BOMBAY HIGH COURT

Satyavart Sidhantalankar

Vs.

The Arya Samaj

O.C.J. Suit No. 489 of 1945

(Bhagwati, J.)

08.11.1945

JUDGMENT

Bhagwati, J.

1. The plaintiffs have filed this suit, being members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the said society, which is a society registered under the Societies Registration Act XXI of 1860, against the first defendant who is the president of the said society, as representing the society of the Arya Samaj, Bombay, and against defendants Nos. 2, 3 and 4 who are the members of the managing committee of the society on behalf of themselves and all the other members of the managing committee of the society, for a declaration that the resolutions dated October 8, 1944, passed at an extraordinary general meeting of the society are ultra vires and in fraud of the minority, for a declaration that the resolution dated January 21, 1945, passed at the general meeting of the said society is also null and void and for further and other reliefs. The resolutions dated October 8, 1944, enacted certain changes in the constitution of the said society and the plaintiffs allege that the said resolutions are void inter alia as being ultra vires the said society and constituting a fraud on the rights of the minority who voted against the said resolutions, and that the minority of the members of the said society was overborne by the vote of the majority who were acting in their own interests illegally, fraudulently and contrary to the interests and objects of the said society and the rights of the minority of the members of the society present at the meeting and voting against the resolutions. The resolution of January 21, 1945, sanctioned the agreement for sale of the Shenwewadi property belonging to the said society and the agreement for purchase of another property situate at Bangadwadi. The plaintiffs alleged inter alia that the resolution was passed by the majority in fraud of the rights of the minority and against the interests of the society. The plaintiffs further alleged that the managing committee of the said society were about to complete the sale of the property at Shenwewadi and purchase of the property at Bangadwadi and sought to restrain the defendants from completing the sale of Shenwewadi property and purchase of Bangadwadi property and from acting on the resolutions, dated October 8, 1944, and January 21, 1945, and carrying the same into effect, particularly from carrying out the sale of the Shenwewadi property and purchase of the Bangadwadi property.

2. At the hearing of the suit before me Mr. R. S. Billimoria for the first defendant raised inter alia the following issues:

> (1) Whether the plaintiffs are entitled to maintain the suit without having obtained the sanction and consent of the society for the institution thereof.
> (2) Whether the society in this suit is both the plaintiff and the defendant and whether the suit as framed is maintainable.
> (4-a) Whether the allegations contained in paragraphs 4(&), 4(e) and 16 of the plaint amount to any averments of fraud.
> (6) Whether apart from the plea of the resolutions being ultra vires, the plaint deals with matters which relate to the internal management of the society.

[Para](7) If so, whether the court will entertain the suit in respect of such matters.

> Mr. M. P. Amin on behalf of defendants Nos. 2, 3 and 4 joined in the issues raised by Mr. R. S. Billimoria and raised further issues on behalf of defendants Nos. 2, 3 and 4 which were:
> (1) Whether the plaint discloses any cause of action against these defendants; and
> (2) Whether these defendants are necessary parties to the suit.

3. Mr. R.S. Billimoria invited me first to decide issue No. 4(a), viz. .Whether the allegations contained, in paragraphs 4(6), 4(c) and 16 of the plaint amount to any averments of fraud. He contended that it was an acknowledged rule of pleadings that the plaintiffs must set forth the particulars of the fraud which they allege and that it was not enough to use such general words as " fraud " or " fraudulently " as has been done by the plaintiffs in the plaint. He relied upon the observations of Lord Selborne in *Wallingford v. Mutual Society*[1] where it has been observed (p. 697):

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.
> These observations of Lord Selborne have been quoted with approval by their Lordships of the Privy Council in *Gunga Narain Gupta v. Tiluckram Chowdhry*[2], and in *Bal Gangadhar Tilak v. Shrinivas Pandit*[3]. He also referred me to the later decision of the Privy Council reported in *The Bharat Dharma Syndicate v. Harish Chandra*[4], where it was held that litigants who prefer charges of fraud or other improper conduct against persons should be compelled to place on record precise and specific details of those charges even if no objection is taken on behalf of the parties who are interested in disproving the accusations, Their Lordships went so far as to observe that in the case before them the petitioner ought not to have been allowed to proceed with his petition and to prove fraud unless and until he had upon such terms as the Court thought fit to impose amended his petition by including therein full particulars of the allegations which he

intended to prove, and that such cases would be much simplified if this practice was strictly observed and

insisted upon by the Court even if as in the case before them no objection was

[1](1880) 5 App. Cas. 685, [3](1915) L.R. 42 IndAp 135

[2](1888) L.R. 15 I.A. 119 [4](1937) L.R. 64 I.A. 143

taken on behalf of the parties who were interested in disproving the accusations. Relying upon these authorities, Mr. R. S. Billimoria urged that the allegations contained in the plaint with regard to the fraud alleged to have been perpetrated by the majority of the members of the society upon the minority were not enough and could not be entertained by the Court as they stood.

4. Mr. M.V. Desai for the plaintiffs did not controvert these propositions of law which were advanced by Mr. R. S. Billimoria but submitted to the Court that no fraud as such was relied upon by the plaintiffs, the only contention of the plaintiffs being that their rights had been wrongfully or unlawfully affected and that the resolutions had been improperly procured. During the course of the argument I understood Mr. M, V. Desai to mean that his clients did not rely upon fraud as such but merely relied upon the wrongful and or illegal manner in which the resolutions had been passed by the majority of the members of the society and on that basis I then ruled that issue No. 4(a) did not survive.

5. After the case had been opened by Mr. M. V. Desai for some time Mr. R. S. Billimoria applied to the Court that issues Nos. 1, 2, 6 and 7 raised by him should be tried first. Mr. M. P. Amin joined in this application and further, applied that his issues Nos. 1 and 2 also should be tried similarly. Mr. M. V. Desai stated that he had no objection to that course being adopted by the Court and I ordered accordingly that issues Nos. 1, 2, 6 and 7 raised by Mr. R. S. Billimoria and issues Nos. 1 and 2 raised by Mr. M. P. Amin should be tried in the first instance.

6. The issues Nos. 1 and 2 raised by Mr. R. S. Billimoria challenged the maintainability of the suit as framed. As I have already observed the Arya Samaj, Bombay r is a society registered under the Societies Registration Act, 'XXI of I860, under the name of the Arya Samaj, Bombay, the memorandum and articles of association of the society were filed with the Registrar of the Joint Stock Companies and the society has been in existence since then and has been functioning as such since the date of ita, registration. The plaintiffs are admittedly in a minority, the majority of the members of the society being of a persuasion contrary to that of the plaintiffs. The plaintiffs,, however, filed this suit in a representative capacity on behalf of themselves and all other members of the society, which would mean that all the members of the society and therefore the society itself is in the position of the plaintiffs. The first defendant is the president of the society and has been sued as representing the society, which means that the society is the defendant in this suit. Mr. R. S. Billimoria contended that the plaintiffs being an admitted minority of the members of the society could not by any stretch of imagination purport to represent all the members of the society and could not even by availing themselves of the procedure laid down in Order I, Rule 8, of the Civil Procedure Code, claim to file this suit as representing all the members of the society, the majority of the members of the society being admittedly against their persuasion. The society had not sanctioned the filing of this suit. No meeting of the society had been called for considering the advisability or otherwise of the institution of the suit. Mr. R.S. Billimoria stated and it was not disputed that if a meeting of the society were called for the purpose of considering whether the suit which had been instituted by

the plaintiffs should be continued or not, the result of such a meeting would be a foregone conclusion and the overwhelming majority of the members of the society would pass a resolution disapproving of the further prosecution of the suit. The objection of Mr. R. S. Billimoria went still further in that he contended that the consent and the sanction of the society not having been obtained by the plaintiffs prior to the institution of this suit which they have filed in a representative capacity on behalf of themselves and all other members of the said society, it was not competent to the plaintiffs to file the suit as they had done. A further objection was raised by Mr. R. S. Billimoria that on the frame of the suit as it stood the society were the plaintiffs as well as the defendants and therefore the suit as framed was not maintainable because it offended against the elementary rule of procedure that the same individual even in different capacities could not both be the plaintiff and the defendant.

7. In dealing with these issues raised by Mr. R. S. Billimoria it is necessary to ascertain what is the legal position of a society which is registered under the Societies Registration Act XXI of 1860. The society is an association of individuals which is neither a corporation nor a partnership nor an individual which apart from statute are the only entities known to law as capable of suing or being sued. The society is an association of individuals which comes into existence with certain aims and objects. If it is not registered as a society under the Societies Registration Act, it would have the character of a club or other association which cannot sue or be sued except in the name of all members of the association or in the name of the secretary or other members of the governing body on their own behalf and on behalf of other members of the association under the provisions of Order I, Rule 8, of the Civil Procedure Code. It would not be competent to a secretary or other members of the governing body of the club or association to sue or be sued alone in respect of matters in which the association is interested even though authority in that behalf has been conferred on them by all members of the association. A partnership firm is also an association of individuals who have come together for carrying on business in partnership. Even in the case of a partnership it would not be competent to file a suit on behalf of or against a partnership as such but for the enactment of Order XIXX of the Civil Procedure Code, which enables a suit to be filed by or against a partnership in the firm name. That is a statutory enactment which enables the firm name being used for the purpose of filing; a suit, by or against a partnership. The society of the character we have before us is, however, quite distinct from a partnership. It has nothing in common with a partnership. A corporation or a limited company which is incorporated under the Indian Companies Act has a corporate existence apart from the members constituting the same. A corporation has been defined as a collection of individuals united into one body under a special denomination having perpetual succession under an artificial form and vested by the policy of law with the capacity of acting in several respects as an individual, particularly of taking and granting properties, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it either at the time of its creation or at any subsequent period of its existence. (Kyd on Corporations, (1793), Vol. I, p 13). (See Halsbury's Laws of England, Hailsham Edition, Vol. VIII, p. 1, para. 1; Adler's Law Relating to Corporations, p. 2; and Grant's Law of Corporation, p. 41). The ideas inherent in the definition of a corporation are (1) that its identity is continuous, (2) that it is intangible, i.e. it is only in abstractor and restd only in intendment and consideration of law (Lord Coke), and (3) it is a thing distinct from its members. Grant in his Law of Corporation predicates a continuous identity, a name and a common seal as indispensable requisites to the creation of a corporation proper and states that besides the aggregate bodies

whose legal character and attributes have been above discussed, there are various other aggregate bodies, partaking in some respects, and for some purposes, of the corporate character, but which nevertheless are not complete corporations for want of some of the essentials of corporations, and which therefore have been called quasi corporations. He gives as an illustration of the latter category "Churchwardens" who though empowered to hold goods, etc., in succession, for the church, etc., have not power to hold lands in succession, have: not a common seal, and want other characteristics of complete incorporation. As regards the companies which are incorporated under the Indian 'Companies Act, Section 23 of the Indian Companies Act enacts that from the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum, together with such other persons as may from time to time become members; of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act. The corporations and the companies incorporated under the Indian Companies Act have thus conferred on them a legal entity which is capable of suing or being sued.

8. If, as stated above, associations of individuals are not capable of suing or being sued except by statutory provisions in that behalf as in the case of partnership firms, corporations or companies incorporated under the Indian Companies Act, could it be said that a society registered under the Societies Registration Act XXI of 1860 becomes a legal entity such as can sue or be sued in the name in which it is registered ? The Societies Registration Act XXI of 1860 is an Act for the registration of literary, scientific and charitable societies, and the object of the Act as stated in the preamble is to make provision for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes. Under the provisions of the Act seven or more persons .associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in Section 20 of the Act may form themselves into a society under the Act by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint Stock Companies, The memorandum of association is to contain the name of the society, the objects of the society and the names, addresses, and occupations of the governors, council, directors, committee or other governing body to whom, by the rules of the society, the management of its affairs is entrusted. A certified copy of the rules and regulations of the society has to be filed with the memorandum of association. The Registrar issues a certificate under his hand that the society is registered under the Act, upon such memorandum and certified copy being filed with him. The property belonging to the society may be vested in trustees, and if not so vested is deemed to be vested, for the time .being, in the governing body of such society, and in all proceedings, civil and criminal, can be described as the property of the governing body of such society by their proper title. Provision is made for suits by and against societies in that the society may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion. If, however, on application to the governing body no officer or person is nominated to be the defendant, it is competent for any person having a claim or demand against the society to sue the president or chairman or principal secretary or the trustees thereof. No suit or proceeding, however, is to abate or discontinue by reason of the person by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the

name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person. A judgment recovered against the person or officer named on behalf of the society is not to be put in force against the property moveable or Immovable or against the body of such person or officer, but against the property of the society. The society is given the power to recover any penalty accruing under the bye-Jaws by filing a necessary suit against the person liable to pay the same. The members are liable to be sued as strangers and the property of the society is liable to process for payment of the costs of unsuccessful litigation against such member. Members guilty of offences are punishable as strangers. 'Provision is made for the adjustment of their affairs, but no member of the society is entitled to receive any profit upon the dissolution of a society; whatever surplus that remains after satisfaction of all its debts and liabilities is to go to some other society as may be determined by the votes of three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by the Court having jurisdiction in that behalf.

9. Do these provisions of the Societies Registration Act XXI of 1860 constitute the society as registered with the Registrar of Joint Stock Companies a legal entity capable of suing or being sued ? Has the society as registered with the Registrar of Joint Stock Companies a legal existence apart from the members constituting the same ? It is significant to observe that the members of the society are a fluctuating body. A member of the society is a person who having been admitted therein according to the rules and regulations thereof has paid the subscription or signed the roll of the members thereof and has not resigned according to the rules and regulations. The governing body of the society is the governors, council, directors, committees, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted. The members as well as the governing body are not always the same and that is the reason why it has been necessary to provide that no suit or proceeding in any civil Court shall abate or discontinue by reason of the person by or against whom such suit or proceedings may have been brought or continued dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person. Even though the members of the society or the governing body fluctuate from time to time, the identity of the society is sought to be made continuous by reason of these provisions The identity of the original members and their successors is one. The liability or obligation once binding on the society binds the successors even though they may not be expressly named, and in this the society savours of the character of a corporation. The resignation or the death of a member does not make any difference to the legal position of the society. The increase or decrease of the members of the society similarly does not make any difference to the position. A partnership under similar circumstances would come to an end, but not the society. The society continues to exist and to function as such until the dissolution thereof under the provisions of the Societies Registration Act. The properties of the society continue vested in the trustees or in the governing body irrespective of the fact that the members of the society for the time being are not the same as they were before nor will be the same thereafter. Could it under these circumstances be said that the society by reason of its registration with the Registrar of Joint Stock Companies becomes a legal entity apart from the members constituting the same ? I am of opinion that by reason of the provisions of the Societies Registration Act, once the society is registered with the Registrar of Joint Stock Companies by the filing of the memorandum and certified copy of the rules and regulations thereof with the Registrar and the Registrar has certified under his hand that the society is registered under the Act, the society enjoys the status of a legal entity apart from the members constituting the same

and is capable of suing or being sued. It may, however, be urged that there are provisions in the Societies Registration Act which would go to show that suits by or against the society have got to be filed in a particular manner, viz. every society registered under the Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion; Provided that it shall be competent for any person having a claim or demand against the society to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant. These provisions and the provisions for the non-abatement of suits and enforcement of judgments against the society would go to show that the society even though registered with the Registrar of Joint Stock Companies would not be able to sue or be sued in the name of the society but could sue or be sued only in the name of the president, chairman, or principal secretary or the trustees thereof or some other person or officer nominated to be the defendant by the society. These provisions, however, in my opinion, are not mandatory. They show a mode in which suits could be filed by or against the society, A similar situation arose in England under the provisions of the Trade Union Acts of 1871 and 1876. A trade union registered under the said Acts was sued in the case of *Taff Vale Railway v. Amalgamated Society of Railway Servants*[1] A summons was taken out on behalf of the trade union to strike out their names as defendants on the ground that they were neither a corporation nor individual and could not be sued in a quasi corporate or any other capacity. The summons came on for hearing before Farwell J. The learned Judge stated that it was undoubtedly true that a trade union was neither a corporation nor an individual nor a partnership between a number of individuals but that was by no means conclusive of the case. He proceeded to observe (p. 429):

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents... It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.

He accordingly dismissed the summons. An appeal was filed against this decision of Farwell J. and the decision of the Appeal Court is reported in *Taff Vale Railway v. Amalgamated Society of Railway Servants*[2] The Appeal Court held that a trade union,

[1][1901] 1 Q.B. 170

[2][1901] A. C. 426

registered under the Trade Union Acts, 1871 and 1876, could not be sued
under its registered name and reversed the decision of Farwell J, A. L. Smith M. R. observed (pp. 173, 175, 176):

> There can, in my judgment, be no doubt that at common law the defendants could not be sued in the name in which they are sued in this action, any more than a tradesman could

> sue a defendant in the name of a West-end club for goods supplied by him to that club, for the simple reason that the name of a club is, not the name of a corporation nor of an individual nor of a partnership, which, apart from statute, are the only entities known to the law as being capable of being sued. In order, therefore, that this action can be maintained against the defendants in the name of 'The Amalgamated 'Society of Railway Servants' there must be some statute enabling this to be done either by creating the society a corporation, or enacting that it may be sued in its registered name; and this, as the learned judge states-and in this I also agree-depends upon the true construction of the Trade Union Acts of 1871 and 1876.
>
> When once one gets an entity not known to the law, and therefore incapable of being sued, in our judgment, to enable such an entity to be sued, an enactment must be found either express or implied enabling this to be done, and it is incorrect to say that such an entity can be sued unless there be found an express enactment to the contrary. Where in the Trade Union Acts is to be found any enactment, express or implied, that a trade union is to be sued in its registered name ? Express there is none, and it is clear that a trade union is not made a corporation, as the Acts above referred to show is constantly the case with other societies [E.G. Companies Act, 1862, Section 6, Building Society Act, 1874, Section 9, Industrial and Provident Societies Act, 1893, Section 21.] That the Legislature has omitted to enact this in the Trade Union Acts of 1871 and 1876 is clear; ... Moreover, by Section 9 of the Act of 1871 it is expressly enacted that the trustees of a trade union registered under the Act, or any other officer of the union who may be authorized to do so by the rules, may bring or defend any action in any Court of law touching the property of the trade union-a most remarkable section if, as is .argued for the plaintiffs and held by the learned judge, the purview of the Act is that a trade union can be sued in its registered name. If this were so, what is the good of this section expressly enabling the trustees or other officer of the union to sue or be sued in respect of property ? We can find nothing in the Acts wherefrom the inference is to be drawn that the Legislature has enacted that a trade union can be sued in its registered name; but, by reason of the language of the Acts and what is omitted therefrom, if necessary, we should find the exact contrary.

An appeal was filed to the House of Lords from this decision of the Appeal Court and the decision of the House of Lords is reported in *Taff Vale Railway v. Amalgamated Society of Railway Servants*[3] The House of Lords reversed the decision of the Appeal Court and restored the decision of Farwell J. and held that a trade union, registered under the Trade Union Acts, 1871 and 1876, can be sued in its registered name. I need not refer at length to the speeches of the noble Law Lords there. It is necessary only to refer to the speeches of Lord Brampton and Lord Lindley in this behalf. Lord Brampton observed (p. 442):

[3][1901] A. C. 426

> I think that a legal entity was created under the Trade Union Act, 187.1, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade

union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by Section 9 of the same Act, who hold real and personal property of the society.

Lord Lindley observed (pp. 444, 445):

The Act does not in express terms say what use is to be made of the name under which the trade union is registered and by which it is known. But a trade union which is registered under the Act must have a name,.. It may acquire property, but, not being incorporated, recourse is had to the old well-known machinery of trustees for acquiring and holding such property, and for suing and being sued in respect of it (Sections 7, 8, 9). The property so held is, however, the property of the union: the union is the beneficial owner... The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceedings than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least .permissive...

.. .to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees.

Even though in the speech of Lord Brampton there are observations which would go to show that the provision, which we have enacted in Section 6 of the Societies Registration Act as regards suits by and against societies, is capable of being construed as the only mode in which suits by or against the societies could be brought, the observations of Lord Lindley which I have quoted above go to show that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes and that even though the use of the name is not compulsory it is at teast permissive, I prefer to be guided by the observations of Lord Lindley which I have referred to above and hold that in spite of the provisions contained in Sections 6, 7 and 8 of the Societies Registration Act as regards suits by and against societies, non-abatement of suits and enforcement of judgment against the societies, which I have already referred to above, it is competent to the society to sue or be sued in the name of the society, to be sued in its registered name, the society on its registration under the Societies Registration Act having come into existence as a legal entity apart

from the members constituting the same. If it were necessary to do so, I would adopt the terminology which has been adopted in this connection by Cozens-Hardy M.R. in *Osborne v. Amalgamated Society of Railway Servants*[4] where he describes a registered trade union as a " species of quasi corporation." (See also note (q) in Halsbury's Laws of England, Hailsham Edition, Vol. VIII, p. 2, " Registered Trade Union is not a Corporation but a legal entity governed by special rules," and also Halsbury's Laws of England, Hailsham Edition, Vol. XXXII, p, 486, para. 776, " A registered trade union is not a corporation nor an individual nor a partnership; but it becomes by registration a legal entity distinct from an unregistered trade union. Its registered name is to be used and applied in all legal proceedings, unless there is any provision inconsistent with such use.")

10. I am of opinion that the provisions contained in Sections 6, 7 and 8 of the Societies Registration Act are not inconsistent with; the user of the registered name of the society in connection with legal proceedings. As Lord Lindley observed in Taff Vale Railway Company's case, " I do not say that the use of the name is compulsory but it is at least permissive."

11. If this is the true legal position of a society registered under the Societies Registration Act, the objection of Mr. R. S. Billimoria that the plaintiffs and the defendants are one and the same and that the suit as framed is not maintainable by reason of the society being the plaintiffs as well as the defendants disappears. The plaintiffs are suing on behalf of themselves and all the members of the society. The first defendant is the president of the society and represents the society. As I have already observed the society on its registration with the Registrar of Joint Stock Companies becomes a legal entity apart from its members; it would be therefore idle to contend that the society are the plaintiffs as well as the first defendant in this action. In my opinion, therefore, this objection of Mr. R. S. Billimoria fails.

12. The next question to consider is how far the plaintiffs are entitled to maintain this suit without having obtained the sanction and consent of the society for the institution thereof. In this connection it must be noted that the plaintiffs are an admitted minority. The affairs of the society are conducted by the majority which for the purposes of this argument may even be assumed to be an overwhelming majority. The resolutions which are sought to be challenged have been passed by that majority in the general meetings of the society convened for the purpose of passing the same. The complaint of the plaintiffs, however, is that in the matter of the passing of the said resolutions the majority has been guilty of oppressing or overbearing the minority and that the acts of the majority complained of are ultra vires the society, are a fraud on the minority, or that in any event, there is an absolute necessity to waive the rule as to the supremacy of the majority in order that there may not be a denial of justice. It is contended on behalf of the plaintiffs that the principles of the company law which are enunciated in the well-known decisions of *Foss v. Harbottle*[5] and *Mozley v. Alston*[6] and the well recognized exceptions thereto should' be applied to this case and it should be held that the plaintiffs are entitled to institute this suit in the manner they have done and without obtaining the sanction and consent of the \

[4][1909] 1 Ch. 163 [6](1847) 1 Ph. 790
[5](1843) 2 Hare 461

society before instituting the same. I accept this contention of the plaintiffs. The society is neither

a corporation nor a limited company incorporated under the Indian Companies Act. It is a registered society of individuals which has acquired a legal status by reason of its registration with the Registrar of Joint Stock Companies under the provisions of the Societies Registration Act, Every member of a corporation or an incorporated company joins the same on the basis that prima facie the majority of its members is entitled to exercise its powers and control its operations generally. The same would be the position in the case of unincorporated associations of individuals whether the same be registered under the Societies Registration Act or not. The rule of the majority is the normal basis of these associations. The members of these associations do join these associations whether incorporated or unincorporated, whether registered or unregistered, knowing full well that the affairs of these associations would be conducted normally by the vote of the majority of the members thereof. In the absence of any specific rules and regulations governing the conduct of these affairs, this would be the normal presumption, and no member who joins any association would be heard to contend to the contrary. If unanimity of opinion were needed for the passing of any proposition, it would have to be expressly provided for. In the absence of any such provision the normal state of affairs would be that the opinion of the majority would be binding on the whole association. In the present case, however, the matter does not rest merely with this presumption which I have enunciated above. It has been expressly enacted in the rules and regulations of this society, certified copy of which has been filed with the Registrar of Joint Stock Companies, that " All matters in the meetings and subcommittees of the Samaj will be decided according to the majority of votes of the members present at the meeting.'" This being the position, I have no doubt that the principles applicable to cases of corporations and companies incorporated under the Indian Companies Act would govern the relations between the members of this society inter se and the principles enunciated in the well-known cases of *Foss v. Harbottle* and *Modey v. Alston* and the exceptions thereto would be applicable to the facts of this case. I am fortified in this conclusion of mine by the observations of Kania J. in *Krishnam v. Sundaram*[7] where the learned Judge held that (p. 565):

> The position of a society registered under the Societies Registration Act {XXI of 1860] is like that of a club or a joint stock company. ... In my opinion the [position of the members of this society is similar to that of shareholders of the company.

13. In that case the learned Judge applied the principles of the company law to the case of a society registered under the Societies Registration Act, the type of which I have before me. I am therefore of opinion that the principles governing the relations of members of joint stock companies, i.e. companies incorporated under the Indian Companies Act, are the principles which are applicable in the case of a society registered under the Societies Registration Act.

14. Applying those principles to the present case, it appears to me that the issues 1, 6 and 7 raised by Mr. R.S. Billimoria can be dealt with together. Whether the acts which are complained of are matters of internal management of the society or constitute acts which fall within the well recognized exceptions to the rules enunciated in the cases of *Foss v.*

[7](1940) 43 Bom. L.R. 562

Harbottte and *Mozley v. Alston* would be the determinative factor in deciding not only issues Nos. 6 and 7 but also issue No. 1 raised by Mr. R. S. Billimoria. According to my reading of the authorities if the Court came to the conclusion that the acts complained of fall within the latter category, the plaintiffs would under those circumstances be entitled to institute a suit on behalf of

themselves and all other members of the society except the defendants making the society and the defendants party defendants to this suit and it would not be necessary to obtain the previous sanction and consent of the society for the institution thereof, simply because the control of the affairs of the society is in the hands of the majority whose acts are complained of and it would be, futile to attempt to obtain the sanction and consent of the society for the institution of the suit, it being an absolute certainty that no such sanction and consent would ever be available to the plaintiffs.

15. Two principles emerge clearly from the authorities and they are (1) that the Court will not interfere with the internal management of the companies acting within their powers and in fact has no jurisdiction to do so, and (2) that in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company the action should prima facie be brought by the company itself. The leading cases on this subject are *Foss v. Hmbottle*, *Mozley v. Alston* and *Lord v. The Governor and Company of Copper Mines*[8] In *Foss v. Harbottle* two members of an incorporated company filed a bill against the directors and others praying that the defendants might be compelled to make good the loss sustained by the company by reason of the fraudulent acts of such directors. The defendants demurred. The Court held that upon the facts stated the continued existence of the Board of Directors de facto must be intended, that the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing Board was not excluded by the allegations of the bill, that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of, that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation and that the demurrers must be allowed. The Court was further of opinion that the acts of the directors complained of were capable of confirmation by the majority of the members of the company and declined to interfere. In the course of his judgment Sir James Wigram V.C. observed (pp. 491, 494):

> The first objection takeii in the argument for the defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on behalf of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights inter se, because in order to make their common objects attainable the crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporator's in their private characters, and asking in such character the protection of those rights to which in their corporate

[8](1848) 2 Ph. 740

> character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt* [9]See also *Adley v. The Whitstabk Company*[10] per Lord Eldon and other cases, would apply, and the claims of justice would be found

> superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.But, on the other hand, it must not be without reasons of a very cogent character that established rules of law and practice are to be departed from, sales, which, though in a sense technical, are founded on general principles of justice and convenience, and the question is, whether a case is stated in this bill, entitling the plaintiffs, to sue in their private character...but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes in the argument, that the powers of the body of the proprietors are still in existence, and may be law fully-exercised for a purpose like; that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions.

16. In *Mosley v. Alston* two members of an incorporated railway company filed a bill in their individual characters against the corporation and twelve other members, who were alleged to have usurped the office of directors and to be exercising the functions thereof, as a majority of the governing body, injuriously to the company's interests,;and praying that the twelve might be restricted from acting as directors, and be ordered to deliver the company's common seal, property and books to six other persons, who were alleged to be the only duly constituted directors. Lord Cottenham L. C, allowed a demurrer to the bill. In the first place, he pointed out that if there had been no other objection to the bill, the fact of its having been brought by shareholders, not on behalf of themselves and others but in their individual characters only, was fatal. Then he said that a more important objection was that the injury alleged was not to the plaintiffs personally but to the corporation, without any reason being assigned by the bill why the corporation did not put itself in motion to seek a remedy. After observing that *Foss v. Harbotth* was identical in principle with the case before him, Lord Cottenham said that the Vice Chancellor's observations in that case applied with greater force to the present case because there (p. 800):

> the bill expressly alleges that a large majority of the shareholders are of the same opinion with them (the plaintiffs); and, if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate character to remedy the evil complained of.

[9](1840) 4 Myl. & Cr. 619, 635

[10](1809-10) 17 Ves, 320

Finally he relied on the ground that it was without precedent for the Court to interfere:

> solely on the ground of the supposed invalidity of the title of persons claiming to be corporate officers.

17. In *Lord v. Governor* and Company of Copper Mines a demurrer of a bill by one of the shareholders of an incorporated mining company on behalf of himself and all other shareholders except the members of the governing body who were the defendants, impeaching several transactions of that body which it appeared had been sanctioned by majorities at general meetings of the shareholders and amongst which was a project to vest all the property of the company in trustees for the purpose of liquidating its affairs was allowed notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants and an allegation that by the constitution of the company no one but the governing body could convene a general meeting the specific acts complained of not being clearly such as in the opinion of the Court it was incompetent to a majority of shareholders to sanction. Lord Cottenham L. C. observed (p. 751):

> I find all the complaints made by the individual shareholders to consist of acts within the powers of the corporation, and all sanctioned by general meetings of the shareholders and no allegation raising any case for the interference of a Court of Equity with the exercise of such rights.
>
> A Court of Equity could not assume jurisdiction in such a case, without opening its doors to all parties interested in corporations or joint stock companies or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere in the conduct of the majority. This cannot be done, and the attempt to introduce such a remedy ought to be checked for the benefit of the community.
>
> In *Foss v. Harbottle* Sir fames Wigram acted on this principle, because the acts were capable of confirmation; and in *Mozley v. Alston* I expressed my strong approbation of Sir fames Wigram's decision in that case.

18. These authorities lay down the general principles which I have above enunciated. These principles have been uniformly followed by the Courts in England and in India,

19. The principle that the Court will not interfere with the internal management of the companies acting within their rights and in fact has no jurisdiction to do so is based on the supremacy of the majority. As I have already observed in all corporations and companies incorporated under the Indian Companies Act the normal position is that the internal affairs of the corporations or the companies are managed by a vote of the majority; and members join the corporations or the companies with full knowledge that the majority of the members are entitled to exercise the powers and control the operations generally. This power which has been conferred on the majority has, however, got to be exercised bona fide and the Court interferes only to prevent unfairness or oppression. But subject to that each member of the corporation or company may vote with regard to his individual interests though these interests may be peculiar to himself and not shared by the company, This is the limitation on the power conferred on the majority which has been
laid down in the case of *Good fellow v. Nelson Line (Liverpool) Limited*[11] which has been approved by the Judicial Committee of the Privy Council in *British America Nickel Corporation*

v. M. J. O'Brien[12] In the latter case Viscount Haldane observed (pp. 371, 373):

> There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted.
> ... But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his, capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

20. In this connection, I may as well refer to the case of *Brown v. British Abraive Wheel Co*[13]. where Astbury J. discussed what constitutes the benefit of the company as a whole. In that case the company was in great need of further capital. The majority representing 98% of the shares were willing to provide this capital if they could buy up the two per cent, minority. Having failed to effect this by agreement, they proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms therein mentioned, but were willing to adopt any other mode of ascertaining the value that the Court thought fit, It was held in the circumstances that the proposed article was not just or equitable or for the benefit of the company as a whole, but was simply for the benefit of the majority. It was not therefore an article that the majority could force on the minority under Section 13 of the Companies (Consolidation) Act, 1908. Astbury J. observed (pp. 295, 296):

> In *Allen v. Gold Reefs of West Ajrica, Limited*[14] the majority of the Court of Appeal sanctioned, as against the only holder of fully paid shares, a new article imposing a lien on Sully paid shares. Lindley M.R. said: 'The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of Section 50 [now Section 13] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded,'

[11][1912] 2 Ch. 324
[12][1927] A. C. 369
[13][1919] 1 Ch. 290
[14][1900] 1 Ch. 656

The question therefore is whether the enforcement of the proposed alteration on the

minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to purchase the shares of a minority by agreement, can take power to do so compulsorily.

> ... in default of further capital the company might have to go into liquidation. The plaintiff is willing to risk that,... It is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.

21. This discussion as to the power of the majority to bind the minority contains within itself the limitations on the power of the majority. Subject to those limitations, however, the powers of the majority are supreme in matters of internal management of the company. As was observed by James L. J. in *MacDougall v. Gardiner*[15]

> I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston* and *Lord v. Copper Miners' Company* and *Foss v. Harbottle* should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent-unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it.

22. Hellish L. J. also observed in the same case (p. 24):

> I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company or in the name of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this:-Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the

[15](1875) 1 Ch. D. 13

> name of the company does certainly greatly tend to stop litigation.In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes, Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed ? If it is a matter of that nature, it only comes to this, that, the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this Court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself.

23. This supremacy of the majority is therefore subject to the following exceptions which are laid down in the authorities, viz. (1) where the act complained of is ultra vires the company; (2) where the act complained of is a fraud on the minority; and (3) where there is absolute necessity to waive the rule in order that there may be no denial of justice, (Palmer's Company Precedents, Vol. I, p, 1246). As was observed by Lord Davey in *Burland v. Earle*[16]

> It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle*, and *Mozley v. Alston* and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of

being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts

[16][1902] A. C. 83. 3 (p. 93)

complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Alenier v. Hooper's Telegraph Works*[17] It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L. J. in *MacDougall v. Gardiner* at p. 25.

There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote. This is shewn by the case before this *Board of the North-West Transportation Company v. Beatty*[18] In that case the resolution of a general meeting to purchase, at vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained.

24. This position is further emphasised by another decision of their Lordships of the Privy Council reported in *Dominion Cotton Mills Company, Limited v. Amyot*[19] In that case Lord Macnaghten observed (p. 551):

> The principles applicable to cases where a dissentiate minority of shareholders in a company seek redress against the action of the majority of their associates are well settled. ... In order to succeed it is incumbent on the minority either to show that the action of the majority is ultra vires or to prove that the majority have abused their powers and are depriving the minority of their rights. It would be pedantry to go through the line of decisions by which those principles have been established. But there is a passage in a recent judgment of this Board in the case of *Burland v. Ettrle* which has the high authority of Lord Davey, so apposite to the circumstances of the present case that it may be useful to cite it at length.
>
> and Lord MacNaghten cites the passage from the speech of Lord Davey which I have herein above referred to. These are really the principles which govern the actions which may be brought by a dissentient minority in respect of the acts of the majority which normally are the governing factors in the internal management of the companies.

25. The second principle that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself, does not require much elaboration. It is a salutary rule the reason of which

is to be found in the observations of Sir James Wigram V.C. in *Foss v. Harbottle* and the observations of Mellish L.J. in *Mac Dougall v. Gardiner*. This is, however, a general rule. As was observed by Sir George Jessel M. R. in *Russell v. Wakefield Waterworks Company*[20]

[17](1874) L.R. 9 Ch. App. 350
[18](1887) 12 App. Cas. 589
[19][1912] A.C. 546.
[20](1875) L.R. 20 Cas. 474 (pp. 479, 480, 482)

> But the general rule being that the cestui que trust must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule. ... when you want to find the rule you must look to *Foss v. Harbottle*, where you will find the general rule is that which I have stated. But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice.

After quoting the remarks of Sir James Wigram1 V. C. in *Foss v. Harbottle* Sir George Jessel M. R. proceeded to observe (p. 480):

> That I take to be the correct law on the subject. It remains to consider what are those) exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a< bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in the case of *Simpson v. Westminster Palace Hotel Company*[21]...
>
> ... But that is not the only case. Any other case in which the claims of justice require it is within the exception.
>
> Another instance occurred in the case of *Atwool v. Merry weather*[22] in which the corporation was controlled by the evildoer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that the majority of the corporator's should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporator's who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shown either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it

> does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned Judge who decided the case of *Pass v. Harbottle*.

26. These observations of Sir George Jessel M. R. go to show that the general principle as to the action having to be brought prima facie by the company itself in order to redress a

[21](1860) 8 H.L.C. 712

[22](1867) L.R. 5 Cas. 464

wrong done to the company or to recover moneys or damages alleged to be due to the company, is subject to exceptions, which are well recognized. The position is thus summarized in Halsbury's Laws of England, Hailsham Edition, Vol. V, p. 408, para 675:

> To redress a wrong done to the company or to recover money or damages due to it the action must prima jade be brought by the company itself. Where, however, the persons against whom relief is sought hold and control the majority of the shares, and will not permit an action to be brought in the company's name, shareholders complaining may bring an, action in their own names ,and on behalf of the others, and they may do so also where the effect of preventing them so suing would be to enable a company by an ordinary resolution to ratify an improperly passed special, resolution. In such an action the plaintiffs have no larger right to relief than the company would have if plaintiff; they cannot complain of acts which are valid if done with the; approval of the majority of shareholders, or are capable of being confirmed by the majority, and can only maintain their action when the acts complained of are of a fraudulent character or are ultra vires of the company, me irregularity or informality which can be remedied by the majority being insufficient.

The reason for this exception is very forcibly brought out in the observations of Sir W. M. James L. J. in *Memer v. Hooper's Telegraph Works*[23]

> It is said, however, that this is not the right form of suit, because, according to the principles laid down in *Foss v. Harbottle*, and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper Plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in *Atwool v. Menyweather (1867) L.R. 5* a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

and also in the observations of Lord Davey in *Airland v. Earle*[24] above quoted. I may also refer to the observations of Lindley M.R. in *Alexander v. Automatic Telephone Company*[25]

> It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the company consists in depriving it of the use of the money

> which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to Foss v, Harbottle and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders^ Under these circumstances an action by some shareholders on behalf of themselves and the others against the defendants is in accordance with the authorities, and is

[23](1874) L.R. 9 (p. 353)
[24][1902] A.C. 83 (p. 93)
[25][1900] 2 Ch. 56

> unobjectionable in form: see *Menier v. Hooper's Telegraph Works*. An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present.

As a matter of fact where the majority is overbearing the minority it was held in *Mason v. Harris*[26] that it was not necessary that a meeting of shareholders should first be called before the bill could be filed by one shareholder on behalf of the others against the company. Jessel M. R. observed there (p. 107):

> As a general rule the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception, to the rule requiring the company to be the Plaintiff is, that where fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of a majority to defraud the minority with impunity.
>
> These are thus the well-recognized exceptions to the second principle, viz. that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself.

27. I shall now turn to the facts of the present case, having regard to the principles .enunciated above. The resolutions dated October 8, 1944, and January 21, 1945, which are complained of by the plaintiffs have been challenged inter alia on the ground that the same have been passed in fraud of the rights of the minority and against the interests of the said society. Even though when arguing issue No. 4(0) at the commencement Mr. M. V. Desai gave me to understand that he was not relying upon fraud as such in support of his contentions as regards the said resolutions, it became .abundantly clear whilst arguments proceeded, that the statement which he made to me on the earlier occasion was due to some misapprehension. He made it clear that he was relying upon fraud alleged to have been perpetrated by the majority of the members of the society upon the minority consisting of the plaintiffs and several others in the matter of the passing of the said resolutions and expressed his willingness to furnish particulars of the fraud alleged in paragraphs 4(ft), 4(c) and 16 of the plaint if the Court thought that the particulars of fraud contained in the plaint were insufficient. I shall, therefore, deal with this part of the case on the basis that the

plaint contains averments of fraud against the majority of the members of the said society. If the majority of the members of the society were guilty of any act which was ultra vires the company or which was in fraud of the minority as has been alleged, it would not constitute merely an infringement of the rights of the minority but would within the meaning of the authorities I have discussed above be a wrong perpetrated by them on the society itself. In the exercise of their power the majority have got to look to the benefit of the society as a whole and not merely to the benefit of the individual members thereof who constitute the majority. The resolutions as passed must be for the benefit of not only the majority of the members who support the same but also the minority who are a dissentient minority and who obviously would be entitled to

[26](1879) 11 Ch. D. 97

demonstrate before the Court that the said resolutions are in fraud of their rights. It would therefore be not merely a wrong perpetrated on the minority but the society as a whole which is an aggregate of members consisting of the majority as well as the minority. That being the position, the society would "be the only person entitled to institute this suit. In so far, however, as the majority of the members of the society are in charge of the affairs of the society, and are also in a position to outvote the minority in any meeting of the society which may be called for the purpose, it would be impossible for the society to pass a resolution sanctioning the institution of this suit or the further continuance thereof, and it would be futile to expect the plaintiffs who are an admitted minority to obtain the sanction or consent of the society to institute this suit even though as I have already observed it is a suit for redressing a wrong done to the society. Under these circumstances, I am of opinion that the case as it stands at present is covered within the well-recognized exceptions to the rule in *Foss v. Harbottle* and *Mozley v. Alston* and the plaintiffs are entitled to maintain this suit in the form which they have done, viz. on behalf of themselves and all other members of the society.

28. I may observe that for the purposes of this decision of mine I am not discussing any further the nature of the fraud which is alleged to have been perpetrated by the majority on the plaintiffs and the other members who constitute the minority of the members of the society. The fraud alleged is not particularized with such detail as it should have been done and it is necessary that the plaintiffs should furnish to the defendants the particulars of the fraud alleged by them in paras. 4(6), 4(c) and 16 of the plaint. I may nonetheless refer to the observations of Marten J. in *Vadilal v. Maneklal*[27]

> ...where fraud is alleged, and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in *Foss v. Hmbottle*, it will, I think,. in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact bind the minority. This is because until the facts are ascertained with some distinctness, it is difficult to say what is the precise action of the majority, and whether it only amounts on the one hand to those matters of internal management where the majority of the shareholders can rightly impose their will upon the minority, or whether on the other hand it is' one of those cases in which the assets of the company are being improperly distributed by an attempt to pay them into the pockets of the majority of shareholders of the company or their friends at the expense of the minority.

29. The only thing which remains to be considered as regards the frame of the suit is whether the plaintiffs would be entitled to bring this suit on behalf of themselves arid all other members of the society when defendants Nos. 2, 3 and 4, even though they are sued in their capacity as members of the managing committee of the society are also members of the society. Defendants Nos. 2, 3 and 4 are sued in a representative capacity as members of the managing committee of the society which consists of 33 members. These 33 members therefore are within the category of defendants and by reason of the description of the plaintiffs in the title of the plaint would also-be included within the category of the plaintiffs. It is, therefore, contended that the same persons cannot be plaintiffs as well as defendants even though they might be impleaded in the suit in

[27](1924) 27 Bom. L.R. 48 (p. 52)

different capacities. I am of opinion that the objection is good to the extent that it goes. It is a well-recognised elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and a defendant, and this principle has been followed by our Court in *Rustomji v. Sheth Purshotamdas*[28] *Dadabhoy Framjee v. Cowasji Dorabji*[29] *Ratanbai v. Narayandas*[30] and *Chandulal v. Keshavlal*[31] This rule is, however, subject to exceptions in equity in cases where it would be possible to ascertain the rights and liabilities of the parties in the event of all the parties being present before the Court either in the group of plaintiffs or defendants. Procedure as has been well said is but the hand-maiden of justice and no rules of procedure as such can be allowed to thwart the ends of justice. As a matter of fact the Courts in Chancery allowed various exceptions to this mere rule of procedure. One finds in Mitford (Lord Redesdale) on The Pleadings in Chancery,: 5th edition (1847), at p. 414, instances where suits were allowed to be filed even: though the defendants were also included in the category of the plaintiffs, as for example:

> Where a suit is instituted for the payment of a sum of money, in the nature of a debt,, due to the whole body of the shareholders of a company, the suit may be instituted by one of the shareholders on behalf of himself and all the other shareholders. And in such a case, although the payment may be claimed from the directors, who are made defendants for that purpose, it is' correct not to except them out of the number of shareholders on whose behalf the bill is expressed to be filed; because they are not sued as shareholder but as directors, and, in their character of shareholders, they would be entitled to participate in the fruits of the suit. *Mocatto v. Ingilby*[32] And in like manner where two or more shareholders in a numerous joint-stock company sue on behalf of themselves and all other shareholders, and one of the shareholders has acted as the agent of the company, the plaintiffs may sue on his behalf in his character as shareholder, although they may make him a defendant in his character of agent. *Taylor v. Salmon*[33]

30. The above mentioned passage goes to show that the Courts in Chancery did not allow the ends of justice to be thwarted by being trammeled by the rules of procedure like this in proper cases. The 'Courts in India are not merely Courts of Law but are also Courts of Equity. Order X'XX, Rule 9, of the Civil Procedure Code has enacted an equitable exception to the elementary rule of procedure which I have stated above, in that it allows suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common to

be filed. In proper cases the Courts would, in spite of that elementary rule of procedure, have the power to deal out justice between the parties even disregarding the elementary rule of procedure which requires that the same individual even in different capacities cannot be both a plaintiff and a defendant. If it were necessary I would, following the passage from Mitford which I have quoted above, hold that defendants Nos. 2, 3 and 4 in their representative capacity as members of the managing committee of the society are made defendants in a capacity different from that of the members of the society who are within the description of, the plaintiffs, and there is no defect in the frame of the suit by reason of their having been included in the category

[28] A.I.R (1901) Bom. 606 : 3 Bom.L.R. 227
[29] I.L.R (1922) Bom. 349: 24 Bom. L.R. 1111
[30] I.L.R (1927) Bom. 771: 29 Bom. L.R. 900
[31](1935) 38 Bom. L.R. 486
[32](1836) 5 L.J. Ch. 145
[33](1838) 4 Myl. & Cr. 134

of the plaintiffs as members of the society claiming relief against the defendants in their capacity as the members of the managing committee thereof. The defect such as this in the frame of the suit by reason of, the 33 members of the managing committee of the society being included in the category of the plaintiffs as members of the society can however be remedied by allowing to the plaintiffs an amendment by describing the plaintiffs in the title of the plaint as members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the Arya Samaj, Bombay, being a society registered under the Societies Registration Act 'XXI of 1860, except the defendants. In that event whatever objection there is to the frame of the suit based on the same parties being plaintiffs as well as defendants to the suit would disappear.

31. There now remain to be considered the two issues which have been raised by Mr. M, P. Amin on behalf of the defendants Nos. 2, 3 and 4, viz. whether the plaint discloses any cause of action against them and whether they are necessary parties to the suit. In this connection it may be observed that in para. 1 of the plaint they have been described as " some of the members of the managing committee of the said society," and are stated there to have been sued on behalf of themselves and all members of the managing committee of the society. In para. 16 of the plaint it is alleged that the managing committee are about to complete the sale of the Shenwewadi property and purchase of the Bangadwadi property, and in para. 17 of the plaint the plaintiffs have submitted that defendants Nos. 2 to 4 should be restrained from completing the said sale of Shenwewadi property and purchase of Bangadwadi property and from acting on the said resolution dated October 8, 1944, and carrying the same into effect. The prayer (c) of the plaint is based on these allegations against defendants Nos. 2, 3 and 4. When one turns to the written statement of defendants Nos. 2 to 4, they merely aver that the plaint discloses no cause of action against them and that they are unnecessarily made parties to the suit. There is no denial of the allegations which have been made in para. 16 of the plaint that the managing committee is about to complete the sale of the Shenwewadi property and purchase of the Bangadwadi property. In the absence of a specific denial in that behalf, I would be entitled to assume that the allegations in that behalf are admitted by defendants Nos. 2, 3 and 4. Mr. M. P. Amin, however, pointed out para. 2 of the written statement of the defendants Nos. 2 to 4 where they joined in all and singular the defences raised by the 1st defendant in his written statement as their own. When one turns to the written statement of the 1st defendant the only traverse which he has made of the allegations in para. 16 of the plaint is contained in the last sentence of para. 21 thereof which runs:

> This defendant admits that the society is about to complete the sale of Shenwewadi

property and the purchase of the property at Bangadwadi and the same will be completed in a few days.

This statement even though it has been adopted in its entirety by defendants Nos. 2, 3 and 4 in their written statement, does not, in my opinion, amount to a traverse of the allegations contained in para. 16 of the plaint that the managing committee are about to complete the sale of the Shenwewadi property and the purchase of the Bangadwadi property. Under these circumstances, I do not see how defendants Nos. 2, 3 and 4 can contend that the plaint discloses no cause of action against them. If it cannot be contended that the plaint does not disclose any cause of action against them, it can certainly not be contended that they are not necessary parties to the suit. On this preliminary objection therefore I am not prepared to hold that the plaint discloses no cause of action against defendants Nos. 2, 3 and 4 or that they are not necessary parties to the suit.

32. In the result I answer the issues which have been argued before me in the first instance as under: Issues raised by Mr. ,R, S. Billimoria.

(1) In the affirmative.

(2) The plaintiffs to be at liberty to amend the plaint by describing themselves as members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the Arya Samaj, Bombay, being a society registered under the Societies Registration Act XXI of 1860, except the defendants.

The suit as framed would then be maintainable.

(6) In the negative.

(7) In the negative.

Issues raised by Mr. M. P. Amin.

(1) In the affirmative.

(2) In the affirmative.

As regards issue No. 4 (a) it is clear that the defendants are entitled to the particulars of the fraud which has been pleaded by the plaintiffs, and I cannot allow the suit to proceed in the absence of such particulars furnished by the plaintiffs. Mr. M. V, Desai strenuously urged that the various allegations which had been made by the ^ plaintiffs in the plaint were sufficient to constitute fraud and that there were sufficient particulars of fraud available in the plaint itself. A careful perusal of the relevant paragraphs of the plaint, however, reveals that there are no sufficient particulars of fraud which could be culled out from the various allegations contained therein and that on the very statement of the case made by Mr. M. V. Desai in his opening there were various facts which were relied upon by him as constituting fraud which did not find their place in the various paragraphs of the plaint relied upon by him for the purpose. I have therefore come to the conclusion that the plaintiffs are bound to furnish to the defendants the particulars of the fraud which they want to rely upon in support of their contentions set out in the plaint. I accordingly order that the plaintiffs do make an affidavit giving particulars of the fraud alleged by them in paras. 4(b), 4(c) arid 16 of the plaint and furnish a copy thereof to the defendants' attorneys within fourteen days. The defendants will be at liberty to plead to the same and file a

supplemental written statement or written statements as they might be advised within fourteen days of such affidavit of particulars made by the plaintiffs.

33. The cost of the issues disposed of by me above and the cost of the supplemental written statement or written statements will be reserved.

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