

The Barium Chemicals Ltd. and Anr.

Vs

The Company Law Board and Others

Civil Appeal No. 381 Of 1966

(M. Hidayatullah, J. R. Mudholkar, R. S. Bachawat JJ)

04.05.1966

JUDGMENT

MUDHOLKAR, J.-

On May 19, 1965 Mr. D. S. Dang, Secretary of the Company Law Board issued an order on behalf of the Company Law Board made under s. 237(b) of the Companies Act, 1956 appointing 4 persons as Inspectors for investigating the affairs of the Barium Chemicals Ltd., appellant No. 1 before us, since its incorporation in the year 1961 and to report to the Company Law Board inter alia "all type irregularities and contravention in respect of the provisions of the Companies Act, 1956 or of any other law for the time being in force and the person or persons responsible for such irregularities and contraventions." The order was made by the Chairman of the Board, Mr. R. C. Dutt on behalf of the Board by virtue of the powers conferred on him by certain rules to which we shall refer later. On June 4, 1965 the Company preferred a writ petition under Art. 226 of the Constitution in the Punjab High Court for the issue of a writ of mandamus or other appropriate writ, direction or order quashing the order of the Board dated May 19, 1965. The Managing Director, Mr. Balasubramanian joined in the petition as petitioner No. 2. The writ petition is directed against 7 respondents, the first of which is the Company Law Board. The second respondent is Mr. T. T. Krishnamachari, who was at that time Minister for Finance in the Government of India. The Inspectors appointed are respondents 3 to 6 and Mr. Dang is the 7th respondent. Apart from the relief of quashing the order of May 19, 1965 the appellants sought the issue of a writ restraining the Company Law Board and the Inspectors from giving effect to the order dated May 19, 1965 and also sought some other incidental reliefs. The order of the Board was challenged on 5 grounds which are briefly as follows :

- (1) that the order was made mala fide;
- (2) that in making the order the Board had acted on material extraneous to the matters mentioned in s. 237(b) of the Companies Act;
- (3) that the order having in fact been made at the instance of the shareholders is invalid and on a true construction of s. 237 this could not be done;
- (4) that the order was invalid because it was made by the Chairman of the Board and not by the Board; and
- (5) that the provisions of s. 27(b) are void as offending Arts. 14 and 19(1)(g) of the Constitution.

The allegations of mala fides were denied on behalf of the respondents. They disputed the validity of all the other grounds raised by the petitioners. The High Court rejected the contentions urged before it on behalf of the appellants and dismissed the writ petition. The appellants thereafter sought to obtain a certificate of fitness for appeal to this Court; but the High Court refused to grant such a certificate. They have now come up to this Court by special leave.

In order to appreciate the arguments addressed before us a brief statement of the relevant facts would be necessary. The Company was registered in the year 1961 and had an authorised capital of Rs. 1 crore divided into 100,000 shares of Rs. 100 each. Its primary object was to carry on business of manufacturing all types of barium compounds. Appellant No. 2 was appointed Managing Director of the Company from December 5, 1961 and his appointment and remuneration were approved by the Central Government on July 30, 1962. The erection of the plant was undertaken by M/s. L. A. Mitchell Ltd., of Manchester in pursuance of a collaboration agreement between it and the company entered in October, 1961 and approved by the Central Government in November of that year. Thereafter a permit for importing the requisite machinery was granted to the Company. The issued capital of the Company was Rs. 50,00,000 and the public was invited to subscribe for shares in the Company. It is said that the issue was over-subscribed by March 12, 1962.

It would seem that soon after the collaboration agreement was entered into M/s. L. A. Mitchell Ltd., was taken over by a financial group (M/s. Pearson & Co. Ltd.), to which a person named Lord Poole belonged. It would appear that as the work of setting up of the plant was being delayed the Company sent a notice to M/s. Mitchell Ltd., on April 2, 1965 in which the Company stated that if the plant was not completely installed and got into running order by June 1, 1965 the Company will have to make alternative arrangements and that it would hold M/s. L. A. Mitchell Ltd., liable to pay damages to the Company for the loss suffered by it. As a result of the notice Lord Poole invited India in April/May, 1965. In his opinion the design of the plant was defective. Certain negotiations took place between the Company and Lord Poole in the course of which an undertaking was given by Lord Poole on behalf of the collaborators that the work would be completed with necessary alterations and modifications in accordance with the report of M/s. Humphrey & Co., and that the collaborators would spend an additional amount upto Pounds 250,000 as may be required for the purpose. It is said that the plant was producing at that time only 25 per cent of its installed capacity but that according to the assurance given by Lord Poole it would yield full production by April, 1966.

According to the appellants, before entering into a collaboration agreement with M/s. L.A. Mitchell Ltd., the appellant No. 2 Balasubramanian was negotiating with a German firm named Kali Chemie A.G. of Hanover for obtaining their collaboration. It is said that the firm of M/s. T. T. Krishnamachari & Sons were and still are the sole agents in India for some of the products of Kali Chemie. The firm of T. T. Krishnamachari & Sons approached appellant No. 2 for the grant of sole selling agency of the products of the plant to be established in collaboration with Kali Chemie. Appellant No. 2 did not agree to this with the result that the company's negotiations with Kali Chemie broke down. The appellants also say that T. T. Krishnamachari & Sons were later also granted a licence to set up a plant for manufacturing barium chemicals but that on appellant No. 2 bringing certain facts to the notice of Mr. Nehru the licence in favour of T. T. Krishnamachari & Sons was revoked. The relevance of these facts is in connection with the plea of mala fides. On this part of the case the appellant's contention is that the Chairman of the Company Law Board Mr. R. C. Dutt made the order for investigation into the affairs of appellant No. 1 at the instance of Mr. T. T. Krishnamachari, the then finance Minister and also because of his bias against appellant No. 2. The suggestion is that as the licence of M/s. T. T. Krishnamachari & Sons was revoked and as they were

not even given sole selling agency for the sale of the products of barium chemicals Mr. T. T. Krishnamachari wanted action to be taken under this provision either for penalising appellant No. 1 or putting pressure on it.

A lengthy argument was addressed before us by Mr. Setalvad bearing on the question of mala fides in the course of which he referred to certain documents. He also wanted us to bear in mind the sequence in which certain events occurred and said that these would indicate that the former Finance Minister must have been instrumental in having an order under s. 237(b) made by the Chairman of the Board. We were, however, not impressed by this argument. Our learned brother Shelat has dealt with this aspect of the matter fully in judgment and as we agree with him it is not necessary to say much on the point. We would, however, like to refer to and deal with one aspect of the argument bearing on the question of mala fides. Mr. Setalvad points out that the Company Law Board had decided in December 1964 to take action against appellant No. 1 under s. 237(b) and had actually obtained approval of Mr. T. T. Krishnamachari to the proposed action. Therefore, according to him the real order is of Mr. Krishnamachari even though the order is expressed in the name of the Board. We find no substance in the argument. The decision to take action was already taken by the Chairman and there is nothing to indicate that in arriving at that decision he was influenced by the Finance Minister. If the decision arrived at by the Chairman was an independent one it cannot be said to have been rendered mala fide because it was later approved by Mr. Krishnamachari whose sons undoubtedly constitute the partnership firm of M/s. T. T. Krishnamachari & Sons. It is also suggested by Mr. Setalvad that the action approved of in December, 1964 was delayed till May, 1965 because in the interval some negotiations with Kali Chemie had been started and had they ended fruitfully M/s. T. T. Krishnamachari & Sons would have got the sole selling agency of the products of barium chemicals. Now it does seem from certain material brought to our notice that negotiations with Kali Chemie were revived by appellant No. 2 because of the difficulties which were being experienced in the working of the collaboration agreement with M/s. L. A. Mitchell Ltd. No material, however, is placed before us from which it could be reasonably inferred that had the negotiations with Kali Chemie fructified M/s. T. T. Krishnamachari & Sons would have secured the sole monopoly for sale of the products of barium chemicals. One more point was urged in connection with this aspect of the argument and it is that the appellants were not given an opportunity to cross-examine Mr. T. T. Krishnamachari and Mr. Dutt. In our opinion, in a proceeding under Art. 226 of the Constitution the normal rule is, as pointed out by this Court in *The State of Bombay v. Purshottam Jog Naik* to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court whether to allow a person who has sworn an affidavit before it - as indeed Mr. Krishnamachari and Mr. Dutt have - to be cross-examined or not to permit it. In exercise of its discretion the High Court has refused permission to cross-examine them. In such a case it would not be appropriate for this Court while hearing an appeal by special leave to interfere lightly with the exercise of that discretion.

Mr. Setalvad said that as the appellants had made out a prima facie case of mala fides in their affidavits, and as these allegations had been denied by the respondents, the High Court was in error in refusing permission to the appellants to cross-examine the persons who swore the affidavits on the side of the respondents. We are not aware of the rule on which Mr. Setalvad bases himself. There is nothing to show that the High Court thought that a prima facie case of mala fides had been made out. Even in such a case a court might well hold that it has been demolished by the affidavits in answer. The court has to find the facts and if it finds that it can do so without cross-examination it is not compelled to permit cross-examination. We have no reason to think that the High Court could not have ascertained the facts on the affidavits themselves.

Coming to the second point, it would be desirable to reproduce s. 237 which reads thus :

"Without prejudice to its powers under section 235 the Central Government -

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if -

(i) the company, by special resolution, or

(ii) the Court, by order,

declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government; and

(b) may do so if, in the opinion of the Central Government, there are circumstances suggesting -

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager of the company."

In view of the fact that the Central Government, by virtue of the powers conferred by ss. 10-E and 637 delegated its powers under s. 237 to the Company Law Board we shall read s. 237 as if in place of the words "Central Government" there are the words "Company Law Board" or for brevity 'Board. According to Mr. Setalvad, cl. (b) of s. 237 requires two things : (1) the opinion to the Board and (2) the existence of circumstances suggesting one or more of the matters specified in sub-cl. (i) to (iii). He contends that though the opinion of the Board is subjective the existence of circumstances set out in the sub-cl. (i) to (iii) is a condition precedent to the formation of the opinion. Therefore, according to him, the Court is entitled to ascertain whether in fact any of those circumstances exists. The Attorney-General disputes this construction and contends that the clause is incapable of a dichotomy and that the subjective process embraces the formation of an opinion that circumstances suggestive of any of the matters comprised in sub-cl. (i) to (iii) exist.

Once it is conceded that the formation of an opinion by the Board is intended to be subjective - and if the provision is constitutional which in our view it is - the question would arise : what is that about which the Board is entitled to form an opinion ? The opinion must necessarily concern the existence or non-existence of facts suggesting the things mentioned in the several sub-clauses of cl. (b). An examination of the section would show that cl. (b) thereof confers a discretion upon the Board to appoint an Inspector to investigate the affairs of a company. The words "in the opinion of"

govern the words "there are circumstances suggesting" and not the words "may do so". The words 'circumstances' and 'suggesting' cannot be dissociated without making it impossible for the Board to form an 'opinion' at all. The formation of an opinion must, therefore, be as to whether there are circumstances suggesting the existence of one or more of the matters in sub-cl. (i) to (iii) and not about anything else. The opinion must of course not have been arrived at mala fide. To say that the opinion to be formed must be as to the necessity of making an investigation would be making a clear departure from the language in which s. 237(b) is couched. It is only after the formation of certain opinion by the Board that the stage for exercising the discretion conferred by the provision is reached. The discretion conferred to order an investigation is administrative and not judicial since its exercise one way or the other does not affect the rights of a company nor does it lead to any serious consequences as, for instance, hampering the business of the company. As has been pointed out by this Court in *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry & Anr.* [[1961] 1 S.C.R. 417] the investigation undertaken under this provision is for ascertaining facts and is thus merely exploratory. The scope for judicial review of the action of the Board must, therefore, be strictly limited. Now, if it can be shown that the Board had in fact not formed an opinion its order could be successfully challenged. This is what was said by the Federal Court in *Emperor v. Shibnath Banerjee* [[1944] F.C.R. 1] and approved later by the Privy Council. Quite obviously there is a difference between not forming an opinion at all and forming an opinion upon grounds, which, if a court could go into that question at all, could be regarded as inapt or insufficient or irrelevant. It is not disputed that a court cannot go into the question of the aptness or sufficiency of the grounds upon which the subjective satisfaction of an authority is based. But, Mr. Setalvad says, since the grounds have in fact been disclosed in the affidavit of Mr. Dutt upon which his subjective satisfaction was based it is open to the court to consider whether those grounds are relevant or are irrelevant because they are extraneous to the question as to the existence or otherwise of any of the matters referred to in sub-cl. (i) to (iii).

Let us now examine the affidavit of Mr. Dutt. Since this affidavit is in answer to the allegations made in the writ petition the two should be considered together. In paragraphs 1 to 19 of the writ petition certain facts and figures concerning the formation, registration etc. of the company, the activities of the company and other related matters have been set out. These were admitted by Mr. Dutt in paragraph 14 of the Counter-affidavit. Paragraph 20 onwards of the writ petition deals with the action taken by the Board and the various grounds on which according to the appellants the action of the Board is open to challenge. The first 4 paragraphs of the counter-affidavit deal with certain formal matters. In paragraph 5 Mr. Dutt has set out that the petition is liable to be dismissed summarily being grounded on facts which are false, speculative and lacking in material particulars. Thereafter he has set out what, according to him, are the true facts. In paragraphs 6 to 8 he has dealt with the legal aspects of the case. The 8th paragraph is the most important amongst them. Here Mr. Dutt has stated that it was not competent to the Court to go into the question of adequacy or otherwise of the material on the basis of which orders under s. 237(b) are passed by the Board. Then he stated : 'However, if in spite of what has been stated and contrary to the submissions above, this Hon'ble Court still holds that it is necessary for the Court to examine the relevant material in order to do justice, then the Board would have no objection to producing the same for the Court's perusal provided it is not shown to the petitioners.' It may be mentioned that the Court did not call for this material at all nor did the appellants seek its production. In paragraph 9 Mr. Dutt has categorically stated that the order of May 19, 1965 was passed after careful and independent examination of the material by the Chairman and that it was issued in proper exercise of the powers conferred upon it. He has specifically denied that it was issued at the instance of the second respondent. In paragraph 10 Mr. Dutt has taken the plea that the petition was liable to be dismissed as it had not been made

bona fide but for extraneous reasons and to create prejudice with a view to thwart statutory investigation. Then he has set out the circumstances upon which his contention is based. In paragraph 13 he has stated that without prejudice to his submissions in the earlier paragraphs he would reply to allegations contained in the various paragraphs of the writ petition. Then follows paragraph 14 upon which Mr. Setalvad has founded an argument that the grounds disclosed therein being extraneous the order is invalid. In this paragraph Mr. Dutt has admitted some of the facts stated in paragraphs 1 to 19. He has also said that the Board was aware of the fact that the company had entered into collaboration with M/s. L.A. Mitchell Ltd. He has then added : ".....but it has no information of any of the other matters and/or negotiations with M/s. L.A. Mitchell Ltd., Manchester. However, from the Memoranda received by the Board referred to in paragraph 5 and other examination it appeared inter alia that :

- (i) that there had been delay, bungling and faulty planning of this project, resulting in double expenditure, for which the collaborators had put the responsibility upon the Managing Director, Petitioner No. 2 :
- (ii) Since its floatation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off;
- (iii) that the shares of the company which to start with were at a premium were being quoted on the Stock Exchange at half their face value; and
- (iv) some eminent persons who had initially accepted seats on the Board of directors of the company had subsequently served their connections with it due to differences with Petitioner No. 2 on account of the manner in which the affairs of the company were being conducted."

In paragraph 5 it may be recalled Mr. Dutt has set out the grounds on which the writ petition deserved to be summarily rejected. It will thus be clear that what are characterised by Mr. Setalvad as the grounds upon which the order of the Board is based are nothing more than certain conclusions drawn by the Board from some of the material which it had before it. Moreover the expression "inter alia" used by Mr. Dutt would show that the conclusions set out by him specifically are not the only ones which could be drawn from the material referred to by him in paragraph 5 of his affidavit.

Turning to paragraph 16 of the affidavit we find that Mr. Dutt has clearly reiterated that there was ample material before the Board on which it could and did form the opinion that there were circumstances suggesting that as stated in the order of May, 19, 1965, the business of the company was being conducted with intent to defraud creditors, members and other persons and further that the persons concerned in the management of the affairs of the company had in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members. This paragraph is in answer to paragraph 21 of the writ petition. It is in that paragraph alone that the appellants had specifically raised the contention that the recital in the order as to the existence of material is not correct and that in point of fact there was no material before the Board to form the said opinion. In this state of pleadings it would not be right to construe the affidavit of Mr. Dutt to mean that the only conclusions emerging from the material before the Board are those that are set out in paragraph 14 of his affidavit.

Apart from this we do not think that the conclusions set out in paragraph 14 are extraneous to the matters indicated in the order of May 19, 1965. What is said therein is that there are circumstances

suggesting that the business of the appellants is being conducted with intent to defraud its creditors, members and others, and that the persons concerned with the management of the affairs of the company have been guilty of fraud, misfeasance and other misconduct towards the company and its members. It has to be borne in mind that what the Board is to be satisfied about is whether the circumstances suggest any of these things and not whether they establish any of these things. Now, the first of its conclusions is to the effect that the materials show that there was delay, bungling, faulty planning of the project and that this resulted in double expenditure for which the collaborators had put the responsibility upon the Managing Director, that is, appellant No. 2. Would it, be farfetched to say that these circumstances could reasonably suggest to the Board that these happenings were not just pieces of careless conduct but were deliberate acts or omissions of appellant No. 2 done with the ulterior motive of earning profit for himself? Similarly could not the fact that the company was continuously showing losses since its floatation and that 1/3rd of its share capital had been wiped out could have been suggestive of fraud to the Board?

In this connection, we think it right to point out that the spirit of the section must be kept in mind in determining its interpretation. The section was enacted to prevent the Management of a company from acting in a manner prejudicial to the interests of the shareholders for whom it was difficult to get together and take steps for the protection of their interests jointly. It was this difficulty of the shareholders - which is a reality - which had led to the enactment of the section. There is no doubt that few shareholders have the means or ability to act against the Management. It would furthermore be difficult for the shareholders to find out the facts leading to the poor financial condition of a company. The Government thought it right to take power to step in where there was reason to suspect that the Management may not have been acting in the interests of the shareholders - who would not be able to take the steps against a powerful body like the Management - and to take steps for protection of such interests. As we have said, the section gives the exploratory power only. Its object is to find out the facts, a suspicion having been entertained that all was not well with the company. The powers are exercised for ascertaining facts and, therefore, before they are finally known, all that is necessary for the exercise of the powers is the opinion of the Board that there are circumstances which suggest to it that fraud and other kinds of mismanagement mentioned in sub-cl. (i) to (iii) of cl. (b) of the section may have been committed. If the facts do reasonably suggest any of these things to the Board, the power can be exercised, though another individual might think that the facts suggest otherwise. It cannot be said that from a huge loss incurred by a company and the working of the company in a disorganised and un-businesslike way, the only conclusion possible is that it was due to lack of capability. It is reasonably conceivable that the result had been produced by fraud and other varieties of dishonesty or misfeasance. The order does not amount to a finding of fraud. It is to find out what kind of wrong action has led to the company's ill-fate that the powers under the section are given. The enquiry may reveal that there was no fraud or other similar kind of malfeasance. It would be destroying the beneficial and effective use of the powers given by the section to say that the Board must first show that a fraud can clearly be said to have been committed. It is enough that the facts show that it can be reasonable thought that the company's unfortunate position might have been caused by fraud and other species of dishonest action. In our opinion, therefore, the argument of Mr. Setalvad about the circumstances being extraneous cannot be accepted.

Coming to the third point of Mr. Setalvad pointed out that four ex-Directors of the Company who had resigned submitted a memorandum to Mr. T. T. Krishnamachari while he was holding the office of Finance Minister in which grave allegations were made concerning the affairs of the Company and the management of the Company by the second appellant. The investigation, according to Mr. Setalvad, was the outcome of this memorandum and that by ordering it the Board has in effect

enabled the ex-Directors who continue to be shareholders to circumvent the provisions of ss. 235 and 236 of the Companies Act. Section 235 deals with "Investigation of affairs of company on application by members or report by Registrar". Clause (a) of this section provides that in the case of a company having a share capital the investigation can be ordered either on the application of not less than 200 members or of members holding not less than one-tenth of the total voting power therein. We are not concerned with cls. (b) and (c). Apparently the four ex-Directors were not holding 10% of the voting power of the Company. At any rate the case was argued on this footing. Section 236 provides that such application has to be supported by such evidence as the Board (reading 'Board' for 'Central Government') may require. It also empowers the Board to require the applicants to furnish security for such amount, not exceeding one thousand rupees as it may think fit, for the payment of the costs of the investigation. The contention is that though the Board acted upon the memorandum submitted by four ex-Directors it did not even require them to comply with the provisions of s. 236. The contention is that the order of the Board appointing Inspectors is invalid. In other words the argument amounts to this that the provisions of s. 237(b) have been utilised by the Board as a cloak for taking action under the provisions of s. 235. In other words this is an argument that the order was made mala fide.

It is true that a memorandum was presented to Mr. Krishnamachari by four ex-Directors containing rave allegations against the two appellants. But it was not solely on the basis of this memorandum that action was taken by the Board. It is clear from the counter-affidavit of Mr. Dutt and particularly from paragraph 5 thereof that the Board had before it not only two sets of memoranda dated May 30, 1964 and July 9, 1964 respectively or four ex-Directors of the Company alleging serious irregularities and illegalities in the conduct of the affairs of the Company but also other materials. The Board points out that over a long period beginning from September 1961 and Department had been receiving various complaints in regard to the conduct of the affairs of the Company. One complaint had also been received by the Special Police Establishment and forwarded by it to the Department in November, 1963. The matter was enquired into by the Regional Director of the Board at Madras and he, in his report, sent to the Board in September 1964 suggested an urgent and comprehensive investigation into the affairs of the Company. In his affidavit the Chairman of the Board Mr. Dutt has stated further in paragraph 5(b) as follows :

"The material on the file was further examined in the light of the Regional Director's recommendation by the two Under Secretaries of the Board (Sarvashri M. K. Banerjee C.S.S. and K. C. Chand, I.R.S. at the headquarters of the Board in New Delhi and both of them endorsed the recommendation of the Regional Director to order an investigation. The matter was then considered by the Secretary of the Company Law Board in charge of investigation (Shri D. S. Dang, I.A.S.) and he also expressed his agreement that there was need for a deeper probe into the affairs of the company."

Then again in paragraph 5(c) he has stated as follows :

"Accordingly, the matter was put up to me at the end of November 1964 and after consideration of all the material on record, I formed the opinion that there were circumstances suggesting the need for action under section 237(b) of the Companies Act, 1956".

It is abundantly clear from all this that the investigation cannot be said to have been ordered either at the instance of the four ex-Directors or on the sole basis of the memorandum submitted by them.

There is, therefore, no contravention of the provisions of ss. 235 and 236 of the Act. As a corollary to this it would follow that the order was not made mala fide or is otherwise invalid.

As already stated the appellant had challenged the provisions of s. 237(b) on the ground that they are violative of the fundamental rights under Arts. 14 and 19(1)(g) of the Constitution. Our brother Shelat has dealt with this attack on the provisions fully and we agree generally with what he has said while dealing with the contentions. We would, however, like to add that the company being an artificial legal person cannot, as held by this Court in *The State Trading Corporation of India Ltd., v. Commercial Tax Officer Visakhapatnam & Ors.* [[1964] 4 S.C.R. 99], claim the benefit of the provisions of Art. 19(1)(g) though appellant No. 2 Balasubramanian can do so. We agree with our learned brother that the action proposed under s. 237(b) being merely exploratory in character the fundamental right of Balasubramanian to carry on business is not affected thereby. Since that is so, the question whether the provisions of the aforesaid section are a reasonable restriction on the exercise of the right under Art. 19(1)(g) does not arise for consideration. In the circumstances, therefore, we do not think that there is anything more that we need say.

The last question is whether it was not competent to Mr. Dutt alone to take the decision that an investigation be ordered against the company. In taking the decision Mr. Dutt acted under a rule of procedure prescribed in the order dated February 6, 1964. The validity of this rule is challenged by Mr. Setalvad on the ground that this amounts to sub-delegation of a delegated power and is ultra vires the Act. clause (a) of sub-s. (1) of s. 637 read with s. 10(E)(1) empower the Central Government to delegate its powers under s. 237 to the Company Law Board. By notification dated February 1, 1964 the Central Government has delegated, amongst other powers and functions, those conferred upon it by s. 237 upon the Company Law Board. By another notification of the same date the Central Government has made and published rules made by it in exercise of its powers under s. 642(1) read with s. 10E(5) rule 3 of which reads thus :

"Distribution of business; - The Chairman may, with the previous approval of the Central Government, by order in writing, distribute the business of the Board, among himself and the other member or members, and specify the cases or classes of cases which shall be considered jointly by the Board."

By order dated February 6, 1964 the Chairman of the Company Law Board specified the cases and classes of cases to be considered jointly by the Board and distributed the remaining business between himself and other members of the Board. Amongst the matters allocated to the Chairman is the appointment of an Inspector under s. 237 to investigate the affairs of a company. This, Mr. Setalvad says, could not be done in the absence of an express provision in the Act. In this connection he has referred us to sub-s. 4A of s. 10E which was subsequently added - but not made retrospective - by an amendment of the Act which confers an express power on the Central Government to enable the Chairman to distribute the powers and functions of the Board. Accordingly to the learned Attorney-General this provision was enacted only to make what was implicit in s. 10E(5) read with s. 642(1) clear and that the distribution of the work of the Board being merely a matter of procedure the order of the Chairman allocating the power under s. 237(b) to himself did not amount to sub-delegation of the power of the Board.

Bearing in mind the fact that the power conferred by s. 237(B) is merely administrative it is difficult to appreciate how the allocation of business of the Board relating to the exercise of such power can be anything other than a matter of procedure. Strictly speaking the Chairman to whom the business of the Board is allocated does not become a delegate of the Board at all. He acts in the name of the

Board and is no more than its agent. But even if he is looked upon as a delegate of the Board and, therefore, a sub-delegate vis-a-vis the Central Government he would be as much subject to the control of the Central Government as the Board itself. For sub-s. (6) of s. 10E provides that the Board shall, in the exercise of the powers delegated to it, be subject to the control of the Central Government and the order distributing the business was made with the permission of the Central Government. Bearing in mind that the maxim delegates non potest delegate sets out what is merely a rule of construction, sub-delegation can be sustained if permitted by an express provision or by necessary implication. Where, as here, what is sub-delegated is an administrative power and control over its exercise is retained by the nominee of Parliament, that is, here the Central Government, the power to make a delegation may be inferred. We are, therefore, of the view that the order made by the Chairman on behalf of the Board is not invalid.

To sum up, then, our conclusions may be stated thus : The discretion conferred on the Central Government by s. 237(b) to order an investigation and delegated by it to the Company Law Board is administrative, that it could be validly exercised by the Chairman of the Board by an order made in pursuance of a rule enacted by the Central Government under s. 642(1) read with s. 10E(5), that the exercise of the power does not violate any fundamental right of the company, that the opinion to be formed under s. 237(b) is subjective and that if the grounds are disclosed by the Board the Court can examine them for considering whether they are relevant. In the case before us they appear to be relevant in the context of the matter mentioned in sub-cl. (i) to (iii) of s. 237(b). Though the order could successfully be challenged if it were made mala fide, it has not been shown to have been so made. The attack on the order thus fails and the appeal is dismissed with costs.

HIDAYATULLAH, J-

We are concerned in this appeal with the legality of an order of the Chairman, Company Law Board, May 19, 1965, (purporting to be under s. 237(b) of the Companies Act, 1956) declaring that the affairs of the Barium Chemicals Ltd. be investigated. As a consequence Inspectors have been appointed and searches have been made. The company and its Managing Director filed a petition under Art. 226 of the Constitution in the High Court of Punjab seeking to quash the order and on failure there, have filed this appeal by special leave of this Court. The action of the Chairman was and is challenged on diverse grounds but those which were presented before us were few and clear cut. The action is challenged as without jurisdiction because not the Board but the Chairman alone acted, as mala fide because no honest opinion was formed on the matters which under the section give rise to the power but on irrelevant and extraneous material, and further because the order was passed under the influence and malice of a Minister of Cabinet who was interested in another Company belonging to his sons and sought this means to oust a rival.

The facts have been stated already in some detail by my brother Shelat and I need not take time in restating them. My brother Shelat has quashed the order and I agree with him in the order proposed by him but as I view the matter a little differently on some of the aspects of the case, I wish to record my reasons briefly.

Under the Companies Act 1956, a power of superintendence over the affairs of Companies is retained by the Central Government in much the same way as the Board of Trade in England exercise over Companies in that country. This power is of two kinds (a) calling for information or explanation from the Company and (b) ordering an investigation into the affairs of the Company by appointment of Inspectors for inspection, investigation and report. The power is not only varied but is capable of being exercised variously. The power to call for information is conferred on the

Registrar in two different ways. Firstly, jurisdiction is conferred on the Registrar by s. 234 to call for information or explanation in relation to any document submitted to him, which information or explanation must be furnished on pain of penalties. If the information or explanation is not furnished or is unsatisfactory the Registrar can report to the Central Government for action. Secondly, if a contributory, creditor or other person interested places materials before the Registrar (a) that the business of the Company is being carried on in fraud of its creditors or of persons dealing with the Company or (b) otherwise for a fraudulent or unlawful purpose, the Registrar can, after hearing the Company, call upon it to furnish any information or explanation. A further power is conferred after December 28, 1960, on the Registrar, who may, after being authorised by a Presidency Magistrate or a Magistrate First Class, enter any place, search and seize any document relating to the Company, its managing agents, or Secretaries and treasurers or managing director or manager, if he has reason to believe that it may be destroyed or tampered with.

Sections 235-251 provide for investigation of the affairs of a company and for sundry matters related to such investigations. They follow the scheme of ss. 164-175 of the English Act of 1948. Section 235 enables the Central Government to appoint inspectors for investigation and report generally if the Registrar reports under s. 234 and also if a stated number of shareholders or shareholders possessing a stated voting power apply. When members apply they must support their application by evidence and give security for costs of investigation. In the present case no action under any of the sections noted so far was taken but it was taken under s. 237. This section is in two parts. The first part which is (a) compels the Central Government to appoint inspectors to investigate and report if the company by a special resolution or the court by order declares that the affairs be investigated. The second part which is (b) gives a discretionary power. As this discretionary power was in fact exercised this is a convenient place to read part (b) of s. 237. It reads :

"237. Without prejudice to its powers under section 235, the Central Government -

#(a) . . .##

(b) may do so (i.e. appoint one or more competent persons as inspectors to investigate etc.) if, in the opinion of the Central Government, there are circumstances suggesting -

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relation to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager, of the company."

By s. 237(b) the power is conferred on the Central Government but under the Companies

(Amendment) Act, 1963 a Board of Company Law Administration consisting of a Chairman and a member has been set up. This Board is constituted under s. 10E which has been introduced in the parent Act. The section may be read here :

"10E. Constitution of Board of Company Law Administration.

- (1) As soon as may be after the commencement of the Companies (Amendment) Act, 1963, the Central Government shall, by notification in the Official Gazette, constitute a Board to be called the Board of Company Law Administration to exercise and discharge such powers and functions conferred on the Central Government by or under this Act or any other law as may be delegated to it by that Government.
- (2) The company Law Board shall consist of such number of members, not exceeding five as the Central Government deems fit, to be appointed by that Government by notification in the Official Gazette.
- (3) One of the members shall be appointed by the Central Government to be the chairman of the Company Law Board.
- (4) No act done by the Company Law Board shall be called in question on the ground only of any defect in the constitution of, or the existence of any vacancy in, the Company Law Board.
- (5) The procedure of the Company Law Board shall be such as may be prescribed.
- (6) In the exercise of its powers and discharge of its functions, the Company Law Board shall be subject to the control of the Central Government.

The Board was constituted on February 1, 1964 by a notification and by a notification of even date in exercise of the powers conferred by cl. (a) of sub-s. (1) of s. 637 read with sub-s. (1) of s. 10E of the Companies Act, the Central Government delegated its powers and functions to the Board under s. 237(b) among others. Simultaneously acting in exercise of the powers conferred by sub-s. (1) of s. 642 read with sub-s. (5) of s. 10E the Central Government made the Company Law Board (Procedure) Rules, 1964 and one such rule dealt with distribution of business to the following effect :

"3. Distribution of business - The Chairman may, with the previous approval of the Central Government, by order in writing, distribute the business of the Board among himself and the other member or members, and specify the cases or classes of cases which shall be considered jointly by the Board."

The Chairman by an order dated February 6, 1964 specified the cases or classes of cases which are to be considered jointly by the Board and distributed the remaining business of the Board between the Chairman and the member each acting individually. The power under s. 237 was placed among the powers exercisable by the Chairman singly. That is how action was taken in the name of the Board but by the Chairman and is the subject of challenge for the reason that a power delegated to the Board as a whole cannot be delegated to an individual member in the absence of a provision such as sub-s. (4A) added recently to s. 10E enabling the solidarity of the Board to be broken. Sub-section (4A) of s. 10E, which has been added by an amending Act of 1965, after the events in this case, reads :

"10E. (4A). The Board with the previous approval of the Central Government, may, by order in writing, authorise the chairman or any of its other members or its principal officer (whether known as secretary or by any other name) to exercise and discharge, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions as it may think fit; and every order made or act done in the exercise of such powers or discharge of such functions shall be deemed to be the order or act, as the case may be, of the Board."

This sub-section enables the work of the Board to be distributed among members while sub-s. (5) merely enables the procedure of the Board to be regulated. These are two very different things. One provides for distribution of work in such a way that each constituent part of the Board properly authorised, becomes the Board. The other provides for the procedure of the Board. What is the Board, is not a question which admits of solution by procedural rules but by the enactment of a substantive provision allowing for a different delegation. Such an enactment has been framed in relation to the Tribunal constituted under s. 10B and has now been framed under s. 10E also. The new sub-section involves a delegation of the powers of the Central Government to a member of the Board which the Act previously allowed to be made to the Board only. The statute, as it was formerly, gave no authority to delegate it differently or to another person or persons. When it spoke of procedure in sub-section (5) it spoke of the procedure of the Board as constituted. The lacuna in the Act must have been felt, otherwise there was no need to enact sub-section (4A). The argument of the learned Attorney-General that sub-s. (4A) was not needed at all, does not appeal to me. It is quite clear that its absence would give rise to the argument accepted by me, which argument is unanswerable in the absence of a provision such as the new sub-section. My brother Shelat has dealt with this aspect of the case fully and I cannot add anything useful to what he has said. I agree with him entirely on this point.

I shall now consider the question of mala fides. This arises in two different ways. There is first mala fides attributed to the chairman because he is said to have acted under the behest of a Minister of Cabinet interested in another rival Company. It is not necessary to go into it. The Chairman obtained the opinion of quite a few of his assistants (perhaps more than was altogether necessary) and this fact is stated to establish his fairness to and honest dealing with the Company. There is nothing to show that this was done on purpose to cover up a conspiracy to do harm to the Company. On the other hand I cannot overlook the fact that the rival Company itself had obtained a licence to manufacture Barium Chemicals which it allowed to lapse. This shows that rivalry between two manufacturing concerns was not the prime motive. No doubt the rival Company had tried to obtain the sole selling rights of, and even a share in, this Company. This might have weighed with me but for the fact that the Company itself had done nothing even before action was taken, to establish itself. The whole project had hung fire and capital was eaten into a rapid rate because there were technical defects in the setting up of the plant and machinery. There was not much hope of profits as a sole selling agent or even as a partner. In these circumstances, I cannot go by the allegations made against the Chairman of the Board personally or those made against the Minister, and I find no evidence to hold that dishonesty on the part of the one or malice on the part of the other lies at the root of this action.

This brings me to the third and the last question, namely, whether mala fides or the ultra vires nature of the action has been established in this case to merit interference at our hands. In view of my decision on the question of delegation it is hardly necessary to decide this question but since contradictory opinions have been expressed on it by my brethren Mudholkar and Shelat. I must give my views on this matter. The question naturally divides itself into two parts. The first is whether

there was any personal bias, oblique motive or ulterior purpose in the act of the chairman. The second is what are the powers of the Board in this behalf and whether they have been exercised contrary to the requirements of the Act. The first ground has already been dealt with in part when I considered the malice and influence of the Minister. It may be said at once, that apart from that allegation, nothing has been said attributing to the Chairman any personal bias, grudge, oblique motive or ulterior purpose. Even in the arguments it was not suggested that the Chairman acted from improper motives. Therefore, all that I have to consider is whether the action of the Chairman can be challenged as done either contrary to the provisions empowering him or beyond those provisions.

In dealing with this problem the first point to notice is that the power is discretionary and its exercise depends upon the honest formation of an opinion that an investigation is necessary. The words "in the opinion of the Central Government" indicate that the opinion must be formed by the Central Government and it is of course implicit that the opinion must be an honest opinion. The next requirement is that "there are circumstances suggesting etc." These words indicate that before the Central Government forms its opinion it must have before it circumstances suggesting certain inferences. These inferences are of many kinds and it will be useful to make a mention of them here in a tabular form :

(a) that the business is being conducted with intent to defraud -

(i) creditors of the company,

or (ii) members,

or (iii) any other person;

(b) that the business is being conducted -

(i) for a fraudulent purpose

or (ii) for an unlawful purpose;

(c) that persons who formed the company or manage its affairs have been guilty of -

(i) fraud

or (ii) misfeasance or other misconduct -

towards the company or towards any of its members.

(d) That information has been withheld from the members about its affairs which might reasonably be expected including calculation of commission payable to -

(i) managing or other director,

(ii) managing agent,

(iii) the secretaries and treasurers,

(iv) the managers.

These grounds limit the jurisdiction of the Central Government. No jurisdiction, outside the section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstance leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly :

"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist.....".

Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in s. 237(b) can at all be drawn the action would be ultra vires the Act and void.

Now the Chairman in his affidavit referred to two memoranda dated May 30, 1964 and July 4, 1964 presented by certain ex-directors and also stated that from September 1961 complaints were being received in regard to the conduct of the affairs of the Company, and one such complaint was received from Special Police Establishment in November 1963. The nature of the complaints was not disclosed but in reference to the memoranda it was stated that "irregularities" and "illegalities" in the conduct of the affairs of the Company was alleged therein. It was also stated that the memoranda "were supported by documentary evidence and details of the impugned transactions and the signatories offered to produce witnesses with knowledge of these transactions". This was followed by an enquiry by the Regional Director of the Board at Madras (Shri R. S. Ramamurthi, I.A.S.) who made a report in September 1964. The report was next considered by two Under Secretaries and by the Secretary of the Company Law Board who all agreed "that there was need for a deeper probe into the affairs of the Company". The matter was then placed before the Chairman who formed the opinion that there were circumstances suggesting the need for action under s. 237(b). None of the reports was produced. Nor was there any indication in the affidavit what their drift was. There was considerable delay in taking up the matter and this was explained as occasioned by the language riots, and other more pressing occupation. It appears that in the High Court an offer was made to place the reports etc. in the hands of the Court provided they were not shown to the other side, but no such offer was made in this Court. The High Court did not look into the documents.

Had the matter rested there it would have been a question whether this Court should interfere with a subjective opinion, when the affidavit showed that there were materials for consideration. It would then have been a question whether this Court could or should go behind the affidavit. I leave that

question to be decided in another case where it arises. In this case it is not necessary to decide it because the affidavit goes on to state :

".....However from the Memoranda received by the Board referred to in paragraph 5 and other examination it appeared inter alia that :

- (i) there had been delay, bungling and faulty planning of this project, resulting in double expenditure, for which the collaborators had put the responsibility upon the Managing Director, Petitioner No. 2;
- (ii) Since its floatation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off;
- (iii) that the shares of the company which to start with were at a premium were being quoted on the Stock Exchange at half their face value; and
- (iv) some eminent persons who had initially accepted seats on the Board of directors of the company had subsequently severed their connections with it due to differences with Petitioner No. 2 on account of the manner in which the affairs of the company were being conducted."

(Paragraph 14 of the affidavit).

It may be mentioned that in paragraph 16 of the affidavit the Chairman also stated :

"With reference to paragraph 21 of the petition, I have already stated above that there was ample material before the Board on which it would and did form the opinion that there were circumstances suggesting that the business of the company was being conducted with intent to defraud its creditors, members and other persons and further that the persons concerned in the management of the affairs of the company had in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members."

The question thus arises what has the Chairman placed before the Court to indicate that his action was within the four corners of his own powers ? Here it must be noticed that members are ordinarily expected to take recourse to the Registrar because there they have to be in a certain number or command a certain proportion of the voting power. They are also required to give evidence and the Company gets an opportunity to explain its actions. If s. 237(b) is used by members, as an alternative to s. 236, the evidence must unerringly point to the grounds on which alone action can be founded. In my pinion there is nothing to show that the reports which were being received from September 1961, or the report of the Special Police Establishment indicated fraud, illegality or action or actions with intent to defraud, as contemplated by the section. The affidavit merely says that these reports indicated the need for a deeper probe. This is not sufficient. The material must suggest certain inferences and not the need for "a deeper probe". The former is a definite conclusion the latter a mere fishing expedition. A straight-forward affidavit that there were circumstances suggesting any of these inferences was at least necessary. There is no such affidavit and the reason is that the Chairman completely misunderstood his own powers. This is indicated by the enumeration of the four circumstances I have extracted from his affidavit and I proceed to analyse them.

The first circumstance is "delay, bungling and faulty planning" resulting in "double expenditure" for

which the collaborators had put the responsibility on the second appellant. None of these shows an intent to defraud by which phrase is meant something to induce another to act to his disadvantage. The circumstances mentioned show mismanagement and inefficiency which is not the same thing as fraud or mis-conduct. The second and the third circumstance merely establish that there was loss in making this project work and that a part of capital had been lost. This was admitted by the appellants who pointed out that after considerable negotiations they induced Lord Poole, the President of the collaborating firm, to invest a further sum of Pounds 25,000. This shows that the appellants were in a position to dictate to the collaborating company which they would not have been able to do if they were guilty of fraudulent conduct. The last circumstance does not also bear upon the subject of fraud and acts done with intent to defraud. That some directors have resigned does not establish fraud or misconduct. There may be other reasons for the resignation.

In the other part of the affidavit the Chairman has merely repeated s. 237(b) but has not stated how he came to the conclusion and on what material. In other words, he has not disclosed anything from which it can be said that the inference which he has drawn that the Company was being conducted with intent to defraud its creditors, members and other persons or persons concerned in the management of the affairs of the Company were guilty of fraud, mis-feasance and misconduct towards the company and its members was based on circumstances present before him. In fact, paragraph 16 is no more than a mechanical repetition of the words of the section.

Coming now to the affidavit of Mr. Dang I find that he merely repeats what was stated in the affidavit of the Chairman. He also said that he had seen the papers and agreed with his two Under Secretaries and the Regional Director that a "deeper probe" was necessary. There is no hint even in this affidavit that the circumstances were such as to suggest fraud, intent to defraud or misconduct, this is to say, circumstances under which investigation can be ordered. The other affidavits also run the same way and it is not, therefore, necessary to refer to them. We are concerned really with the affidavits of the Chairman and Mr. Dang in relation to the exercise of the powers conferred by s. 237(b). Neither proves the existence of circumstances under which the power could be exercised. In my opinion, therefore, the action has not been proved to be justified. No doubt, the section confers a discretion but it sets its own limits upon the discretion by stating clearly what must be looked for in the shape of evidence before the drastic act of investigation into the affairs of a company can be taken. The affidavits which were filed in answer to the petition do not disclose even the prima facie existence of these circumstances. On the other hand, they emphasise only that there was mismanagement and losses which necessitated a "deeper probe". In other words, the act of the Chairman was in the nature of a fishing expedition and not after satisfaction that the affairs of the Company were being carried on even prima facie with the intent to defraud or that the persons incharge were guilty of fraud or other misconduct. As to the constitutionality of s. 237(b) I agree with my brethren Bachawat and Shelat and have nothing to add. I, therefore, agree with my brother Shelat that the appeal must be allowed. There will be no order about costs.

Bachawat, J. The order dated May 19, 1965 was passed by the Chairman of the Company Law Board Mr. Setalvad submitted that only the Board could pass an order under s. 237, the Central Government could delegate its function under s. 237 to the Board but it had no power to authorise the Chairman to sub-delegate this function to himself and consequently, the Company Law Board (Procedure) Rules, 1964 made by the Central Government on February 1, 1964 and the Chairman's order of distribution of business dated February 6, 1964 delegating the function of the Board under s. 237 to the Chairman are ultra vires the Companies Act and the impugned order is invalid. The learned Attorney-General disputed these submissions.

As a general rule, whatever a person has power to do himself, he may do by means of an agent. This board rule is limited by the operation of the principle that a delegated authority cannot be re-delegated, *delegatus non potest delegare*. The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot re-delegate his authority. As a general rule, "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited." See Crawford on Statutory Construction, 1940 Edn., art. 195, p. 335. Normally, a discretion entrusted by Parliament to an administrative organ must be exercised by that organ itself. If a statute entrusts an administrative function involving the exercise of a discretion to a Board consisting of two or more persons it is to be presumed that each member of the Board should exercise his individual judgment on the matter and all the members of the Board should act together and arrive at a joint decision. *Prima facie*, the Board must act as a whole and cannot delegate its function to one of its members.

The learned Attorney-General submitted that a distribution of business among the members of the Company Law Board is not a delegation of its authority, and the maxim has no application in such a case. I cannot accept this submission. In *Cook v. Ward* [[1877] L.R. 2 C.P.D. 255], the Court held that where a drainage board constituted by an Act of Parliament was authorised by it to delegate its powers to a committee, the powers so delegated to the committee must be exercised by them acting in concert and it was not competent to them to apportion those powers amongst themselves and one of them acting alone, pursuant to such apportionment, could not justify his acts under the statute. Lord Coleridge, C.J. said at p. 262 : "It was not competent to them to delegate powers, which required the united action of the three, to be exercised according to the unaided judgment of one of them" Again, in *Vine v. National Dock Labour Board* [[1957] A.C. 488], the House of Lords, held that a local board set up under the scheme embodied in the schedule to the Dock Workers (Regulation of Employment) Order, 1947 and no power to assign its disciplinary function under cls. 15(4) and 16(2) of the scheme to a committee and the purported dismissal of a worker by the committee was a nullity. In my opinion, the distribution of the business of the Board among its members is a delegation of its authority.

But the maxim "*delegatus non potest delegare*" must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. *Prima facie*, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. But the intention may be negated by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted.

Under ss. 10E(1) and 637(1)(a), the Central Government has power to constitute a Company Law Board and to delegate its functions to the Board. The Board can consist of such number of persons not exceeding five as the Government thinks fit. One of the members of the Board has to be appointed a Chairman and this necessarily implies that the Board shall consist of at least two members. As a matter of fact, the Government constituted a Board consisting of two members and appointed one of them as Chairman. To this Board the Government delegated its function under s. 237. Section 637 shows that the function under s. 237 can be delegated to the Board and to no other authority. The function under s. 237(b) involves the exercise of a discretion. *Prima facie*, all the members of the Board acting together were required to discharge this function and they could not delegate their duty to the Chairman. However, under ss. 10E(5) and 642(1), the Central Government may frame rules regulating the procedure of the Board and generally to carry out the purposes of the

Act. In the context of s. 10E, I am inclined to construe this rule-making power liberally. The Central Government has power to constitute the Company Law Board, to delegate its functions to the Board and to control the Board in the exercise of its delegated functions. In this background, by conferring on the Central Government the additional power of framing rule regulating the procedure of the Board and generally to carry out the purposes of s. 10E, the Parliament must have intended that the internal organisation of the Board and the mode and manner of transacting its business should be regulated entirely by rules framed by the Government. The Government had, therefore, power to frame the Company Law Board (Procedure) Rules, 1964 authorising the Chairman to distribute the business of the Board. In the exercise of the power conferred by this rule, the Chairman assigned the business under s. 237 to himself. The Chairman alone could, therefore, pass the impugned order. Act No. 31 of 1965 has now inserted sub-s. (4A) in s. 10E authorising the Board to delegate its powers and functions to its Chairman or other members or principal officer. The power under sub-s. (4A) may be exercised by the Board independently of any rules framed by the Central Government. We find, however, that the Central Government had under ss. 10E(5) and 642(1) ample power to frame rules authorising the Chairman to distribute the business of the Board. The wide ambit of this rule-making power is not cut down by the subsequent insertion of sub-s. (4A) in s. 10E.

Sections 235, 237(a) and 237(b) enable the Central Government to make an order appointing an inspector to investigate the affairs of a company in different sets of circumstances, and the contention that s. 237(b) is discriminatory and is violative of Art. 14 must fail. I also think that s. 237(b) is not violative of Arts. 19(1)(f) and 19(1)(g) of the Constitution. The company is not a citizen and has no fundamental right under Art. 19. Appellant No. 2 who is the managing director of the company is not a citizen, but even assuming that s. 237(b) imposes restrictions on his right of property or his right to carry on his occupation as managing director, those restrictions are reasonable and are imposed in the interests of the general public.

On the question of mala fides, I am inclined to think that the Chairman passed the order dated May 19, 1965 independently of and without any pressure from the Minister. I am all the more persuaded to come to this conclusion having regard to the fact that in paragraph 14 of his affidavit the Chairman has disclosed the circumstances which he took into account in passing the order. In paragraphs 5, 8 and 16 of his affidavit, the Chairman stated that he had various materials on the basis of which he passed the order. But, on reading this affidavit as a whole and the affidavit of Mr. Dang, I am satisfied that in paragraph 14 of his affidavit the Chairman has set out all the material circumstances which had emerged on an examination of the various materials before him. Briefly put, those circumstances are delay, bungling and faulty planning by the management resulting in double expenditure, huge losses, sharp fall in the price of the Company's shares and the resignation of some of the directors on account of differences in opinion with the managing director. I think that these circumstances, without more, cannot reasonably suggest that the business of the company was being conducted to defraud the creditors, members and other persons or that the management was guilty of fraud towards the company and its members. No reasonable person who had given proper consideration to these circumstances could have formed the opinion that they suggested any fraud as mentioned in the order dated May 19, 1965. Had the Chairman applied his mind to the relevant facts, he could not have formed this opinion. I am, therefore, inclined to think that he formed the opinion without applying his mind to the facts. An opinion so formed by him is in excess of his powers and cannot support an order under s. 237(b). The appeal is allowed, and the impugned order is set aside. I concur in the order which Shelat, J. proposes to pass.

Shelat J. The appellant company is a public limited company registered on July 28, 1961 having its registered office at Ramavaram in Andhra Pradesh and the second appellant was at all material

times and is still its managing director.

On August 25, 1959 and September 23, 1960 appellant No. 2 obtained two licences for the manufacture of 2500 and 1900 tonnes of barium chemicals per year in the name of Transworld Traders of which he was the proprietor. He then started negotiations with Kali Chemie of Hannover, West Germany to collaborate with him in setting up a plant. While he was so negotiating, M/s. T. T. Krishnamachari & Co., who were the sole selling agents of the said German Company, approached the 2nd appellant for the sole selling agency of barium products of the plant proposed to be put up by the 2nd appellant. The 2nd appellant did not agree. On December 5, 1960 M/s. T.T.K. & Co., applied for a licence for manufacture of barium chemicals. On December 23, 1960 the 2nd appellant wrote a letter to the Minister of Commerce and Industry objecting to the grant of a licence to M/s. T.T.K & Co. Both were considered by the Licensing Committee. The Committee rejected the application of M/s. T.T.K. & Co., but advised them to apply again after six months. On a representation by M/s. T.T.K. & Co., the Committee reconsidered the matter and recommended the grant of licence to M/s. T.T.K. Chemicals Private Limited. The second appellant once more protested, this time to the Prime Minister but that was rejected.

On July 28, 1961, an agreement between the appellant company and L.A. Mitchell Ltd., of Manchester was signed whereunder the latter agreed to put up the plant on the appellant company agreeing to pay them Pounds 184,500. On November 27, 1961, the Government granted a licence to the company for the import of machinery. In the mean time, respondent No. 2 was appointed a Minister without portfolio and rejoined the Cabinet which he had left earlier owing to certain circumstances which are not relevant for the present. From January, 1962 to March, 1963, he continued as a Minister without portfolio but from March, 1963 to September, 1963, he became the Minister for Defence and Economic Co-ordination and thereafter the Finance Minister. On August 30, 1962, the licence granted to M/s. T.T.K. Chemicals Ltd. was revoked as the company had decided to surrender it.

It would seem that the appellant company was not faring as well as was hoped and though it had been incorporated as early as July, 1961 production had not commenced. There arose also disputes among its director. On May 30, 1964 and July, 9, 1964 four of its directors submitted two memoranda alleging irregularities and even illegalities in the conduct of the company's affairs to the Company Law Board. According to the second appellant, the four directors were disgruntled directors, hostile to him and the company. The company was not able to start work in full capacity not because of any irregularities but because of the faulty planning and designing by the collaborators. The company realised this fact only in June, 1964 when it received a survey report after the breakdown of the plant during that month from M/s. Humphreys and Glasgow (Overseas) Ltd., Bombay. In September, 1964, a meeting was arranged in London between the company's representatives and the representatives of L.A. Mitchell Ltd., of which Lord Poole was the Chairman. It was agreed that L.A. Mitchell Ltd., should depute M/s. Humphreys and Glasgow Ltd., London, to go through the designs etc., and to make a report showing the causes of the repeated failures of the plant and suggesting remedies therefor. Lord Poole also agreed that the factory would be commissioned without any further delay and that L.A. Mitchell Ltd., would carry out the necessary repairs at their cost. While these negotiations were going on, representatives of M/s. Kali Chemie of Hannover arrived in India to negotiate a collaboration agreement with the company. On April 4, 1965, a meeting of the company's directors was held in New Delhi which was attended by one Kriegstein, a representative of Kali Chemie and also by the General Manager of M/s. T.T.K. & Co. Certain proposals were discussed and it was decided that the company should give notice to L.A. Mitchell Ltd. cancelling the agreement with them. Accordingly, by a notice dated April 2,

1965 the agreement with the said L.A. Mitchell Ltd., was cancelled. On May 7, 1965 representatives of the appellant company and of Kali Chemie met at Stuttgart when proposals for an agreement were discussed. One of these proposals was that the company should be reorganised and its share capital should be distributed in the following proportions : 49 per cent to the appellant company, 26 per cent to Kali Chemie and 25 per cent to M/s. T.T.K. & Co. It was also proposed that Kali Chemie should take over the responsibility on the production side, the appellant company would be responsible for the management and M/s. T.T.K. & Co. should take over sales promotion. Before however these negotiations could take concrete shape, Lord Poole came over to India. A meeting was held on May 10, 1965 between him and the directors of the appellant company. Lord Poole agreed that the British company would put in Pounds 250,000 in addition to the amount already invested by it and that production would commence from June, 1965. On May 11, 1965 another meeting took place when it was decided that without prejudice to what was stated in the notice of April 4, 1965, the appellant company should withdraw para 9 thereof whereby the agreement between them was terminated. By May 11, 1965, the position therefore was that the collaboration agreement between the company and L.A. Mitchell Ltd. was agreed to be continued and consequently the negotiations with the German company and M/s. T.T.K. & Co., were not to proceed further.

On May 19, 1965 the first respondent passed the impugned order which inter alia stated :-

"In the opinion of the Company Law Board there are circumstances suggesting that the business of M/s. Barium Chemicals Ltd.....is being conducted with intent to defraud its creditors, members and other persons; and further that the persons concerned in the management of the affairs of the company have in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members.

Therefore, in exercise of the powers vested by clause (b) of section 237 of the Companies Act 1956 (Act, 1 of 1956) read with the Government of India, Department of Revenue Notification No. GSR 178 dated the 1st February 1964, the Company Law Board hereby appoint.....as Inspectors to investigate the affairs of the company since its incorporation in 1961.....".

On May 25, 1965 search warrants were obtained by respondents 3 to 10 and accordingly search was carried out at the office of the company at Ramavaram and at the residence of the second appellant and several documents and files were seized. On May 28, 1965, the second appellant submitted a representation to the Chairman of the first respondent Board. He explained that out of the company's paid up capital of Rs. 50, lacs, shares of the value of about Rs. 47 lacs were owned by members of the public, that the company was the first of its kind in India, that it could not go into production soon because of the defective planning by the collaborators, that as a result of recent negotiations, the collaborators had agreed to invest Pounds 2,50,000 more and that the company's factory had now commenced production from April 1964, that the Board appeared to have acted on the complaints filed by the said four directors who resented the second appellant's refusal to purchase their holdings at a price above par demanded by them; that though those complaints were lodged some two years ago and were not acted upon, they were sought now to be made the basis of the impugned order on account of trade rivalry between the company and M/s. T.T.K. & Co., that the order was mala fide and that it was made on grounds extraneous to the provisions of s. 237(b) and at the instance of the second respondent. On receipt of this representation, the Chairman of the first

respondent Board contacted the second respondent and at the latter's instance the Prime Minister by an order dated May 31, 1965 transferred the case to the Home Minister.

It was against the background of these allegations that the appellants filed a petition in the Punjab High Court under Art. 226 for having the impugned order quashed and for certain other reliefs. The appellants alleged therein that the impugned order was mala fide and passed at the instance of the 2nd respondent who was unfavorably disposed towards them, that it was made under Rules which were illegal, and lastly, that it was also illegal as it was passed under provisions violative of Art. 14 and Art. 19(1)(g) of the Constitution. On June 11, 1965, the appellants applied to the High Court for production of certain documents. That application was dismissed. On September 7, 1965, they filed another application for cross-examination of the 2nd respondent and production of two letters. One dated March 15, 1961 by one Schemidtmann and the other dated July 27, 1965 by Andhra Bank Ltd. to the Reserve Bank of India. The High Court did not pass any separate order on this application but dismissed it in the course of its judgment on the main petition on the ground that it was not necessary to take additional evidence and that the affidavits filed by the parties were enough for the disposal of the petition. On October 7, 1965, the High Court dismissed the petition observing that the appellants had failed to establish their allegation as to mala fides and accepted the respondents' contention that the decision to order investigation was arrived at in December, 1964 but could not be crystallised into a formal order till May 19, 1965 owing to language strikes in Madras and other administrative difficulties and that the fact that the order was ultimately passed on May 19, 1965 soon after the said meetings of the 10th and 11th May 1965 was a mere coincidence. The High Court was also of the view that even assuming that the second respondent had retained his interest in M/s. T.T.K. & Co., and that firm was interested in the production of barium chemicals or for being appointed as sole selling agents or otherwise, the first respondent, its chairman and officials were not shown to have been aware of the second respondent's interest in M/s. T.T.K. & Co. and therefore in the absence of any allegation of personal malice against them the allegation as to mala fides failed. The High Court also rejected the contention that s. 237(b) was ultra vires Arts. 14 and 19(1)(g) or that the procedure laid down under power conferred by the Rules or the Rules themselves were invalid.

On behalf of the appellants, the following four contentions were raised : (1) that the impugned order dated May 19, 1965 was mala fide, that the High Court erred in failing to give due weight to the personal hostility of the 2nd respondent against the appellants and deciding the petition on the footing that the first respondent was an independent authority and that it was its Chairman who on his own had formed the requisite opinion and passed the order and therefore the motive or the evil eye of the second respondent was irrelevant. The High Court also erred in failing to appreciate that even though the impugned order was by the Chairman, it had to receive and in fact received the second respondent's agreement and therefore if the second respondent's mala fides were established they would vitiate the order. Therefore, the High Court ought to have taken additional evidence and allowed the production of documents as prayed for by the appellants; (2) that even taking the circumstances said to have been found by the first respondent, they were extraneous to s. 237(b) and could not constitute a basis for the impugned order and the order therefore was ultra vires the section; (3) that the impugned order was in any case bad as it was passed by the Chairman alone acting under Rules under which such a power was conferred in contravention of the provisions of s. 10E; and (4) that the impugned order was bad because s. 237(b) itself was bad as offending against Arts. 14 and 19(1)(g).

Before these contentions are dealt with it is necessary first to consider the relevant provisions of the Act, the Rules made thereunder and the order of distribution of work passed by the Chairman of the

Board in pursuance of these Rules.

Section 234 empowers the Registrar to call for information or explanation. Sub-section 1 provides that if on perusing any document which a company is required to submit to him under the Act, the Registrar is of opinion that any information or explanation is necessary with respect to a matter to which such document purports to relate, he may call on the company to furnish the said information or explanation. If that is done it is the duty of the company and its officers to furnish information or explanation. If such information or explanation is not furnished or is inadequate, the Registrar has the power to order production of such books and papers he thinks necessary for his inspection and thereupon it is the duty of the company and its officers to produce such books and papers. Sub-section 4 provides for penal consequences for failure to furnish information or explanation or to produce the books and papers. Sub-section 6 provides that if the said information or explanation is not furnished within the specified time or if on perusal of such information or explanation etc., furnished or produced under sub-s. 3A or 4 the Registrar is of opinion that the document referred to in sub-s. 1 together with such information or explanation to be furnished as aforesaid discloses an unsatisfactory state of affairs, he has to report the case to the Central Government. Sub-section 7 provides that if it is represented to the Registrar on materials placed before him by a contributory or a director or any other person interested that (i) the business of the company is being carried on in fraud of its creditors or of persons dealing with the company or (ii) otherwise for a fraudulent or unlawful purpose, he may call upon the company to furnish any information or explanation on matters specified in the order after giving the company an opportunity of being heard. The said representation must be by a contributory or director or a person interested and it must be on materials showing that the business of the company is being carried on in fraud of creditors or members or other persons dealing with the company or otherwise for a fraudulent or unlawful purpose. If he is satisfied that the representation is frivolous or vexatious he has to disclose the identity of such informant to the company, presumably, to enable the company to take such action against him as it thinks fit. Section 234A deals with the seizure of documents by the Registrar in the circumstances set out therein. While s. 234 deals with the Registrar's power to call for information or production of documents and papers, section 235 and onwards deal with investigation. Section 235 empowers the Central Government to appoint inspectors to investigate the affairs of a company (a) on an application of not less than 200 members or by members holding not less than 1/10th of the voting power, or (b) on an application, in the case of a company not having a share capital, or not less than 1/5th in number of persons on the company's register of members, or (c) on a report by the Registrar under sub-secs. 6 or 7 read with sub-sec. 3 of s. 234. Section 236 provides that an application by members under cl. (a) or (b) has to be supported by such evidence as the Central Government may require. Thus both under s. 234 and s. 235 before action is taken certain conditions have to be complied with, under s. 234, an opportunity of being heard and under s. 235 the application has to be not only by a certain number of members but has to be accompanied by evidence.

Section 237(a) authorises the government to appoint investigators if the company by a special resolution or the Court by an order declares that the company's affairs should be investigated. Clause (b) empowers the government to do so if in its opinion there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members or (ii) that the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or any of its members. Sub-cl. (iii) is not relevant and therefore need not be cited.

Thus the consideration on which action is permissible under s. 234 and the kind of action taken thereunder are different from those under s. 237. It is true that the authority to take action under s. 235 is the government and the action authorised thereunder is investigation but action can be taken thereunder not suo moto but only on an application by a certain number of members or by members with a certain amount of voting power or on the Registrar's report. Section 234, besides, has nothing to do with investigation as s. 235 and s. 237 have, though on a report under s. 234, the government can institute investigation under cl. (e) of s. 235. Section 10E was inserted in the Act by Act LIII of 1963 and deals with the constitution of the Company Law Board. The Board constituted under this section consists of a Chairman and members. By a notification G.S.R. 176 dated February 1, 1964 the Central Government constituted the Company Law Board under s. 10E. By another Notification No. G.S.R. 178 it delegated some of its powers under the Act including those under s. 237 to the Board. On the same day, it also published Rules under s. 642(1) read with s. 10E(5) called the Company Law Board (Procedure) Rules, 1964. Rule 3 empowers the Chairman of the Board to distribute the business of the Board among himself and the other member or members and to specify the cases or classes of cases which shall be considered jointly by the Board. On February 6, 1964, the Chairman, under the power vested in him by r. 3 passed an order distribution the business of the Board between himself, the other member and the Board. Under this order the business of ordering investigation under sections 235 and 237 was allotted to himself to be performed by him singly.

Reverting now to the contentions urged by Mr. Setalvad, the first was that the impugned order though passed by the Chairman of the Board was really the order of the second respondent and was actuated by malice and hostility which he bore towards the appellants. In the alternative, it was urged that if the order were held to be the order of the Chairman, it was passed at the 2nd respondent's instance, the Board and its Chairman being under his control and the order in fact having also been passed after he had agreed to it. The order in either event was mala fide and in fraud of the statute, it being actuated by the hostility which the 2nd respondent bore against the appellants. The mala fides alleged against the 2nd respondent fall under two heads; (1) the trade rivalry between the appellant company on the one hand and M/s. T.T.K. & Co., on the other in which the 2nd respondent continued to retain interest in spite of his having apparently gone out as a partner, and (2) the personal hostility, political and otherwise which existed between the 2nd respondent and the appellants which actuated the 2nd respondent to have the impugned order passed with a view to ruin the company and the 2nd appellant.

As regards the first head of mala fides, Mr. Setalvad relied on certain documentary evidence, and argued that the second respondent exploiting his position as a Minister tried to further he interests of M/s. T.T.K. & Co., in which he continued to have interest in one way or the other and that his stand that he went out of the firm long before he became the Minister and had nothing to do with it thereafter was not true. The registration of the firm on December 21, 1943 shows that the 2nd respondent was a partner therein along with his son Narasimhan and one G. Veeraghavan. It appears that in 1947 there was a change in the firm's constitution. The registration on April 18, 1947 shows that the 2nd respondent ceased to be a partner, his two sons, T. T. Narashimham and T. T. Rangaswami were henceforth the partners and in his place was substituted his minor son, T. T. Vasu, entitled to the benefits of the firm, the minor son being represented by the 2nd respondent as his father and guardian. The said minor son attained majority on April 27, 1947 but he gave notice of election to become a partner only on April 5, 1952. It was said that this fact indicted that the 2nd respondent maintained his interest till April, 1952. According to the 2nd appellant, the 2nd respondent's active interest in the firm did not cease even after 1952. Mr. Setalvad pointed out a letter dated March 30, 1965 from Kail Chemie to the Manager of the firm in which the German concern acknowledged their gratitude towards the 2nd respondent in the following terms :-

"Moreover, we thank you for your good suggestion and reminder as to the next step to be taken; the production partly to be taken up in India; We owe special thanks to Mr. T. T. Krishnamachari for his readiness to put up the necessary plant. We gave you previously the assurance to consider such a question always favourably and we repeat that assurance."

The letter further suggested that the installation of the plant referred to therein should not be rushed through "unless there are other reasons, for instance import policy for certain preparations and/or equipment of pharmaceutical products." Reliance was also placed on a letter dated March 15, 1961 by one Schmidtman, the appellants' representative in Hannover to the 2nd appellant in which it was stated that Kali Chemie were expecting a visit there by the 2nd respondent and were confident that "an arrangement can be reached in the matter proposed by you," presumably a collaboration agreement between the appellant company and the German company. The submission was that these and other such documents established that the 2nd respondent had all throughout retained interest in M/s. T.T.K. & Co., that there was on that account trade rivalry between him and the appellant company and that due to his sustained interest in the firm, apart from his three sons being the partners therein, it was hardly to be expected that the 2nd respondent would permit the appellant company to go on with its project. On the question of personal animosity, it was pointed out that soon after the 2nd respondent became the Commerce and Industries Minister in 1952, he was instrumental in getting a licence issued to Madras Motors Ltd. in December 1953 for the manufacture of motor cycle. In March 1955, another manufacturing concern, the Ideal Motors of Bombay, applied for a similar licence. But that application was rejected as the Standing Committee on Automobile Industry decided that there was no scope for manufacture of more than one make of motor cycles and scooters. After the 2nd respondent ceased to be a Minister in 1958, the 2nd appellant made a representation to the then Minister of Commerce and Industries against what he called manipulations in the policy of manufacture of motor cycles in favour of the said Madras concern with which he alleged the 2nd respondent was on friendly terms. The case of the 2nd appellant was that it was due to his efforts that the government revised its policy in 1959, invited applications from other persons interested in the manufacture and on April 9, 1960 granted a licence to the Ideal Motors of Bombay for manufacture of motor cycles. It was also pointed out that in the General Elections of 1957, the 2nd appellant supported the candidature of one Balasubramania Mudaliar, the rival of the second respondent.

Mr. Setalvad argued that these facts established at least prima facie case of (i) the 2nd respondent's continued interest in M/s. T.T.K. & Co. in spite of his denial, (ii) the trade rivalry between the appellant company and M/s. T.T.K. & Co., (iii) the attempt of that firm to have control or at least a substantial interest in the appellant company through a collaboration agreement with the German company and (iv) of personal animosity. He contended that with this background the appellant company should have been afforded an opportunity to establish its case of mala fide by being allowed to cross-examine the 2nd respondent and the Chairman of the Board and of adducing further documentary evidence by compelling the respondents to produce such documents as were required by the appellants to establish their case. His contention was that the High Court erred in turning down the applications for cross-examination and production of documents. He also argued that under s. 10E(1) the first respondent Board was only a delegate of the Central Government and therefore the impugned order, though passed by the Board, was the order of the government and the 2nd respondent being the head of the Department, that fact coupled with his agreement of that order, made the impugned order both in fact and in law his order.

In this connection reliance was placed on *Roopchand v. State of Punjab* [[1963] Supp. 1 S.C.R.

539]. This decision cannot assist the appellants for the question decided there was that where power is delegated to an authority and the delegate passes an order under such delegated power, the order is the order of the government and the government cannot interfere with it in its revisional jurisdiction. In the present case we are not concerned with the question of the power of revision by the government. Though the impugned order was passed under a power delegated to the Board, factually it was passed by the Chairman and not by 2nd respondent. The appellants' case was that though the four directors, who had resigned, had submitted their memoranda, the Board had declined to take any action. The allegation was that one Sabanathan, one of the four directors and one Somasundaram, who were the friends of the 2nd respondent and his sons, had thereafter discussed the matter of the appellant company with the 2nd respondent, that at the instance of the 2nd respondent they sent a petition to the Board and then the 2nd respondent directed the 7th Respondent to prepare the impugned order. The case there stated is that the order was "prepared by respondent No. 7 in accordance with the aforesaid directions given by respondent No. 2 without obtaining the prior approval of the members of the Company Law Board and the members of the Company Law Board never applied their mind to the material before the passing of the order." Thus the appellants' case as to mala fides was that the impugned order was not really the order of the Board but that it was made at the 2nd respondent's dictate and that though it was issued formally by the Board it was in truth that of the 2nd respondent who manoeuvred to have it passed.

The question then is : What were the materials placed by the appellants in support of this case which the respondents had to answer ? According to para 27 of the petition, the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him, the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on "reasons to believe". Even for their reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made, such as its contents, its time or to which authority it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of mala fides, but then where such knowledge is wanting he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in the State of Bombay v. Purushottam Naik [[1952] S.C.R. 674] that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of O.XIX r. 3 of the Civil Procedure Code and that where an averment is not based on personal knowledge, the source of information should be clearly deposed. In making these observations this Court endorsed the remarks as regards verification made in the Calcutta decision in Padmabati Dasi v. Dhar [I.L.R. 37 Cal. 259]. Apart from this consideration it is clear that in the absence of tangible materials, the only answer which the respondents could array against the allegation as to mala fides could be one of general denial. The affidavits of the respondents however do not rest with a mere denial. They obtain positive averments to the effect that the impugned order was passed in exercise of the power conferred on the Board, that the order was independently made by the Chairman on materials before him and that the 2nd respondent had nothing to do with the making of it. Putting it in a somewhat different way, what was it that the respondents were expressed to explain in their answer ? The answer which they were expected to make was against the allegation that the order was not independently made by the Board, that it was made at the instance of the 2nd respondent in consequence of the discussions he had with his said two friends who were made to file a petition and that the Board had mechanically issued it in obedience to the 2nd respondent's behest without applying its mind to any materials before it. It is obvious that in the absence of any particulars about

the alleged discussion or the alleged petition or the alleged direction given by the 2nd respondent or the sources of information on which the appellants had reasons to believe these things, the only answer which the respondents could give was a general answer that these allegations were not true and that the order was independently made by the Board and as recited therein it was passed by the Board as in its opinion the conditions of s. 237(b) were existent.

Can the High Court in these circumstances be said to have failed to exercise its discretion when it refused to take evidence in addition to the affidavit evidence by permitting the appellants to cross-examine the 2nd respondent and the Chairman of the Board and to compel production of documents which they desired to have produced ? In a petition under Art. 226, there is undoubtedly ample power in the High Court to order attendance of a deponent in Court for being cross-examined. Where it is not possible for the Court to arrive at a definite conclusion on account of there being affidavits on either side containing allegations and counter-allegations, it would not only be desirable but in the interest of justice the duty also of the court to summon a deponent for cross-examination in order to arrive at the truth. As observed in *A.P.S.R.T. Corporation v. Satyanarayan Transports* [A.I.R. 1965 S.C. 1303 at p. 1307], if the evidence led by the parties is tested by cross-examination it becomes easier to determine where the truth lies. In *B. Venkatarathnam v. Registrar of Co-operative Societies, Andhra Pradesh* [C.A. No. 321 of 1965 decided on 6-5-1965] where allegations similar to the ones made in the present case were made, this Court recognised the right of a party to apply for cross-examination. But the position in the present case is not as it was in that case. The appellants no doubt applied for cross-examination and production of certain documents, but the High Court felt that this was not a case where it should exercise its direction as the cross-examination of the two deponents would not serve any useful purpose. The view of the High Court was that even if the two deponents were to be called they could in the circumstances of the case only report their denials in the affidavits in answer to the allegations made in the petition and the affidavit in rejoinder and therefore such cross-examination would not take the court any further than the affidavits. In view of the fact that the appellants were not in a position to give particulars of the allegations made by them, the generality of those allegations and particularly of the allegation that the impugned order was passed at the behest of the 2nd respondent, the only recourse left to the Chairman of the Board would have been to repel in equally general terms what he had already stated in his affidavit, viz., that it was his own order made independently of the 2nd respondent and that it was founded on the opinion formed by him on the materials before him. Even at the stage when the appellants made the application for cross-examination they did not state that they had any additional materials to face the deponents. In these circumstances it is not possible to say that the High Court erroneously exercised its discretion. Nor is it possible to say that its conclusion, that whatever motives and animosity the 2nd respondent might have had towards the appellants, the appellants had failed to establish that the order was not independently made by the Chairman or that it was an order made at the instance or instigation of the second respondent, was erroneous. This is particularly so, as, except the allegation that the Chairman and the 7th respondent acted as the tools of the 2nd respondent, no mala fides or evil intent have been urged against them. It may be that certain circumstances such as the timing of the order, might create suspicion, perhaps a strong suspicion but it is trite to say that suspicion, however grave, cannot substitute evidence. It is true as observed in *Pannalal Binjraj v. Union of India* [(1957) S.C.R. 233 at p. 259] that in a case where want of bona fides in the authority passing the impugned order is alleged, the burden of proof, though on the party alleging it, is to the extent of its being shown as reasonably probable. But the allegation made in the present case is that the impugned order was in fact the order of the 2nd respondent either because he directed the 7th respondent to make it or because he agreed to it or that it was passed by the Authority not on his own but at the behest of the second respondent. In the present case the court

is not directly concerned with the alleged malice the 2nd respondent might have against the appellants. The Board is a statutory authority, has an independent existence and the absence of bona fides with which the Court in such a case is concerned is that of the Board and not of the 2nd respondent. As observed in *Pratap Singh v. State of Punjab* [(1964) 4 S.C.R. 733] an allegation as to bad faith or indirect motive or purpose cannot be held established except on clear proof thereof. In the absence of any materials relating to the mala fides of the Board, and in particular, of materials to show that the order was passed at the dictate of the 2nd respondent, this part of the appellants' case must fail.

But the contention which calls for a more serious consideration is that the circumstances disclosed in para 14 of the Chairman's affidavit and on which he is said to have formed his opinion were circumstances extraneous to s. 237(b) and hence the order was ultra vires the section. The contention was a two-fold one, (1) that though under cl. (b) the opinion of the authority is subjective there must exist circumstances set out in the clause which are conditions precedent for the formation of the opinion, and (2) that assuming that this is not so, since the Chairman has disclosed the circumstances on which he forms the opinion, the court can examine them and see if they are relevant for an opinion as to fraud or an intent to defraud. Reliance was placed on paras 14 and 16 of the Chairman's affidavit to show that the circumstances there stated show that in passing the order, matters totally extraneous to the section were taken into account rendering the order ultra vires cl. (b) of s. 237. The other affidavits do not matter much as they only repeat what the Chairman has stated in his affidavit. The construction of cl. (b) suggested by Mr. Setalvad was that the clause requires two things, (1) the opinion of the Central Government, in the present case of the Board, and (2) the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-cl. (1) or that the persons mentioned in sub-cl. (ii) were guilty of fraud, misfeasance or misconduct towards the company or any of its members. According to this construction, though the opinion is subjective the existence of circumstances set out in cl. (b) is a condition precedent to the formation of such opinion and therefore even if the impugned order were to contain a recital of the existence of those circumstances the court can go behind that recital and determine whether they did in fact exist. The learned Attorney-General opposed this construction and argued that the clause was incapable of such dichotomy, that not only the opinion was subjective but that the entire clause was made dependent on such opinion, for, what the clause lays down is that the authority must come to an opinion on materials before it that there exist circumstances suggesting fraud, or intend to defraud etc. Such dichotomy, according to him, is impossible and not reasonable because it cannot be that the authority must first ascertain by holding an inquiry that there are circumstances suggesting fraud or intent to defraud etc. and then form a subjective opinion that those circumstances are such as to suggest those very things. He emphasised that the words "opinion" and "suggesting" were clear indications that the entire function was subjective, that the opinion which the authority has to form is that circumstances suggesting what is set out in sub-cl. (i) and (ii) exist and therefore the existence of those circumstances is by itself a matter of subjective opinion. The legislature having entrusted that function to the authority, the Court cannot go behind its opinion and ascertain whether the relevant circumstances existed or not.

The question is which of the two constructions is correct? In *Emperor v. Sibnath Banerjee* [(1944) F.C.R. 1] one of the questions which arose was with regard to the interpretation of the words "the Central Government or the Provincial Government, if it is satisfied with respect to a particular person" in r. 26 of the Defence of India Rules, 1939. What was questioned there was the correctness of the recital in the detention order that the Governor was satisfied that with a view to preventing the detenu from acting in a certain manner certain action was necessary. It was held that though the Court could not be invited to investigate the sufficiency of the material or the reasonableness of the

grounds on which the Governor was satisfied, if the contention was that the Governor never applied his mind and therefore he could not have been satisfied, the court could enter into that question, the ingredient of satisfaction being a condition precedent to the exercise of power notwithstanding the satisfaction being subjective and there being a recital as to the satisfaction in the order. Referring to *Liversidge v. Anderson* [[1942] A.C. 206] and *Greene v. Secretary of State* [[1942] A.C. 234] it was observed :

"If the ground of challenge against the orders thus sought to be impugned had been that the cases had never been placed before the Secretary of State at all, so that he never had any opportunity of exercising his mind with respect to them, we have not the slightest doubt that this would have been a proper ground for challenge in a court of law."

Again at p. 42, the observations are :-

"The presence of the recital in the order will place a difficulty burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate. If, however, in any case a detenu can produce admissible evidence to that effect, in my judgment, the mere existence of the recital in the order cannot prevent the court considering such evidence and if it thinks fit, coming to a conclusion that the recital is inaccurate."

The observations were made on the footing that though the satisfaction was subjective, it was a condition precedent to the exercise of power and therefore the order was open to a challenge that it was not in conformity with the power. In appeal this view was endorsed by the Privy Council *King Emperor v. Sibnath* [72 I.A. 241, 268]. In *Machinder v. The King* [[1950] F.C.R. 227] the Federal Court dealing with similar words in s. 2 of the Central Provinces and Berar Public Safety Act, 1948 again held that the Court can examine the grounds disclosed by the government to see if they are relevant to the object which the legislature had in view, viz., the prevention of acts prejudicial to public safety and tranquillity, for, satisfaction in this connection must be grounded on materials which are of rationally probative value. In this case, the statute no doubt required that the grounds should be disclosed but that makes no difference to the principle that though the satisfaction was exclusively of the executive authority, it was nonetheless, a condition precedent to the exercise of the power. In *Atmaram Vaidya's case* [[1951] S.C.R. 167], this court while dealing with s. 3 of the Preventive Detention Act, 1950 observed that though the satisfaction necessary thereunder was that of the Central or the State Government and the question of satisfaction could not be challenged except on the ground of mala fides, the grounds on which it was founded must have a rational connection with the objects which were to be prevented from being attained. At p. 176 it is stated :-

"If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court."

This view was again emphasised in *Shibban Lal Saksena's case* [[1954] S.C.R. 418] where it was said that the power of detention being entirely dependent on the satisfaction of the appropriate authority, the question of sufficiency of the grounds on which such satisfaction is based cannot be gone into provided they have a rational probative value and are not extraneous to the scope and

purpose of the statute. The principle is not exclusively applicable to cases under such measures as the Defence of India Act or the Preventive Detention Act and has been applied also in the case of other statutes. This in the State of Bombay v. K. P. Krishnan [[1961] 1 S.C.R. 227] while dealing with the discretion of the State Government to make or refuse to make a reference under s. 10(1) of the Industrial Disputes Act, 1947. Gajendragadkar, J. (as he then was) spoke for the court in these words :-

"The order passed by the Government under s. 12(5) may be an administrative order and the reasons recorded by it may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny;nevertheless if the court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then the court can issue and would be justified in issuing a writ of mandamus even in respect of such an administrative order."

In Dr. Akshaibar Lal v. Vice-Chancellor [[1961] 3 S.C.R. 386] the question was with reference to termination of services of some of its employees by the University. The University in exercise of its power to terminate the services of its employees under Ordinance No. 6 passed the impugned order notwithstanding its having already taken action under Statute 30 under which the cases of the appellant and others were referred to the Solicitor-General who made his report to the Reviewing Committee on his finding that there was a prima facie case. The contention was that the resolution of the University lacked bona fides and was therefore invalid. The University contended that its powers were cumulative and that it could resort to either of the two remedies open to it. The action adopted by the University was executive. Yet, this Court, held that though the University possessed both the powers and could exercise one or the other of them, the action as held in the State of Kerala v. G. M. Francis & Co. [[1961] 1 S.C.R. 227] could still be challenged on the ground of its being ultra vires. Hidayatullah J. said that proof of alien or irrelevant motive is only an example of the ultra vires character of the action. The University having adopted action under Statute 30 it was not possible to undo everything and rely upon other powers which were not available in the special circumstances which led to action under the statute and that though the University had the discretion to adopt either of the two courses, the discretion could not be read in the abstract but had to be read within the four corners of Statute 30 and not outside it. In this sense action on matters extraneous to the statute conferring power is a specie of the vice of ultra vires. These two are sometimes inter-related and slide into each other. When a power is exercised for a purpose or with an intention beyond the scope of or is not justified by the instrument creating it, it would be a case of fraud or power, though no corrupt motive or bargain is imputed. In this sense, if it could be shown that an authority exercising power has taken into account, it may even be bona fide and with the best of intentions, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. See Pratap Singh v. State of Punjab [[1964] 4 S.C.R. 733]. Thus apart from an authority acting in bad faith or from corrupt motives it may also be possible to show that "an act of the public body, though performed in good faith and without any taint of corruption, was so already founded on alien and irrelevant grounds as to be outside the authority conferred upon that body and therefore inoperative. It is difficult to suggest any act which would be ultra vires under this head though performed bona fide," per Warrington L.J. in Short v. Poole Corporation [[1926] Ch. 66, 20]. Similar observations are also to be found in Rameshwar v. District Magistrate [A.I.R. 1964 S.C. 334 : [1964] 4 S.C.R. 921], a case under the Prevention Detention Act, 1950, where this Court held that though the satisfaction of the relevant authority was subjective, a detenu would be entitled to challenge the validity of his detention on the ground of mala fides and in

support of his plea urge that along with other facts which show mala fides the court should also consider his grievance that the grounds served on him cannot possibly or rationally support the other. The challenge would be that the order was beyond the scope of the power as its exercise was on grounds irrelevant to the purpose and intention of the power. In *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust* [[1937] A.C. 898] a declaration made by the Improvement Trust under s. 57 of the Singapore Improvement Ordinance 1927 that the appellants' property was in an insanitary condition and therefore liable to be demolished was challenged. The Privy Council set aside the declaration on two grounds; (1) that though it was made in exercise of an administrative function and in good faith, the power was limited by the terms of the said Ordinance and therefore the declaration was liable to a challenge if the authority stepped beyond those terms and (2) that the ground on which it was made was other than the one set out in the Ordinance. In *Ross Clunis v. Papadopoulos* [[1958] 1 W. & R. 516] the challenge was to an order of collective fine passed under Regulation 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 which provided that if an offence was committed within any area of the colony and the Commissioner "has reason to believe" that all or any of the inhabitants of that area failed to take reasonable steps to prevent it to render assistance to discover the offender or offenders it would be lawful for the Commissioner with the approval of the Governor to levy a collective fine after holding an inquiry in such manner as he thinks proper subject to satisfying himself that the inhabitants of the area had been given an adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. The contention was that the only duty cast on the Commissioner was to satisfy himself of the facts set out in the Regulation, that the test was a subjective one and that the statement as to that satisfaction in his affidavit was a complete answer to the contention of the respondents. Rejecting the contention the Privy Council observed :-

"Their Lordships feel the force of the argument, but they think if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.

Being in mind these principles the provisions of s. 237(b) may now be examined. The clause empowers the Central Government and by reason of delegation of its powers the Board to appoint inspectors to investigate the officers of the company, if "in the opinion of the Central Government" (now the Board) there are circumstances "suggesting" what is stated in the three sub-clauses. The power is executive and the opinion requisite before an order can be made is of the Central Government or the Board as the case may be and not of a court. Therefore the court cannot substitute its own opinion for the opinion of the Authority. But the question is, whether the entire action under the section is subjective ?

In *Nakkuda Ali v. Jayaratne* [[1951] A.C. 66] the Privy Council had to construe the words "where

the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" occurring in Regulation 62 of the Defence (Control of Textiles) Regulations, 1945. Lord Radcliffe who spoke for the Board first considered the construction given to similar words in *Liversidge v. Anderson* [[1942] A.C. 206] and said :-

"Their Lordships do not adopt a similar construction of the words in Reg. 62 which are now before them. Indeed, it would be a very unfortunate thing if the decision in *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words "if A.B. has reasonable cause to believe" are capable of meaning. "If A.B. honestly thinks that he has reasonable cause to believe", and that in the context and attendant circumstances of Defence Regulations 18B, they did in fact mean just that."

Having confined that construction to that case only, he proceeded to observe :-

"After all, words such as these are commonly found when a legislature or law making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith; but the field in which this kind of question arises is such that the reservation of the case of bad faith is hardly more than a formality."

The Privy Council held that the aforesaid words in Reg. 62 imposed a condition that there must in fact exist such reasonable grounds known to the controller before he could validly exercise the power of cancellation. Therefore, though the belief of the Controller that the dealer was unfit was subjective, existence of reasonable grounds on which the belief could be founded was objective and a limitation on his power. In *Ridge v. Baldwin* [[1964] A.C. 46, 73] Lord Reid suggested the same construction of similar words occurring now-a-days in several statutes. Speaking about the rules of natural justice not having been abandoned as a sacrifice which war conditions required, he observed :

"And I would draw the same conclusion from another fact. In many regulations there was set out an alternative safeguard more practicable in war time - the objective test that the officer must have reasonable cause to believe whatever was the crucial matter. (I leave out of account the very peculiar decision of this House in *Liversidge v. Anderson*)."

The words "reasonable grounds to believe" were considered thus to be a restraint on administrative power just as compliance of the rules of natural justice in a quasi-judicial power which otherwise would render the power arbitrary. A recent decision in *Vellukunnel v. The Reserve Bank of India* [[1962] Supp. 3 S.C.R. 632] is in point in this connection. Section 38(3)(b)(iii) of the Banking Companies Act, 1949 was assailed there as being discriminatory and an unreasonable restriction. The impugned clause provided that the High Court shall order the winding up of a banking company on the Reserve Bank making an application for winding up "if in the opinion of the Reserve Bank(iii) the continuance of the banking company is prejudicial to the interests of the depositors." The learned Attorney-General rightly pointed out that the question there was not so

much on the meaning of the words "in the opinion of" as whether a law which requires the High Court to order winding up because the Reserve Bank is of that opinion is constitutional. But it is not without significance that the divergence of opinion in this Court was that according to the minority opinion the vice of the impugned provision lay in the power vested in the Reserve Bank to apply to the High Court for a winding up order exercisable solely on its subjective satisfaction while according to the majority opinion the power did not rest solely on the subjective satisfaction and that what the impugned clause did was to leave to determination of an issue to an expert body, viz., whether the continuance of the Banking company in question was detrimental to the interests of the depositors. In support of this view Hidayatullah J. speaking for the majority made the following significant observation :-

"It is enough to say that the Reserve Bank in its dealings with banking companies does not act on suspicion but on proved facts."

And again at p. 672 he observed :-

"But this seems certain that the action (winding up) would not be taken up without scrutinising all the evidence and checking and re-checking all the findings."

Distinguishing a case arising from a statute like the Banking Companies Act from cases of detention and associations declared unlawful, he emphasised the fact that "the factual background will not be one of suspicion, and action will be based on concrete facts." The majority view thus vindicated the validity of the provision on the ground that under the power conferred thereby, the Reserve bank had to determine, albeit instead of the court, the issue whether the continuance of a particular banking company was detrimental to the depositors' interests. Though the words used were "in the opinion of", the opinion, though exclusively of the Reserve Bank, was dependent on the determination by it of the aforesaid issue. Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Redcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.

The object of s. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted s. 637(i)(a) it knew that government would entrust to the Board its power under s. 237(b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board ? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist ? The legislature no

doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with s. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Even assuming that the entire cl. (b) is subjective and that the clause does not necessitate disclosure of circumstances, the circumstances have in the present case been disclosed in the affidavits of the Chairman and the other officials. Once they are disclosed, the Court can consider whether they are relevant circumstances from which the Board could have formed the opinion that they were suggestive of the things set out in cl. (b). Paragraph 14 of the Chairman's affidavit sets out the following :-

"(i) there had been delay, bungling and faulty planning of this project, resulting in double expenditure for which the collaborators, had put the responsibility upon the Managing Director, Petitioner No. 2;

(ii) since its flotation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off;

(iii) that the shares of the company which to start with were at a premium were being quoted on the stock exchange at half their face value; and

(iv) some eminent persons who had initially accepted seats on the Board of directors of the company had subsequently served their connections with it due to differences with Petitioner No. 2 on account of the manner in which the affairs of the company were being conducted."

No doubt the words "inter alia" occur in this paragraph but that expression means no more than that

those which are set out were among others. But those others would be of the same category, for if they were of other category they would naturally be stated. The deponent would not be content by using the expression "inter alia" unless he meant that the things contained in that phrase were of the same type as those expressly set out. Paragraph 16 is in reply to para. 21 of the Petition which alleges that there was no material from which the Board could form the opinion and that no such opinion was in fact formed. In that para the Chairman has stated as follows :-

"With reference to paragraph 21 of the Petition I have already stated above (which means para 14) that there was ample material before the Board on which it could and had formed the opinion that there were circumstances suggesting" etc.,

The "ample material" referred to in this para is obviously the material from which the circumstances stated in para 14 of his affidavit were deduced. But the learned Attorney-General argued that para 14 was an answer to paras 1 to 19 of the petition where the petitioners claimed the soundness of the company and secondly that if para 14 were to be construed as disclosing the circumstances, it must be read along with para 16 and that if so read they were capable of showing that there were materials suggesting intent to defraud, misfeasance, misconduct etc. Paragraph 14 no doubt states that it is in reply to paras 1 to 19 of the Petition. In this para, the facts stated in paras 1 to 19 are admitted as being substantially correct except as regards the fact that while seeking approval of the government to his appointment as the Managing Director, the 2nd appellant had stated that there was no formal agreement between him and the company. The para then sets out the facts that the company held the licence, that it had made an agreement with the British Company but that the Chairman had no information with regard to the other facts stated in paras 1 to 19 of the petition. There the reply to paras 1 to 19 of the petition ends. Then follows the statement which is an independent averment, viz.,

"However from the memoranda received by the Board referred to in paragraph 5 and other examination it appeared inter alia that."

Then follows the four circumstances already set out earlier. Paragraph 16, though a reply to para 21 of the petition, refers back to para 14 and relies on the statement made therein for an answer to the allegation in para 21 of the petition that there were no materials and therefore no opinion as required by s. 237(b) was ever formed. From the language and scheme of paras 14 and 16 it is thus impossible to escape the conclusion that between them they disclose and were meant to disclose all the materials from which the Board formed the opinion. In para 8 of his affidavit, the Chairman no doubt refers to other materials which he says he was agreeable to disclose to the Court though not to the appellants. But those materials, assuming they were before him, cannot help, for they would not disclose any circumstances other than those formulated in para 14. This is clear from the fact that as stated there, those circumstances were deduced from the said memoranda and 'other examination' meaning the examination of all the materials before him. The question is : are the materials formulated in para. 14 circumstances suggestive of the things set out in cl. (b) ? the learned Attorney-General contended that on the assumption that para 14 disclosed the circumstances, they would suggest an intent to defraud, fraudulent management, misfeasance and misconduct; and that even if delay, bungling and faulty planning of the project might not suggest the relevant intent or purpose, they together with the facts that one-third of the subscribed share capital was sipped off, the shares of the company being quoted at half of their face value and of some eminent persons having severed their connection with the company would suggest that all was not well with the

company or its management and that its management was conducted with the intent to defraud. He argued that in any event they would suggest that those responsible for it were guilty of at least misfeasance or misconduct.

The expression "with intent to defraud" connotes an intention to deprive by deceit. Construing s. 165 of the Companies Act, 1862, Bookley J. In re London and Globe Finance Corporation Ltd., [[1903] 1 HC. 728, 732] distinguished deception and fraud as follows :-

"To deceive is I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit : it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind to defraud is by deceit to induce a course of action."

Lord Esher also said much the same thing in *Le Lievre v. Gould* [[1893] 1 Q.B. 49].

"A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind. That is the effect of *Derry vs. Peck* (14 App. Cases 337). What is meant by a wicked mind ? If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it is true or false. I do not hesitate to say that a man who thus acts must have a wicked mind. But negligence however great, does not of itself constitute fraud."

In *Re William C. Leitch Bros.* [[1932] 2 Ch. 71] Maugham J. held.

"If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the director no reasonable prospect of the creditor ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud."

There is no such suggestion in the present case. The same learned Judge in *Re Patrick and Lyon* [[1933] Ch. 786] observed that the terms "defraud" and "fraudulent purpose" connote actual dishonesty involving, according to current notions of fair trading amongst commercial men, real moral blame." However much the Court may disapprove of a personal conduct it must consider whether he has been guilty of dishonesty. Misfeasance results from an act or conduct in the nature of a breach of trust or an act resulting in loss to the company. Misconduct of promoters or directors as understood in the Companies Act means not misconduct of every kind but such as has produced pecuniary loss to the company by misapplication of its assets or other act. (cf. *Re Kingston Cotton Mill Co. (No. 2)* [[1887] 12 App. Cas., 652] and *Cavendish-Bentinck v. Fenn.* [[1887] 12 App. Cas., 652].

Are the allegations set out in para 14 of the Chairman's affidavit capable of suggestion an intent to defraud or a fraudulent or unlawful purpose either in the formation or conduct of the company or misfeasance or misconduct towards the company or its members ? Delay, bungling and faulty planning of the project entailing double expenditure, continuous losses resulting in 1/3rd of the share capital being wiped out, shares being quoted at half their face value and severance of their

connection by some eminent persons cannot by themselves suggest an intent to defraud or fraudulent management. As regards misfeasance or misconduct, it is not suggested in any of the affidavits, though the Board had before it the memoranda of the four directors, that the circumstances set out in paragraph 14 of the Chairman's affidavit had arisen as a result of any fraud or dishonesty on the part of the second appellant or that it was his act which had caused pecuniary losses to the company. Mere bungling or faulty planning cannot constitute either misfeasance or misconduct. But assuming that these circumstances were to be treated as suggestive of misfeasance and/or misconduct, the impugned order is an integral and indivisible order and the investigation ordered thereunder is not and by the very nature of it cannot be confined to finding out only misfeasance and/or misconduct. In this view, the order must be held as being beyond the scope of clause (b) and cannot be sustained.

The next challenge is that the order contemplated by section 237(b) being the order of the Central Government or the Board it must be that of the Board and not of its Chairman. The contention was that the powers and functions under section 237 having been delegated to the Board and not to my individual member, the Board alone could pass the order, that the Chairman had no competence to pass it and that Rule 3 and the said order of the Chairman to the extent that it purported to distribute the work individually to the Chairman and the other member were ultra vires section 10E(1). The learned Attorney-General, on the other hand, argued that section 10E not only empowered the government to constitute the Board but also simultaneously authorised it to prescribe its procedure under sub-section 5. What Rule 3 did was to enable the Chairman to rationally divide amongst the Board its work under different sections of the Act. Under such division, whether a particular work is done by one member or jointly by the Board, it is the Board which does that work and the orders so passed are by and of the Board. Such distribution is nothing but procedure because procedure must involve the manner in which the Board would work and is not contrary either to s. 637(1)(a) which empowers the Government to delegate its power to the Board or to s. 10E. While delegating its power the government may say that the Board shall exercise its delegated power by one of them or by the Board as a whole, but notwithstanding such distribution, it is the Board which acts. As an analogy he relied on s. 10A and s. 10B under which the Company Tribunal is constituted and which enable its Chairman to form Benches which discharge the functions entrusted to the Tribunal, to s. 6 of the Code of Criminal Procedure and to Art. 145 and the orders passed by this Court delegating certain powers to the Registrar to show that procedure might differ from Act to Act according to the legislative understanding of the word procedure. Therefore, he argued, the expression "procedure" must not be construed in any inflexible sense. When a particular procedure permits allocation of work for the smooth discharge or exercise of a function of power, it is not tantamount to sub-delegation but is simply distribution.

However wide a connotation of the word "procedure" one may accept there is a sharp cleavage between power and procedure. Section 10E which provides for the constitution of the Board nowhere provides for the splitting up of the Board into benches as is expressly done in the case of the Tribunal under s. 10B nor does it provide for the distribution of work entrusted to the Board. It is true that sub-s. 5 confers power on the government to prescribe procedure. But that procedure is of the Board. If the legislature intended that the Board should act by dividing its work amongst the members, there was no obstacle in its way to provide for benches as is done under s. 10B. Section 637(1)(a) empowers the government to delegate its power to the Board, no doubt, under such conditions, restrictions, or limitations as may be specified in the notification delegating such power. But the notification by which the government delegated its power contains no conditions, limitations or restrictions. A provision enabling the Chairman to distribute the powers and functions delegated to the Board is not a provision prescribing conditions, limitations or restrictions. Section 637(1)(a)

which authorises the government to delegate its power clearly lays down that such delegation is to be made to the Board and no one else. Under sub-section 2 of section 637 certain powers and functions therein set out cannot be delegated to any other authority. The section thus contains both a positive and a negative mandate that the power under s. 237 shall not be delegated to any other authority except the Board as constituted under section 10E. Section 637 thus makes it clear that the legislature wanted the powers under s. 237 to be exercised by the Board and did not intend that they should be exercised singly by members constituting it. This conclusion is supported by the insertion of s. 4A in s. 10E by Act 31 of 1965 whereby the legislature has permitted the Board to authorise its Chairman or any other member or its principal officer to exercise and discharge such of its powers and functions as it may think fit. If the learned Attorney-General was right that the government could under its power of prescribing procedure under sub-sec. 5 authorise the Chairman to distribute the Board's work there was no necessity of enacting sub-sec. 4A at all. That contention, if correct, would render sub-sec. 4A a superfluity. Since sub-s. 4A is not retrospective, any distribution of powers and functions made by the Chairman would be valid if made after and not before the enactment of Act 31 of 1965. No assistance can also be had from the provisions and Acts relied upon by the learned Attorney-General, such as s. 10A or s. 10B of the Act or s. 6 of the Code of Criminal Procedure or Art. 145 of the Constitution. Under the first, there is an express provision providing for the constitution of benches of the Tribunal which was absent in s. 10E till sub-section 4A was enacted; under the second the Code provides for setting up of different kinds of court with varying jurisdiction. Such an arrangement can bear no analogy as it is not distribution of power of one body to its components. The third illustration also gives no assistance for it relates not to procedure but to entrustment of certain functions to the Registrar of this Court. Such power is there in Art. 145 which is an inclusive Article.

It was however argued that under s. 165(b) of the English Companies Act, 1948 a power similar to the one under s. 237(b) has been conferred on the Board of Trade. Reliance was placed on a passage in Halsbury's Laws of England (3rd Edition) Vol. VII at p. 421 where it is stated that the Board of Trade never meets and for all practical purposes the President is the Board of Trade. It appears from this very passage that the Board was constituted by an order-in-council dated August 23, 1786 and consisted of the President and the holders of certain offices therein specified. But it is the President who takes the oath of allegiance and the official oath and it is he alone for all practical purposes who constitutes the Board. In point of fact certain statutes and orders in council have empowered the President who is a senior Minister or one of the junior ministers to act of behalf of the Board. [Good Phillips : Constitutional and Administrative Law : 3rd Ed. 331]. That being so, there is no question of distribution of work or delegation of power by the Board to the President. The statute conferring power on the Board of Trade itself has authorised the President to act on behalf of the Board. The Board set up under s. 10E therefore cannot bear analogy with the Board of Trade. Nor does that section or s. 637 empower, as is the case with the Board of Trade, the Chairman to exercise or discharge the Board's powers and functions. The statute having permitted the delegation of powers to the Board only as the statutory Authority, the powers so delegated have to be exercised by the Board and not by its components. To authorise its Chairman to hand over those functions and powers is not procedure but sub-delegation which is not authorised by the Act. The effect of r. 3 and the order of distribution of work made in pursuance thereof was not laying down a procedure but authorising and making a sub-delegation in favour of the members. The only procedure which the Government could prescribe was the procedure in relation to the Board, the manner in which it should discharge and exercise the functions and powers delegated to it but it could not make a provision which under the cloak of procedure authorised sub-delegation. Both r. 3 and the order dated April 6, 1964 made pursuant thereto are thus invalid and the impugned order made in

pursuance of the power conferred under the said Rule and the said order are incompetent and invalid.

Lastly, the order was attacked on the ground that s. 237(b) which empowers the making of such an order was violative of Arts. 14 and 19(1)(g). The challenge was raised on behalf of the 2nd appellant only. The contention under the head of Art. 14 was that the Act provided three different ways by which the Government can take action, under s. 234 or s. 235 and s. 236 and lastly under s. 237(b), that the power contained under s. 237(b) was more drastic than under the former sections and that these sections enabled the Government to discriminate between companies and companies and pick and choose and one of them at its pleasure for action under s. 237(b). In support of this contention reliance was placed on *Suraj Mall Mohta & Co., v. A. V. Vishwanatha Sastri* [[1955] 1 S.C.R. 448] where s. 5(4) of the Taxation on Income (Investigation Commission) Act, 1947 was declared discriminatory legislation and *Meenakshi Mills Ltd. v. A. V. Vishwanatha Sastri* [[1955] 1 S.C.R. 787] where s. 8(1) of the Act was struck down after the Income Tax (Amendment) Act XXXIII of 1964 was enacted. These decisions, however, cannot avail the petitioners for the reasons for which these provisions were struck down are lacking in the present case. No question of discrimination arises in regard to the powers under s. 234 and s. 237. Section 234 only empowers the Registrar to call for information or explanation and to take action where such information or explanation is not forthcoming. Under section 234 there is no power to order investigation either in the Registrar or the Government. Under s. 235, no doubt, to Government can appoint inspectors but it can do so under the three specified cases set out therein. What ss. 235 and 236 do is to give power to shareholders on the one hand and the Registrar through a report on the other hand to move the government to take action. These sections do not authorise the Government to appoint inspectors suo moto as in the case of s. 237(b). The discretionary power directing an investigation is contained in s. 237(b). Therefore s. 234, s. 235 and s. 236 and s. 237(b) give powers to different authorities viz., the Registrar and the Government, provide powers which are different in extent and nature, exercisable in sets of circumstances and in a manner different from one another. Therefore, there is no question of discriminatory power having been vested in the government under these sections to pick and choose between one company and the other. The challenge under Art. 14 therefore must fail.

As regards Art. 19(1)(g) the question is whether an order directing an investigation is a restriction and if so, is it a reasonable restriction. Mr. Setalvad tried to seek assistance from the decision in *Saghir Ahmad v. The State of U.P.* [[1955] S.C.R. 707] but that decision cannot assist him for in that case the U.P. Road Transport Act 1951 deprived the petitioner of his right to carry on his business of plying stage carriages on public highways and the impugned statute was passed before the enactment of clause 6 of Art. 19(1). It is true in a sense that when investigation is ordered, there would be inconvenience in the carrying on of the business of the company. It might also perhaps shake the credit of the company. The investigators have also the power to seize papers and their report is made admissible in evidence as opinion evidence under s. 246. But an investigation directed under s. 237(b) is essentially of an exploratory character. When it is directed, it is not as if any restriction is placed on the right of the concerned company to carry on its business and no restrictions are imposed on those who carry on the company's affairs. Even if it is regarded as a restriction, it is not possible to say that it is not protected under cl. 6 of Art. 19(1). As stated in *Narayanlal Bansilal v. Manek Phiroz Mistry* [[1961] 1 S.C.R. 417 at p. 445] though the Companies Act on the one hand throws open to all citizens the privilege of carrying on business with limited liability, on the other hand, since the company's business has to be conducted through human agency irregularities and even malpractices in the management of the company's affairs sometimes arise :

"If persons in charge of the management of companies abuse their position and make personal profit at the cost of the creditors, contributories and other interested in the company, that raises a problem which is very much different from the problem of ordinary misappropriation or breach of trust. The interest of the company is the interest of several persons who constitute the company, and thus persons in management of affairs of such companies can be classed by themselves as distinct from other individual citizens. A citizen can and may protect his own interest but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power vesting in the managers."

If ss. 234 and 237 are viewed from this point of view there would be no difficulty in coming to the conclusion that there is neither the violation of Art. 14 nor of Art. 19(1)(g). To these observations may be added the observations of the Company Law Committee in their report of 1952 where the Committee have noted that the need for a provision for investigation was generally recognized while recognising that in some cases the use of the powers of inspection and investigation may shake the credit of the company and affect its competitive position in the committee observed that such a risk "should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is prima facie called for." Similar observations are also to be found in the Report of the Company Law Committee presented to the British Parliament in June 1962 in regard to a similar power of investigation under s. 165(b) of the English Act. In the context of the rapid pace at which industrialisation is taking place in the country and companies are floated with share capital of the size and volume not conceived of only a few years ago, chances of misuse of power, maladministration and malpractices have considerably increased. A safeguard such as a power of investigation becomes not only necessary but also inevitable for the protection of an increasing number of shareholders, creditors and other persons interested in such large companies. Considered from this angle there would be no difficulty in holding that even if the provision as to investigation amounts to a restriction, it is a reasonable restriction, especially so when the power under s. 237(b) as stated earlier can only be exercised on an opinion formed on the objective test of the existence of circumstances suggesting things set out in cl. (b) of s. 237. It is not therefore possible to uphold the challenge to the clause under either of these two heads.

Though the contentions regarding mala fides and the constitutional invalidity of s. 237(b) are not upheld, the appellant succeed in the other two contentions. The appeal is allowed and the impugned order is set aside. Since the appellants have partly succeeded and partly failed, there will be no order as to costs.

ORDER

In accordance with the opinion of the majority the appeal is allowed but there will be no order as to costs.

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