P L D 1960 Supreme Court (Pak.) 266

Present: Muhammad Munir, C.J., M. Shahabuddin,
A. R. Cornelius, Amiruddin Ahmad and
S. A. Rahman, JJ

Civil Appeal No. 51 of 1959

SHEIKH MAQBOOL ELAHI AND OTHERS-Appellants
versus
KHAN ABDUL REHMAN KHAN AND OTHERS-Respondents

Civil Appeal No. 52 of 1959
Khan ABDUL REHMAN AND OTHERS-Appellants
versus
Sheikh MAQBOOL ELAHI AND OTHERS-Respondents.
Civil Appeals Nos. 51 and 52 of 1959, decided on 29th April 1960.

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 6th June 1958 in Writ Petition No. 1074 of 1957.)
AND
Civil Appeal No. 53 of 1959

***Sheikh* MAQBOOL ELAH1 AND OTHERS-Appellants**
versus
***Khan* ABDUL REHMAN KHAN AND OTHERS-Respondents**

(On appeal from the order of the High Court of West Pakistan, Lahore, dated the 9th April, 1959 passed on the report of Sheikh Bashir Ahmad made by him in pursuance of High Court's order, dated the 24th June 1958, in Writ Petition No. 1074 of 1957.)

(a) Writ-Joint Stock Company-Admission or reinstatement to Board of Directors duly quaked-May be enforced by writNot, however, n/'Secretarv of cnmpaqv-Scope «f high prerogative writs-Director has legal right to sit on Board-Right of *greatest importance to public interest-Constitution of Pakistan (1956), Art. 176. Held,* that the admission of a duly qualified Director to the Board of Directors of a public company is within the scope of a writ.

Although here no statutory duty is involved, it is undeniable that a duly qualified Director has a legal right to sit on the Board of Directors and

that this is a right which is of the greatest importance to the public interest, in the field of the operation of public joint stock companies under Company Law. The composition of the Board of Directors of a company incorporated as a public company, in whose operation the public at large has an interest, and whose constitution is required to be determined by the wishes of the shareholders, is a matter of the greatest interest to the public. Putting it slightly differently, it is of interest to the shareholders being themselves members of the public, 'and it is a legal right vested in them, to elect persons to be members of the Board of Directors which shall conduct the affairs of the Company, and it is directly in the interest of the public at large which has dealings with the Company that it should know whom it is dealing with and that the dealings are not with one or a few of the Board of Directors, but that all the Directors duly elected by the shareholders should be functioning together, within the relevant instruments, for the conduct of the affairs of the Company. Therefore, it is conceivable as a public duty bearing upon the conduct of the members of a Board of Directors that they shall admit to their number every person who is qualified to be a Director of the Company.

While the scope of the high prerogative writs has never been defind in specific terms, it is nevertheless very well understood, in respect of each of the writs, that there are limitations of subject and occasion applicable to each one of them. These limitations are derivable from, and are the result of a very long series of decisions by the English Courts, whose practice and precedent has been followed and applied *mutatis mutandis* by other jurisdictions in a continuous course of devolution.

Even upon the basis of the narrow requirements that there should be either a statutory duty involved, or a legal right to be enforced or the performance of a public duty which was attracted by the circumstances, it is easily possible to regard the admission of a duly qualified Director to the Board of Directors of a public company as being within the scope of a writ.

Government Stock Investment Company Limited (1878) 3 Q B 442 and *Albert Mills Co., Ltd.* (1872) 9 Born. H C R 438 *rel.*

So far, however, as the office of a Secretary is concerned that would not appear to be within the principles and the practice applying to the writ of *mandamus.*

Pir Saifullah Shah's case P L D 1959 S C (Pak.) 210 and *Evans v. Hearts of Oak Benefit Society* (1866) 12 Jur. N S 163 *ref.*

(b) Companies Act (VII of 1913) Ss. 86-F & 86-I*-Director entering into contracts with company in absence of consent of Directors-Combined*

efect of sections-"Entry into" contracts for "sale" etc. must be established within meaning of Contract Act (IX of 1872) and Sale of Goods Act (111 of 1930)-Company, as licensed Provincial stock-holder of steel, delivering G. P. sheets to Director on production of permit issued by statutory authorityTransaction not within mischief of sections.

The combined effect of sections 86-F and 86-1, Companies Act (VII of 1913) is that in the specified circumstances, a Director of a Company automatically loses his position as such. It is unquestionable that thereby he suffers a grievous personal injury, and in one aspect, such injury may be seen as a just punishment for the grave fault of not subjecting a transaction in which his personal interest was in conflict with the general interest of the Company to the scrutiny of his fellow-directors before entering upon it. For, a contract once entered upon attracts sanctions and may involve the Company in penalties should the company attempt to escape the obligation incurred under it. But that does not relieve the Court of the plain duty which falls upon it in the application of a penal statute such as section 86-F read with section 86-I of the Companies Act, to assure itself that the conditions requisite for the application of the penalty are strictly satisfied. The duty in the case will be to see that there was in actual fact an *entry* into a *contract n,* for the *sale,* purchase or supply of goods or materials with the Company, and there need be no doubt whatsoever that the expression "contract for sale" must be understood within the definitions contained in the relevant laws, namely, the Contract Act, 1872 and the Sale of Goods Act, 1930.

Where some of the Directors had entered into transactions .with the Company involving supply and delivery of iron and steel from stocks held by the Company as Provincial stock-holders, in compliance with permits and instructions of the .relevant authorities, and at the controlled price, but without the prior consent of the Directors and the effect of permits issued by the relevant authorities was such that not to honour them might have involved the Company in the loss of its position as Provincial stock-holders and importers *Held* that there was no contract of purchase in these cases.

It was impossible to say that when a Director of the Company armed with a permit presented himself before the Company and demanded supply according to the details appearing on the face of the permit, any occasion arose for a conflict between the interests of such a Director and the interests of the Company.

Such transactions did not fall within the scope of section 86-F of the Companies Act, and therefore declarations of disqualification on their basis were entirely illegal and void.

Walchandnagar Industries v. Ratanchand A I R 1953 Born. *285 considered.*

(c) Companies Act (VII of 1913), -S. 86-F*-Whether general consent of Directors valid* (Quaere).

(d) Company*-Directors-Retiring by rotation-Director illegally ousted-Requirement of rotation not mandatory-Operation of rule of rotation becoming impossible-Whether ousted Director may make up for period of ouster on re-instatement.*

Civil Appeal No. 51 of 1959

Mahmud Ali, Senior Advocate Supreme Court *(Attaullah Sajjad, Nasim Hasan Shah* and *Rafiq Ahmad* Advocates Supreme Court with him), instructed by *Amjad Hussain,* Attorney for Appellants.

H. S. Suhrawardy, Senior Advocate Supreme Court and *Ved Viyas,* Senior Advocate Supreme Court of India *(Khurshid Ahmad,* Advocate Supreme Court, with them), instructed by *Siddiq and Company* Attorneys for Respondents Nos., 1, 2, 3, 5 and 6.

Respondents Nos. *4, 7* and 8 : Ex ***parte.*** -, .

Civil Appeal *No.* 52 of 1959

H. S. Suhrawardy, Senior Advocate Supreme Court and *Ved Viyas,* Senior Advocate Supreme Court of India, *(Khurshid Ahmad,* Advocate Supreme Court with them) instructed by *Siddiq and Company,* Attorneys for Appellants.

Mahumd Ali, Senior Advocate Supreme Court *(Attaullah Sajjad, Nasim Hasan Shah* and *Rafiq Ahmad,* Advocates Supreme Court with him) instructed by *Amjad Hussain,* Attorney for Respondents.

Civil Appeal No. 53 of 1959

Mahmud Ali, Senior Advocate Supreme Court *(Attaullah Sajjad, Nasim Hasan Shah* and *Rafiq Ahmad,* Advocates Supreme Court with him) instructed by *Amjad Hussain,* Attorney for Appellants.

H. S. Suhrawardy, Senior Advocate Supreme Court and *Ved Viyas,* Senior Advocate Supreme Court of India *(Khurshid Ahmad,* Advocate Supreme Court with them) instructed by *Siddiq and Company,* Attorneys for Respondents *Nos. 1, 2, 3,* 5, 6 and *8.*
Respondent Nos. 4, *7,* 9, 10 and 11 *Ex-parte.*

Dates of hearing : **24th, 28th and 31st March 1960 ; 1st and 4th April,** 1960.

JUDGMENT

CORNELIUS, J.-This judgment will dispose of three Civil Appeals which have come before the Court on the basis of special leave granted in each case. The appeals are Civil Appeal No. 51 of 1959 by Sheikh Maqbool Elahi and Mian Muhammad Fazil, Civil Appeal No. 52 of 1959 by Khan A. Rahman and other members belonging to his group within the Board of Directors of the West Punjab Steel Corporation Limited and Civil Appeal No. 53 of 1959 by the aforesaid Sheikh Maqbool Elahi and Mian Muhammad Fazil as well as a third person Sardar Muhammad Umar Khan. The cases arise out of certain proceedings taken in the High Court of West Pakistan in the writ jurisdiction, touching, the affairs of the West Punjab Steel Corporation Limited.

A brief account of the manner in which this Corporation was brought into being and its purpose is essential for a proper understanding of the questions arising in these cases. On the 23rd March 1948 the Central Government promulgated the Iron and Steel (Control of Production, Distributions and Imports) Order, 1948, under powers given by section 3 of the Essential Supplies (Temporary Powers) Act, 1946. The purpose of this Order was to impose control over the production distribution and import of iron and steel and articles made therefrom, comprised in 19 items in a schedule attached to the Order.

Provision was made for the appointment of Provincial and Central "stock-holders" meaning persons or firms appointed by a Controller acting under the Order to hold stocks of iron and steel under terms prescribed from time to time. As to Provincial stock-holders they were also to distribute iron and steel allocated to the Provinces under the instructions of the Provincial Steel Licensing Officer, A stock-holder was prohibited from disposing of or agreeing to dispose of any iron or steel except "in accordance with the conditions contained or incorporated in a general or special written order of the Controller". The purchase of iron and steel from stock-holders was also controlled by the provision that no person should acquire or agree to acquire any iron or steel from such a person except "under the authority and in accordance with the conditions contained or incorporated in a general or special written order of the Controller", or in other words, under a permit. This permit the stock-holder was required to honour. The Order also gave power to the Controller to fix the maximum prices at which any iron or steel might be sold by a stock-holder. These prices were clearly not within the category of "market prices" for the law provided that they could include "allowances for contribution to and payment from any equalization fund established by the Controller for equalising freight, the concession rates

payable to each producer or class of producers under agreements entered into by the Controller with the producers from time to time, and any other disadvantages". Out of the equalization fund, stock-holders could be compensated for losses incurred by them in adhering to the prices fixed by the Controller. The purpose of the Order is not set out in the Order itself, but it was stated at the Bar to be to equalise the distribution of the very limited supplies of iron and steel which were available in the period immediately following the establishment

It was also stated at the Bar that at the commencement of the operation of this Order, and at all material time affecting the proceedings in the present case, the West Punjab Steel Corporation Limited (hereinafter referred to as the "Company") was a monopolist stock-holder for the whole of the Punjab and the North-West Frontier Province. This Company was established on the 24th March, 1948, the day following the promulgation of the Order. It was duly registered and a certificate of commencement of business was immediately granted. Three of the Directors were nominated by the Government to form with the signatories of the memorandum of Association the first Board. Among the 22 objects enumerated in the Memorandum of Association the first four items set out the principal purposes. These were to import and acquire quota of iron and steel and to engage in its distribution, to enter into contract with the Central Government to be appointed stock-holders of controlled stock and to hold and handle such controlled stock of iron and steel materials and in pursuance of the objects of the aforesaid Order "to buy, sell and deal in such iron and steel materials as are placed in controlled stock by the Central Government in accordance with the terms and conditions of the contracts entered into with the Central Government". The Articles of Association in the main followed the standard pattern. The capital was Rs. 15 lacs divided into 15,000 ordinary shares of Rs. 100 each, and as to the disposal of the shares, there was a very specific provision in the following terms, viz., that the Directors-

"may allot or otherwise dispose of the same to such persons or parties, provided they are registered stock-holders, Metal Trade Dealers or otherwise connected with Engineering and Metal Industries on such terms and conditions and at such time as the Directors think fit".

The number of the Directors was fixed at not less than six and not more than thirteen of whom the Government of Pakistan were to nominate three persons as *ex-officio* Directors. The first non-official Directors of the Board, seven in number, were the signatories of the Memorandum of Association. The first meeting of the Directors was held on the 20th September 1949 and thereafter it would appear that the Company continued to operate smoothly enough until the 16th September 1956

when certain changes took place which have led to the present group of appeals.

On the 28th August 1957, a number of share-holders belonging to the group opposed to Mr. A Majid Mufti, the Secretary of the Company had submitted a requisition for the calling of an Extraordinary General Meeting of the share-holders for the following business viz., (1) to co-opt additional Directors, (2) to extend time for payment of the first call of Rs. 25 per share up to the 31st March, 1958, (3) to consider the position created by the "illegal and unauthorised" sale by the Company of controlled items of iron and steel as well as refusal to deliver such goods against valid permits issued by the Government which had damaged the good name of the Company, and (4) to consider the conduct of Mr. A. Majid Mufti upon the allegation that in connivance with some of the Directors be had been carrying on the business of the Company for his personal benefit. the Secretary on the 7th September 1957, issued an agenda for an emergent meeting to be held on the 16th September 1957, for consideration of this requisition and to fix a date for the Extraordinary General Meeting if the requisition were found in order. Notices of this meeting were sent to Khan A. Rehman, Haji Muhammad Amin, Seth Tahir Ali, Sardar Muhammad Umar Khan, Sheikh Maqbool Elahi, Mian Muhammad Fazil and Mian Abdul Aziz, Directors of the Company.

The meeting of the 16th September 1957 may be appropriately described as stormy. It was presided over by Khan A. Rehman and at the commencement it seems that only three other Directors were present, namely Abdul Aziz Malik, Mian Muhammad Fazil and Haji Muhammad Amin. After confirmation of the minutes of the last meeting the Chairman mentioned a letter which he had received from a share-holder, the previous day to the effect from that three Directors of the Company, namely, Mian Muhammad Fazil who was present, and Sheikh Maqbool Elahi and Sardar Muhammad Umar Khan who were absent, had contravened the provisions of section 86-F of the Companies Act of 1913 by having bought quantities of G. P. sheets from the Company without the prior consent of the Directors, and under the provisions of section 86-I their seats on the Board bad been automatically vacated. The letter was from a person named Mian Fazal Muhammad and was accompanied by a legal opinion given by a lawyer. Thereupon, without further enquiry, the Chairman declared that the seats of Sheikh Maqbool Elahi, Mian Muhammad Fazil and Sardar Muhammad Umar Khan had been vacated. In another version of the affairs given by the party of Sheikh Maqbool Elahi, it is stated that there was a vote taken on the point, in which Khan A. Rehman and Haji Muhammad Amin voted in favour of the vacation and Mian Muhammad Fazil and Abdul Aziz Malik voted against it, whereupon, Khan A. Rehman exercised his casting vote and they were removed. It is also said by the same party that this was done at a time

when Sheikh Maqbool Elahi had a right to vote and along with the Secretary, Mr. A. Majid Mufti was in the room. With Sheikh Maqbool Elahi voting, there would have been a majority against the view of the Chairman. However, immediately after declaring the three seats vacant, the Chairman proposed that Mr. C. M. Latif, Mian Fazal Muhammad and Khan Muhammad Safdar Khan should be co-opted as Directors in the place of Sardar Muhammad Umar Khan, Sheikh Maqbool Elahi and Mian Muhammad Fazil respectively. The proposal was passed by a majority, Mr. Abdul Aziz Malik dissenting. Immediately after, Mr. C. M. Latif, and Mian Fazal Muhammad entered the room and joined the meeting, and the next thing that happened was that a resolution was passed suspending Mr. A. Majid Mufti from the office of Secretary on the ground of there being serious allegations against him which were said to require investigation. In another account of the occurrence given by the party of Sheikh Maqbool Elahi, it is said that at the entry of Mr. C. M. Latif and Mian Fazal Muhammad rowdyism broke out, and led to the adjournment of the meeting after which Khan A. Rehman in the capacity of Chairman suspended Mr. A. Majid Mufti.

The next thing that happened was that on the 20th September 1957 Messrs Maqbool Elahi, Muhammad Fazil and A. Majid Mufti instituted Writ Petition No. 1074 of 1957 in the High Court, praying for a writ of mandamus or other appropriate writ or direction to the following effects, viz. (1) that the newly-constituted Board should not function, (2) that this Board should not operate the Bank account, (3) that this Board should hand over the books, keys, etc., to Mr. Mufti the lawful Secretary, and (4) that the respondents, namely, Khan A. Rehman, Mr. C. M. Latif, Mr. Fazal Muhammad, Khan Muhammad Safdar Khan, Haji Muhammad Amin and Mr. M. A. Siddiqi should be restrained from interfering in any way with the functioning of Sheikh Maqbool Elahi, Mian Muhammad Fazil, petitioners and Sardar Muhammad Umar Khan, the seventh respondent as Directors of the Company, as also with the functioning of Mr. A. Majid Musfti as its Secretary. A Division Bench of the High Court composed of Kayani, C. J. and Masud Ahmad, J. decided this petition on the 6th June 1958, granting the following declarations, viz., (1) that the Secretary had not been properly removed and his functions should not be interfered with, (2) that the new Directors, Mr. C. M. Latif, Mian Fazal Muhammad and Khan Muhammad Safdar Khan had not been duly co-opted and were not competent to act, (3) that the new Board of Directors should not function as it was not properly constituted, and (4) that the Secretary should call a meeting of the share holders to fill up not three vacancies among the Directors, as held by the Chairman, Khan A. Rehman, but five vacancies, the additional names being those of Khan A. Rehman himself and Haji Muhammad Amin, whom the High Court held to be subject to precisely the same disqualification, viz., that they had entered into transactions of purchase of iron and steel from the Company

in contravention of section 86-F of the Companies Act and had, therefore, automatically vacated office. The learned Judges went on to say that time thus "there are only two persons left intact, Malik Abdul Aziz and Seth Tahir Ali, and they do not form a quorum, even if they had both been present". They proceeded to the conclusion that on the 16th September 1957 there was no "qualified quorum which could fill the casual vacancies or suspend the Secretary".

The order of the High Court, dated the 6th June 1958 is the principal order requiring consideration for the disposal of these appeals. Appeals Nos. 51 and 52 of 1959 are directed against this order, and it is note-worth that they are brought by opposing parties within the body of the Directors, each seeking reversal of the order of the High Court, and asserting the right of the Company to manage its own internal affairs without interference by the Courts. Principally, the appeal of Sheikh Maqbool Elahi, No. 51 of 1959, challenges the order on the ground that the transactions between the three removed Directors and the Company were not within the mischief of section 86-F of the Companies Act, and that Mian Muhammad Fazil's affidavit denying any transaction with the Corporation had been ignored the conclusion sought being that these three persons were unlawfully removed, and that from that point onwards, all proceedings of the Board were unlawful. Further, it is urged that even with only two Directors "intact", namely, Abdul Aziz Malik and Seth Tahir Ali, the Company could have continued to operate under the relevant law since by Article 102 of its Articles of Association, it was provided that even if the body of Directors was reduced below the prescribed minimum of six, that would not prevent the remaining Directors from acting for the purpose of filling vacancies. The impression gained is that the party of Sheikh Maqbool Elahi could reply upon Abdul Aziz Malik and Seth Tabir All to co-opt fresh Directors to their own satisfaction. The appeal of Khan A. Rehman and his group, namely, Civil Appeal No. 52 of 1959 seeks dismissal of the writ petition on a number of grounds. It is contended that a writ was not an appropriate remedy and that equally efficient remedies were available otherwise, that the relief sought by the respondents related to the internal management of the Company, which could not thus be interfered with, and that the respondents, namely, Sheikh Maqbool Elahi, etc., had no *locus standi* to sue as only the Company could have instituted proceedings. The finding by the Court that Khan A. Rehman and Haji Muhammad Amin were also disqualified, had been arrived at suo motu in the course of the proceedings in which they were given no opportunity to defend their position, and the order clearing their seats vacant was, therefore, bad in law. With these two Directors there was a quorum and the Company could function and because of this quorum the election of the three new Directors was also **'valid, and equally the suspension of the** Secretary was valid. By forcing the Secretary Mr. A. Maid Mufti back upon the Company, the

Court had violated an equitable principle applicable to contracts of pcr,:onal service, for the breach of which the appropriate remedy was in damage. Other grounds taken need not be mentioned as they relate to proceedings held in implementation of the order of the Court that the Secretary should call an Extraordinary General Meeting of the shareholders. These proceedings' being of a consequential nature, their effect will depend upon whether or not the directions given by the High Court on the 6th June 1958 can be sustained in law. One ground taken in Khan A. Rahman's appeal is that the writ had abated under the Laws (Continuance in Force) Order of 1958, and in this ground, there appears patently to be no force at all.

The consequential proceedings mentioned above culminated in an order of the High Court, dated the 9th April 1959, whereby the same Division Bench reviewed the report of the Chairman appointed to conduct the Extraordinary General Meeting. This meeting was held on the 20th August 1958, and it should be mentioned that Sheikh Maqbool Elahi's petition for special leave to appeal which later matured into Civil Appeal No. 11 of 1959 was filed in this Court on the 4th of July 1958, and was accompanied by a petition asking for a stay of the proceeding, ordered by the High Court. Stay was refused, and the meeting, being accordingly held the Chairman made a note of the proceedings on the 21st August 1958, which was subject to his decision as to the validity of certain votes, which decision was given, after hearing the parties, on the 22nd September 19-58, The Chairman, viz., Sheikh Bashir Ahmad had been nominated by the High Court, and had been given power to decide as to the competency and validity of votes. His report was submitted to the Vacation Judge, who felt that there were questions involved which required to be decided by the Division Bench which had directed the proceedings to be held, and accordingly the report came up before the Division Bench and has confrmed on the 9th April 1959. Civil Appeal No. 53 of 1959 by Sheikh Maqbool Elahi, Mian Muhammad Fazil and Sardar Muhammad Umar Khan is directed against this order and raises grounds of detail concerning the acceptance and rejection of shares and proxies, the existence of names on the share register and the value to be attached thereto and similar matters. In the view which we take of the case, it is not necessary for us to consider any of the points raised in Civil Appeal No. 53 of 1959. All these matters arise consequently upon the making of the order of the, Division Bench on the 6th June 1958 and we are clearly of the opinion that that order proceeds on an erroneous view concerning the effect of section 86-F of the Companies Act, and that it cannot be sustained. We are conscious that this entail; the avoidance of a whole series of proceedings, in the High Court and outside; covering a period of nearly 18 months, and that it is about a year since the last order of the High Court was made in the case. However, the affairs of the Company have throughout most of this period been conducted under orders of the High Court, and thereafter of

this Court, and therefore, to reverse the High Court's decision will not involve upsetting an autonomous working arrangement, of the kind natural to Companies operating harmoniously under the law and the Articles. It will merely amount to restoring to the Company, and to those persons who on the 16th September 1957 were its duly constituted Directors, control of the internal management of the affairs of the Company leaving them and the shareholders free from that point onwards, to resolve any difficulties that might still stand in the way of harmonious operation of the Company by recourse to the provisions of the laws which enable Companies and their shareholders in this behalf. We are so clearly of the opinion that the action of Khan A. Rehman in excluding the three Directors from the meeting of the 16th September 1957 is insupportable in law that we must unhesitatingly conclude that all consequential steps which have flowed from that action constitute an intolerable interference with the due and legal management of the internal affairs of the Company, and that the mere fact of such actions having been taken in forms of law cannot operate to give them any validity in law.

The question which we propose to consider first is as to whether the writ of mandamus extends to the making or orders for admission to a Board of Directors of a Company or the reinstatement upon such a Board, of a person whose qualification to act as a Director has been established to the satisfaction of the High Court. Mr. Suhrawardy for the appellants of Khan A. Rehman's group has contended that the office of Director of a Company is not a public office, and that it is not in the nature of a public duty for a Board of Directors of a Company to admit a person to its membership. He has referred to a number of statements of the law appearing in Halsbury's Laws of England, Volume II, Third Edition at pages 52 and 54, and has relied also upon a treatment of the subject in the recent judgment of this Court published as ***Pakistan v. Mirajuddin (***P L D 1959 S C (Pak.) 147***).*** The passages referred to occur on pages 158 and 159. It is unnecessary to reproduce what was said in that judgment, since it was of a general nature, and is a matter of common knowledge among those concerned with the procurement and operation of the high prerogative writs. The following passage, which occurs at the close of the general discussion of the nature of a writ of ***mandamus,*** and the circumstances appropriate to its issue, may however be quoted with advantage:-

> "In the absence of proof that any statutory duty was involved or that any legal right was being enforced, or that the performance of a public duty was being claimed, it is clear that a ***mandamus*** or an order of ***mandamus*** could not have issued, ***consistently with the relevant practice and precedent".***

We emphasize in particular the closing words. The scope of the application of the high prerogative writs, and the procedure applicable to these writs was for centuries and until comparatively recently settled exclusively by practice and precedent in England. At a number of places in the general discussion in the case of ***Mirajuddin*** emphasis had been placed upon the importance of practice for the application of the writs. It was said for instance that the "system of writs derives from ancient English practice", and that :-

> "the occasions for the issue of, for instance, a *mandamus* remained precisely as they were before as settled by long judicial practice and precedent. By the change in law it does not appear that there has been any extension of the process by way of *mandamus* into any fields where previously by practice and precedent it was not available as a mode of relief".

We repeat these passages here for the purpose of making it clear that, while the scope of the high prerogative writs has never been defined in specific terms, it is nevertheless very well understood, in respect of each of the writs, that there are limitations of subject and occasion applicable to each one of them. These limitations *B* are derivable from, and are the result of a very long series of decisions by the English Courts, whose practice and precedent has been followed and applied *mutatis mutandis by* other jurisdictions such as ours, in a continuous course of devolution.

Even upon the basis of the narrow requirements that there should be either a statutory duty involved, or a legal right to be enforced or the performance of a public duty which was attracted by the circumstances, it is easily possible to regard the admission of a duly qualified Director to the Board of Directors of a public company such as the West Punjab Steel Corporation Limited, as being within the scope of a writ. No statutory duty is involved, c but it is undeniable that a duly qualified Director has a legal right to sit on the Board of Directors and that this is a right which is of the greatest importance to the public interest, in the field of the operation of public joint stock companies under Company Law. The composition of the Board of Directors of a company incorporated as a public company, in whose operation the public at large has an interest, and whose constitution is required to be determined by the wishes of the shareholders, is clearly a matter *00A* the greatest interest to the public. Putting it slightly differently, it is of interest to the shareholders being themselves members of the public, and it is a legal right vested in them, to elect persons, to be members of the Board of Directors which shall conduct the affairs of the Company, and it is directly in the interest of the public at large which has dealings with the Company that it should know whom it is dealing with and that the dealings are not with one or a few of the Board of Directors, but that all the Directors duly elected by the

shareholders should be functioning together, within the relevant instruments, for the conduct of the affairs of the Company. Therefore, it is conceivable as a public duty bearing upon the conduct of the members of a Board of Directors that they shall admit to their number every person who is qualified to be a Director of the Company.

If however the case of excluded Directors rested on *a priori* considerations, such as those which have been set out above, a Court faced with the matter as *res integra* might well consider with the utmost seriousness whether or not the agency of the high prerogative writ should be imported into such a matter. For, there are other means available, although one of them, that is the remedy by suit is generally very lengthy and laborious, and the other, namely, by reference to shareholders is apt to lead to unsatisfactory results through the spread of dissension and dis-agreement from the body of Directors into the larger body of the shareholders. But the matter does not rest on mere theory. The records of the English Courts provide a clear case, that of the *Government Stock Investment Company Limited ((*1878) 3 9 B 442*),* where a *mandamus* was issued to admit to the directorship of a registered company the candidate elected by a show of hands. The case is instructive besides being most unusual. A rule had been obtained calling on the Company "to show cause why a *mandamus* should not issue, commanding them to admit F.H. Fowler as a Director of the Company". Fowler had been duly elected by show of hands, but thereupon the deputy chairman of the meeting demanded a poll, showing as his qualification that he held 20 shares, and proxies for more than 2,000 shares. No objection was then taken in ignorance of the law, and on a subsequent date, a poll being held. Fowler was not elected. He later claimed a seat as director, on the basis that the poll had been illegally demanded, and the Court (Cockburn, C. J. and Mellor, J.) upheld his contention, on the view that the provision of law that a poll may be "demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares or more" was not satisfied in the case. Cockburn, C. J., observed that, "no one can be said to be `holding' shares within the meaning of this article when, instead of holding shares, he is holding the proxies of other persons who do hold them". In a brief judgment expressing his concurrence, Mellor, J. made the following observation :-

> "And as there seems to be ample authority for granting a *mandamus,* although the office is full, inasmuch as the office has .been filled by votes which cannot be sustained, the rule must be made absolute . . . . .".

In our view, that is a strong precedent and a sufficient answer in itself to the contention raised in Civil Appeal No. 52 of 1959 by Khan A.

Rehman's group that a writ was not an appropriate remedy in a case like the present.

There is an equally clear precedent of somewhat earlier date from the Indian jurisdiction, viz., the case of *Albert Mills Co. Ltd.* ((1872) 9 **B**om, HCR 438). The following statement of the law appearing in the judgment of Green, J. is applicable almost *verbatim* to the facts of the present case :-

> "According to the present state of the law in England and apart from the provisions of the Common Law Procedure Act, 1854, the right of persons duly elected directors of a Company incorporated under the Joint Stock Companies Acts t9 exercise the office and functions of directors would, if interfered with on the Company, acting through the other directors or officers of the company, be enforceable by *mandamus. I* am at a loss to see by what other remedy the right of such persons could be enforced, unless as writ of *mandamus* were grantable; and the absence of any other remedy has been always regarded as a strong ground for the Court to issue such writ".

It is perhaps not possible to accept as wholly valid the supporting ground stated in the above extract, but the enunciation of the law is both clear, and correct, and it stands in no need of such support.

It may be mentioned however, that so far as the office of the Secretary is concerned, that would not appear to be within the principles and the practice applying to the writ of *mandamus.)* Here, by the Articles of Association, the Company was authorised to appoint a Secretary, but only for the performance of secretarial duties. The Articles do not suggest that he was to be an *officer* of the Company, and therefore it is not within the scope of *mandamus* to seek the restoration of Mr. A. Majid Mufti to his office of Secretary. The matter is covered by authority, namely the decision of this Court in the recent case of *Pir Saifullah Shah (*P L D 1959 S C (Pak) 210*)* relating to an employee of a Co-operative bank who was not an office-holder. *Mandamus* has also been refused in the case of a post held at the wish of a fluctuating body of persons, namely, the directors of a *company,-vide the* case of *Evans v. Hearts of Oak Benefit Society (*(1866) *12 Jur. N S 163).* It may be noted that the relief on this matter granted by the High Court to Mr. A. Majid Mufti is based on the consideration that the order suspending him from the post of Secretary was passed by a body of Directors none of whom was competent to act as such.

We proceed now to consider the impact upon the case of the provisions of section 86-F of the Companies Act which are as follows :-

> "Except with the consent of the directors, a director of the company . . . . . shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company . . . . .".

The sanction for this provision is to be found in section 86-1 and in clause (h) of subsection (1) reading as follows :-

> "The office of a director shall be vacated if . . . . . (h) he acts in contravention of section 86-F".

The combined effect of the two provisions noted above is that i the specified circumstances, a Director of a Company automatically loses his position as such. It is unquestionable that thereby he suffers a grievous personal injury, and in one aspect, such injury may be seen as a just punishment for the grave fault of not subjecting a transaction in which his personal interest was in conflict with the general interest of the Company to the scrutiny of his fellow-directors before entering upon it. For, a contract once entered upon attracts sanctions and may involve the Company in penalties should the Company attempt to escape the obligation incurred under it. But that does not relieve the Court in a case like the present of the plain duty which falls upon it in the application of a penal statute such as section 86-F read with section 86-I of the Companies Act, to assure itself that the conditions requisite for the application of the penalty are strictly satisfied. The duty in the case will be to see that there was in actual fact an *entry* into a *contract* for the *sale*, purchase or supply of goods or materials with the Company, and there need be no doubt whatsoever that the expression "contract for sale" must be understood within the definitions contained in the' relevant laws, namely, the Contract Act, 1872 and the Sale of' Goods Act, 1930. The application of the law on the point of! entry into contracts of sale must, moreover, be made against the background that the mischief at which the penalty of section 86-F is aimed is, in the words already employed above, viz., the grave fault of not subjecting a transaction in which the erring director's personal interest was in conflict with the general interest of the Company, to the scrutiny of his fellow-directors before entering upon it.

Mr. Suhrawardy, arguing for Khan A. Rehman's group was constrained to admit that no enquiry of any kind had been made by Khan A. Rehman as to the facts of the alleged transactions or the details thereof, before he declared that his opponents on the Board, namely, Sheikh Maqbool Elahi, Mian Muhammad Fazil and Sardar Muhammad Urnar Khan were disqualified. It is quite clear from the record that Khan A. Rehman had nothing before him but Mr. Fazal Muhammad's letter which is to the following effect, viz., that Sheikh Maqbool Elahi, Mian Muhammad Fazil and Sardar Muhammad Umar Khan being proprietors of their respective

firms, the said firms "have entered into contracts for the purchase of goods with the Company, without the consent of the directors" and the said Directors have thus "contravened the provisions of section 86-F of the Companies Act, 1913 and under section 86-1 of that Act their office has been vacated". The last paragraph of the letter states that legal opinion has been obtained which is enclosed and "is absolutely clear that these gentlemen cannot act as Directors" adding a threat that if an immediate action were not taken, the writer and other shareholders will be compelled to seek redress in a Court of law. Attached to the letter was the legal opinion mentioned above which was to this effect, viz., that the writer had been given to understand that certain Directors of the Company or the firm in which such directors are partners have purchased certain goods from the Company and no prior consent of the Directors had been obtained and having studied the legal position the writer was "definitely" of the opinion that in the circumstances, there had been contravention of the mandatory provisions of section 86-F and that under section 86-I, these Directors had immediately and automatically vacated th:ir seats. The only way in which they could regain their seats was by re-election in accordance with the constitution of the Company.

There is an affidavit on the record by Mian Muhammad Fazil denying that he or his Company had ever entered into any such contract with the Company. In the minutes of the meeting of the 16th September signed by Khan A. Rehman himself, the only material mentioned as affording ground for the direction that the three Directors in question had vacated their office was that the Chairman had received a letter from a shareholder "drawing his attention to the fact that three Directors . . . . . had contravened the provisions of section 86-F of the Companies Act, 1913 and had therefore vacated their office of Directors". Mr. Suhrawardy attempted to rely upon a certain document viz., a letter written by Mr. *A.* Majid Mufti as Secretary of the Company to the Steel Licensing Officer, Government of West Pakistan, Lahore, dated the 3rd August 1957, with which was enclosed a list "of the parties to whom we have supplied G. P. Sheets Wasters (Defective Cuttings)". This list shows at No. I the name of Messrs Sh. Maqbool Elahi as persons to whom 4 tons of such sheets have been delivered, at item 3 a similar delivery of a similar quantity to Messrs Abdul Rahim & Sons of Railway Road, Gujrat of which company Muhammad Fazil is said to be a member, and at No. 12, delivery of four tons of the same goods to Messrs Sarfraz Iron and Timber Mart, City Saddar Road, Rawalpindi of which Sardar Muhammad Umar Khan is said to be a partner. This list further shows a cross against items Nos. 1 and 3 and a note at the bottom reads as follows :-

"Out of this list 6 parties marked x have been included in the permits already issued by you".

These documents are relied upon for the purpose of showing that there had been irregular supply of iron and steel materials to the three Directors in question. In our opinion, they cannot be allowed that effect without additional evidence being led as to the meaning and value to be attached to these documents. For the letter was being written by the Secretary to the Corporation to the Steel Licensing Officer, a person entrusted with the due operation of the Iron and Steel Control Order, to whom it, therefore, is inconceivable that, in writing, statements would be made which would bring the stock-holders immediately within the clutches of law as directly proved contravention of that law. The letter cannot be read to involve any such admission. It refers to an earlier letter of the 31st July 1957, and states that the list is being enclosed to enable the officer to reconcile his records so as to "avoid any duplication in the issue of further instructions for the release of the stocks held in balance by us". Further, and by way of assistance to the officer in the performance of his duties, the letter went on to suggest that in order "to legalise the issue of permits by you on this stock" the balance of stock amounting to 29 tons should be allocated to "any of your Provincial Stockists" since that would "facilitate the matter both ways as we will get ready money for the bulk sale and you in return can release the stocks at your convenience". A simple reading of this letter is sufficient to show that it cannot by any means be held to constitute by itself or when read with the list a confession that in respect of the supply to any of the persons mentioned in the list, there had been a contravention of any of the requirements of the Iron and Steel Control Order.

It is important to mention here a letter from the Director of Industries, West Pakistan to the Company, dated the 26th August 1957. It refers to the Company's letter of the 31st July 1957, of which mention has already been made, and goes on to say that the Company had been instructed to keep a certain stock of G. 1P. sheets to be released on the instructions of the Director of Industries, Lahore. The letter continues as follows :-

> "Necessary permits to clear the stock were accordingly issued under his instructions, but you failed to give delivery of sheets against the permits, and thus disregarded the instructions of the Central as well as Provincial Governments.

You are, however, warned that the permits issued by this office must be honoured and if you fail to give delivery of sheets to the Consumers within a reasonable time, you will not be considered as a Stockist-cum-importer and no import licenses will be issued to you in future."

This letter contains a clear indication of the kind of threat under which the Company was carrying on its work. It was required under pain of losing its licences to honour every- permit issued by the Director of Industries at

Lahore, and although the reference is clearly to a letter of the 31st July 1957, in continuation of which the letter of the 3rd August 1957, together with the list mentioned above was sent (a copy of which was endorsed to the Director of Industries), it does not in any way appear from the reply of the Director of Industries that he had found any contravention of the Iron and Steel Control Order in relation to the supply and delivery of goods admitted in detail by the Company in the aforesaid list.

Here, it is of some interest, although in the circumstances it cannot be other than melancholy, that the High Court in holding that Khan A. Rehman and Haji Muhammad Amin had also vacated office by reason of similar purchase have acted on an affidavit filed by Mr. A. Majid Mufti some six days after the petition was admitted. No prayer was made in the petition in respect of these two Directors nor was any such prayer sought to be added to the petition. An affidavit in reply was received from Mr. C. M. Latif, which was to the effect that Khan A. Rehman (who was probably not at Lahore at the time) had informed Mr. Latif on the telephone that to the best of his re-collection he had made no purchases from the Company and as to Haji Muhammad Amin, he admitted only one transaction of pig iron for which however, a permit had been obtained from the appropriate authorities for purchase at the controlled rate so that "the said transaction was not a contract" between Haji Muhammad Amin and the Company. The Division Bench having already held that purchases of this kind without the consent of the Directors fell within the prohibition contained in section 86-F of the Companies Act observed that "what is good for the goose is good for the gander" and going rather by what was not said in Mr. C. M. Latif's affidavit, than by what was said, they declared that Khan A. Rehman and Haji Muhammad Amin were both disqualified. As has been seen, this action on the part of the Division Bench has been characterized as being beyond the jurisdiction of the Court in the appeal of Khan A. Rehman and his group. Whatever may be said for the action of Khan A. Rehman in acting without evidence on the 16th September 1957, it seems to us that when the learned Judges of the Division Bench chose to take up the question of disqualification of these two Directors, which was not a question raised before them in the petition, they were not without the means of obtaining correct evidence regarding the facts and details of the alleged transactions, before proceeding make a declaration depriving these Directors of their office.

The basis for the decision in favour of the disqualification cannot upon the record be placed higher than this viz. that some of the Directors had entered into transactIons with the Company involving supply and delivery of iron and steel from stocks held by the Company as Provincial stock-holders, in compliance with permits and instructions of the relevant authorities, and at the controlled price, but without the prior consent of the Directors. The effect of permits issued by the relevant authorities is such

that not to honour them might have involved the Company in the loss of its position as Provincial stock-holders and importers. 1n these circumstances, the crucial question for decision which arises is-can such a transaction carried out under orders of statutory authority prescribing the kind and quantity of goods to be delivered, the person to whom delivery was to be made and the price which was to be charged, to such person fall within the meaning of the expression "a contract of sale" as used in section 86-F ?

The argument on behalf of Sheikh Maqbool Elahi's group is that in effect, the Company was merely carrying out directions received from the duly empowered statutory authority, which instructions it could only ignore at the risk of losing its position and thereby denying the very function for which it was created. It had no option in the matter but to honour the permit. Even the price paid by the purchaser or the person to whom delivery was made was not the measure of the remuneration of the Company, but that remuneration was a calculated figure based upon a system of equalisation and as such an amount which was within the complete power of the authorities to determine. Reference was made to the relevant provisions of the Contract Act and in particular to section 10 which clearly states that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object-". It is urged that in order to fall within the mischief of section 86-F the transactions in question should satisfy the condition of being agreements made by free consent between the Company on the one hand and the Directors in question on the other. In this case the elements of the contract apart from the question of free consent might be thought to lie in the kind and quantity of material required by the buyer and the price which he was to pay, and none of these matters were subject to any agreement between the two parties at all, but were decided by general or special order of the authorities. Under the Sale of Goods Act, of which sections 4, 5, 6 and 9 are relevant to the present discussion, a contract for the sale of goods is a contract whereby the seller transfers the property in the goods to the buyer for a price, which may be fixed by the contract or may be left to be fixed in a manner agreed by the contract or may be determined by the course of dealings between the parties. Such a contract of sale is made by an offer to buy and the acceptance of such offer by the seller. None of these conditions is present in any of the transactions to which the present discussion relates. These transactions amounted to nothing more than honourin