Court held as follows :

"The simple question thus which we have to consider is whether, in view of the cirumstances of this case, it is just and convenient to uphold the order of the lower court appointing a receiver in the suit now pending before it. In Benoy Krishna Mukerjee v. Satish Chandra Giri [1928] 55 ILR 720 ; AIR 1928 PC 49, their Lordships of the Judicial Committee of the Privy Council made the observation set out below (at p. 50) :

'On an interim application for a receivership such as this, the court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the court gives its protection. Such an order is discretionary, and the discretion is, in the first instance, that of the court in which the suit itself is pending.' 'On the facts before them, their Lordships came to the conclusion that there were various wastes and there was a danger of loss or injury to the properties in question if they remained in unrestricted control of the defendant Mahant. In the

present suit, there are allegations supported by an affidavit, which have not been rebutted by any counter-affidavit on behalf of the defendant, of waste, falsification of accounts, of destruction of accounts, of removal of machinery and embezzlement of money on the part of the plaintiffs. In view of these allegations, the strained relations between the parties and the various litigations, civil and criminal, to which reference has been made by us before, we are not able to say that the learned civil judge did not exercise a proper and judicial discretion in appointing a permanent receiver in this case. The interim receiver operated for a period of nine months and the permanent receiver has been working for another nine months. The appellant's counsel has not been able to show that the management of the undertaking has in any way suffered by the financial control which the lower court has vested in the receiver. We are not oblivious of the fact that the company in question is a public utility concern, but that by itself is, in our opinion, no sufficient ground for refusing to provide a check in the shape of a receiver over the financial management of the concern, the title of which is seriously in dispute between the plaintiffs and the defendant. The learned civil judge came to the conclusion that it was just and convenient in the interest of the safety of the property and its preservation from destruction and dissipation that a receiver should be appointed. We are not disposed to say, on the material before us, that the trial court was in error in taking this view.'"

62. In the case of Ratan Lal v. Jagadhri Light Railway Co. Ltd., AIR 1946 Lahore 193, the short question for decision was whether a company judge exercising jurisdiction under the Companies Act has jurisdiction to appoint a receiver to take over the management and possession of the company and also take over possession of its property pending decision of an application. There, the Division Bench observed as follows :

"It is, no doubt, true that ordinarily, when the affairs of a company reach a deadlock, then the appropriate procedure is the one provided for in the winding up chapters of the Companies Act and by the appointment of an ad interim liquidator. But there may be cases where winding up is not just and equitable and, otherwise, there are no grounds to wind up the company which is solid and yet the court may have to protect the property from being alienated and wasted owing to mutual bickerings and troubles among the directors and the court may be called upon to hold a meeting of the company in exercise of the powers given to it in the Act in order to elect new directors or to undo the effect of certain ultra vires resolutions. .

I am further supported in this view by the fact that there are several English cases in which a receiver has been appointed to conduct the business of a company. Reference in this connection may be made to the cases in Stanfield v. Gibbon [1925] WN 11 ; 159 LT 29, Featherstane v. Cooke [1874] 16 Eq 298 ; 21 WR 835 and Trade Auxiliary Co. v. Dickers [1874] 16 Eq 303 ; 21 WR 836. These were no doubt cases in which the receiver was appointed in an action and not in summary proceedings. But I see no difference in the exercise of court's powers to appoint a receiver, where the matter comes to it in exercise of its ordinary civil jurisdiction. Therefore, in my view, it is possible in suitable cases under the Companies Act to appoint a receiver who may take up the business of the company and the management of its property and its affairs, pending the decision of the court in that litigation".

63. These authorities support the proposition that the court can temporarily take over the management of the affairs of the company by the appointment of a receiver or a special officer. Even the court may not appoint a receiver or a special officer for all times to come but it may, for a limited period and for limited purpose, appoint a receiver or a special officer to take over the management.

64. The present management is bent upon remaining in power by any means. They have rejected registration of transfer of shares for the said purpose so that no change takes place in the composition of the board of directors. If the present board is allowed to continue, they will resist such transfers being-registered perpetually and remain in power as long as they want to. The conduct of the present board does not inspire confidence.

65. Before I part with this case, I must dispose of another contention which has been raised by the defendants. The objection of the defendants as to the non-joinder of necessary parties, i.e., the persons in whose names the shares have been transferred and which is being challenged by the plaintiffs, for the purpose of the present interlocutory application, cannot be upheld for the simple reason that without investigation into the impugned transactions of transfer of shares, the full particulars as to the persons in whose favour the shares have been transferred, as to that number of shares, date of transfer and mutation, the share distinctive numbers, etc., cannot be ascertained. These are matters for the trial of the suit upon proper discovery and inspection and, if necessary, after interrogatories are administered.

66. For the reasons aforesaid, this application is allowed. The present board of directors of the respondent-company is superseded and is restrained from functioning any further.

67. Mr. Chandan Kumar Banerji, a retired judge of this court, is appointed special officer of the company. The management of the company shall be conducted by a committee or a board of management consisting of two representatives from each side headed by the special officer. The company shall not conduct or hold any general meeting, whether an annual general meeting or an extraordinary general meeting, until further order of this court.

68. There will also be an order in terms of prayer (g) of the notice of motion. The existing interim orders are confirmed.

69. The special officer will be entitled to a remuneration of 200 G. Ms. per month to be paid by the respondent-company. The special officer will be at liberty to engage a clerk or a manager to assist him. The special officer will also be at liberty to appoint any member of the Bar to assist him, if he so desires. The remuneration of the clerk or the manager or any member of the Bar junior to him shall be determined by the special officer and will be paid out of the funds of the company. No effect shall be given to the resolutions passed in the annual general meeting.

70. The suit is expedited as follows :

The defendants shall file their written statement, if any, within four weeks from the date of service of this signed copy of the operative part of this judgment and order. Cross-order for discovery within a

fortnight thereafter and inspection forthwith thereafter. Liberty to mention for early hearing.

71. The special officer shall get the accounts audited by any auditor, preferably Price Waterhouse and Co. to be appointed by him and not by the auditor of the company. All the accounts shall be audited from April 1, 1985, onwards.

72. It is stated that the rectification application was allowed by the company court and an appeal was preferred by the company. The said appeal has been dismissed by the Division Bench against which a special leave petition has been filed before the Supreme Court and special leave has been granted.

73. Mr. Sen, appearing for the company, asks for stay. Having regard to the facts and circumstances of the case, stay is refused.

74. The special officer and all parties shall act on a signed copy of the operative portion of this judgment and order upon usual undertaking.