Saurashtra Cement Chemical Industries ... vs Esma Industries Pvt. Ltd. on 16 June, 1994

Equivalent citations: [2001]103COMPCAS1041(GUJ), (1995)1GLR673

Author: M.B. Shah

Bench: M.B. Shah

JUDGMENT

M.B. Shah, J.

1. The question involved in these appeals is whether injunction granted by the learned single judge should be continued till the company petition filed under Sections 397 and 398 of the Companies Act, 1956, is decided. The hearing of the application for grant or refusal of an injunction pending the hearing of the main matter would not normally take much time. Still however, the matter is required to be heard at length because of heavy stake, the so-called public interest and the vexed questions of law involved in the matter, even though the main company petition is fixed for final hearing shortly. In this background, it would be appropriate to begin with the underlying observations made by Chinnapa Reddy J. in the case of Life Insurance Corporation of India v. Escorts Ltd. [1986] 59 Comp Cas 548 as under (at page 559) :

> "Problems of high finance and broad fiscal policy which truly are not and cannot be the province of the court for the very simple reason that we lack the necessary expertise and, which, in any case, are none of our business are sought to be transformed into questions involving broad legal principles in order to make them the concern of the court. . . . The court room becomes their battle ground and corporate battles are fought under the attractive banners of justice, fair play and the public interest."

2. In paragraph 2, it is further observed as under (page 560) :

> "In the case before us, as if to befit the might of the financial giants involved, innumerable documents were filed in the High Court, a truly mountainous record was built up running to several thousand pages and more have been added in this court. Indeed, and there was no way out, we also had the advantage of listening to

> learned and long drawn out, intelligent and often ingenious arguments, advanced and dutifully heard by us. In the name of justice, we paid due homage to the causes of the high and mighty by devoting precious time to them, reduced, as we were, at times to the position of helpless spectators."

3. Similar is the situation in the present case, At length, the matter was heard by the learned single judge. Thereafter, the appeal was heard by the Division Bench of this court. The special leave petition was heard by the Supreme Court, and on remand we are again required to devote a long time for hearing on the interim relief. However, we would be failing in our duty if we do not mention that the arguments of learned counsel for both the parties were intelligent, ingenious and precise and were made in a pleasing manner.

4. The material short facts, which are required to be taken into consideration for deciding this appeal, are as under : ESMA Industries Private Limited is holding 3.27 per cent, (at present) shares in Saurashtra Cement and Chemicals Industries Limited ("SCCIL" for short). It has filed Company Petition No. 62 of 1986 under Sections 397 and 398 of the Companies Act, 1956, for certain directions by, inter alia, contending that respondents Nos. 2 and 3 (Mrs. M.N. Mehta and D.N. Mehta) are in charge of the management of respondent No. 1 company and were conducting the affairs of the company in an oppressive manner and in a manner prejudicial to the company, on various grounds mentioned in the said petition.

5. Thereafter, the company petition was amended and also Company Application No. 852 of 1993 was filed wherein the petitioners sought interim relief restraining the SCCIL and its directors from diverting the funds of the company and the funds of its subsidiaries for the purchase of shares of Cement Corporation of Gujarat Limited ("CCGL" for short). It is contended that the application was necessary as it was felt that the funds of SCCIL were being diverted to meet the personal obligation of respondent Nos. 2 and 3 (Mr. M.N. Mehta and Mr. D. N. Mehta) because of the memorandum of understanding (MOU) dated April 30, 1992, entered into between the Mehta International Limited ("TMIL" for short) and the Gujarat Industrial Investment Corporation Limited ("GIIC") for short}, I. Firstly it is contended that the Mehtas (respondents Nos. 2 and 3) should not be permitted to assert that their action was bona fide and was in the interest of the company because it is for the furtherance of their self-interest of maintaining the management of CCGL :

6. The question of law which is highlighted before this court is : whether purchase of shares in the Cement Corporation of Gujarat Limited by the SCCIL would be per se bad because the shares are sought to be purchased by the SCCIL at the instance of the Mehtas who are directors of SCCIL and who are bound to purchase the shares of CCGL held by the GIIC on the basis of the memorandum of understanding. It is contended that the Mehtas are transferring their obligations to purchase shares of the CCGL to SCCIL for maintaining control of management over the CCGL. It is also contended that because of the MOU between the GIIC and the Mehtas, the Mehtas are required to purchase the shares held by the GIIC in the CCGL and as the Mehtas are financially not in a position to purchase the said shares or for ulterior motives, they are transferring" their obligation to purchase the shares of the CCGL to the SCCIL in breach of their fiduciary duty. For this purpose, reliance is placed on the principles laid down by the Privy Council in the case of Howard Smith Ltd. v. Ampol Petroleum

Ltd. [1974] 1 All ER 1126, wherein the court has observed as under (page 1133):

> "In their Lordships' opinion neither of the extreme positions can be maintained. It can be accepted, as one would only expect, that the majority of cases in which issues of shares are challenged in the courts are cases in which the vitiating" element is the self-interest of the directors, or at least the purpose of the directors to preserve their own control of the management.
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> Further, it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected just as trustees who buy trust property are not permitted to assert that they paid a good price".

7. Mr. Chinoy, learned counsel for the respondents submitted that the aforesaid principle is accepted by the Supreme Court in the case of Needle Industries (India) Ltd. v. Needle Industries (Newey) India Holdings Ltd. [1981] 51 Comp Cas 743 (SC). It is, therefore, contended that, indisputably, the Mehtas (TMIL) who are directors of the SCCIL are having self-interest of maintaining control over the management of CCGL and as they are required to purchase the shares of CCGL held by the GIIC as per the MOU, they could not be permitted to assert that their action was bona fide or that it was in the interest of the SCCIL. He submitted that, as held by the Privy Council, pleas to this effect have invariably been rejected just as trustees who buy trust property are not permitted to assert that they paid a good price.

8. As against this, it is contended by Mr. Chidambaram, learned counsel for the appellants, that :

> (i) the board of directors (15 directors) of SCCIL has taken a decision to purchase the shares of CCGL ;
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> (ii) the said decision is taken in the interest of the company for various reasons ;
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> (iii) the other 13 directors who were parties to the decision taken by the board of directors are not made parties to the present proceedings and there is no allegation against them ;
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> (iv) the decision to purchase the shares was taken in the interest of the company because the SCCIL is producing cement and its installed capacity at present is 11 lakhs MT of cement per day while CCGL is also a company producing cement and having an installed capacity to produce 12 lakhs MT of cement per day. However, for acquiring such a plant, it would require Rs. 400 crores. But because of the arrangement for getting control over the management of such plant, at present the SCCIL is required to invest only Rs. 45 crores ;

(v) it would be a far-fetched inference that by purchase of shares by the SCCIL, the Mehtas are going to get any benefits. The reason to purchase the shares of CCGL is to see that the CCGL is not controlled by outsiders who are interested in having business competition with the SCCIL ; and

(vi) the decision to purchase the shares of CCGL by the board of directors of SCCIL is intra vires and is not against the provisions of law. There is no allegation of fraud nor is there any allegation to the effect that the purchase of shares would be against the public interest.

9. For appreciating the aforesaid contentions, we would first refer to the memorandum of understanding dated April 30, 1992, between the Mehta International Limited (TMIL) and the Gujarat Industrial Investment Corporation Limited (GIIC), which inter alia, recites that, in terms of the shareholders' agreement dated April 9, 1981, between them, TMIL and GIIC are the promoters of Cement Corporation of Gujarat Limited (CCGL): there were differences of opinion between them which have resulted in various court proceedings; therefore, in the interest of CCGL and in the public interest, GIIC and TMIL have decided to resolve the differences and agreed that TMIL will be solely and wholly responsible for the management of CCGL and that the GIIC have decided to disinvest their shares in favour of TMIL as provided in the shareholders' agreement on the conditions mentioned in the MOU. Clause No. 1, inter alia, provides that GIIC has agreed to sell its entire shareholding" of 82,69,999 equity shares to TMIL. Clause No. 3 reads as under :

"3. The Corporation shall sell to TMIL and its associates and TMIL and its associates shall buy from the Corporation the entire 82,69,999 equity shares of Rs. 10 each fully paid up at a price to be determined in accordance with clause No. 4 as a spot delivery contract. These shares shall be bought by and transferred in favour of such persons, firms or companies as TMIL may decide to which the Corporation has agreed."

10. As per clause No. 4 the Corporation has worked out the average price of shares at Rs. 54.30 per share. Clauses Nos. 5 and 6, inter alia, provide that the entire consideration shall be paid by TMIL within sixty days from the date of price fixed as per clause Nos. 3 and 4 without any interest. In case of delay in payment by TMIL beyond the said period of sixty days, TMIL shall pay simple interest at the rate of 24 per cent, per annum commencing after sixty days from the date of the price determined as per clause No. 4 on unpaid amount till the date of actual payment. Clause No. 13 provides that the GIIC shall immediately propose the name of Shri M.N. Mehta or his nominee as chairman of CCGL and ensure his election to that post at a board meeting'. Clauses Nos. 15 and 16 read as under :

"15. GIIC, TMIL and CCGL shall jointly represent to the authorities including the BIFR, public financial institutions, banks and Central Government of this understanding with a request to ensure all possible help to CCGL for the rehabilitation under the management of TMIL. . . .

> 16. GIIC shall forthwith inform the BIFR that its proposal to revive CCGL on its own stands withdrawn and that GIIC will in terms of this memorandum of understanding, support a new proposal to BIFR being" put forward by TMIL."

11. Clause 22 further provides that if for any reason the transfer of shares from GIIC to TMIL does not take place, in whole or in part, or any clause of this understanding is not capable of being implemented, the steps taken under the memorandum shall be irreversible in spite of non-performance of any clause of this agreement.

12. From the above terms of the MOU, it is apparent that the MOU is executed between the Mehtas and the GIIC and, admittedly, the SCCIL is not party to the MOU. From this MOU, it is further clear that :

> (1) the obligation to purchase shareholding of 82,69,999 equity shares of CCGL from the GIIC at the rate of Rs. 54.30 per share is that of the Mehtas (TMIL) ;
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> (2) the Mehtas are required to purchase the shares within sixty days from the date of agreement. If there is delay, they are required to pay 24 per cent, interest per annum ;
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> (3) Shri M.N. Mehta is elected as chairman of the CCGL on the basis of clause No. 15. The other directors as nominated by the Mehtas are required to be appointed ; and
> (4) GIIC, TMIL and CCGL are required to jointly represent to the BIFR and other financial institutions to ensure all possible help to CCGL for rehabilitation under the management of TMIL.

13. The aforesaid terms of the MOU, in our view, leave no doubt that the Mehtas were and are under the obligation to purchase the equity shares of CCGL from the GIIC at the rate of Rs. 54.30 ps. One of the reasons to purchase the said shares is to have the sole control of the management of CCGL. Admittedly, the said MOU is implemented and Shri M.N. Mehta is appointed as chairman of the CCGL. Considering these facts, it would be reasonable to draw an inference that self-interest of the Mehtas is involved in the purchase of shares of CCGL from GIIC. This arrangement was made for acquiring or maintaining their control over the CCGL. For the purpose of complying with the terms of the MOU, they have managed to see that the SCCIL purchases the shares of CCGL. Hence, there is a breach of fiduciary relationship and even if their action was bona fide or in the interest of the company, that plea should be rejected.

14. However, learned counsel Mr. Chidambaram vehemently submitted that the law laid down by the Privy Council in the case of Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] 1 All ER 1126 ; [1974] AC 821 is not accepted by the Supreme Court in the case of Needle Industries (India) Ltd. v. Needle Industries (Newey) India Holdings Ltd. [1981] 51 Comp Cas 743 and is distinguished by the Supreme Court. In the case of Needle Industries (India) Ltd. v. Needle Industries (Newey) India Holdings Ltd. [1981] 51 Comp Cas 743 (SC) one of the questions was whether the directors of Needle Industries (India) Ltd, in issuing' the rights shares abused the fiduciary power which they possessed

as directors to issue shares ? While considering' the said contention, the court has referred to various decisions. It would be necessary to reproduce the main discussion because the law on the subject is discussed in a nutshell and, in our view, the Supreme Court has relied upon the ratio laid down in the case of Howard Smith Ltd. v. Ampol Petroleum Ltd [1974] 1 All ER 1126 ; [1974] AC 821. The relevant observations in paragraphs 105 to 111 are as under (pages 808-813 of 51 Comp Cas) :

> "In Punt v. Sijmons and Co. [1903] 2 Ch 506 (Ch D) which applied the principle of Fraser v. Whalley [1864] 71 ER 361 it was held that:
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> 'Where shares had been issued by the directors, not for the general benefit of the company, but, for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power, they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.' But Byrne J, stated :
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> 'There may be occasions when directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised.' In the instant case, the issue of rights shares was made by the directors for the purpose of complying with the requirements of the FERA and the directives issued by the Reserve Bank under that Act. The Reserve Bank had fixed a deadline and NIIL had committed itself to complying with the Bank's directive before that deadline.
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> Peterson J, applied the principle enunciated in Fraser v. Whalley [1864] 71 ER 361 and in Punt v. Symons and Co. [1903] 2 Ch 506 (Ch D) in the case of Piercy v. S. Mills and Co. Ltd. [1920] 1 Ch 77 (Ch D). The learned judge observed at page 84 :
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> 'The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friendsover the affairs of the company, or merely for the purpose of defeating the wishes of the existing" majority of shareholders.' The fact that by the issue of shares the directors succeed also or incidentally in maintaining' their control over the company or in newly acquiring it, does not amount to an abuse of their fiduciary power. What is considered objectionable is the use of such powers merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. . . .
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> Before we advert to the decision of the Privy Council in Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] 1 All ER 1126 ; [1974] AC 821 we would like to refer to the decision of the High Court of Australia in Marlowe's Nominees P. Ltd. v. Woodside (Lakes Entrance) Oil Co. [1968] 121 CLR 483 and to the Canadian decision of Berger J. of the Supreme Court of British Columbia, in the case of Teck Corporation Ltd, v.

Millar [1973] 33 DLR (3d) 288 both of which were considered by Lord Wilberforce in Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] 1 All ER 1126. On a consideration of the English decisions, including those in Punt v. Symons and Co. [1903] 2 Ch 506 (Ch D) and Piercy v. S. Mills and Co. Ltd. [1920] 1 Ch 77 (Ch D), Barwick C.J. said in Harhwe's Nominees P. Ltd. v. Woodside (Lakes Entrance) Oil Co. [1968] 121 CLR 483, 493 :

'The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefitting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An enquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but the ultimate question must always be whether in truth the issue was made honestly in the interests of the company.' We agree with the principle so stated by the Australian High Court and, in our opinion, it applies with great force to the situation in the present case. In Teck Corporation Ltd. v. Millar [1973] 33 DLR (3d) 288 the court examined several decisions of the English courts and of other courts including the one in Hogg v. Cramphorn Ltd. [1967] 37 Comp Cas 157 (Ch D). The headnote of the last report (33 DLR (3d) 288) at page 289 reads thus:

'Where directors of a company seek, by entering into an agreement to issue new shares, to prevent a majority shareholder from exercising' control of the company, they will not be held to have failed in their fiduciary duty to the company if they act in good faith in what they believe, on reasonable grounds, to be the interest of the company. If the directors' primary purpose is to act in the interest of the company, they are acting in good faith even though they also benefit as a result.' In Howard Smith ltd. v. Ampol Petroleum Ltd. [1974] AC 821 (PC), no new principle was evolved by Lord Wilberforce who, distinguishing the decisions in Tech Corporation Ltd. v. Millar [1973] 33 DLR (3d) 288 and Harlawe's Nominees P. Ltd. v. Woodside (Lakes Entrance) Oil Co. [1968] 121 CLR 483 (Australia) said (page 837 of [1974] AC) :

'By contrast to the cases of Harlowe's Nominees P. Ltd. v. Woodside (Lakes Entrance) Oil Co. [1968] 121 CLR 483 (Australia) and Tech Corporation Ltd. v. Millar [1973] 33 DLR (3d) 288, the present case, on the evidence, does not, on the findings of the trial judge, involve any consideration of management, within the proper sphere of the directors. The purpose found by the judge is simply and solely to dilute the majority voting power held by Ampol and Bulkships so as to enable a then minority of shareholders to sell their shares more advantageously. So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned.' The dictum of Byrne J. in Punt v. Symons and Co. [1903] 2 Ch 506 (Ch D), that 'there may be reasons other than to raise capital, for which shares may be

issued' was approved at page 836 and it was observed at page 837 :

'Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghante [1906] 2 Ch 34 (CA)), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers. If there is added, moreover, to this immediate purpose, an ulterior purpose to enable an offer for shares to proceed which the existing majority was in a position to block, the departure from the legitimate use of fiduciary power becomes not less, but all the greater. The right to dispose of shares at a given price is essentially an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail.' In our judgment the decision of the Privy Council in Howard Smith [1974] AC 821, instead of helping the holding company goes a long way in favour of the appellants. The directors in the instant case did not exercise their fiduciary powers over the shares merely or solely for the purpose of destroying an existing majority or for creating a new majority which did not previously exist. The expressions 'merely', 'purely', 'simply' and 'solely' virtually lie strewn all over page 837 of the report in Howard Smith Ltd. v. Ampol Petroleum Ltd. The directors here exercised their power for the purpose of preventing the affairs of the company from being brought to a grinding halt a consummation devoutly wished for by Coats in the interest of their extensive world-wide business.

In Nanalal Zaver v. Bombay Life, Assurance Co. Ltd. [1950] 20 Comp Cas 179 (SC), Das J., in his separate but concurring judgment, deduced the following" principle on the basis of the English decisions (page 203) :

'It is well established that directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement and to the detriment of the company, the court will interfere and prevent the directors from doing so. The very basis of the court's interference in such a case is the existence of the relationship of a trustee and of cestui que trust as between the directors and the company, (pages 419-420 of [1950] SCR).

It is true that Das J. held that the Singhanias were complete strangers to the company and consequently the directors owed no duty, much less a fiduciary duty, to them. But we are unable to agree with the contention that the observations extracted above from the judgment of Das J. are obiter. The learned judge has set forth the plaintiffs

contention under three sub-heads (page 415 of [1950] SCR). At the bottom of page 419 of SCR he finished the discussion of the 2nd sub-head and said : 'This leads me to a consideration of the third sub-head on the assumption that. . . . the additional motive was a bad motive.' The question was thus argued before the court and was squarely dealt with. Before we leave this topic, we would like to mention that the mere circumstance that the directors derive benefit as shareholders by reason of the exercise of their fiduciary power to issue shares, will not vitiate the exercise of that power. As observed by Gower in Principles of Modern Company Law, 4th edn., page 578 :

'As it was happily put in an Australian case they are not required by the law to live in an unreal region of detached altruism and to act in a vague mood of ideal abstraction from obvious facts which must be present to the mind of any honest and intelligent man when he exercises his power as a director.' The Australian case referred to above by the learned author is Mills v. Mills ([1938] 60 CLR 150) which was specifically approved by Lord Wilber-force in Howard Smith [1974] AC 821 (PC). In Nanalal Zaver [1950] 20 Comp Cas 179 (SC); [1950] SCR 391 ; AIR 1950 SC 172 too, Das J. stated at page 425 of SCR (page 185 of AIR) : that the true principle was laid clown by the Judicial Committee of the Privy Council in Hirsche v. Sims [1894] AC 654, 660-661 thus (page 207 of 20 Comp Cas) :

'If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with dolus malus or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits.' Whether one looks at the matter from the point of view expressed by this court in Nanalal Zaver [1950] 20 Comp Cas 179 (SC), or from the point of view expressed by the Privy Council in Howard Smith [1974] AC 821, the test is the same, namely, whether the issue of shares is simply or solely for the benefit of the directors. If the shares are issued in the larger interest of the company, the decision to issue the shares cannot be struck down on the ground that it has incidentally benefitted the directors in their capacity as shareholders. We must, therefore, reject Shri Seervai's argument that in the instant case, the board of directors abused its fiduciary power in deciding upon the issue of rights shares."

15. From the aforesaid discussion, in our view, it is difficult to hold that in the case of Needle Industries (India) Ltd. v. Needle Industries (Newey) India Holdings Ltd. [1981] 51 Comp Cas 743, the Supreme Court has distinguished the law laid down by the Privy Council in the case of Howard Smith Ltd. [1974] AC 821 that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company ; pleas to this effect have invariably been rejected just as trustees who buy trust property are not permitted to assert that they paid a good price.

16. Further, from the aforesaid discussion by the Supreme Court with regard to exercise of the powers by the directors of a company, it is apparent that the directors are not entitled to use their powers of issuing shares for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company. What is considered objectionable is the use of such powers merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. In such cases, an enquiry as to whether the additional capital was presently required or whether purchase of such shares was necessary is most relevant to the ultimate question. The primary duty of the directors is to act in the interests of the company and in good faith even though they also benefit as a result by such exercise. But, if such power is exercised by them solely for their personal aggrandisement, then the court would interfere and prevent the directors from doing so.

17. In any case, there is nothing to indicate that, on April 30, 1992, when the memorandum of understanding was executed between the Mehtas and the GIIC, the SCCIL was informed or the board of directors of the SCCIL had passed a resolution at the relevant time that the SCCIL should purchase the equity shares of CCGL from the GIIC as the nominees of the Mehtas. Therefore, at the relevant time, the Mehtas never intended that what they did was in the interest of the SCCIL. On the contrary, it can be said that the memorandum of understanding was solely for the benefit of the Mehtas. For getting the benefit, they are trying to shift the burden or obligation to the SCCIL. Therefore, even applying the ratio laid down by the Supreme Court in the case of Needle Industries (India) Ltd.'s case [1981] 51 Comp Cas 743, prima facie it is apparent that there is breach of trust by the Mehtas in seeing that their obligation to purchase the equity shares of CCGL is transferred to SCCIL. Even on an assumption that the SCCIL may indirectly or incidentally benefit because of purchase of shares of CCGL by the Mehtas as is sought to be contended by learned counsel Mr. Chidambaram, such a course would be per se bad.

18. In view of the aforesaid discussion in Needle Industries (India) Ltd.'s case [1981] 51 Comp Cas 743 there can be no dispute to the principle that the directors' power is a fiduciary power, and although an exercise of such power may be formally valid, it may be attacked on the ground that it was not exercised for the purpose for which it was granted. Further, from the abovequoted paragraphs wherein various decisions are cited, it is a crystallised principle that the directors are not entitled to use their powers of issuing shares (in the instant case "purchasing of shares" from the funds of the company) merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company. That is to say, what is considered objectionable is the use of such powers merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. Admittedly, this is not a case where respondents Nos. 2 and 3 have acted in obedience to their duty to comply with the law of the land. Further, it cannot be said that, while discharging their duty, respondents Nos. 2 and 3 incidentally got the benefit of acquiring and maintaining the control over the CCGL. However, learned counsel Mr. Chidambaram referred to the passage from the case of Teck Corporation Ltd.'s case [1973] 33 DLR (3d) 288 to contend that the ultimate question must always be whether the shares were purchased by the directors honestly in the interests of the company. In our view, from the memorandum of understanding, it is apparent that the said agreement is solely between the Mehtas and the GIIC. It nowhere states that the Mehtas were purchasing the shares of CCGL on behalf of

the SCCIL or that the Mehtas were empowered to enter into such type of agreement on behalf of the SCCIL. Even from the passage quoted above from the case of Nanalal Zaver's case [1950] 20 Comp Cas 179 (SC), it is clear that, if the power to purchase shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement the court will interfere and prevent the directors from doing so. The very basis of the court's interference in such a case is the existence of the relationship of a trustee and of cestui que trust as between the directors and the company. In any set of circumstances the learned counsel for the appellant has not shown any resolution passed by the SCCIL authorising the Mehtas to purchase the shares of the CCGL from the GIIC before the memorandum of understanding was executed between the Mehtas and the GIIC.

19. In our view, learned counsel Mr. Chinoy was right in submitting that we would get the correct answer if we posed the question as to who would get control of CCGL? The answer obviously would be that the Mehtas, and not the SCCIL, would get the control over CCGL. For this purpose, considering the affidavits filed by both the parties at the time of hearing of the matter, it is apparent that, if the SCCIL purchases the shares of CCGL as suggested by the Mehtas, then also at the most the SCCIL may have a 17 per cent. shareholding, as stated by the appellants, or a 15 per cent. shareholding as stated by Jitin Loparain on behalf of the respondents. As against this, learned counsel Mr. Chidambaram submitted that in these days even 15 per cent. or 17 per cent. shareholding in a company would have its own impact because the shareholding of the public is about 21 per cent. only and, therefore, the said percentage of shareholding is a substantial one which would enable the SCCIL to exercise its control over the management of CCGL. In our view, the question is not whether the SCCIL would have any say in the management of the CCGL ; but the question in the instant case is who gets the benefit by purchase of equity shares of CCGL by the SCCIL. In our view, considering the facts stated above obviously the Mehtas are the only beneficiaries because the memorandum of understanding' is between the Mehtas and the GIIC. The fact that merely because the Mehtas are in the management of the SCCIL and they may get managerial control of CCGL, the SCCIL may get some business benefit, would be of no consequence or in any case it would be incidental. Considering the aforesaid facts, in our view the submission of learned counsel Mr. Chidambaram that:

> (i) the board of directors (15 directors) have taken a decision to purchase the shares of CCGL ;
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> (ii) 13 directors are not joined as parties, and
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> (iii) the so-called reasons to purchase the shares of CCGL, would be insignificant. In the company petition under Section 397 of the Companies Act, 1956, what is challenged is the action of the company and not of the individual members. In any case, the concerned individual directors against whom the allegations are made are joined as parties to the company petition.

20. At this stage, we may note that learned counsel Mr. Chinoy has submitted vehemently that the decision to purchase the shares of the CCGL at the rate of Rs. 54.30 ps. is per se bad because the price at the relevant time was Rs. 30 or less than Rs. 30. This contention is vehemently disputed by

learned counsel Mr. Chidambaram by pointing out various facts that the average price was worked out approximately at Rs. 17. In our view, at this interim stage, it would be difficult to decide this contention by appreciating the facts relied upon by both the parties as it would require detailed investigation. In any case, as observed by the Supreme Court in the case of Needle Industries (India) Ltd.'s case [1981] 51 Comp Cas 743, (page 818) : "it is also not true to say as a statement of law, that the directors have no power to issue shares at par, if their market price is above par. These are primarily matters of policy for the directors to decide in the exercise of their discretion and no hard and fast rule can be laid down to fetter that discretion." The court has also clarified that such discretionary powers in company administration are in the nature of fiduciary powers and must, for that reason, be exercised in good faith.

21. Learned counsel Mr. Chidambaram submitted that to purchase the shares of the CCGL by the SCCIL is a question of internal management of the company and is the concern of the company. The company is a better judge of the business prospects of a trading venture than the court can ever hope to be. He, therefore, submitted that the court should not interfere at this stage with regard to the internal management of the company. For this purpose, he relied upon the decision of the Bombay High Court in the case of Cine Industries and Recording Co. Ltd., In re [1942] 12 Comp Cas 215, wherein the court has observed as under (page 228) :

> "The court constantly bears in mind that the internal management of the company is its own concern, and it is a much better judge of business prospects of a trading venture than the court can ever hope to be. If, therefore, the majority of the shareholders show confidence in the management of the company and have faith in its future prospects, the court has rarely interfered."

22. The aforesaid judgment is followed by this court in the case of Mohanlal Dhanjibhai Mehta v. Chunilal B. Mehta [1962] 32 Comp Cas 970 (Guj).

23. For meeting this contention, learned counsel Mr. Chinoy has vehemently submitted that the submissions of learned counsel for the appellant is without any substance because in the present case, even if the act is approved by the majority, it is in breach of fiduciary duty of the directors and on the face of it, it would be bad. He submitted that a similar contention is dealt with by the Division Bench of the Bombay High Court in the case of Vadilal Raghavji v. Maneklal Mansukhbhai, AIR 1925 Bom 188.

24. In the aforesaid case of Vadilal, AIR 1925 Bom 188, the court has held that the minority has a right to sue one of the shareholders forming the majority for acts of misappropriation of the company's goods on the part of that shareholder, even though the majority approved of his acts. While dealing with this contention, the court observed (page 190) :

> "The allegations might in certain circumstances amount to criminal breach of trust or to theft. And to test the question whether a majority can bind a minority under these circumstances, I put it to Sir Chimanlal Setal-vad whether supposing a case was one of actual theft and the fiduciary agent had actually stolen the assets of the company

> counsel still contended that the majority of the shareholders could bind the minority not to recover those stolen assets of the company. Counsel was forced to argue that the majority could bind the minority. . . On general principles this proposition is clearly erroneous. The assets of the company, so far as they represent profits, may be distributed by way of dividend, capital assets may be distributed in a winding up or in certain other limited ways under the Indian Companies Act."

25. The court further observed that in those cases in which the assets of the company are being improperly distributed by an attempt to pay them into the pockets of the majority of shareholders of the company or their friends at the expense of the minority, the court can interfere. The court referred to the following passage from the decision of the Privy Council in the case of Cook v. Deeks [1916] 1 AC 554, 564 :

> "If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of North-West Transportation Co. v. Beatty [1887] 12 AC 589 and Burland v. Earle [1902] AC 83 (PC) have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts, and, indeed, was expressly disapproved in the case of Menier v. Hooper's Telegraphic Works [1874] LR 9 Ch 350."

26. In view of the aforesaid discussion, in our view, prima facie, it appears that the funds of the SCCIL are diverted for the personal benefits of the Mehtas who have executed the memorandum of understanding with the GIIC for purchase of shares of CCGL. Assuming that because of purchase of shares of CCGL by the Mehtas, the SCCIL may get some commercial benefit but that benefit would be an incidental one. The Mehtas would be getting the right to manage CCGL and it can never be said that the SCCIL is getting the right to manage CCGL.

II. BIFR Scheme :

27. Now, we will deal with the next aspect of the matter, that is to say :

> (a) why the BIFR did not consider the earlier proposal of amalgamation of CCGL with the SCCIL, as prudent?

(b) whether the SCCIL was a party to the scheme framed by the BIFR for revival of the CCGL?

28. With regard to the first part of the question, learned counsel Mr. Chidambaram relied upon the resolution dated August 8, 1991, passed by the board of directors of SCCIL. By the said resolution, the board had approved the proposal to submit an application through the Mehta group to the BIFR either for take over of CCGL or merging the same with the SCCIL. For this purpose, he further relied upon the order passed by the BIFR in the proceedings held on November 11, 1991. The record of the proceedings is produced at annexure I to the further affidavit filed by Mr. B. N. Attara, duly authorised representative of the appellant-company, in Civil Application No. 12 of 1994. The relevant consideration is in paragraph 11. From the order of the BIFR, it is apparent that the BIFR has not accepted the proposal of the SCCIL for merger of the CCGL mainly on the ground that the SCCIL is itself a sick industrial company and it may take some time before its net worth becomes positive. The Bench has further observed that there was no rationale in considering merger of a sick company (with huge accumulated losses and liability) with another sick company (with a doubtful ability to make requisite funds available for rehabilitation on a long term viable basis). No other discussion by the BIFR is there in the said order. It, therefore, appears to us that the BIFR rejected the scheme for amalgamation of SCCIL with CCGL only because SCCIL itself was a sick unit in August, 1991.

29. The next aspect is whether the SCCIL was a party to the scheme framed by the BIFR. Learned counsel Mr. Chidambaram vehemently submitted that, even though the name of SCCIL is not mentioned in the beginning of the proceedings recorded by the BIFR it would not mean that the SCCIL was not a party to the said scheme finalised by the BIFR on October 26, 1993. For this purpose, he relied upon a number of paragraphs of the scheme framed by the BIFR which is produced at annexure B to the company petition. As against this, learned counsel Mr. Chinoy submitted that at no point of time was the SCCIL a party to the scheme framed by the BIFR. For this purpose, he contended that there is no resolution passed by the board of directors of the SCCIL or by the company to the effect that the SCCIL should take part before the BIFR for framing a scheme for revival of the CCGL. He submitted that under Sub-section (2) of Section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985, the BIFR is required to circulate to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation. He pointed out that the BIFR has never circulated the scheme to the SCCIL nor has SCCIL given consent to it by passing any resolution. He lastly submitted that if any representation is made by the Men-tas before the BIFR on behalf of the SCCIL, then it is without authority. According to his contention, the Mehtas (the promoters and their associates) alone would be bound by the said scheme. He submitted that the SCCIL cannot be termed as an associate of the Mehtas nor is it a subsidiary company of TMIL. The SCCIL is a different and distinct entity. As against this, learned counsel Mr. Chidambaram pointed out the resolution dated October 22, 1993, passed by the board of directors of SCCIL to the effect that Shri M.N. Mehta, Chairman, Shri A.A. Trivedi, Director (Corporate Finance) and Shri Kirit N. Raval, advocate, were severally authorised to represent the SCCIL at the BIFR hearings and support the scheme for revival of CCGL and agree to such commitments on behalf of the company as are within the approved parameters and represent before the BIFR for deletion/relaxation of the restricted conditions Nos. E-5 and 7 of the scheme.

For this purpose, he also referred to the agenda of the said meeting wherein it is specifically stated that the draft rehabilitation scheme of CCGL was enclosed for the members' perusal, to contend that the draft scheme prepared by the BIFR was circulated to the members of the board of directors of the SCCIL. He, therefore, submitted that the SCCIL was a party to the scheme framed by the BIFR and that on behalf of the SCCIL, the persons mentioned in the resolution passed by the board of directors on October 22, 1993, remained present to represent the SCCIL before the BIFR. As against this, learned counsel Mr. Chinoy contended that the conditions, which were imposed on the SCCIL as per the draft scheme, were deleted in the final scheme, which would indicate that the SCCIL was not a party to the scheme.

30. Prima facie, from the final scheme framed by the BIFR, it appears that the SCCIL was not a party to the scheme. Prima facie, it appears that the promoters according to the scheme, are the Mehta International Limited (TMIL) and the liability under the scheme is that of the promoters and not of the SCCIL. By reading paragraph 2 of the proceedings of the BIFR, it appears that counsel for the CCGL (company) had submitted that though the promoters had brought in Rs. 5 crores by October 22, 1993, they had delayed the first instalment of Rs. 2.5 crores, the funds of Rs. 5 crores were brought in by SCCIL and were not out of internal accruals of the company ; it is further contended that the amount of Rs. 1.6 crores was, however, out of internal accruals of the company. Paragraph 3 narrates what counsel for the promoters had submitted. Nowhere in the said order is there any mention that on behalf of the SCCIL any representations were made before the BIFR or that the SCCIL had agreed to be the promoter of the scheme or to render financial assistance to CCGL. On the contrary, in paragraph 8, it is specifically mentioned as under :

> "On the request of the company the Bench agreed to delete the word "SCCIL" in Clause (v) and delete Clause (vii) of para 3 E of the draft scheme. The Bench observed that the company should identify measures for effecting cost savings and submit its report along with the half-yearly progress report. The representative of the promoters and the company agreed to undertake necessary obligations as envisaged in the scheme."

. (As stated earlier in the scheme "company" means "CCGL" and the "promoter" means "TMIL")

31. We also note that the correspondence produced by the appellants between the BIFR and the Chairman would not have much bearing in deciding whether the SCCIL was party to the scheme framed by the BIFR. We may also note that it is contended by learned counsel for the appellants that, when--

> (i) the SCCIL states that it was a party to the scheme ;
>
> (ii) the BIFR states that the SCCIL was a party to the scheme ;
>
> (iii) the financial institutions state that on the basis of the scheme, the SCCIL was a party before the BIFR proceedings ;

there is no reason to hold that the SCCIL was not a party to the scheme.

32. Prima facie, in our view, the scheme framed by the BIFR is a quasi-judicial order. It is a speaking one and what is stated in that order is required to be considered and not the subsequent correspondence. At this stage, we would not deal with the contention of learned counsel Mr. Chinoy that the letters written on behalf of the BIFR are without any authority. At this stage, in our view, we are not required to finally decide this question because it may depend upon other resolutions or other documentary evidence which may be brought on record by the parties.

III. Violation of Section 372 of the Companies Act :

33. The next question which requires consideration is whether the arrangement to purchase shares of CCGL by the SCCIL through its subsidiaries is inconsistent with the ambit and scope of Section 372 of the Companies Act, 1956 ? If yes, what is its effect at the present stage ?

34. For this purpose, learned counsel Mr. Chinoy relied upon the resolution dated November 27, 1992, passed by the board of directors of SCCIL. The relevant part is as under :

> "At the meeting of the board of directors held on July 24, 1992, the board was informed that it is intended to acquire 30 per cent. stake of CCGL which will result in achieving the synergies between the two companies and pave the way for common marketing strategies to meet the challenges of competition. Subsequently, at the annual general meeting of the company held on September 29, 1992, the members had passed a unanimous resolution authorising the board to invest the funds of the company not exceeding Rs. 50 crores by way of subscription, purchase or otherwise acquisition, in the shares of any other body or bodies corporate. Gujarat Industrial and Investment Corporation (GIIC) holds 82.70 lakh shares in Cement Corporation of Gujarat Ltd. (CCGL) who have expressed the desire to disinvest the shareholding. As a first step, it is proposed to acquire 45 per cent. of GIIC's stake in CCGL (37.12 lakh equity shares) at a cost of Rs. 20.35 crores through three investment subsidiaries of the company."

35. It is further stated as under :

> "The total investment from SCCIL and/or its subsidiaries in CCGL would amount to Rs. 43.3175 crores which would mean that SCCIL and/or its subsidiaries would pay an average of Rs. 17.36 per share and acquire a 20 per cent. stake in CCGL over a period of one year."

36. From the above, it is sought to be contended that the SCCIL has first resolved to acquire 37.12 lakhs equity shares of CCGL at the cost of Rs. 20.35 crores through three investment subsidiaries of the company. Learned counsel Mr. Chinoy submitted that there is violation of Section 372 straightaway. On this question, both counsel have submitted detailed written submission.

37. In our view, for deciding the application for interim order, it is not necessary to consider the submissions made by learned counsel for the parties at this stage. However, it should be noted that, from the wording of Section 372(1) of the Companies Act, it would be difficult to straightaway arrive at the conclusion that there is violation of the statutory provisions of Section 372(1) by purchase of shares through the three subsidiaries of the SCCIL. With regard to violation of statutory provisions by the subsidiaries as alleged by learned counsel Mr. Chinoy, it would require investigation of facts. This is more so, because, it is contended by learned counsel Mr. Chidambaram that even if there is some violation of Section 372 of the Companies Act, the court would not interfere and at the most a penalty as provided under the Act would be imposed. This question also requires to be considered in detail. Hence, in our view, as the matter is fixed for final hearing, it would be just and proper to leave this question at this stage for its decision at the final hearing.

IV. Balance of convenience :

38. Now, we would deal with the question of balance of convenience for continuing the interim relief granted earlier. Mr. Chidambaram, learned counsel for the appellants, submitted that :

> (i) If the injunction granted earlier is continued, then the SCCIL would lose a golden opportunity to have control over the CCGL. This cannot be compensated in terms of money. He submitted that it is a golden opportunity for the SCCIL because the SCCIL is engaged in the business of manufacturing cement and by investing only Rs. 45 crores, the SCCIL would get commercial advantage in running its business. He further submitted that this opportunity would be lost because the other competitors in the business of manufacturing cement such as Gujarat Ambuja Cement, Larsen and Toubro, ACC, Tata Chemicals, Birla Jute and Cement Industries, etc., are interested in taking over the management of the CCGL. They have also submitted their offers before the BIFR.
>
> (ii) In any case, the SCCIL may be permitted to purchase shares worth Rs. 7.50 crores (remaining part of Rs. 12.50 crores by way of promoters' contribution as Rs. 5 crores are already invested) and Rs. 4.135 crores (for purchase of rights shares). It is his contention that the SCCIL had already invested Rs. 22.45 crores and the investment of the remaining' sum may be kept in abeyance.
>
> (iii) The purchase of shares is approved by the annual general meeting of the SCCIL, It is approved by the financial institutions and BIFR. Therefore, the court should not interfere with it.
>
> (iv) By vacating the interim relief, the petitioner is not going to suffer any loss. He submitted that, in any case, Mr. M.N. Mehta has filed an affidavit and undertaking to the effect that, if the matter is finally decided and the court so directs, the TMIL and the associate companies forming part of the Mehta group shall ensure the purchase of shares that will be hereafter acquired by the SCCIL in such a manner that the SCCIL does not suffer any loss as a result of purchase of the shares in dispute.

39. As against this, learned counsel Mr. Chinoy submitted that :

> (i) Purchase of shares by the SCCIL for seeing that the Mehta group fulfils its obligation under the MOU or that the Mehtas acquire and retain the control of the CCGL, is per se bad because it is a breach of fiduciary duty.
>
> (ii) The SCCIL is not having sufficient funds, because--
>
> (a) the SCCIL was required to issue debentures worth Rs. 58 crores and is required to pay 18 per cent. interest on them ;
>
> (b) payment of sales tax to the tune of Rs. 45 crores is deferred for which the SCCIL is required to pay 12 per cent. interest ;
>
> (iii) At the most, as per the scheme, after some years the SCCIL may get a 2 per cent. return on the investment made in the CCGL. Hence, this investment is on the face of it not for the commercial purposes.
>
> (iv) The annual general meeting had not passed any resolution empowering its directors to purchase shares of CCGL. There is suppression on the part of the directors in not informing' the shareholders that they envisaged purchase of shares of a sick unit and that too for acquiring or maintaining' managerial control by the Mehtas ;
>
> (v) In a case where there is breach of trust by the trustees, the question of irreparable injury is not required to be considered.

40. In our view, considering the controversy between the parties and the prima facie case which is made out as stated hereinabove, this would be a fit case for continuing the interim relief. Prima facie, as held above, it appears that for acquiring and/or maintaining the control over CCGL, the Mehtas have agreed to purchase shares of CCGL from GIIC as per the MOU. The SCCIL has not independently decided to purchase the shares of CCGL. As stated above, the SCCIL may get in future (which is doubtful) some commercial benefits. But that would hardly be a ground for refusing the interim relief. Prima facie, from the record as it stands, it appears that the SCCIL was not a party to the scheme framed by the BIFR. Further, Mr. Chinoy has rightly relied upon the provisions of Sections 38(3)(a) and 41(h) of the Specific Relief Act, 1963, which are as under, to contend that in a case where there is breach of trust, the court should grant injunction without considering the question of irreparable injury.

> "38. (3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property the court may grant a perpetual injunction in the following cases, namely :--
>
> (a) where the defendant is trustee of the property for the plaintiff ;

41. (h) An injunction cannot be granted, when equally efficacious relief can certainly be obtained by any other usual mode of processing except in case of breach of trust."

41. He further rightly relied upon the submissions made by the appellants in the grounds of appeal that the Mehtas have no constraints of funds being" a 500 million dollars turnover group worldwide with sufficient interest in India also, to contend that, if the Mehtas are having 500 million dollars turnover, then they would not find any difficulty to bring Rs. 12.5 crores for purchase of shares, which arises because of their commitment as per the MOU. In our view also, if the Mehtas are having such financial capacity as contended by them, then it would be open to them to purchase the shares of the CCGL worth Rs. 12.5 crores from their funds. Hence, in our view, this would not be a fit case for vacating the interim relief.

42. In this interim order, some detailed discussion was required because of elaborate arguments. However, we clarify that the observations and findings on facts are made only for deciding the application for interim relief and are not conclusive.

43. In the result, the appeals are dismissed with no order as to costs.