ORISSA HIGH COURT

State of Orissa

Vs

Indian Chemical Products Ltd

Company Act Case No. 2 of 1955

(P.V.B. Rao, J.)

22.11.1956

ORDER

P.V.B. Rao, J.

1. This is an application filed by the State of Orissa through the Secretary to the Government of Orissa, Finance Department under Section 38 of the Indian Companies Act (Act 7 of 1913) praying to order that the register of members of the Company (The Indian Chemical Products Limited) opposite party No. 1 be rectified by inserting therein the name of the petitioner as the holder of 7500 fully paid up shares in the company being shares Nos. 1 to 7500, Scrip No. 12, in the place of opposite party No. 2 the Maharaja of Mayurbhanj.

2. According to the petitioner's allegations, the Indian Chemical Products Ltd., which will hereafter be referred to as the Company, was incorporated on 29-11-47 as a company Limited by shares with its registered office at Baripada, District Mayurbhanj now in Orissa. The capital of the Company is Rs. 25,00,000/- divided into 25,000 shares of Rs. 100/- each and according to the balance sheet of the Company filed by the Registrar of Joint Stock Companies, Orissa, the subscribed capital of the Company is Rs. 7,75,000/- being the fully paid up capital of 7750 shares. Out of these 7750 shares opposite party No. 2, the Maharaja of Mayurbhanj a, is the registered holder of 7500 fully paid up shares of the value of Rs. 7,50,000/-. The objects of the Company, according to the Memorandum of Association Annexure A (The Annexures to the petition filed by the petitioner are marked A, B, C, etc. and the annexures filed along with the counter-affidavit of opposite Party No. 1 are also marked A, B, C, etc. In this judgment the Annexures of the petitioner will be referred to as A. B, C, etc. and the Annexures of opposite party No. 1 will be referred to as Annexures A/1, B/1, O/1 etc.) are to carry on the business of Chemists, druggists, distillers, drysalters, oil and color men, importers and manufacturers of and dealers in chemicals forest byproducts, medical, forest products, pharmaceutical, medicinal, industrial, and other preparations and articles etc.; to buy, sell, manufacture, refine, prepare, manipulate, import, export and deal in all substances, apparatus and things capable of being used in any such business as aforesaid; and to prepare, manufacture, finish and deal in any manner convenient in iron, steel and other metallic and wooden articles.

3. On the 17th day of October 1948, an agreement was entered into between the Government of the Dominion of India and the Maharaja of Mayurbhanj. Extracts from the said agreement are in Annexure B filed along with the petition. Under Article 1 of the said agreement the Maharaja of Mayurbhanj ceded to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State and agreed to transfer the administration of the State to the Dominion Government on the 9-11-1948 and as from the said day the Dominion Government will be competent to exercise the said powers, authority and jurisdiction in such manner and through such agency as it may think fit. Under Article 4 the Maharaja shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of this agreement and the Maharaja will furnish to the Dominion Government before the 17-11-1948, an inventory of all the immovable property securities and cash balance held by him as such private property. In pursuance of the provisions contained in the said agreement opposite party No. 2 the Maharaja of Mayurbhanj made a declaration in respect of the properties which he claimed to be his personal properties, a copy of which is Annexure C. The said declaration does not include the 7,500 shares which he possessed in the Company. According to the White Paper on Indian States issued by the Government of India, the State of Mayurbhanj was taken over by the Government of India on the 9-11-1948 and a Chief Commissioner was appointed to administer it. On the 1-1-1949, the State was merged with the province of Orissa. By Notification No. 342 P dated the 7-11-1948, in exercise of the powers conferred by Sections 3 and 4 of the Extra Provincial Jurisdiction Act, 1947 (XLVII of 1947) and of all other powers enabling it in this behalf, the Central Government passed an order called "The Mayurbhanj (Administration) Order, 1948", whereby it enacted that there shall be a chief Commissioner appointed by the Central Government at the head of the administration of Mayurbhanj and by this order the entire administration was taken over by the Central Government from the 9-11-1948. By Notification No. 388 P dated the 31-12-1948 the Government of India notified, -

> "Whereas the Central Government has full and exclusive extra-provincial jurisdiction for and in relation to the governance of the Mayurbhanj State;

Now, therefore, in exercise of the powers conferred by sub-section (2) of Section 3 of the Extra Provincial Jurisdiction Act, 1947 (XLVII of 1947), and of all other powers enabling it in this behalf, the Central Government is pleased to direct that the Mayurbhanj (Administration) Order, 1948, shall be cancelled with effect from the 1-1-1949 and to delegate to the Provincial Government of Orissa with effect from the said date the extra provincial jurisdiction as aforesaid, including the power conferred by Section 4 of the said Act to make orders for the exercise of that jurisdiction.

> Provided that –
> (i) the exercise of the jurisdiction hereby delegated shall be subject to the control of the Central Government; and
> (ii) the delegation shall not preclude the Central Government from exercising the jurisdiction hereby delegated."

By Notification No. 2-A dated the 1-1-1949, in exercise of the powers conferred by Section 4 of the Extra-Provincial Jurisdiction Act, 1947 (XLVII of 1947) read with Notification No. 388-P/48 dated the 31-12-1948, the Government of Orissa in the Ministry of States the Government of Orissa made the order for the effective exercise of extra provincial jurisdiction in the Mayurbhanj State. This order is called "The Administration of Mayurbhanj State Order. 1949". On the 3rd/4th August, 1949, the Governor-General made a notification called "The States' Merger (Governors' Provinces) Order, 1949" enacting,

> "Whereas full and exclusive authority, jurisdiction and powers for and in relation to the governance of the Indian States specified in the Schedules annexed hereto are exerciable by the Dominion Government;

And whereas it is expedient to provide by order made under Section 290A of the Government of India Act. 1935 the administration of the said States together with the adjoining Governors' Provinces; And whereas the views of the Government of the said Provinces have been ascertained both with respect to the proposal to make such an Order and with respect to the provisions to be inserted therein; Now, therefore, in the exercise of the powers conferred by the said Section 290A, the Governor-General is pleased to make the following order" called the States' Merger (Governors' Provinces) Order. 1949 and it shall come into force on the first day of August 1949. Section 3 of the said Order is,

> "As from the appointed day, the States specified in each of the Schedules shall be administered in all respects as if they formed part of the Province specified in the heading of that Schedule...." And According to Schedule VI, 'Mayurbhanj' is one of the States merged in the Province of Orissa. From this date, Mayurbhanj was integrated into Orissa. Section 5 of the said order enacts,
> "(1) All property wherever situate which immediately before the appointed day, is vested in the Dominion Government for purposes of the governance of a merged State shall, as from that day, vest in the Government of the absorbing Province, unless the purposes for which the property is held immediately before that day are central purposes.
> (2) A certificate of the Dominion Government signed by a Secretary to that Government shall be conclusive as to whether the purposes for which any property is held immediately before the appointed day are central purposes".

4. The case of the petitioner is that by virtue of the above said provisions of law and the agreement, the said 7500 shares in the Company vested in the petitioner the State of Orissa with which the State of Mayurbhanj was integrated. According to Annexure D, the certificate given by the Government of India under Section 5, clause (2) of the States' Merger (Governors' Provinces) Order, 1949 and signed by the Secretary to the Government the said 7500 shares which had vested in the Government of the Dominion of India by virtue of the agreement for the merger of the State concluded with the Maharaja of Mayurbhanj for the purpose of governance of the merged State of Mayurbhanj, was not held for a central purpose.
5. The petitioner being, according to the provisions of law the absolute owner of the said 7500 ordinary shares in the Company is entitled to have his name registered as the share-holder of the Company in the register of members thereof. On the 1-12-1953, Messers Fox and Mandal, the

solicitors at Calcutta, wrote to the Company on behalf of the petitioner requesting that the petitioner's name he registered as the owner of the said 7500 shares. The Company replied by Annexure F on the 8-12-1953 stating that they were not prepared to divulge the reasons that weighed with their directors in refusing to register the transfer and that the said reasons would be given at the proper time and before the appropriate authority, and the solicitors wrote by Annexure G on 10-11-53 in reply stating that they never wanted the reasons to be stated.

6. The petitioner's case is that it is entitled to be registered as the holder of the shares in the register of the Company by virtue of this title and the deed of transfer on which much correspondence took place, which will be referred to hereafter was only a formal document sent to the Company in compliance with its request. The Company adopted dilatory methods ever since the petitioner requested the Company to register its name and on one pretext or other delayed in coming to a conclusion about the registration and finally communicated the refusal of the Board of Directors to register, so late as 16-5-1953, though the petitioner was asking for the registration since at the latest 16-3-1950. The petitioner being entitled to be registered in the register of the Company by virtue of operation of law, the provisions of the Company's Articles of Association relating to the transfer of shares do not apply. Even on the assumption that the petitioner had become the owner of the shares in question by virtue of a transfer, the petitioner submits that the decision of the Board of Directors refusing to register the petitioner's name in respect of the said shares is without sufficient cause, arbitrary, capricious, mala fide and illegal. The petitioner also submits that the affairs of the Company require investigation; that the Company spent most of the said sum of Rs. 7,50,000/-; that the Company did not produce any Chemicals or manufacture any Chemical products: that it has no factory; and that it has got merely an office at No. 6, old post office Street, Calcutta and also another registered office at Baripada. The petitioner, in consequence of the non-registration of its name in the register of the Company is not able to take any effective steps to protect its interest. Consequently, the petitioner filed this application under Section 38 of the Indian Companies Act.

7. Opposite party No. 2 appeared through Mr. S. Patnaik and did not oppose the application. Opposite party No. 1 the Company filed a counter affidavit with several Annexures refuting all the allegations of the petitioner. The Company averred that this Court has no jurisdiction; that the application by the petitioner is barred by time; and that the Company by virtue of its Articles of Association is entitled to refuse to recognize the transfer. It also alleged that the petitioner has not complied with all the formalities required in connection with the transfer inasmuch as the transfer deed is not properly stamped and left many blanks and that the petitioner is not entitled to be the owner of the shares by operation of law and even if it is did not submit the required proof to make out its ownership. It is also alleged that the reason for the refusal by the Board of Directors to register the petitioner as the holder of the shares is the non-execution of the agreement forming part of the Memorandum of Association, agreed to be executed as stated therein, either by the Maharaja of Mayurbhanj or by his successor-in-interest the State of Orissa.

8. The application was argued before me on the basis of the affidavits made by the respective parties and the Annexures filed along with the said affidavits. Both the learned counsel for opposite party No. 1 and the learned Advocate-General did not challenge the correctness of the Annexures filed. (After discussing the Annexures and other evidence connected with them, the judgment proceeded :)

9-11. From this correspondence, it is clear that the Company was trying to avoid the registration, on one ground or other being emboldened to do so by the apparently different stands taken by the Deputy Secretary to the petitioner and ultimately when a definite notice was given proposing legal action, a communication was sent that the Board of Directors refused to register and to the notice given by the solicitor, though the solicitor did not require the reasons for the refusal, the Company stated that it was not prepared to divulge the reasons for the refusal.

12. In the counter affidavit, a definite reason is averred for the refusal, in paragraph 22. sub-paragraph (h) to the effect that the act of the petitioner in seeking to put itself in the shoes of the Government of Mayurbhanj when benefits were to be enjoyed but repudiating the obligations of the said Government appeared to the Directors of the Company to fall so far below that excepted in dealings with persons in commercial and/or industrial circles that the Directors declined to register the transfer of the said shares in the name of the petitioner as they had every right to do.

13. Mr. R. Choudhury, the learned counsel for opposite party No. 1 in a very able argument objected to the petitioner's application and contended that the application should be dismissed and the petitioner be asked to seek relief by a suit. He contended that the scope of Section 38 of the Companies Act is limited and the points in issue in this application cannot be gone into in a summary way. He urged further that it cannot be definitely ascertained on the basis of the affidavits and the annexures filed in this case whether the petitioner has title to the share certificates. Next he contended that the petitioner has not succeeded in making out his claim even on the ground of transmission by operation of law. According to the learned counsel, the Annexures disclose that the petitioner was not in a position to say by the time of the refusal to register its name whether its claim was based upon a transfer inter vivos or a transmission by operation of law. In either view, his contention is that the petitioner has not complied with the requirements necessary to recognize the transfer and enter its name in the register of the Company. The learned counsel further contended that under Article 11 of the Articles of Association, the Board of Directors has full right to refuse to register the transfer of any share or shares to any person without showing any cause or sending any notice to the transferee or transferor, as this power of the Board of Directors under the Articles of Association cannot be questioned in this application. His further contention is that the Company refused to register the name as the Maharaja of Mayurbhanj and the State of Orissa failed to implement the agreement agreed to be entered into in the Memorandum of Association at the time of the incorporation of the Company, according to the terms of the said agreement which is a part of the Memorandum of Association.

14. Article 6 of the Memorandum of Association says.

> "A copy of agreement between this Company and the Government of H. H. Maharaja of Mayurbhanj proposed to be entered into is annexed hereto and. form part hereof."

The failure to sign the said agreement is a sufficient ground to refuse registration.

15. I take up the last contention with regard to the agreement advanced by the learned counsel in the first instance. The incorporation of the Company was on the basis that there would be an agreement between the Government of Mayurbhanj and the Company as in Annexure A/1. According to Annexure A/1 the Government shall grant and convey to the Company State lands

within the State of Mayurbhanj according to the requirements of the Company on such terms and conditions referred to therein. The Government shall give all reasonable facilities to the Company to secure all materials required for the construction of the Factory buildings etc., and shall not impose any import duty on machinery, plants, etc. The Company shall not export any raw material from the State to any place outside the State without the written permission of the Government. The Government shall grant reasonable protection to the industry by imposing such restrictions as may be feasible on exports of such raw materials etc. The Government will not permit similar industry to be run in the State for a period of 20 years. The Company shall keep and maintain proper books of accounts relating to the industry and such accounts shall be kept open for inspection by the Government or by their authorised officers. The Government shall purchase shares of the aggregate value of 30 per cent of the share capital and the shares of the aggregate value of 20 per cent shall be left open by the Company for the public of the Mayurbhanj State and if the Government within 20 years from the execution of the agreement desires to grant any concessions in respect of such chemicals, herbs, forest products, minerals or other raw materials as may be required or considered essential for purposes of the main industry and which are specified in Schedule D annexed thereto, to any other party, the Government shall offer to the Company the option of first refusal in respect of any such concessions and leases. Mr. Choudhary contends that this agreement being a part of the Memorandum of Association and not having been implemented in spite of repeated demands either by the Maharaja of Mayurbhanj or by the Successor, the Company has got a cause of action for specific performance and for damages, which the Company could agitate if the petitioner is driven to a suit and so the application should not be granted. Also the Company has a right to damages for breach of contract and has a lien over the shares. Under these circumstances, according to the learned counsel the Board of Directors rightly refused to register the name of the petitioner.

16. Mr. Choudhary contends that the Directors are in fiduciary position as far as the Company is concerned and look after the interests of the Company and consequently are justified in refusing to register on the ground that the agreement contemplated was not implemented. In support of this contention he relied upon a decision of the Madras High, Court in the case of *E.M. Muthappa Chettiar v. Salem Rajendra Mills Ltd*[1]. In that case it was held that if a person is of such a character as to throw theirCompany into confusion and if he was not a desirable one then the Board of Directors would certainly be acting in the best interests of the Company in refusing to register the shares in his name and such a reason is quite a valid reason. But the decisions relied on in that case clearly show that the Directors also stand in a fiduciary relation as far as the shareholder is concerned. In the instant case before me it is already noted that the petitioner owns 7500 shares out of 7750 shares which were subscribed. It is expected that the company should look to his interest also. It was observed in the case of In re., Gresham Life Assurance Society; Ex parte, Penny, (1872) 8 CH A 446 by James, L.J.

> "No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon the ground it must be made out that the directors have been acting from some improper motive, or arbitrarily or capriciously."

Mellish, L.J., observes at page 451,-

> "I am therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly that may be ground for the Court interfering.'-

Buckley on the Companies Act, 12th Edition at page 175 says

> "Where the articles authorise the directors to reject transfers to transferees of whom they do not approve the directors must before rejecting a proposed transferee, fairly consider the question at board meeting.
> Provided that they do so however, they are not bound to disclose their reasons for rejecting any particular individual, as to compel them to do so would be to deprive the power of half its efficacy."

The same case AIR 1955 Madras 665, also quotes with approval Buckley on the Companies Act, in which it is stated.

> "If the directors do give their reasons the Court will then consider whether they are legitimate or not, i.e., whether the directors have proceeded on a right or wrong principle, and will overrule their decision if their reasons are not legitimate, but not, if they are legitimate, merely because the Court would not have come to the same conclusion."

In my opinion, therefore, this case does not help Mr. Choudhury.

17. On the other hand, the above observations clearly show that if the reasons are given by the Directors for the refusal, the Court can go into the questions whether those reasons are proper, legitimate and bona fide. Annexure Q/1, a letter from the Secretary to the Government of H.H. the Maharaja to the promoters of the company, "The National Distributors Ltd." dated 16-10-47 shows that the Maharaja approved of the scheme furnished on the understanding that 30 per cent of the proposed capital would be available for investment by H. H.'s Governor and another 20 per cent by H. H.'s subjects and that the Maharaja would be entitled to nominate two Directors on the Board of the Company and enclosed a draft agreement which the Company would have to execute. The Company, in accordance thereto allowed the Maharaja to subscribe for 30 per cent of the shares, but the Maharaja did not implement the said agreement. By Annexure R/1 dated 31-7-48, the Company asked the Secretary, Mayurbhanj State as to when the draft agreement, annexure to the Memorandum of Association would be executed as the Company intended to operate in Mayurbhanj as the advantages of the availability of raw materials were held out to its promoters and that upon execution of the said agreement only the Company may proceed to acquire the structure at Kathpal at a reasonable sum. Subsequently, there seems to be some other correspondence which is not before me but by Annexure S/1 dated 22-9-48, the Secretary drew

the attention of the Company that a formal stamped receipt for the cheque issued on 5-12-1947 for Rs. 7,50,000/- being the value of 7500 shares purchased by the Government of Mayurbhanj or the usual share certificate were not received although nearly eight months have elapsed since the encashment of the same, and that the funds of the Company which were deposited with the Pioneer Bank Ltd. should be transferred to a first class Bank as agreed to by the Company. Enclosed to this is another letter dated 8-1-48 by the Assistant Secretary asking the Company when it was expected to start business at Baripada and whether the Company was agreeable to deposit the money which would be required for construction of factories, purchase of raw materials etc. in the Mayurbhanj State Bank. Annexure T/1 dated 21-12-48 is a letter from the Managing Director to the Chief Commissioner Mayurbhanj State. By this time, the Dominion Government of India had taken over charge of the administration of the State. The Company informed the Chief Commissioner that the business of the Company had been irreparably injured due to the neglect of the Government of Mayurbhanj in implementing the agreement and wanted to know when the agreement would be executed. By Annexure U/1 dated 29-3-51 the Company demanded the Government of Orissa to implement the agreement by executing the same or in the alternative to pay the Company a sum of Rs. 1,25,000/- assessed as damages. By Annexure V/1 dated 4-1-52, the Government intimated that the Company had no enforciable right as regards the unexecuted agreement of the late Mayurbhanj Durbar Government against the State of Orissa and as such they were not entitled to any damages as contemplated in the letter. To the contentions of the learned counsel for opposite party No. 1 and on the basis of the correspondence noted above, the learned Advocate General contended that the Maharaja rightly refused to implement the agreement as the Company did not start any business, did not invest the funds in a big Bank and did not even allow the Maharaja's officers to look into the accounts. In my view, it is not necessary for me to go into this question whether the Maharaja was justified in not implementing the same, as I am not satisfied that the registration was rightly refused on account of the non-execution of the agreement. The Company can either sue for specific performance or for damages even after the registration was effected and the name of the State is entered in the register of the Company.

18. The Maharaja having refused to implement the agreement even before the merger and the petitioner as also the Chief Commissioner having refused to do the same the conduct of the Company in refusing to register the name of the petitioner on the ground of non-execution of the agreement without having recourse to a suit in the long interval is, in my view, not bona fide, and is not proper and legitimate.

19. Next with regard to the contention of the learned counsel for opposite party No. 1 that the petitioner failed to make out even the claim based upon devolution, I am satisfied that in the circumstances of this case the petitioner has placed all the materials required in support of his claim before the Company. Some of the letters which are referred to above clearly mention that on account of the merger of Mayurbhanj and integration of the same with the State of Orissa, the State of Orissa became entitled to the shares. The relevant merger orders were referred to. The agreement is a part of the 'White Paper' issued by the Government of India. If the Company had any doubt with regard to any particular matter, it ought to have specifically referred for production of the same in proof of the title of the State. Instead of doing so the letters of the Company show that some attempt is made out only to evade the issue and go on insisting upon the transfer deed. No doubt, the Deputy Secretary to the Government of Orissa in his correspondence did not stick to a particular stand. This, the learned counsel makes Capital of and

contends that the State was not sure about its title by devolution and therefore had recourse to rely upon the transfer from opposite party no. 2 also. The only document which was not before the Company by the time the Board of Directors passed the resolution refusing to register the name of the petitioner is the certificate of the Secretary to the Government of India to the effect that these shares were not reserved for any central purpose.
Having had the States' Merger (Governors Provinces) Order, 1949 which was sent to it by the petitioner, the Company ought to have asked the petitioner to send the certificate of the Dominion Government under Clause 5 (2) of the said Order. The attitude of the Deputy Secretary of the petitioner is in my opinion, not at all due to any doubt with regard to the title of the petitioner by transmission though it may be due to either ignorance, inexperience or some other cause. On the affidavits filed in this case and the Annexures the title of the petitioner by devolution or transmission is fully made out and even if a separate suit is filed on the basis of title, the State is not required to let in any more evidence than what is on record in this case. There is sufficient material that the State is entitled to the 7500 shares by virtue of the orders quoted above and the certificate Annexure D.

20. The petitioner has also complied with the requirements necessary to register the name on the ground of claim by transfer. After prolonged correspondence, from Annexure T dated 28-7-52 from the Deputy Secretary to the Imperial Bank of India sending therewith the transfer deed form duly filled up along with the exemption certificate and requesting the Bank of India to take early steps to get the shares transferred at an early date and from Annexure U dated 10-3-53 by the Imperial Bank to the Deputy Secretary informing that despite several reminders the Bank had not yet received from the Company the certificate for the shares duly registered, it is clear that by 10-3-53, the transfer deed duly filled up along with the exemption certificate must have been sent to the Company by the Imperial Bank and from Annexure M/1 filed by opposite party no. 1 which is the same as Annexure W filed by the petitioner dated 17-3-53 which is a letter written by the Company to the Imperial Bank, it is evident that the Company acknowledged the receipt of those two documents sent by the Imperial Bank; that the Bank in its turn forwarded the transfer deed and the certificate of the Collector of Stamp Revenue to the Company as in it, it is stated by the Company that the shares could not be registered so long in the name of the Secretary, Finance Department, Government of Orissa for want of quorum in the last meeting of the Board of Directors and assuring that the registration will be effected shortly. This sentence clearly indicates that the Managing Director of the Company was satisfied that there was no other defect with regard to the deed of transfer presented to the Company. Though Mr. Choudhury contended that there is no evidence before me that the transfer deed form duly filled up along with the certificate was in fact sent by the Bank to the Company, I do not think there is any force in it in view of Annexures T and M/1 filed by opposite party no. 1 itself. So I am clearly of opinion that there was before the Company a transfer deed duly filled up and satisfying all the formalities required by law. The share scrip was already with the Company. Consequently, the objection contended for by Mr. Choudhury under Section 34, Clause (3) of the Companies Act, 1913 that it shall not be lawful for the Company to register a transfer of shares in or debentures of the Company 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 is no longer tenable.

21. The learned Advocate General contended that as per Annexures T and U, at the latest, the instrument of transfer was lodged with the Company by 10-3-53, the refusal is not in accordance with law as the refusal was made by the Board of Directors by its resolution dated 16-5-53 under

Clause (4) of Section 34. Mr. Choudhury in reply stated that there is no Annexure showing on which date the Imperial Bank actually sent the transfer deed and the exemption certificate to the Company and as Annexure M/1 was dated 17-3-53, the refusal which was made on 16-5-53 was within two months. Of course, the petitioner ought to have obtained a copy of the letter of the Imperial Bank forwarding the transfer deed and the exemption certificate and filed it in this case, but even in the absence of any such letter, I have no doubt in my mind that as per Annexure U, the Imperial Bank sent the two documents before 10-3-53 and as per Annexure M/1, the Company must have received them before 17-3-53. In this view of the matter, I am clearly of opinion that the refusal to register was two months after the instrument of transfer was lodged with the Company and the Company has thus contravened Clause (4) of Section 34. The holding of the meeting of the Board of Directors on 16-5-53 at which the resolution refusing to register was passed is also significant. If the resolution was passed on that day, there was nothing to prevent the Company and no explanation is offered before me as to why either the Imperial Bank which was writing reminders about the subject to the Company or the Government of Orissa was not informed of the refusal at such meeting immediately afterwards instead of waiting till 28-5-53 and informing of the said refusal on that date especially after the receipt of notice from the Deputy Secretary to the Government under Annexure V dated 19-5-53. This attitude of the Company is in my view, not bona fide.

22. The last but the most important point very strenuously urged by Mr. Choudhury is with regard to the maintainability of this application and the limited scope of Section 38 of the Companies Act. The learned counsel for the Company contends that Section 38 contemplates only a summary procedure and an application under Section 38 can be allowed only when it is clear that the refusal was not *bona fide* and was without sufficient cause. He contends that in this case the title of the petitioner is to be found and such a title can be established only in a separate suit and consequently the petitioner under Section 38 is not maintainable. In support of his contention, he relied upon the decisions reported in *Ramesh Chandra v. Jogini Mohan*[2], *Luchmee Chund v. Bengal Coal Co*[3]., and *Devakumar Mishra v. Rupak Ltd*[4]., In the case of ILR 47 Cal 901 , it was held,

> "In a simple case where an immediate rectification is essential, it may be desirable to apply under Section 38; but if the case is at all complicated, an action should be brought."

In this case, J, a share holder, applied to have his name removed from the register of the Company under Section 33 of the Indian Companies Act. R, a mortgagee of the uncalled capital of the shares came to Court and opposed. It was held that R. was entitled to intervene and oppose, being vitally interested in the proceedings and might be seriously prejudiced by an order for rectification made behind his back and the jurisdiction under Section 38 of the Indian Companies Act is unlimited. This case, in my opinion, does not help opposite party No. 1. In the course of the judgment, the learned Judge Mookerjee, J., observed.

> "The Legislature obviously intended that the Court should have the widest possible power to determine, in its discretion, question which may appear to it to be necessary or expedient for decision before an order for rectification is made or refused."

In the case of ILR 8 Cal 317, it was held that,

> "The power given to the Court by Section 34 of the Indian Companies Act of 1866 is discretionary, and the Court will not order a transfer to be registered, where the alleged transferor is not before the Court, and there is any real doubt as to the validity or *bona fides* of the transaction." In this case the Court refused to order the Bengal Coal Company to register the transfer. The refusal was based upon a very cogent reason. The transfer was made in the absence from this country of the transferor, by his power of attorney holder. The transfer was made in blank. On these facts, the Court refused to direct the registration of the name of the transferee. But in the instant case the transfer deed is admittedly signed by the transferor the Maharaja of Mayurbhanj who is also opposite party No. 2 to this proceeding.

Due execution of the transfer deed was never challenged by the Company. Consequently, I am of opinion that this case does not help opposite party No. 1. The
next case cited by the learned counsel is the case of AIR 1955 Patna 486. This is a
decision of a single Judge of the Patna High Court in which I may mention, the learned counsel appearing before me also appeared for the opposite party. It was held in this case that the application for rectifying the share register under Section 38 of the Companies Act cannot be allowed where there are serious disputes as to whether the resolution of the Company is valid and intra vires and whether there can be a valid transfer of those shares in pursuance of that resolution and the issues arising between the parties cannot be properly decided in the summary proceedings under this Section and that the proper course in such a case for the parties was to get the questions determined in the civil suit. On the facts of this case, the civil suit was already filed and was pending by the time the application came for hearing. The petitioner's case was that 2000 ordinary shares of Rs. 10/- each were standing in the share register in the name of his father and after the death of his father on 1-12-52, the title to the shares devolved on the petitioner who was his only son and heir. The petitioner contended that the title to the shares was the subject-matter of dispute between the parties in the Court of the Subordinate Judge, Patna and the question could not be decided in a summary way by that Court acting under Section 38 of the Companies Act. It was also alleged that there was a prior agreement between the petitioner and the Company that Rs. 1,00,000 would be paid to the petitioner, his father and his wife in lieu of the share which they held and on condition that they retired from the Company and that in pursuance of that agreement a sum of Rs. 50,000 was paid by the company to the petitioner and the petitioner presented a winding up application to the High Court claiming that he was entitled to the Balance of Rs. 50,000 from the Company, in addition to Rs. 2,50,000 which he advanced as loan. There was a dispute between the parties as to the vires of the said resolution. The petition for winding up was stayed pending the determination of the title to the shares and also of the other disputed questions in a properly constituted civil suit and that civil suit was pending by the time the present application was made. On these facts the learned Judge decided that the proper course was for the parties to get the questions determined in the civil suit. This case, in my opinion, is not applicable to the facts before me where the question of title is clear and no complicated question arises for decision.

23. Relying on Article 11 of the Articles of Association, Mr. Choudhury next contends that under that Article the right of the Board of Directors to refuge registration is absolute and they can do

so even without assigning any reasons and that the word "transfer" in Article 11 is used in a general sense and includes both transfers intra vires and transfers by operation of law. Article 11 of the Articles of Association is as follows :

> "The Board of Directors shall have full right to refuse to register the transfer of any share or shares to any person without showing any cause or sending any notice to the transferee or transferor.

The Board may refuse to register any transfer of shares on which the Company has lien." The contention of the learned counsel is that Article 11 represents an act of parties and is a contract and is binding on the share-holder. This power of the Board of Directors, according to Mr. Choudhury, is not restrictable. In the case of In re. Smith and Fawcett, Ltd., 1942 Ch 304, it was held that Article 10 of the articles of association of a private company gave the directors the widest powers to refuse to register a transfer, and that while such powers are of a fiduciary nature and must be exercised in the interests of the Company, there was nothing to show that they had been otherwise exercised; and that affidavit evidence is unsatisfactory evidence of the motives of directors in exercising their powers. In the course of the judgment, Lord Greene, M.R., observed,

> "The language of the article in the present case does not point out any particular matter as being the only matter to which the directors are to pay attention in deciding whether or not they will allow the transfer to be registered. The articles does not, for instance, say, as is to be found in some articles, that they may refuse to register any transfer of shares to a person not already a member of the company or to a transferee of whom they do not approve. Where articles are framed with some such limitation on the discretionary power of refusal as I have mentioned in those two examples, it follows on plain principle that if the directors go outside the matters which the articles say are to be the matters and the only matters to which they are to have regard the directors will have exceeded their powers.........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 interest 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." Relying on the above observations of Lord Greene, M. R., the learned counsel submits that Article 11 is in the widest possible terms and consequently the discretion of the Board of Directors is uncontrolled and cannot be questioned. The above decision, in my opinion recognises that the power vested in the Board of Directors under such an Article is a fiduciary power and must be exercised *bona fide* in the interests of the company. In the instant case as has been already observed, the action of the Directors does not appear to be *bona fide* and in the interests of the company. The learned Advocate-General relies upon a decision in the case of *Thenappa Chettiar v. Indian Overseas Bank, Ltd*[5]*.,* In this case it was held by a single Judge of the Madras High Court, Chandrasekhara Ayyar, J.

> "The right of a share-holder to transfer his shares in a company is absolute as it is inherent in the ownership of the shares, but it can be restricted by contract, which has to be found in the articles of association of the company. Even in a case where the power to refuse registration of transfer of shares is conferred on the directors of a company in absolute terms, the refusal must not be arbitrary. Provided they act in a *bona fide* manner, the directors are not bound to give any reasons. But if they give reasons, the Court can examine them, but it will not overrule the decision of the directors merely on the ground that it would have reached a different conclusion.

If the directors refuse registration on any wrong principle, their act can be rectified. When consent for the transfer of shares is withheld by the directors for reasons which cannot stand scrutiny, and no objection is raised of a personal kind against him on whom the shares have devolved by operation of law, to recognise a power in the directors to refuse the transfer is to countenance an abuse of powers vested in them for the due and efficient management of the company." Mr. Choudhury tried to distinguish this decision by saying that in that case the Articles of Association provided by a separate article with regard to transmission of shares by devolution also, but as far as I can see, the principle enunciated in the decision is of general application and does apply to the facts of the present case. In the case of In re, Bede Steam Shipping Co., Ltd., 1917-1 Ch. 123, the majority of the Judges Lord Cozens-Hardy, M. R., and Warrington, L.J. (Scrutton, L.J., dissenting) held that.

> "A power for directors to refuse to register transfers of shares if 'in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof only justifies a refusal to register upon grounds personal to the proposed transferee. It does not justify refusal to register transfers of single share or shares in small numbers because the directors do not think it desirable to increase the number of share-holders, or because they think that the transfer is not bona fide, but that the transferee is the mere nominee of the transferor, and the transfer is made to increase the number of share-holders who will support him in a policy which the directors disapprove."

In the course of the judgment, Lord Cozens-Hardy, M. R., approved the principle laid down by Mellish, L.J., in the case of (1872) LR 8 Ch. A 446, that

> "The directors have no right to say: 'We will force a particular share-holder to continue a share-holder, and we will not allow him to transfer his shares at all.' That would be an abuse of their power. In the same way it would be an abuse of this power to object, on any

> ground not applying personally to the transferee, to say, for instance that a particular share-holder should not transfer his shares till he had given security for the calls."

and Lord Cozens-Hardy, M. R., says,

> "That lays down a principle which seems to me to be perfectly sound and a principle which has been followed, so far as I am aware, for at least forty years, and I should be very sorry in any way to infringe upon it."

In the instant case before me, opposite party No. 1 mainly relied upon the non-execution of the agreement forming part of the Memorandum of Association as the ground for refusal. This observation of Mellish, L.J., approved by Lord Cozens-Hardy, M. R., clearly shows that except on grounds which apply personally the refusal cannot be based upon grounds like security was not given or a particular agreement was not executed.

24. Mr. Choudhury contends that the power to reject contemplated under Article 11 of the Articles of Association includes both transfers inter vivos as well as transfers by operation of law. The learned Advocate-General relies upon Table A in Schedule 1 of the Companies Act and contends that transfer and transmission are two different things contemplated and the heading given under Regn. 18 of Table A is "Transfer and transmission of shares." He submits that transfer applies therefore to transfers inter vivos and transmission applies to devolution by operation of law and as Article 11 uses only the word 'transfer,' the power is confined only to transfers inter vivos specially in view of the fact that the words 'transferee' and 'transferor' are used in the said article. He relies upon a decision of a single Judge in the case of Wahid Bus and Mailsi Transport Co., Ltd., Multan, in the matter of, AIR 1949 Lahore 6(I). It was held in this case,

> "There is a distinction between transfer and transmission of shares. Transfer is by voluntary act of parties whereas transmission is by operation of law. A Court sale is not a transfer. An Article of Association which gives the Directors absolute and unrestricted discretion to refuse to register a proposed transfer of shares has no application to a Court sale and the Directors cannot refuse to register a transfer of shares effected by a Court sale."

The learned Advocate-General relied on this case also for the purpose that the discretion to refuse a proposed transfer should be exercised at the earliest opportunity. When the Directors have once accepted the transfer and agreed to register it and communicated their acceptance, they have no power to change their decision later on. He also relied upon a decision of the Calcutta High Court in the case of *Mahadeo Lal v. New Darjeeling Union Tea Co., Ltd*[6]*.,* In this case it was held,

> "Where there is nothing in the Articles of Association forbidding a sale by Court of the shares held by a member, the sale by Court has the effect of transferring the shares to the purchaser. An Article of Association requiring that a transferee can obtain mutation of his name only on the basis of a letter signed jointly by the transferor and the transferee cannot be applied to auction sales but is confined to private transfers. The language of Section 34

(3) clearly shows that it applies only to transfers by acts of parties and does not apply to sales by the Court."

Mr. Choudhury relied on a decision in support of his contention in the case of *Balwant Transport Co., Ltd., Amraoti v. Y. H. Deshpande*[7], in which it was held,

"The case of a purchaser of a share at a Court auction does not fall under Article 22 of Table A and therefore the contention that a transfer in a Court sale is a transmission of the shares to the purchaser and the discretion which vests in the directors of a company to refuse to register a transfer cannot be exercised in the case of a transmission cannot be accepted as correct."

It was also held :

"Where the company has adopted Articles 18 to 23 of Table A subject to the modification of Article 20 which modification invests the directors with absolute and uncontrolled discretion to refuse to register a transfer of a share, then even in a case falling under Article 22, the directors have the same right to decline or suspend registration as they would have had in the case of a transfer of a share by the deceased or insolvent person before the death or insolvency."

25. Regulation 22 of Table A says :

"Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall in either case have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency." Section 18 of the Companies Act says,

"In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles."

Reading Section 18 and Regn. 22 of Table as also the Memorandum of Association and the Articles of Association, in the present case it is not necessary to consider the question whether Article 11 of the Articles of Association covers only transfers inter vivos as contended by the learned Advocate-General or includes transfers by operation of law. Regulation 22 clearly provides that the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency. The Article of Association in this case has not provided for the refusal of transfers by devolution and by virtue of Section 18 and Regn. 22, the Board of Directors of opposite party No. I have the same power even in the case of transmission as they have under Article 11. Consequently, if the refusal is *bona fide* and is for sufficient reason, there can be no doubt that Article 11 covers transmission also.

26. The contention that this proceeding being on motion and being a summary procedure should not decide questions of title and the mutter should be referred to be fought out in a regular suit does not appeal to me. An order under Rule 38 of the Companies Act is not so summary as is contemplated under the English Law. It contemplates decisions of questions relating to title and also provides for an appeal from the decision of such an issue in the manner directed by the Code of Civil Procedure 1908, on the grounds mentioned in Section 100 of that Code. Section 38, clause (3) runs as follows :

> "On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register".
>
> Provided that the Court may direct an issue to be tried in which any question of law may be raised: and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure 1908 (V of 1908) on the grounds mentioned in Section 100 of that Code."

27. As I have already stated, all the relevant papers to determine the question of title involved in this case are filed as Annexures by the parties. The question of title does not appear to me to be of any complicated nature. I have held on the Annexures filed that the petitioner succeeded in establishing his title by operation of law to the shares in question. The petitioner also lodged a proper deed of transfer with the company. The Annexures disclose that the action of the Board of Directors in refusing to register the petitioner in the register of the company as a shareholder is not *bona fide* and is not for sufficient cause. Accordingly I am of opinion that the petitioner's name is to be registered in the Register of Share-holders of the company.

28. Mr. Choudhary also raised some technical contentions. He contended that the correspondence shows that the petitioner wanted the shares to be registered in the name of the Secretary to the Government of Orissa, Finance Department which cannot be done; that the shares stand in the name of Shri Pratap Chandra Bhanj Deo and as such there should be a transfer by a person as a holder is only a person whose name is entered as the share-holder; and that the petitioner took up the contention of his title by devolution of law only in this application and during the correspondence he was mainly, if not absolutely, relying upon a transfer inter vivos by the Maharaj of Mayurbhanj. I have already held that in the first letter of the Deputy Secretary to the Government of Orissa, the claim was based upon devolution by operation of law. The other contentions are too technical and do not appeal to me.

29. The petition is, therefore, allowed with costs. Opposite party No. 1 is directed to rectify the register by inserting the name of the petitioner as the holder of the shares Nos. 1 to 7500. Hearing

fee is fixed at Rs. 250/-.
Petition allowed.

Cases Referred.

[1] AIR 1955 Mad 665
[2] ILR 47 Cal 901
[3] ILR 8 Cal 317
[4] AIR 1955 Pat 486
[5] AIR 1943 Mad 743
[6] AIR 1952 Cal 58
[7] AIR 1956 Nag 20