(1956) 03 P&H CK 0001

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Miscellaneous No. 97 of 1955

Fateh Chand Kad		APPELLANT
	Vs	
Hindsons (Patiala) Ltd.		RESPONDENT

Date of Decision: March 13, 1956

Acts Referred:

- Companies Act, 1913 - Section 105C, 153C(5), 162, 85, 85(1)
- Constitution of India, 1950 - Article 26

Citation: AIR 1956 P&H 89

Hon'ble Judges: Chopra, J

Bench: Single Bench

Advocate: V.N. Bhatnagar and B.R. Tulli, for the Appellant; Dalip Chand, for S. Kapur, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Chopra, J.
This is a petition u/s 162, Companies Act to wind up the Hindson (Patiala) Ltd., private limited Co.. The petition is presented ban ex-director of the Co. holding 210 fully paid-up shares of the value of Rs. 21,000/-. The Co. was incorporated under the Indian Companies Act, 1913, on 30-12-1953. The authorised capital, of the Co. is Rs. 5,00,000/- divided into five thousand shares of Rs. 100/- each. The issued capital is 2,500 shares of Rs. 100/-each and the capital subscribed, or credited as paid-up, is Rs. 1,24,000/- consisting of 1,240 fully paid-up shares of Rs. 100/- each.

2. The objects of the Co. were manifold; but of them the principal one was to carry on the business in tractors and to run a workshop by acquiring and taking over the assets and goodwill of a private concern, known as Hindson Automobiles, Patiala. The Petitioner and three others, namely, Shri Ram Lal Kad, Shri Anand Kumar Chopra and Shri Prem Pal Garg, were the promoters of the Co. and they were also the sole proprietors of the said firm. They floated the Co. by taking ten shares each

of the total value., of Rs; 4,000/- and formed its first permanent directors.

According to the agreement with the said firm, this Co.,'' besides paying in cash for the purchase. of its .assets, allotted two hundred fully paid-up shares of Rs. 100 each to each of its four promoters for the transfer of goodwill of the firm, valued at Rs. 80,000/-. The same day, viz. 1-3-1954, two hundred fully paid-up shares were allotted to Shri Swam J., Singh against cash payment" of; Rs. 20.00/- and he was co-opted as a director. The five directors were thereafter appointed to act as the Co.''s working directors, on a remuneration of Rs 500/- per month each.

In the minutes of 1-1-1955, fifty fully paid-up shares each were allotted to Shri Sat Pal and his, brother Mr. Raj Pal and hundred such ''shares were allotted to their mother Shrimati Pritam Devi, against their loan of Rs. 20,000/- already advanced to the Co. In the next meeting held on 9-1-1955, Shri Sat Pal, who was already acting as the Co.''s legal adviser on remuneration of Rs. 200/- per menses, was also co-opted as a director. This appointment of his was confirmed in a general meeting of the share-holders on the following day.

The total number of directors thus came to six; five of them were the working directors. or an year or so, the affairs went on smoothly. In the middle of January 1955 Fateh Chand Petitioner started a separate business of his own dealing with International Tractors, in the name of Bir Trading Corporation, Patiala. Only a few days thereafter the Petitioner addressed a letter to the Co. saying, "kindly consider me from today, 27-1-1955, as a sleeping partner a d oblige". This letter was placed before the board on 13-2-1955.

In view of, "the direct competitive business" started by the Petitioner, his resignation was accepted and it was further resolved that in accordance with his desire he should be treated as an ordinary share holder of the Co The change in the directorate was duly intimated to the Registrar on 24-2-1955.

On 29-4-1955 the Petitioner addressed a letter to the Co. saying that he had resigned merely from the office of a working director and that he still continued to be its ordinary director. The Co. wrote back to say that the idea was simply an after-thought and against actual facts and that the Petitioner had ceased to be a director from the day he resigned. This accelerated the trouble that was brewing for sometime and it rose to its climax when, on 15-5-1955, the directors decided to hold an extraordinary general meeting for consideration of a resolution to amend the articles in certain matters.

One of these was to authorise the shareholders, hi an ordinary or extraordinary general meeting for expropriate the shares of any member or members who carried on or proposed to carry on any competitive bigness. This meeting was to be held on 9-7-1955. In the nature of things, the Petitioner took it as a move to expropriate his shares and to bring about his total exclusion from the Co. and its affairs.

The present petition was then presented on 4-7-1955, together with an application for an interim order to restrain the Co. from holding the proposed meeting on the said date. In reply to the summons, the Respondent Co. denied that the proposal was meant to expropriate the Petitioner and further stated that they had al- . ready decided not to hold the meeting on 9th July. The matter was consequently dropped and the application dismissed.

3. The Petitioner relies upon Clause (6) of Section 162, Companies Act, and alleges that in view of the present state of affairs it is just and equitable- that the Co. should be wound up. The cir constancies relied upon are:

(i) Illegal allotment of shares to Shri Sat Pal, Shri Raj Pal and Shrimati Pritam Devi, in as much as the mandatory provisions of Section 105C were not complied with, (ii) Unwarranted and wrongful exclusion of the Petitioner from the office of a director and the subsequent attempt to expropriate his shares .

(iii) The number of directors was reduced to less than four, the minimum number provided by the articles Shri Sat Pal did not hold the necessary qualification, and Shri Swam J. Singh had ceased to be a director when he was not elected in the next following annual general meeting.

(iv) The directors were recklessly wasting the funds of the Co. with a view to harm the interest of the Petitioner and to benefit the selves.

4. Mr. Tulli, learned Counsel for the Petitioner, started by asserting that the Co., though a limited one, was for all practical purpose nothing more than a "domestic" and family concern". It was turned into a limited Co. mainly to take over and run the business previously carried on in partnership by its four promoters. The directors, who form the entire body of shareholders, are inter-related. The capital of the" Co. is so owned as to make the Co. in substance a partnership.

It is, therefore, urged that the circumstances which justify the dissolution of a partnership, would apply to the exercise of discretion under the just and equitable clause and to wind up the Co. State of animosity precluding all reasonable hope of reconciliation and friendly cooperation between the partners, justifiable lack of confidence by one in the other partners and the total exclusion of one partner from participation in the affairs of the partnership are generally regarded as good grounds to put an end to the partnership. The same principles, it is stressed, ought to apply to the present case and if any of those circumstances are found to exist, the com- pany should be wound up.

5. Mr. Kapur, learned Counsel for the res-Pendent Co., has no dispute as to the principles which apply to the dissolution of partner- ship and also to their application to a limited com- pany which by its very nature and constitution is no more than a partnership. Counsel, however, contends that the Respondent-Co. does not fall under that category and that, in any case, none of the circumstances

justifying its dissolution does- exist. In view of the actual facts of the case, I am inclined to think the contention is not without force.

6. "In re Yenidje Tobacco Co. Ltd., (1916) 2 Ch.'' 426 (A), is the leading authority relied upon by Mr. Tulli in this connexion. There, only two persons agreed to amalgamate their private business and Ts--m a private limited Co.. They were the only shareholders and the two directors of the Co.. They fell out and a long drawn litigation was going on between them. They were cot even on speaking terms and complete deadlock had, therefore, arisen. One director formed the quorum.

In case of difference, the matter was every time to be referred to arbitration. It was held that if this were a case of- partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private Co.. Lord Cozens-Hardy M. R. at 3. 431 observes:

Is it possible to say that it is not just and suitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered? ''They assumed, and it is the foundation, of the whole of the agreement that was made, ;that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other, and arbitration was only'' to be resorted to with regard to some particular dispute between the directors which could not be determined in any other way. Certainly, having regard to the fact that the only two directors will not speak to each'' other, and no business which deserves the name of business in the affairs of the Co. can be carried on, I think the Co. should not be allowed to continue.

Warrington L. J., in his concurring judgment at p. 435 observed as follows:

I am prepared to say that in a case like the present, where there are only two persons interested, where there are no'' shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, - the Co. ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. Such ground exists In the present case. I think, therefore, that it is just and equitable that the Co. should be wound up.

In ''Loch v. John Blackwood, Ltd.'' 1924 AC 783 (B), one man''s private concern was turned into a limited Co. by the trustees as desired by him in his will. The board of directors consisted of McLaren, his wife Mrs. McLaren and his clerk Yearwood. The total amount of the Co.''s capital was forty thousand in 1L shares. Twenty thousand of these were allotted to the testator''s sister, Mrs. McLaren. Ten thousand each should have gone to Mr. Rodger and Mrs. Loch, the testator''s nephew and niece respectively; but'' in fact, out of their shares, one share was allotted to Mr. McLaren

and one each to his clerk and solicitor.

The Co., although it had taken the form of a public Co., was practically "a domestic and family concern." The preponderance of voting power lay with McLaren, and it was impossible for Mrs. Loch, the Petitioner, to obtain any relief by calling a general meeting of the Co.. Lord Shaw at p. 793 of his judgment quoted the following passage from a Scotland decision as it was found aptly applicable to the circumstances of the case:

But then this is not a Co. that is form-. Ed by appeal to the public. It is what, for want of a better name, I may call a domestic Co. The only real partners are the three brothers of a family; the other shareholders have only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all. the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to tire division amongst the shareholders of this Co., and I agree with your Lordship that this Is a case in which it would be just and equitable that this Co. should be wound up, and the partners allowed to take out their money and, trade separately if they please.

In Re Davis and Collett Ltd., (1935) 1 Ch 693 (C), the Petitioner and the Respondent held the capital of the Co. substantially in equal shares. It was h''eld that where the capital of a private Co. is so owned as to make the Co. in substance a partnership and one director has purported by means of irregularities to acquire complete control of the Co. and to exclude the other director from the management of It; it may be "Just and equitable" within the meaning of! the section that the Co. should be wound up.

7. The Great Indian Motor Works Ltd. v. Chandt Das Nundy 57 Cal WN 220 (D), is the last decision relied upon by Mr. Tulli. There, the entire body of shareholders consisted of the Petitioner his brother Mr. Kristo three sons of Kristo and a first cousin of Kristo''s wife. The three directors were the two brothers and the brother-in-law of Mr. Kristo. The whole business of the Co. was being engineered for the benefit of Mr. Kristo who held the majority.

The Co. was not being run fairly and properly for the benefit of its shareholders. Principles for the dissolution of partnership were, therefore, applied, and it was held that where two persons'' cannot agree and cannot carry on busi-ness and also where one partner was acting dis-honestly, towards the other or acting unfairly, the Court will: always wind up the partnership.

8. Here in this case, the state of affairs is absolutely different. The Respondent Co. can by no means be regarded as "a domestic or family concern". The Co.''s capital is not distributed amongst the members of one and the same family. Some of the shareholders are total strangers. Swam J. Singh holds fully paid-up shares worth Rs. 20,000/-. Sat Pal, his brother and mother also hold the same amount of fully paid-up

shares.

Swarn J. Singh, if at all, may be distantly related to. the Petitioner himself. Sat Pal or any other member of his family has not been shown to bear any relationship with others. As against their shares of Rs. 40,000/- paid for in cash, it shall be remembered, the Petitioner, like other three promoters, holds no more than ten shares, besides the two hundred shares allotted to him against the good-will of the earlier partnership.

Even the four promoters, though previously they carried on business in partnership, are not all inter-related. Out of them Pateh Chand Petitioner and Ram Lal are collaterals in the fourth . or fifth degree. The former and the latter''s brother are married to- the sisters of An and Kumar. Whatever relation they may have, it is not such as to place the rest of them in one group against the Petitioner. More over, An and Kumar would be more interested in the Petitioner than in Ram Lal. Priem Lal, the fourth promoter, is a vaish (the others being Kashatrias) and a total stranger.

With the exception of Raj Pal and Shrimati Pritam Devi, all these shareholders were at one time acting as directors. The management of the Co. also cannot, therefore, be said to be, or ever to have been, in the hands of a particular director or set of directors. Unless it be for some fault or action of the Petitioner himself, the rest of the directors are not shown to have any parent or conceivable common cause to form a party against the Petitioner or to be antagonist to him or his interest.

If there is an honest difference of views between the Petitioner and the other directors and the Petitioner, on that account, has lost confidence in them, the view of the majority must prevail; and the. Petitioner, can have no cause for any justifiable complaint. His remedy would ordinarily the in appealing to the general body, which forms ''the domestic tribunal in case of a limited concern. There is and allegation, much less proof, of any misappropriation or molestation of funds by the directors, or that any one of them, because of the preponderance of his voting power, is managing the affairs of the Co. for his personal advantage. The mere fact that the Petitioner can be or is being out-voted by the majority in the internal management of the Co., or that he is. being singled out by the rest of the directors, ought not to be regarded a sufficient ground to wind up the Co. under the just and equitable Clause.

9. In Sethiah v. Venkatasubbiah'' AIR 1949 Mad 675 (AIR v. 36) (E), mere in compatability of good relations between, two rival factions in the directorate, in the absence of some other strong ground such as misappropriation, or malversation of funds, was not regarded as sufficient for ordering winding up of the Co. under Clause (6) of Section 162. There was nothing particularly wrong with the management of the Co., except that the Petitioners were holding views different from those ''held by the majority in'' relation to the details of management. Gobinda Menon J in the concluding portion of his judgment observes:

When there is such unanimity amongst the majority belonging to different communities, that''s, by itself is a reason, in the absence of any evidence of misappropriation or altercation of funds'' by the management, to conclude that on account of difference of views alone the Co. should not be wound up.

10. There is yet another difficulty in applying the rules of dissolution of partnership to this case. It cannot be positively said that the Petitioner is in no way responsible for creating the" present situation.

For the dissolution of a partnership on the ground of justifiable lack of confidence it has to be shown that a partner, other than the partner suing, will fully or persistently commits breaches of agreements relating to the management of the affairs of the firm or the conduct of its business, p or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the bus!-'' ness in partnership with him.

The Petitioner admits that he started a private business of his own at Patiala in the name of; Bir Trading Corporation on 18-1-1955. It was the; that he submitted his resignation to the Co. on 27th January. His firm deals in Co. as well. I do not agree with Mr. Tulli that the business is not a competitive one because the two deal to tractors of different make or imported from different, manufacturers.

The facts disclose that the Petitioner began to evidence! dissatisfaction of the Co. management only after he started his own simi lar business. Shri Anand Kumar, in his affl davit, states that when tractors were required to be purchased by the Municipal Committees of Patiala and Nabha the Petitioner, as proprietor of Bir Trading Corporation, submitted his tenders in direct competition with those sent by the Co..

Each of the directors has further testified that four of the employees of the Respondent-Co. were induced to leave their services and were employed by the Petitioner in his private. concern. There are affidavits of three other em ployees to the effect that they too were appro ached by the Petitioner to give up their services with the Co. and also to disclose certain secrets concerning the Co.''s business. Generally speaking a director stands In 8 fiduciary position to the Co.. Being a direc-for and therefore in a fiduciary relation to the Co., he is always expected to guard the Co.''s interest and surely not to utilise the position and knowledge possessed by him in virtue of his office to the detriment of the Co.''s interest and for this personal advantage.

A corporate body can only act by agents and it is of course the duty of his agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may conflict, with the interests of those

whom he is bound to protect.

It seems, the Petitioner realised the situation and submitted his resignation shortly after he started his own business, but sometimes later ho changed his mind and preferred to stick to his guns.

11. The main point repeatedly stressed by Mr. Tulli is that the Petitioner''s resignation was intentionally mis-interpreted so as to exclude him from the Co.''s management. The contention is that the Petitioner in fact meant to resign merely from the office of a ''working director and intended to continue as an ordinary director. Article 26 authorises the board to appoint all or any of the permanent directors to work whole-time or nart-time for the business of the Co. on such remuneration and conditions as the directors may decide.

under this article, the four promoters and permanent directors of the Co. were appointed. as its working directors on a remuneration of Rs. 500/- pretense each. On 31-3-1954, Swarn, J., Singh was also appointed a working director. The Petitioner sent in his resignation on 27-1-1955. Let me repeat, it says "Kindly consider me from today as a sleeping partner and oblige.

On receipt of this resignation, power of the Petitioner to operate upon the Co.''s bank account was withdrawn in the minutes of 1-2-1955. The resignation itself was considered by the board in its next meeting on 13th February. The resignation was unanimously accepted and Shri Prem Pal was authorised to communicate the decision to the ''outgoing director''. The resignation was regarded as one from the office of a director and not merely from that of a working director, and it was accepted as such. The word''s ''sleeping partner'' could not be reasonably construed as ''ordinary director''. A director, even when he is not a working and paid director is still a governing partner and not a sleeping partner On the other hand, partne may be taken as synonymous to a share-holder who has no direct concern with the governance of the Co.''s affairs as compared with a director.

With the adjective ''sleeping the word ''partner could, therefore, be reasonably understood to mean a share-holder. If the Petitioner reallyment something else, he could have conveyed it in explicit terms. He could have plainly said that while ceasing to be working director he would continue to be a director.

In any case, the language used in the letter was possible of the interpretation placed on it by the board. The most that can be said is that the board committed an honest mistake in interpreting the letter;, the action was not mala fide or based upon fraudulent intention to oust the.

Petitioner. The Petitioner himself, in his letter dated 29-4-1955, described It as an "error which-obviously has been due" to some misunderstanding."

12. The resignation, with the above inter predation, was accepted on 13-2-1955. Statutory information of the Petitioner having ceased to. be a director was filed with

the Registrar on 24th February. Entry No. 511 dated 15th Febuary, in the Co.''s despatch register, relates to the intimation of the decision sent to the Petitioner.

The Petitioner says he did not receive the intimation and that he came to know of the re solution only on inspection Of the records with the Registrar. He put forth his interpretation of the resignation for the first time in his letter of 29-4-1955. It is difficult to believe that the Co.''s letter was not actually dispatched and it did not reach the Petitioner, or that the Petitioner did not come to know of the resolution much earlier.

What I am inclined to think is that the Petitioner, for some reasons, changed his mind subsequently and chose to take advantage of the in advertent omission of sufficient clarity in his-letter. I cannot, therefore, arrive at the conclusion that it is established that the Petitioner was fraudulently or unreasonably excluded from the directorate.

13. It is then contended that no notice of the meeting''s held on 1st Febuary and 13-2-1955 was given to the Petitioner. I do not think that was at all necessary after the Petitioner''s resignation of 27th January. According to Article 18, a permanent director is to remain in office so long as he continues to hold the necessary qualification or he does not himself voluntarily resign. This clearly means that a director is entitled to relinquish his office at any time he pleases and his-resignation is not dependent upon its acceptance by the Co. The Petitioner, therefore, vacated his office as soon as he tendered his resignation to the Co..

14. Mr. Kapur has referred to certain purchases, worth several thousands, made by the Petitioner on behalf of his private firm from the Co. between 3rd February and 4-4-1955. A such of Rs. 1018/12/6 is shown to be due from the Petitioner in this account on the last date. The purchases and correctness of the statement of account are not denied by the Petitioner The contention is that, notwithstanding the resignation, the Petitioner would have ceased to be a director because of his having entered into these contracts with the Co. without explicit consent of the directors. Section 86F provides-that, except with the consent of the directors a director of the Co., or the firm of which he is a partner or any partner of such firm, or'' the private Co. of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials-with the Co.

Section 861 (h) further lays down that the office of a director shall be vacated if he acts in contravention of Section 86F. Undoubtedly, the provision is mandatory and was introduced by the Amendment Act of 1936 to safeguard the interest of the Co. against any possible misuse of his position by a director. The consent of the directors cannot be a general one, it must be with respect to the particular transaction which the director intends to enter into.

There is not even a suggestion that the purchases were made with the consent, express or implied, of all the directors. I cannot agree with Mr. Tulli that''s. 86F is

confined in its application to contracts which are to be performed at some future time, and that it does not apply to an individual sale or purchase, or to a contract which is performed, and completed the moment it is entered in to Emphasis in this connection is laid on the use of the plural "contracts" and the word "for" in the phrase "shall not enter into any contracts for the sale, purchase or supply of goods and materials with the Co.." An agreement enforceable by law is a contract. The agreement may be given effect to the moment it is entered into or it may be executable at some future time. In either as it will be a contract, if. it is permissible by law. The plural includes the singular as well, and its use does not in any way lead to the interpretation placed on the Section by Mr.

Similarly, no particular significance can be attached to the, use of the word ''for. Grammatically, this is the only preposition that could be appropriately used for connecting the term contracts with the three nouns that follow. In no way does it signify that the Section covers only those contracts which are executor in nature, and not those- which are executable at the time they are entered into.

I do not see any force in the argument that the word of would have been used if the section was intended to include the latter type of contracts as well. Even the use of the word ''of instead of ''for'', in pay view, would not have made any difference or conveyed a different sense.

15. The continued transactions between the Petitioner'' and the Co., even after the formers resignation, rather go to show that there was no serious antagonism between him and the Co.''s working directors. The latter would not have agreed to supply the goods for the Petitioner''s competitive business, if they had formed into a group to oust him.

16. The proposed amendment in the articles, authorising the expropriation of competitive share holder or share-holders, is relied upon as an instance of oppressive attitude of the majority to- words the minority and is said to be directly intended for application to the Petitioner. At pre sent, I need not go into boniness of the directors in proposing the amendment or adjudicate upon the justification or reasonability of the amendment. The board of itself rescinded the resolution and gave up the idea of holding the extraordinary general meeting.

plied with Section where the (17) It is next contended that the allotment of shares to Mr. Sat Pal, Raj Pal and Shrimati Pritam Devi was illegal inasmuch as the provisions of Section 105C, Companies Act, were not com-105C runs as follows: directors decide to increase'' the capital of the Co. by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to Which the member is entitled. and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is

given that he declines to accept the shares offered, the directors may dispose of the same in the Co.." The question whether the word ''capital'' in the above section means the authorised capital or the subscribed capital of a bompany came up before me in Section Pritam Singh v. Kotkapura Bus Service Ltd.'', Civil Misc. Appeal . No. 58 of 1952, D/- 12-3-1954 (Pepsu) (F), It was held that the term ''capital'' in S. 105C means the Co.''s subscribed capital and, therefore, when the directors decide to increase the subscribed capital by issuing further shares, the section applies and it is obligatory for the directors to offer the Bhares to the existing share-holders before allotting them to any other person.

It was further held that if the shares were not so offered, their allotment to others would be irregular and hence invalid. In ''Nanalal v. Bombay Life Assurance Co. Ltd., 1950 SC 172 (AIR v. 37), (G), the question as to the precise scope of S. 105C was not finally decided because in their Lordships opinion, on any interpretation of it, the provisions of the section were substantially complied with.

Their Lordships, however, favoured the view that S. 105C becomes applicable only when the directors decide to increase capital within the authorised limit by issue of further shares. It is consequently urged that before shares could be allotted to Mr. Sat Pal and others the shares ought to have been offered to the existing shareholders, and since that was not done the allots rent was illegal and inoperative.

18. Mr. Kapur, on behalf of the Respondent, in the first instance, takes up his stand on the minutes of the first meeting of the board on 1-1-. 1954, whereby shares of the value of Rs. 2,50,000/-(out of the authorised capital of Rs. 5,00,000/-) were issued for subscription by the promoters, their relations and friends''. In the next meeting held on 25-1-1954, the- four promoters offered to take ten shares each and the same were allotted to them.

According to the learned Counsel, the word ''capital'' in S. 105C does not mean anything more than the issued capital and the same having been once offered to the share-holders it need not have been again offered to them when shares were allotted to Mr. Sat Pal and others. Counsel, however, forgets that the very first allotment was made on 25-1-1954, and before that'' there were no share-holders in existence; there could, therefore, be no question of an offer of further shares to the existing share-holders.

Moreover, Mr. Kapur has not been able to convince me to change my view that the word ''capital'' in S. 105C means the subscribed capital and that every time further shares are issued they ought to be offered to the existing share-holders.

19. Mr. Kapur then maintains that the pro visions of Section 105C were substantially complied with inasmuch as all the existing share-holders were present in the meeting when shares were unanimously allotted to Mr. Sat Pal and others, and also that the Petitioner having once agreed to accept the allotment cannot now be

allowed to question its validity.

The section authorises the directors to dispose of. the shares in such manner as they think most beneficial to the Co. after the existing members have declined to accept the shares of freed to them. But if all the existing members have themselves joined to make the allotment they should be deemed to have declined to accept the shares for themselves.

20. The Petitioner takes up two alternative positions in this connection. He says he did not attend the meeting of 1st February and was not presser. when the shares were allotted; but if he did attend and was present he was not apprised of the fact that he was entitled to those shades, or some of them, for himself.

The mainstay of the Petitioner is that he did not sign the minutes or note down his presence that day. He, therefore, affirms that his name, as one of the directors who participated in the meeting, was subsequently added in the minutes. The assertion, however, is not supported by actual facts. Except for a couple of meetings, he did never sign the minute-book in token of his presence. Every time a note with respect to his presence was made by someone else; the Petitioner does not deny to have attended any of those meetings.

Statutory presumption of correctness attaches to the entries in books regularly maintained by a limited Co.. It is for the person alleging the contrary to prove it. The facts in the present case are that in the petition it was nowhere alleged that the Petitioner did not attend the meeting on 1st February. Even in his reply affidavit submitted on 18-2-1955, the Petitioner did not swear to that effect. A casual reference to it was, however, made in the replication submitted by him that day.

On the other hand, the other four directors who attended the meeting, in their affidavits submitted much earlier, vouchsafe to the Petitioner''s participation in the said meeting. Moreover, the minutes were read out and confirmed (without any objection) in the next meeting, on 9th February. Presence of the Petitioner is noted, in the usual mode, in the minutes of this meeting. Neither in his reply affidavit nor in his replication the Petitioner did any where allege that he did not in fact attend the meeting on 9th February. The inference, therefore, is that the Petitioner did participate in the meeting on 1st February and that the shares were allotted with his consent.

21. As regards the effect of it, Mr. Tulli con tends that acquiescence cannot be presumed unless'' knowledge of the irregularity or invalidity of the transaction could be brought home to every one of the members who attended the meeting. Relying upon the observations of their Lordships in AIR 1938 284 (Privy Council) the learned Counsel maintains that'' there can be no ratification without an intention to ratify, and there can be no Intention to ratify an illegal act without knowledge of the illegality.

It is correct that in order to establish a case of ratification it is essential that the party ratifying should be conscious of the excess of authority exercised by his agent, and also that, in spite of this knowledge, the party conscientiously by an overt act agreed to be bound by it.

But the present is not a case of ratification of something done by his agent or some one else on behalf of the Petitioner. It is in fact a case where the Petitioner himself was a party to the transaction, and therefore estoppel or waiver of his right (which he failed to exercise) may be forcefully pleaded. To hold that the Petitioner did not acquiesce in the irregular mode in which the allotment was made would be giving him an opportunity to do that which, in fact, would be a fraud upon those who were admitted into the Co. as subscribers of its additional capital.

22. In any case, it is not necessary for me to dwell on the point any further or to decide it finally. The Petitioner, if he feels aggrieved, has a more appropriate remedy (application for rectification of the register of members) open to him All other members are agreed to and accept the allotment. It is not even alleged that the allot ment was made fraudulently or with a view to gain majority against the Petitioner. No present right of the Petitioner seems to be affected. He never was, nor is he now, anxious to get any more shares for himself.

As a matter of fact he is anxious to get rid. of those he already has. The only question with which I am here concerned is whether it is just and equitable to wind up the Co., and I have absolutely no doubt that it is not a ground which does lead to that conclusion.

23. It is next urged that the board is not properly constituted and that the number of its members is reduced to less than the minimum. The contention that Shri Sat Pal had ceased to be a director on 9-3-1955, is unassailable. According to Article 19, a director must hold in his own name shares of the face value of Rs. 20,000/-. Shri Sat Pal cannot be said to have ever attained that qualification. He could not, in that matter, take advantage of the shares standing in the name of his brother or mother. He was appointed a director on 9-1-1955''. He ought to have obtained the specified share qualification within two months of his appointment, as required by Section 85 (1), Companies Act.

Section QUI (1) (a) lays down that the office of a director shall be vacated if he fails to obtain the share qualification necessary for his appointment within the time specified in Section 85 (1). Shri Sat Pal, therefore, ceased to be a director oh 9-3-1955. When the law provides that a director shall vacate office on the happening of some event, the director automatically vacates his office on '' the happening of that event; the board has no power to waive the event. Consequently, Shri Sat Pal could not legally act as a director after that date.

24. Section 85 (2) lays down the penalty that may be imposed upon the unqualified person who acts as a director after the- expiration of the specified period of two

months. But with that we are not at present concerned. Here, what we have to see is the effect of his having so acted. Does it vitiate the proceedings of the board in which he took part alter 9th March, 1955? Section 85 of the Act says:

The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification:

Provided that nothing in this section shall be deemed .to give validity to acts done by a director after the appointment of such director has been shown to be invalid." It cannot be seriously disputed that Shri Sat Pal was appointed, and he accepted that appointment, under the mistaken belief that he was holding shares worth Rs. 20,000/- jointly with his brother and mother. It is not even alleged that the mistake was pointed out, or that the appointment was shown to be invalid, at any time be. fore the present petition was presented on 4-7-1955. Notice of the petition was left at the Co.''s office on 6-7-1955 and it was published in the State Gazette on 16-7-1955.

The minutes shown that the meeting that Shri Sat Pal attended was held on 7-7-1955. Tha only business transacted that day was to confirm the proceedings of the previous meeting and to cancel the decision to hold the extraordinary general meeting on 9th July. Acts bona fide done by a de facto director ought to be regarded as valid, and that is not only between the communal the outsiders but also between the Co.

and its members.

25., As regards'' Swam J. Singh, it is stated that he ceased to be a director when, after his appointment on 1-2-1954, he was not elected in the- next; following ordinary general meeting on 25-6-1855. ReUance in this connection is placed on Regn 85 of Table ''A'' Companies Act, The Re-"The director shall have power at any time, and from time to time, to appoint a person as at the next following ordinary general meeting, but Shall be eligible for election by the Co. at that an additional director."

Minutes, of'' 1-2-1954, while co-opting Swarn J. Singh as a director, make it clear that "he shall hold office ''until removed by the directors or by the share holeders This appointment of his was confirmed in a general meeting of the shareholders held on 4-4-1954 Mr. Tull however, stresses that this could have no effect, as provided by Regn. 85, Swarn J. Singh should be deemed to have retired on 25-6-19S5 when the first ordinary general meeting of the Co. was held. Since he was not elected in that meeting he ceased to be a director that day and could not act as such thereafter. The Petitioner had resigned.

Swarn J. Singh ceased to be a director on 25-6-1955 and Sat Pal had ceased to be a director much earlier. This reduced the number of directors to three Article 17 requires that "until otherwise determined by the Co. in general meeting", the

number of directors shall not be less than lour. It is, therefore, urged that there was no legally constituted board after 25-6-1955 and that the same state of affairs still continues.

26. Now, Regn. 85 of Table ''A'' in the First Schedule, is not a compulsory regulation; it is within the competency of a Co. to adopt it or not, or to adopt it with any modification. The . Respondent- Co. by its Article 1 adopts the regulations contained in Table ''A'', so far as they are applicable to a private Co., but expressly makes them subject to the provisions contained in the articles. That leads one to find out if the articles contain anything contrary to, or in modification of Regn. 85. Article 28 contains an analogous provision and it reads:

The directors shall have power from time to time, and at any time, to appoint any other per sons to be directors and no person other than a person, recommended by the directors shall be elected as a director of the Co. Obviously, the article authorises the directors to make the appointment of a director without any restriction or limitation as to the period of Ills appointment. To be more precise, the article does not adopt the proviso that the director so appointed shall retire from office at the next following ordinary general meeting.

That is the modification with which the regulation is adopted. It authorised the board to .decide that the appointment of Swarn J. Singh as a director shall continue till he is "removed by the directors or by the share-holders". He would not, therefore, be deemed to have retired from office at the next following ordinary general meeting and did not stand in need of election by the Co. at that meeting.

27. Let us assume that Swarn J. Singh did cease to be a director on 25-6-1955. The Question still remains, what is its effect. Does it vitiate or invalidate the proceedings in which he took part thereafter? Does it unavoidably lead to the conclusion that there no longer exists a legally constituted board to manage the Co.''s affairs? As already observed, answer to the first question in the negative is afforded by S. 86, Companies Act. It is not even suggested that the legal complications were known to the directors or that Swarn J. Singh''s appointment was, at any time earlier, shown to be invalid.

28. Regulation 89 provides for the contingency giving rise to the second question. The regulation says:

The continuing directors may act not with-standing any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the Co. as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the Co., but for no other purpose.

According to Article 32 of the Co., until otherwise determined by the directors, two of them form the quorum. Their number being still more than the necessary

quorum, the continuing directors, notwithstanding the vacancy, are legally en-titled to carry on the management. It is only where the number is reduced below the necessary quo-rum that the directors are not competent to function for any purpose other than those specified in the, regulation.

I do not see force in Mr. Tulli s argument that since the number of the continuing directors has gone below the minimum number of four there is no legally constituted board and there-fore the regulation can have no application. What he precisely contends is that you must have a board of four before there can be a quorum.

The learned Counsel, in this connection, for-gets the significant distinction between the cases where directors too few in number can and can-not act as continuing directors. If there never existed a board sufficient in number, the continuing Clause (in Regn. 89) would be of no help in authorising the board to carry on business. But where the board, which was originally competent to transact business, is for any reason diminished to a number less than that provided for by the articles, the continuing clause would apply and the remaining directors would be competent to transact the Co.''s business.

The phrase "notwithstanding any vacancy in their body" applies equally to a case where the number of directors is reduced below the mini-mum number. It is true that there cannot be a quorum competent to act where the number of directors is not filled up to the minimum num-ber. But this is always subject to any contrary provision in the articles of a Co.. That pro-vision is made in this case by Regn. 89, adopted by Article 1 of the Co.''s Articles of Association.

29. Lastly, it is urged that the Co.''s funds, are being recklessly wasted. The instances relied upon are:

(i) Payment of Rs. 500/-/- per-menses as remuneration to each of the working directors;

(ii) Rs. 200/-/- per-menses paid to Shri Sat, Pal, legal adviser of the Co.; and (iii) Rs. 1000/-/- paid for the year 1955, to wards premium for insurance against accident of the directOrs. The remunerations were allowed and the expenses incurred when the Petitioner was one of the working directors, and with his approval and consent. He himself enjoyed their benefit so long as he continued as a working director. He did never come forward with an objection that the expenses were excessive or unnecessary. The remuneration is now stated to be exorbitant and highly incommensurate with the amount of business the Co. is handling and the profits that are being made out of it.

The amount of remuneration was unanimously settled by all the directors (of whom the Petitioner was one) and it was subsequently confirm-ed in a general meeting. The directors, and the share-holders were in full knowledge of the true state of

affairs and they, were, therefore, in a position to judge and decide the reasonability of the remuneration. On the basis of the material on record, it is not possible for me to hold that they had singularly erred or that their action was not bona fide.

30. The grounds urged, individually or collectively, in my opinion, are in no way sufficient to lead to the irresistible conclusion that it is just and equitable to wind up the Co.. The petition is being opposed by all the share-holders, except the Petitioner. They all show confidence in the management of the Co. and desire that they should be allowed to carry on the business on which they have jointly and willingly me Interest of the general body of shareholders is a matter of primary consideration in I such cases.

It may suit the Petitioner''s purpose, but I am not at all satisfied that the winding up order will be to the advantage of the entire body of shareholders or the Co.''s creditors, or that it is necessary to safeguard their interest. Some of the share-holders have subscribed large sums to the capital of the Co.. Their stake is much more than that of the Petitioner, whose subscription in cash towards the capital amounts only to Rs. 1000/-/-.

31. I have no hesitation to agree with Mr. Tulli that the "just and equitable clause" ought not to be confined to circumstances ejusdem gener is with those set out in the foregoing clauses of Section 162. But, wide as the powers are, they ought to be exercised with greater care and circumspection. There must boo very strong grounds for ''exercising the discretion, particularly at the instance of a share-holder and against the unanimous view of all the rest of them. No such case, I am sure, is made out by the Petitioner.

32. I also do not see any justification for making an order u/s 153C (5) (b), directing the Co. or its members to purchase the Petitioner''s shares. As already observed, the facts do not justify the making of a winding up order under the just and equitable'' clause.'' Nor has it been shown that the affairs of the Co. are being conducted in a manner prejudicial to the interest of the Co. or in a manner oppressive to some of its members. Consequently, the alternative prayers has also to be rejected.

33. In, the result the application is dismiss- ed with costs.