CALCUTTA HIGH COURT

Babulal Choukhani

Vs.

Western India Theatres Ltd

A.F.O.D. No. 153 of 1952

(P.B. Mukharji and Bachawat, JJ.)

05.12.1956

JUDGMENT

P.B. Mukharji, J.

1. This appeal questions the refusal by the Board of Directors of the Defendant Western India Theatres Ltd. to register certain shares transferred by defendant Shantaram Raghurao Hemmad in favour of the plaintiff Babulal Choukhani. Two essential points arise for determination in this appeal. The first point relates to the construction of the Articles of Association restricting the right of transfer and limiting such transfer by certain conditions mentioned in the Articles. The second point raises the question of proper exercise of such power by the Directors under those Articles and how far and to what extent the Director's decision in this respect is reviewable by the Courts.

2. The plaintiff's case briefly is that he obtained shares of the face value of Rs. 5,00,000/- in the defendant company bearing Nos. 30057 to 35056 together with blank transfer deed duly executed and completed and transferred by the defendant Hemmad. The transfer was made on or about the 27th April 1950 and is said to be for the consideration of debts owed by defendant Hemmad to plaintiff Choukhani. It is the plaintiff's case in the plaint that Hemmad executed the relevant transfer deed in favor of the plaintiff in respect of the said shares and also completed the same. The plaintiff thereupon applied to the defendant company for registration of those shares in his name, but at meetings held on the 5th June 1950 and 30th June 1950 the Board of Directors of the defendant company refused to register such transfer of shares in the name of the plaintiff. The plaintiff challenges such refusal as wrongful and not *bona fide*. He pleads that there is no valid reason for such refusal. In paragraph 16 of the plaint the plaintiff states that the Directors of the defendant company did not exercise their powers *bona fide* under the Articles of Association of the defendant company in refusing to register the shares. He then proceeds to set out in different sub-paragraphs, namely, (d) to (1) the different facts and circumstances on which he

states that the defendant company in refusing to register his name did not act *bona fide*.

3. The defendant company by its written statement stated that the decision of the Board of Directors to refuse to register the transfer was arrived at *bona fide* and after due consideration. It also pleads that the said transfer deed was not duly stamped as required by law. It denied all charges of bad faith.

4. The defendant Hemmad neither entered appearance, nor filed any written statement.
5. Three issues were raised before the learned trial Judge. The first issue was :

> "Was the Transfer Deed duly completed as alleged in paragraph 11 of the plaint? If not, has the defendant company waived the conditions? Is the defendant stopped from stating that the Deed was not duly executed?

The second issue was :

> "Did the Directors of the defendant company act mala fide in refusing to accept or register the transfer of the shares in favor of the plaintiff as alleged in the plaint?

The third issue was a general one : "To what reliefs, if any, is the plaintiff entitled?"
6. The learned Judge after hearing the evidence dismissed the suit with costs.

7. The right to transfer shares is regulated by the Company's Articles. The Companies Act lays down that the shares of any member in a company shall be moveable property, transferable in the manner provided by the articles of the company. The relevant article of the defendant company in this case is Article 52 which reads as follows :-

> "The Directors may at their absolute and uncontrolled discretion decline to register or acknowledge any transfer of shares and shall not be bound to give any reason for such refusal and in particular may so decline in respect of shares upon which the Company has a lien or whilst any member executing the transfer is either alone or jointly with any other person or persons indebted to the Company on any account whatsoever or whilst any moneys in respect of the shares desired to be transferred or any of them remain unpaid or unless the transferee is approved by the Directors and such refusal shall not be affected by the fact that the proposed transferee is already a member. The registration of a transfer shall be conclusive evidence of the approval by the Directors of the transferee."

8. This is an express charter of large powers given to the Directors of the company to decline to register shares and also gives them the power to withhold reasons for such refusal to register. Expressly the power is said to be absolute and uncontrolled. The Directors' discretion is uncontrolled and absolute. But if it is shown that there has been no exercise of any discretion but

an exercise of a whim or a caprice, then such purported exercise of power under such an article can be examined by the court. The test of 'discretion' is not satisfied if the act or the decision of the Directors declining to register is oppressive, capricious, corrupt or mala fide or not in the interest of the company at all. But once it is shown to the court that the Directors have exercised their discretion, then this Court does not sit as a court of appeal reviewing or revising that discretion. This Court in that event will not set aside that discretion of the Directors even though it would have come to a different conclusion on the same set of facts. It has been held that such a power is not illegal and under such power the Directors are not bound to give reasons for their refusal. Cases have gone so far as to lay down the law that the court should not draw even an adverse inference because the Directors under such a power refuse to disclose or state the reasons of their decisions. If, however, any reason or reasons are given by the Directors in a particular case, the Court can always enquire if they are legitimate or not. But even then when the court considers whether such reasons are legitimate or not, that only means that it tries to ascertain whether the Directors have proceeded on a right or wrong principle. Chitty, J., In Re. Bell Brothers Ltd.; Ex parte, Hodgson, (1891) 65 LT 245 at p. 246(A) explains this part of the law in these words :

> "If the reasons assigned are legitimate, the court will not overrule the director's decision merely because the court itself would not have come to the same conclusion. But if they are not legitimate, as, for instance, if the directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees, the court would hold that the power had not been duly exercised. So, also, if the reason assigned is that the transferee's name is Smith, or is not Bell. Where the directors do not assign any reason, it is still competent for those who seek to have the transfer registered to show affirmatively, if they can by proper evidence that the directors have not duly exercised their power."

9. In a more recent case in Re. Smith and Fawcett, Limited, 1942-1 Ch 304(B) the English Court of Appeal had to construe a similarly worded power under the articles of association. There the power was couched in these words :-

> "The directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares."

Simonds, J., held that the directors under such a clause had the widest power to refuse to register a transfer and that whilst such powers are of a fiduciary nature and must be exercised in the interest of the company, there was nothing to show that they had been otherwise exercised in that particular case. The Court of Appeal with Lord Greene, M.R., presiding affirmed that decision. At p. 308 of the report the Master of the Rolls observed :

> "There is nothing, in my opinion, in principle or in authority to make it impossible to draft

> such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the interests of the company, and thereby to admit or not to admit a particular person and to allow or not to allow a particular transfer for reasons not personal to the transferee but bearing on the general interests of the company as a whole - such matters, for instance, as whether by their passing a particular transfer the transferee would obtain too great a weight in the councils of the company or might even perhaps obtain control. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their *bona fide* view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised *bona fide* in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion."

It is, therefore, clear on the construction of this article in the present case that unless it is established that there has not been any *bona fide* exercise of this power in the interest of the company, the decision of the directors must remain inviolate. The appellant wants to establish this by a number of arguments.

10. The first argument on behalf of the appellant is that the defendant company refused to register the transfer on the ground that the defendant Hemmad was indebted to the company when in fact he was not so at any material time. In support of this argument reliance was placed on a letter. It is a letter which is undated and in fact originally unsigned and was never used or despatched to the addressee. In other words, it was a draft which was never used but which remained on the file of the defendant company, and in the usual course of the discovery of documents appeared in the brief of documents disclosed on behalf of the defendant company. Before proceeding further it will be useful to set out the contents of that letter. It was addressed to the plaintiff and is in these terms : "Dear Sir, Re. 5000 shares Nos. 30057/35056 standing in the name of Mr. S.R. Hemmad.

> With reference to your letter of the 24th instant we are to say that the various statements made in para. 1 of your said letter are absolutely untrue.
> With reference to the last para of your letter, our Directors are not bound to give any reason for their refusal to register any transfer; without prejudice to our aforesaid contention, we may state that if you will refer this matter to Mr. Hemmad he will tell you that he is heavily indebted to our company.
> Yours faithfully,
> (In pencil) Western India Theatres Ltd."

11. This draft of a letter even on its own language does not seem to us to be a refusal based only on the ground of Hemmad's indebtedness to the company. Even in the draft it is quite expressly

clear that the directors are relying on their power not to give any reason for their refusal. It is only at the end that the draft proceeds to say and that also expressly without prejudice to that contention, that even if the plaintiff referred the matter to Mr. Hemmad, he would tell him that Hemmad was heavily indebted to the company. A true construction of even the draft cannot in our view mean that the directors gave reasons for their refusal and one of the reasons for such refusal was Hemmad's indebtedness to the company.

12. There are, however, other features in respect of this draft which show that it does not achieve the purpose for which it was attempted to be used by the appellant before the learned trial Judge. To appreciate that aspect of the case it is necessary to state the circumstances in which this draft came to be used at the trial Court. According to the usual practice on the Original Side of this Court an admitted brief of documents containing this draft was prepared and was sent by the plaintiff's attorneys to the defendant company's attorneys for comparison. At that stage the defendant company's attorneys put the words 'Western India Theatres Limited' in pencil on that draft signifying that the draft had been signed by the company. Then the plaintiff's attorneys asked the defendant company's attorneys to initial that copy draft when they replied that they would take instructions on the matter from the defendant company. Subsequently the draft was initialed by the attorneys of the defendant company and the brief of documents containing this draft was admitted. At the trial the learned Advocate General who appeared on behalf of the defendant company admitted that brief of documents without taking any exception to that draft. The Advocate General in his address before the learned trial Judge said that he admitted the draft on a misapprehension of facts. The facts as they appear now are what have been stated before, namely, (1) that this was only a draft, (2) that it was not actually signed and used by the company, (3) that it was not dispatched to the addressee at all and (4) that the addressee who was the plaintiff did not get, as he could not, the original of that letter.

13. Whether the defendant company in refusing to register shares did so on the ground of indebtedness of Hemmad or not has in our opinion first to be found from the terms of the resolution of the meeting of the Board of Directors. The company or the Board of Directors speak primarily through its or their resolution. If the enquiry is as to what was the decision taken by the Board of Directors the Court would look more and depend more on the actual terms of the resolution than on the terms and the language in which such decision was conveyed by letter or correspondence even if such a letter in fact was written and dispatched. It is, therefore, necessary to refer to the resolutions in this case. The first resolution is the one that was passed at the meeting of the Board of Directors on 5th June, 1950. The terms of that resolution are :

> "It was proposed by Mr. C.J. Desai that the application for transfer of shares received from Mr. Babulal Choukhani be declined in exercise of Article 52 of the Articles of Association of the Company and Mr. Babulal Choukhani be informed accordingly. The said resolution was seconded by Mr. B.K. Pai and passed unanimously.
> Sd/- K.M. Modi,

Chairman,
Sd/- C.L. Diwan,
Secretary."

The second resolution is the one passed at the meeting of the Board of Directors on 30th June 1950. Its terms are :

"The Chairman then placed before the Board a letter dated 24th June 1950 received from Mr. Babulal Choukhani in respect of 5000 shares standing in the name of Mr. S.R. Hemmad. The said application for transfer of shares was not accepted for registration and transfer by the Directors at the meeting held on 5th June, 1950, Mr. Babulal Choukhani has now again requested the Board to reconsider their decision. After careful consideration, the Directors once again unanimously decided to adhere to the former decision not to register the said application for transfer of shares under Article 52 of the Company's Articles of Association and the Managing Agents were asked to inform the applicant accordingly.
Sd/- K.M. Modi,
Chairman,
Sd/- C.L. Diwan,
Secretary."

It is clear from the actual terms of the resolution that no reason whatever was disclosed or stated by the Board of Directors for refusing to register this transfer. Hemmad's indebtedness to the company is not one of the reasons on which the refusal was made according to the terms of the resolution of the Board of Directors.

14. The letter of the defendant company dated 5th July 1950 conveying the unanimous and considered opinion of the Board of Directors arrived at on 30th June, 1950 also does not state Hemmad's indebtedness as one of the grounds or as any ground for refusing to register the shares.

15. The whole object of this argument was that the statement of Hemmad's indebtedness to the company in that draft showed that the company was prepared to put forward a false reason as a ground for refusing to register and, therefore, being based on a false reason the company was not acting in *bona fide* exercise of its powers under Article 52 of the Articles of Association. We have found it extremely difficult to appreciate this argument for many reasons. The first reason is that this was not a letter which was in fact used or sent to the plaintiff at all. The second reason is that the very fact that this letter was not sent to the plaintiff shows that the company was not prepared to put forward a false reason to the plaintiff. That is a point in favour and not against the defendant company. It the defendant company were going to put forward a false reason and that false reason was Hemmad's indebtedness to the company, there was nothing to prevent the

defendant company from sending this letter to the plaintiff with that false reason. Thirdly, neither the two relevant resolutions nor the letter dated 5-7-1950 suggested to the plaintiff that the defendant company was refusing to register on the ground of Hemmad's indebtedness to the company. Even if the unused draft be regarded as an attempt to find a false reason, that does not at all help the appellant. Assuming that at one stage the company thought of putting forward a false reason and that false reason was Hemmad's indebtedness to the company and, therefore, a draft was under preparation putting that forward as a reason. But then what is the explanation of its not being sent to the plaintiff. The explanation can only be that the company thought better. It may also be that the company thought that that was not the right thing and the right ground on which they had taken the decision and the draft did not correctly represent the facts. It will be idle for us in this Court of Appeal to speculate over this unused, undated and undespatched letter and hold the company guilty of mala fides on that ground. Realizing the difficulty that this argument did not find any support either from the resolutions or from the letter of 5th July, 1950 the appellant tried to use the evidence of K.M. Modi where the counsel introduced this draft as if it were a letter. In fact, he was being asked at that time by the counsel whether there was any reason for the refusal to register. When the witness Modi wanted to refer to his letter he was at once shown this particular document and asked whether this was not the reason that he gave in the letter. The questions we have in view are questions 487 to 493. We do not read Modi's answer to those questions as any admission that this draft was in fact a letter duly signed and dispatched to the plaintiff. In fact, it is now common ground that this letter was never sent to the plaintiff, nor even signed by the defendant company. We, therefore, find ourselves in agreement with the conclusion of the learned trial Judge on this point.

16. Before leaving this branch of the case, a reference perhaps will not be inappropriate to a certain distinction which has been made in some of the decisions between grounds and reasons in considering Articles of Association of similar import although not couched in the same language. The cases that we have in view are Duke of *Sutherland v. British Dominions Land Settlement Corporation Ltd*[1]*.,* and *Berry and Stewart v. Tottenham Hotspur Foot ball and Atheletic Co., Limited*[2]*,* In the first case Tomlin, J., said, on the construction of the article and the expression there 'without assigning any reason', that the reason for exercising the power is a distinct thing from the grounds which give rise to its exercise. In that case the interrogatories, therefore, on the grounds as distinguished from the reasons were allowed. The ratio of that decision was that the company was not entitled to refuse to state which of the grounds mentioned in the article the directors had acted under although the company had the right to refuse to say what reasons influenced them in exercising their discretion upon that ground. In the second case Crossman, J., very rightly pointed out that in coming to that conclusion the actual language of the article was important. In fact, at page 726 of the report the learned Judge observed :

> "I think they are two quite different things, and that what the directors are excused or saved from doing in the case before me is naming the species of ground under which they have acted; that is to say, the particular interrogatories which it is sought to administer

here ask them to do the very thing which in my judgment, on the construction of this article, it is provided that they are not bound to do." The point is not important in the facts of this case first because no distinction was attempted to be made by the appellant at any stage between grounds and reasons as such, secondly because no question of interrogatories arises in this case because at no stage did the appellant apply to deliver interrogatories to find out the grounds, and thirdly because the language of Article 52 of the Articles of Association in this case is in our opinion plain and unambiguous. Here the intention of the Article as gathered from the express language in which the article is framed is clear. The directors may at their absolute and uncontrolled discretion decline to register or acknowledge any transfer of shares and shall not be bound to give any reason for such refusal. That is the first part of Article 52. It is, in our view, subject to the discretion having been exercised, absolute and uncontrolled. The latter part of Article 52 is only illustrative of the grounds on which the directors could decline to register but not exhaustive. It does not control the absolute and uncontrolled discretion given in the first part of Article 52.

17. For these reasons we hold that in this case the directors did not give any reason for rejecting to register the shares transferred to the plaintiff and that they were not bound to give any reason. We also hold that the draft cannot be used and read in this case as an actual letter informing the plaintiff putting forward Hemmad's indebtedness to the company as a reason for their refusal to register the shares.

18. The more fundamental attack of the appellant is based on the ground of mala fides. The gist of the appellant's case is that the real object of the defendant company's refusal to register the transfer was that Modi wanted to buy the shares himself and as the plaintiff had refused to sell the shares to Modi he, that is, Modi was exercising his influence and control over the Board of Directors and by practicing such influence and control denied registration of these shares. In support of this contention the appellant urged a number of

[1] 1926-1 Ch D 746

[2]1935-1 Ch D 718

reasons. He tried to show that Modi has been attempting to corner the shares of the company for some time past. In fact, the appellant also urged that the shares of this company when transferred to the name of some persons were refused registration and ultimately were allowed to be registered when they were retransferred in the name of Modi. The outstanding incident which the appellant relies in proof of this contention is the transfer of certain shares to the Sahas. In support of this branch of the appellant's case it has also been argued that most of the directors were under the influence and control of Modi. These directors, it was argued, were in fact indebted to Modi. That in brief is the appellant's case on the allegation of mala fides against the company.

19. It is in evidence that Modi had been purchasing large blocks of shares of this company. But cornering as such or purchase of large blocks of shares as such so long as they are permissible by law is not unjustified. That by itself does not prove mala fides or bad faith either in fact or in law.

To acquire a control which the law permits cannot be illegal.

20. It is said that between March and December 1950, Modi bought in the name of himself and his wife 11536 shares from Wadi H. Kazi and Hari Bhusan Ghose. In fact, certain shares which had been transferred by the defendant Hemmad to other persons like the Sahas were not recognised by the Board of Directors on the ground that the defendant Hemmad was in debt to the company. But when those very identical shares were sold to Modi, the transfer was duly registered in his name. The minutes of the Board of Directors of the meeting held on Saturday, the 20th May, 1950, show that Hari Bhusan Ghose transferred 1000 shares to Modi and Mrs. Modi and the applications for such transfer of those shares were duly approved and it was resolved that the shares be transferred and entered in the Company's register as holders of the said shares in place of the transferors. Although the shares were thus duly registered in the name of Mr. and Mrs. Modi as transferees on 20th May, 1950, yet in respect of these very shares the Board had resolved at a meeting of the Directors on 9th March, 1950 that –

> "The chairman explained to the Board that Mr. Hari Bhusan Ghose was actually the nominee of Mr. S.R. Hemmad who was the virtual holder of the shares. Mr. Hemmad, however, was indebted to the company and as such the Chairman was of the opinion that in exercise of the Article 52 of the Company's Articles of Association this application for transfer should be rejected. Accordingly, it was proposed by Mr. C.J. Desai that in exercise of the Article 52 of the Company's Articles of Association the Directors are unable to register the said transfer. The said resolution was seconded by Mr. J.B.H. Wadia and passed unanimously.
>
> Sd/- K.M. Modi,
> Chairman."

The appellant urged us to infer mala fides and bad faith from this particular instance as showing that there was no inherent defect in the shares transferred by Hemmad. So long as the transfer was to other persons they could not be registered, but the same when transferred in favour of Modi or his nominees the company found no difficulty in registering such transfers. For that purpose our attention has also been drawn to the actual attempts at transfer by Hari Bhusan Ghose to such persons as Mohanlal Tarachand Shah and Ramniklal Nanchand whose names had been crossed out in the transfer deeds to be subsequently replaced by the names of Modi and his wife. Our attention has also been drawn to Mr. Modi's evidence on this subject of transfer of shares in the name of Shahs. Modi's evidence appears in his answers to questions 321 to 334 as also 240 to 262. Modi's evidence is that a public auction was held with regard to these shares and that he purchased those shares at Rs. 50/- per share. On this evidence and on those facts it was contended on behalf of the appellant that a glance at the transfer deeds showed that the shares had been originally sold to the Sahas for Rs. 75/- and, therefore, the Sahas had not voluntarily sold the shares but were in fact compelled or forced to sell the shares to Modi.

21. Before considering how far the Court would be justified in drawing an inference of fraud and mala fides or bad faith from one solitary instance as that of the transfer regarding the Sahas it is necessary to discuss the legality and the weight of such extraneous evidence of transactions not in issue in the suit and not between the parties to the suit. Mr. A.C. Gupta the learned counsel appearing for the appellant argued that the transaction of the Sahas is admissible under Section 11 (2) of the Evidence Act. That section lays down that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Neither by canons of common sense nor by construction of the statute of Evidence Act can it be said in our opinion that one particular instance, such as the one in this case, can render the issue of bad faith and mala fides in a totally different transaction 'highly probable? The words 'highly probable' are significant. The words are not 'reasonably probable'. The word is not just only 'probable'. The significant word is 'highly'. That means more than normal standard of probability. The illustrations although not controlling the section indicate clearly what is the standard of high probability or high improbability. We have no hesitation in holding that the single instance of the Sahas in this case does not reach anywhere near such standard of high probability as in our view is contemplated under Section 11 (2) of the Evidence Act. After all Section 11 of the Evidence Act is making irrelevant facts relevant in other words, Section 11 represents an exception. The general rule of evidence is contained in Section 5 of the Evidence Act which says that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. Then Section 6 of the Evidence Act says that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. This is usually known as the rule of res gestae in evidence, the essence of which doctrine is that the facts which though are not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue. By that standard the transaction of the Sahas cannot be said to be so connected with the transaction of the plaintiff which is in issue in the case as to form part of the same transaction. In fact there is no connection between the transaction of the Sahas and the transaction of the plaintiff in suit, and these two transactions in shares are independent transactions. The Evidence Act goes on to provide in Section 8 that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. We cannot imagine how bad faith, assuming it to exist, in the case of the transfer regarding the Sahas can be a motive or preparation of bad faith for the plaintiff's transaction. Whether the evidence relating to the transaction of the Sahas could be evidence on other points such as cornering of shares by Modi we need not pause to enquire. We are, however, satisfied that the transaction of the Sahas cannot be used as evidence of mala fides or bad faith in the transaction in respect of the plaintiff. The only other section of the Evidence Act to which reference is necessary is Section 15. Section 15 of the Evidence Act lays down that when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the

person doing the act was concerned, is relevant, If the transaction of the Sahas could be brought within the limits of Section 15, then certainly it would be a piece of relevant evidence on the intention of Modi or the Company. But in order to become relevant under Section 15 such act has to form part of a series of similar occurrences. A solitary act or a single instance is the very antithesis of the expression "part of a series of similar occurrences". Here, again, the illustrations at least are good guides to indicate what "series of similar occurrences" would mean. Common sense would suggest, quite apart from legal consideration, that one act cannot be called the 'series' of similar occurrences. It will not be inappropriate in this connection to refer to an English decision which although cannot be regarded as an authority under Section 15 of the Evidence Act here represents the principle on which the Court would act apart from the express language of any particular statute.

22. In *Berry and Stewart v. Tottenham Hotspur Football and Athletic Co. Ltd*[3]*.,* evidence as to rejection of transfers on previous occasions was held to be inadmissible as it could not be material to the issue in the case and an attempt was there made to adduce evidence that directors had systematically refused to register transfer of shares which would increase the voting power of shareholders. The relevant article of Association of the defendant company in that case was :

> "The directors may decline to register any transfer of shares made by a member who is indebted to the company, or in case the transferee shall be a person of whom the directors do not approve or shall be considered by them to be objectionable, or the transfer shall be considered as having been made for purposes not conducive to the interest of the company and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article."

A shareholder in that case sought to transfer a number of his shares, but the directors declined to register the transfer. By another article the holder of 1 share had 1 vote, the holder of 5 shares had 2 votes and there was an additional vote for every additional 10 shares, with the result that by splitting a holding of shares, the voting power could be increased. It was alleged that the directors had systematically rejected transfers in order to prevent an increase in the voting power of the shareholders. The plaintiff brought an action to enforce registration of the transfer and there attempted to adduce evidence to show that the directors had refused registration in accordance with that systematic practice. Clauson, J., expresses his decision on this particular point at p. 556 of that report in his judgment in this manner :

> "The plaintiffs sought to establish their case by putting in certain evidence which was directed to show that on certain previous occasions the directors had rejected other transfers for reasons which would not justify the rejection and were not

[3]1936-3 All England Reporter 554

> within the terms of the article. I rejected that evidence on the ground that the issue before me was as to what the directors did on November 6, 1935, and that I was not entitled to

> listen to evidence as to what took place on other occasions, as it could not be material to the issue. I have been referred to a certain number of authorities but it will be sufficient to indicate the nature of them if I mention *Makin v. A.G. for New South Wales*[4]*,*"

23. Clauson, J., having ruled that evidence out said that in that event there was no evidence before him in any shape or way to justify the inference by the Court that the directors had exercised their powers otherwise than reasonably and *bona fide*. In the English case, however, there was more than one act attempted to be put in evidence. Here, however, the only reliance is on this solitary instance in respect of the Sahas which fact makes it worse because one cannot make up a "series" with one incident.

24. We are, therefore, of opinion that the evidence of what happened in respect of the transfer of the Sahas' shares is not admissible on the point of bad faith and mala fides in respect of a subsequent transaction in respect of the transfer to the plaintiff which is in issue in this case.

25. We need only add that the learned Judge also referred to the fact that at best this piece of evidence was only a suggestion because no independent evidence was adduced in respect of the transaction of the Sahas and certainly the Sahas did not give evidence. Any Court would hesitate long and much to condemn a transaction as one of bad faith when (1) the transaction is not in issue, (2) when all the interested parties in the transaction are not before the Court and (3) when the most material evidence of the person whose transaction is condemned is not available to the Court.

26. The next branch of the case of bad faith and mala fides relates to the influence of Modi on the other directors. It is essential to recite certain facts in this connection. Now, at the relevant times the company had six directors of whom three were Modi Brothers and the other three were J.B.H. Wadia, C.J., Desai and B.K. Pai. All that is suggested in evidence is that at all material times all the Directors except one were indebted to Modi. The evidence of indebtedness of course is not satisfactory but assuming that there was indebtedness we fail to see how that fact goes to prove either influence or mala fides on the part of the defendant company. The fact that a person is indebted to somebody else does not necessarily make the debtor surrender all his judgment in other respects to the creditor. The fact that the other Directors are indebted is in our opinion not sufficient to induce the conclusion that the creditor Director exercised the biggest influence even in this particular matter in suit. Even then one of the Directors was in fact not indebted to Modi. There is in our opinion hardly any real or substantial evidence to show first that Modi had such influence over the other Directors and, secondly, that even if he had he exercised such influence, all the other Directors in fact were so overcome as to act in fraud of the power contained in the Article and not in the best interests of the company. After all these other Directors were also interested in the company and they had their stakes. It is difficult to believe how they could surrender all their interests to Modi. In fact, the conclusion would appear to be the other way and if some of them were indebted to Modi, then far from surrendering the rest of their interests to

Modi the natural instinct

[4](1894) AC 57

would impel them to protect such of the remaining rights and interests which they had and stick on to them. In fact, this is the inherent contradiction in the appellant's case to which reference has been made by the learned trial Judge, and on the ground of which the learned Judge has rightly rejected the plaintiff's evidence. The plaintiff's evidence was that he met the Directors in May when they told him that they had no voice in the affairs of the company because everything was in Mr. Modi's hands, the suggestion being that the registration of the transfer in favor of the plaintiff depended entirely on Modi. That would mean that the Directors confessed their own helplessness in the matter. But then again the plaintiff's evidence is that the Directors gave assurance to the plaintiff that the registration in his favor would be effected as soon as possible. Naturally the learned trial Judge said how could the Directors give assurance when they had already expressed their helplessness in the matter. We do not, therefore, think that the influence or control of Modi on the other Directors is at all established in evidence.

27. The central core of the plaintiff's case on this point of mala fides and bad faith is that the Board refused to register the transfer as the plaintiff had refused to sell the shares to Modi and so Modi by the exercise of control over the other Directors induced the Board to decline to register the transfer with a view to put pressure on the plaintiff to sell the shares ultimately to Modi. But then to find in favour of the plaintiff the Court has to be satisfied that there was in fact an offer of Modi to buy the plaintiff's shares and there is in fact refusal by the plaintiff to sell the shares to Modi. Apart from the evidence of the plaintiff on this point which the learned trial Judge in our opinion rightly disbelieved, the circumstances are all against this contention. The most important circumstance is the correspondence of the time. The material letters from the plaintiff to the company dated the 24th June 1950 and the 18th July 1950 appear to show conclusively that there was no offer by Modi to buy those shares of the plaintiff or that there was any refusal by the plaintiff to sell the shares to Modi. It is difficult to get away from the fact why the plaintiff should not put forward the very central reason, his very major grievance, at least in the letter of the 18th July 1950 when the disputes had come to a breaking point with the plaintiff charging bad faith and mala fides and threatening to hand over his papers to his solicitors to take legal proceedings. To make the charge of mala fides and bad faith and not to put forward the main act of bad faith which was the attempt of Modi to buy the plaintiff's shares at an under-value and the plaintiff's refusal to sell the same to Modi is inexplicable and must be taken as the most cogent evidence disproving the plaintiff's contention on this most material allegation of bad faith against the defendant company.

28. We, therefore, hold that the charge of bad faith and mala fides has not been established against the defendant company. The charge of bad faith and mala fides is against the defendant company and it is not proved by creating what at best may be called suspicion against the conduct of one individual director, Modi. The hurdles the plaintiff had to overcome in proving fraud and mala fides are (1) that Modi had the requisite influence over each one of the other

Directors and (2) that Modi in fact successfully exercised that influence and (3) that in pursuance of such influence all the other directors of the company acted in the way that Modi had suggested. We are of opinion that the plaintiff had failed on these hurdles. The onus of proving fraud, mala fides and dishonestly is upon the party who alleges them. The onus in this case is upon the plaintiff to prove his charge that the directors of the defendant company acted dishonestly and that their act was in fraud upon their powers in the Articles of Association. It is difficult to prove fraud and dishonesty and rightly so because they are grave charges and imputations. Because they are difficult to prove that is no reason why court should take a lenient view and make that light and easy for which law seeks most satisfactory proof in order to hold a person guilty of fraud and dishonesty. That proof is absent here. We were asked to infer fraud in this case from the circumstances which we have analysed. The circumstances in our opinion are not such that fraud or dishonesty can safely or reasonably be inferred. They are too remote to prove fraud or bad faith. It is necessary to say that fraud is not proved by mere suspicion.

29. The defendant company in its written statement has justified refusal to register on the ground that the transfer deed was not stamped as required by law. Section 34 (3) of the former Companies Act which governs this case, provides :

> "It shall not be lawful for the company to register a transfer of shares * * unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip."

Now it is admitted that the deed of transfer in this case was not duly stamped at the time when it was delivered to the company. What happened was that the plaintiff sent a cheque for the value of the stamp necessary to be affixed on the transfer deed to the company. The law, however, is quite clear that the obligation is not of the company but of the transferee to deliver the transfer deed duly stamped and executed. In a stamp reference the Special Bench of the Bombay High Court presided over by the learned Chief Justice in In Re. Jagdish Mills Ltd., AIR 1955 Bombay 79, came to the conclusion that if a company registered an instrument of transfer of shares which was not duly stamped, it would be doing something which was not lawful. That decision is also an authority for the proposition that there is no provision in the Companies Act or in the Stamp Act which would make the company liable for payment of the proper stamp duty and that the liability to pay stamp duty in the case of an instrument of transfer is upon the executant.

30. Mr. Gupta arguing for the appellant submitted that the point that the transfer deed was not duly stamped was not one of the grounds or rea sons in Article 52 of the Articles of Association of the company on which the company has refused registration. The main thesis of his argument was that Article 52 naturally operated in a field of discretion, but where the law required the doing of an act it was not a matter of discretion at all but of legal compulsion. As Article 52 uses the word "discretion" the legal requirement of stamp cannot come under Article 52 of the Articles of Association. We are unable to accept this argument as a sufficient and valid excuse for the plaintiff in this case.

31. After all this was a plaintiff's suit against the defendant company for the relief that the register of the defendant company be rectified by acknowledging the plaintiff as transferee and owner of the shares. The complaint is against refusal of the company to register such transfer. If the law prohibits registration without stamp, then the company is entitled to refuse such registration on that ground and whether it does so under a particular article - Article 52 or not seems to us to be immaterial. It is quite true that the company informed the plaintiff that the rejection was under Article 52, but that does not carry the plaintiff further. Assuming that it was only under Article 52 that the company had rejected the registration of the transfer of the shares, but the law gives the company power to refuse to register in case the transfer deed is not duly stamped. That point is taken in the written statement of the defendant company. In fact, it is one of the main issues in the suit. The issue was 'Was the transfer deed duly completed'? If the law requires stamp on the transfer deed, it cannot be said to be completed without the stamp. It is unnecessary for us, from that point of view, to pronounce on the question of construction of the word "discretion" in Article 52 namely whether the company could refuse to register shares on the ground that the relative transfer deed was not duly stamped. We are, however, prepared to hold that if a transfer deed is not duly stamped as required by law, that consideration can also very well come within the ambit or meaning of Article 52 because although the Article speaks of the Directors' discretion to register but that only means that it must be discretion and not whim but a discretion which takes into consideration the legal requirement nevertheless remains a discretion. To be alive to the law is a part of the well-informed discretion which the Board of Directors are required to exercise under the Article.

32. In this connection reference to the decision in *Maynard v. The Consolidated Kent Collieries Corporation Ltd*[5]*.,* may appropriately be made. There when a transfer to the plaintiff of the shares in the defendant company was presented for registration it was found that the stamp on the transfer, although in accordance with the consideration stated on the face of it, yet was less than what it should have been, whereupon the directors refused to register the transfer. The Court came to the conclusion that as due stamping was a requirement under the English Stamp Act on a transfer deed the Directors were entitled to refuse to register the transfer and that in determining whether the transfer was duly stamped they were entitled to go behind what appears on the face of the document. Collins, M.R., at page 130 of the report came to the conclusion :

> "It seems to me that this consideration affords an absolute justification to the directors in their refusal to register this transfer. It was the duty of the plaintiff to tender a transfer which was right in all respects in point of law, and that he never did; and unless he did that the company were under no obligation to put him on the register." That principle of law is applicable here. Section 3 of the Stamp Act makes the transfer of shares the subject of stamps as much as section 34 (3) of the Companies Act. But section 17 of the Stamp Act makes it clear that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. Therefore, the legal

requirement is that the stamp must be put either before or at the time of execution. That requirement was not satisfied in this case.

33. Mr. Gupta tried to get away from the rigours of law by saying that the correspondence showed that the plaintiff sent a cheque for stamp to the company and thereby he tried to spell out an agreement by which the company were agreed in some form or another to purchase the stamp and put it on the transfer deed. Whatever the practice may be, even that would not satisfy the law. As pointed out, the stamp must be put at the time or before the execution of the transfer deed. Subsequent stamping will not satisfy that legal requirement. But then even there the case which the plaintiff has made is not for any specific performance of the agreement for the stamping: in other words, that is not the case which the plaintiff has made in the plaint. In the plaint he came with the definite case that the transfer deed was duly completed which means that it was also duly stamped and

[5](1903) 2 KB 121

the defendant company joined issue on that point with the result that one of the issues in this case was: Was the transfer deed duly completed as alleged by the plaintiff?

34. We must hold on the facts of this case that the transfer deed was not duly stamped as required by section 34 (3) of the Companies Act read with relevant provisions of the Stamp Act.

35. Mr. Gupta tried to rely on the case in In re, Indo China Steam Navigation Company, (1917) 2 Ch 100. The facts of that case, however, are entirely different and the principle on which that case proceeded far from helping the appellant goes against him. In fact, what was held there was that in the circumstances of that case the alteration in the register of the company made by the Secretary was a mere nullity and that the registration of the transfer being made by the company without notice of the insufficiency of the stamp duty and the ad valorem stamp duty and the penalty having since been paid the transferee should be allowed to remain on the register. In that case the observations of Eve, J., at page 106 where the learned Judge was in agreement with the decision in (1903) 2 KB 121, are against the appellant. The significant words of Eve, J., are :

> "The fact that, as between the Navigation Company and Green, the former could properly have refused to register the transfer so long as it was insufficiently stamped could not, in my opinion, entitle Hopkinson to maintain the attitude that the transfer was void and his signature a nullity. The most he could do was to assert that which was undoubtedly the fact that the registration of the transfer while inadequately stamped could not operate to bring about a legal transfer of the shares into the name of the transferee."

Therefore when the transfer without stamps is not a legal transfer we do not see why the directors should not refuse to register such transfer. In fact, in that case the transfer was subsequently stamped with the proper ad valorem duty and the penalty for neglect to do this also had been paid neither of which fact is present here in this case before us. The position in that case was that

when the summons came on to be heard the transfer by virtue of which Hopkinson's name was taken off and Green's entered had been validated by the payment of the additional duty and, therefore, the Court in that case came to the conclusion that it was impossible for Mr. Hopkinson to claim to have Green's name struck out and his own restored. We fail to see how this case or its principle can help the appellant before us.

36. While we are satisfied that the law is clear on the point, reference may be made to the Company's own article in this case, namely, 53(3) which repeats the provisions of the Indian Companies Act by saying –

> "It shall not be lawful for the company to register a transfer of any shares unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the script. Although this part of the Article is not printed in the paperbook, we find that the whole of the Article was made exhibit in the trial court.

37. We must also record the fact in this connection that the instrument of transfer along the share script and the cheque were returned to the plaintiff by the defendant company on the 15th June, 1950 and since then they have been lying with the plaintiff. If the appellant's case were true that there was an agreement by the company to affix the stamp, then the obvious conduct of the plaintiff in consonance with that agreement was to send back the deed of transfer with the cheque to the company and that perhaps explains the reason why the plaintiff did not ask for any specific performance of an alleged agreement by the company to put the stamp out of the proceeds of the cheque because this conduct of retaining the transfer deed and the cheque is inconsistent with the plaintiff's own readiness and willingness. At any rate, as the pleadings do not proceed on the basis of specific performance this point of the appellant cannot be sustained.

38. We, therefore, hold that the transfer deed in this respect not having been stamped was rightly refused registration by the defendant company.

39. We cannot also shut our eyes to the fact that in the cross-examination of the plaintiff the fact was brought out that the plaintiff had suffered conviction and imprisonment for a year for theft of electricity in connection with a Cinema house. As no reason was disclosed by the company for refusing to register the shares we do not know whether the plaintiff's conviction with incarceration was one of the reasons. It would be a valid personal objection against the plaintiff under Article 52 of the Article of Association. In fact it is significant that when Modi said in his evidence that apart from indebtedness of Hemmad there were other reasons, no cross-examination on behalf of the plaintiff about such other reasons was made or ventured. Against a possible personal objection to the plaintiff and when the transfer deed was not stamped it is impossible for this court to hold that the direrctor's refusal to register was fraudulent and dishonest.

40. Mr. Hazra, the learned junior counsel for the appellant, in his argument in reply tried to salvage the wreck of his client's case by suggesting that as the defendant Hemmad has not appeared in this case and as the plaintiff has asked for an injunction restraining the defendant Hemmad from exercising any right in respect of these shares, this court should grant him that injunction. Now, the relief of permanent injunction in suits must be governed by section 54 of the Specific Relief Act. The requirements of that section are well known. It says that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication. In this connection the material part of section 54 is that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court may grant a perpetual injunction. There is, however, no pleading in the plaint alleging that the defendant Hemmad has invaded or threatens to invade the plaintiff's right to or enjoyment of the shares. Mr. Hazra tried to induce us to hold that there is a pleading in paragraph 16 (i) of the plaint where it is suggested that the dividend in respect of these shares was wrongfully appropriated by Modi in collusion with the defendant Hemmad. The charge even there is directed against Modi and not against Hemmad because if anybody appropriates the dividend it is not alleged that Hemmad is appropriating the dividend but Modi is. Then Mr. Hazra suggested that an injunction against the defendant Hemmad would do him no harm. This Court has previously on numerous occasions held that the principle on which it grants injunction is not that an injunction will not hurt a party against whom it is granted, but it grants an injunction on the principle that the applicant for injunction must satisfy the Court that he has made out a case within the law to be clothed with an order of injunction from this Court. We, therefore, reject Mr. Hazra's contention.

41. We affirm the judgment and decision of the learned trial Judge.

42. We dismiss this appeal with costs.

43. The appeal is certified fit for the employment of two Counsel.

Bachawat, J.

44. I agree.

Appeal dismissed.