Surajmull Nagarmull Vs Shew Bhagwan Jalan

Court: Calcutta High Court

Date of Decision: Nov. 20, 1970

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 2 Rule 2
Companies (Amendment) Act, 1936 â€" Section 81(2)
Companies (Consolidation) Act, 1908 â€" Section 67, 69, 82, 82(1)
Companies Act, 1913 â€" Section 4, 4(2), 86, 91B, 97B
Companies Act, 1929 â€" Section 143
Companies Act, 1956 â€" Section 108, 164, 170, 171, 171(1)
Partnership Act, 1932 â€" Section 18, 19, 22, 4

Citation: (1973) 1 ILR (Cal) 207

Hon'ble Judges: A.N. Sen, J

Bench: Single Bench

Advocate: S.K. Gupta, Banilal Jain and N.K. Das, for the Appellant;Gouri Mitter, J.N. Roy, Mathura N. Banerjee, R.N. Gupta, S. Tibrewal and R.P. Tutsan, for the Respondent

Final Decision: Allowed

Judgement

A.N. Sen, J.
This suit is an offshoot of the disputes amongst the partners of the well-known firm of Surajmull Nagarmull. Surajmull

Nagarmull has been a partnership firm of repute and has been carrying on business on a very extensive scale. The members of the firm Surajmull

Nagarmull have beeri controlling various companies and the firm of Surajmull Nagarmull had acted as Managing Agents of very many of the

companies which were promoted by the said firm or the members thereof It is unfortunate, though not uncommon, that disputes have arisen

amongst the members of the said firm.

2. Deokinandan Jalan is one of the partners of the firm of Surajmull Nagarmull. He is also one of the Directors of Howrah Trading Company Pvt.

Ltd. This suit is essentially a suit by Deokinandan Jalan. Originally there were four Plaintiffs in the suit, the first Plaintiff being Asiatic Oxygen and

Acetylene Company Ltd. The other Plaintiffs were Surajmull Nagarmull, Howrah Trading Company Pvt. Ltd. and Deokinandan Jalan. On behalf

of Asiatic Oxygen and Acetylene Company Ltd., which was originally the Plaintiff No. 1, the plaint was signed by Deokinandan Jalan as partner of

Surajmull Nagarmull, the Managing Agents of Asiatic Oxygen and Acetylene Company Ltd. Subsequently by an order made, the name of Asiatic

Oxygen and Acetylene Company Ltd. was deleted from the category of the Plaintiffs and the said company was transposed to the category of the

Defendants. The firm of Surajmull Nagarmull, which was originally the Plaintiff No. 2, has now become the first Plaintiff in the suit. Howrah Trading

Company Pvt. Ltd. is now the second Plaintiff and Deokinandan Jalan, who happens to be the real Plaintiff, is the third and the last of the Plaintiffs.

On behalf of Surajmull Nagarmull, now the first Plaintiff in the suit, the plaint has been signed by Deokinandan Jalan as partner of the said firm. On

behalf of Howrah Trading Co, Pvt. Ltd. the plaint has been signed also by Deokinandan Jalan as Director of the said company.

3. There were originally twelve Defendants in the suit of which four were companies, viz., the Defendant No. 4 Asiatic Oxygen Ltd., the Defendant

No. 10 Coochbehar Trading Company Pvt. Ltd., the Defendant No. 11 Orient Trading Company Ltd. and the Defendant No. 12 Raigarh Trading

Company Ltd. Of the other eight Defendants who were individuals, some happen to be members of the firm of Surajmull Nagarmull. Nandkisore

Jalan, the original Defendant No. 8 who was a partner of the firm of Surajmull Nagarmull, died during the pendency of this suit, and the heirs and

legal representatives of the said Nandkisore Jalan have been brought on record. As a result of the order striking out the name of Asiatic Oxygen

and Acetylene Company Ltd. from the category of the Plaintiffs and transposing the said company to the category of the Defendant Asiatic

Oxygen and Acetylene Company Ltd. is now one of the Defendants in the suit and is the Defendant No. 13 hereunder. The said company is one of

the main contenders in the present action. All the Defendants excepting the Defendant No. 12 Raigarh Trading Company Ltd., which has not

appeared at the trial, are contesting the present suit.

4. The case made out by the Plaintiffs in the plaint filed herein, as it now finally stands after the amendments, may be conveniently set out.

5. In paras 1 and 2 of the plaint the Plaintiffs refer to the incorporation of the Defendant No. 13 Asiatic Oxygen and Acetylene Company Ltd. as a

public limited company and to the share capital to the said company of Rs. 7,00,000 consisting of 70,000 equity shares of Rs. 10 each, all fully

paid up.

6. In para 3 the Plaintiffs state that at all material times the Plaintiff No. 1 Surajmull Nagarmull was and still is the Managing Agent of the Defendant

No. 13 Asiatic Oxygen and Acetylene Company Ltd. and under the Articles of Association of the said Defendant No. 13 the said Plaintiff

Surajmull Nagarmull is authorised to appoint up-to but not more than one-third of the total number of Directors and to remove from office any

person or persons so appointed and upon the removal or retirement of any or more of such persons to appoint any other one or more persons in

his or their place or places; and it is further provided under the said Articles of Association that such Directors shall be ex-officio Directors within

the meaning of the. said Articles of Association and that one of them as shall be named by the said Plaintiff Surajmull Nagarmull would be the

Chairman of the Board of Directors of the said Defendant No. 13.

7. It is stated in para 4 of the plaint that at all rriaterial times one Baijnath Jalan, father of the Plaintiff No. 3 Deokinandan Jalan, since deceased

was the registered share-holder of the Defendant No. 13 to the extent of 350 equity shares of Rs. 10 each and was a partner of Surajmull

Nagarmull, and the said Baijnath Jalan died intestate in the year 1954 leaving him surviving the Plaintiff Deokinandan Jalan as his only son. It is

stated that since long prior to the death of the said Baijnath Jalan the Plaintiff Deokinandan Jalan was a partner of Surajmull Nagarmull, and after

the death of the said Baijnath Jalan the Plaintiff"s firm Surajmull Nagarmull was reconstituted and the Plaintiff Deokinandan Jalan in his individual

capacity became a partner to the extent of 2 as. 9 pies share in the Plaintiff firm.

8. It is averred in para 5 of the plaint that prior to the alleged and impugned transfer of shares the Plaintiffs Surajmull Nagarmull and Howrah

Trading Company Pvt. Ltd. and the Defendants Nos. 1, 2, 3, 5, 7, the original Defendant No. 8 and the Defendants Nos. 9 to 12 and the said

Baijnath Jalan, since deceased, were the registered shareholders of the Defendant No. 13 to the extent mentioned in the schedule annexed to the

plaint, which reads as follows:

ShewBhagwanJalan ... ... 1,750 shares

BaijnathJalan ... ... 350 Ã¯Â¿Â½

BabulalJalan ... ... 350 Ã¯Â¿Â½

KesordeoJalan ... ... 350 Ã¯Â¿Â½

SurajmullNagarmull ... ... 9,420 Ã¯Â¿Â½

Howrah Trading Company Pvt. Ltd. ... ... 13,750 Ã¯Â¿Â½

Raigarh Trading Company Pvt. Ltd. ... ... 7,500 Ã¯Â¿Â½

S. Ghosh ... ... 10 Ã¯Â¿Â½

Orient Trading Company Ltd. ... ... 14,500 Ã¯Â¿Â½ ;

ShyamsundarJalan ... ... 500 Ã¯Â¿Â½

Cooehbehar Trading Company Pvt. ... ... 20,500, Ã¯Â¿Â½

Ltd.

KisorilalJalan ... ... 420 Ã¯Â¿Â½

HiralalDey ... ... 500 Ã¯Â¿Â½

NandkisoreJalan ... ... 100 Ã¯Â¿Â½

70,000 shares

It is further alleged that the Plaintiff Deokinandan Jalan as a partner of the Plaintiff firm Surajmull Nagarmull was at all material times and still is a

share-holder in the Defendant No. 13 and the defen-, dant No. 6 Sm. Santidevi Jalan is the widow of Kesordeo Jalan who was at all material

times a partner of the Plaintiff firm and was the registered share-holder of the Defendant No. 13 to the extent of 350 equity shares, and after the

death of the said Kesordeo Jalan the Defendant No. 6 Sm. Santidevi Jalan was taken in as a partner of the Plaintiff firm and the Defendants Nos.

1, 5, 7 and the original Defendant No. 8 are also the partners of the Plaintiff firm. It is also alleged that the Plaintiff Deokinandan Jalan and the

Defendant No., 1 Shew Bhagwan Jalan at all material times were and are the only Directors of the Plaintiff No. 2 Howrah Trading Company Pvt.

Ltdi

9. It is alleged in para 6 of the plaint that at all material times the shares of the Defendant No. 13 registered in the name of the said Baijnath Jalan

and Kesordeo Jalan, both since deceased, and in the names of the Defendants Nos. 1, 2, 3, 5, 7, the original Defendants Nos. 8 and 9 belonged

to and or were owned by the Plaintiff No. 1 Surajmull Nagarmull and none of the aforesaid persons in whose names the shares stood registered

paid any consideration money for purchase and their acquisition of any of the shares which stood registered in their respective names and the same

was paid by and or on behalf of the Plaintiff No. 1 Surajmull Nagarmull and the aforesaid persons held and still hold the said shares as trustees and

benamders and nominees of the Plaintiff No. 1 Surajmull Nagarmull.

10. It is stated in para 7 of the plaint that Article 87 of the Articles of Association of the Defendant No. 13 at all material times, inter alia, provided

that not less than 21 days'' notice shall be given of a general meeting to pass any special resolution specifying the intention to propose the resolution

as special resolution.

11. Paragraph 8 of the plaint states that Article Ill qf the Articles of Association of the Defendant No. 13 at all material times provided that

minimum number of Directors of the Defendant No. 13 would be three and the maximum number of Directors would be eight.

12. It is alleged in para 9 of the plaint that qualification shares required to be held by a Director of the Defendant No. 13 under the Articles of

Association thereof at all material times were 500 equity shares.

13. It is alleged in para 10 that at all material times and in any event since long prior to the year 1959 the Defendant No. 1 Shew Bhagwan Jalan

was and still is a partner and associate of the Plaintiff No. 1 Surajmull Nagarmull and in para 11 it is averred that the Defendant No. 2

Shyamsundar Jalan is the son of Babulal Jalan, the Defendant No. 5 who is also a partner and associate of the Plaintiff No. 1 Surajmull Nagarmull

and, as such, the Defendant No. 2 at all material times was and still is an associate of the Plaintiff No. 1.

14. In para 12 of the plaint reference is made to the employment of Gopalkrishna Jalan under the Defendant No. 13 at a monthly remuneration of

more than Rs. 500 and it is alleged that the said Gopalkrishna Jalan, who is the son of the Defendant No. l Shew Bhagwan Jalan and cousin of

Defendant No. 2 Shyamsundar Jalan, is an associate of the Plaintiff No. 1 Surajmull Nagarmull, held an office of profit under the Defendant No.

13 at all material times and in any event since prior to September 1962. 4

15. Paragraph 13 of the plaint reads as follows:

As a result of enquiries and/or searches caused to be made by and/or on behalf of the Plaintiff No. 3 from the office of the Registrar of Companies,

West Bengal, Calcutta, it appears:

(a) On December 21, 1959, a special resolution is alleged to have been passed at the general meeting of the company being the Defendant No. 13

alleged to have been held in Calcutta within the said jurisdiction on December 21, 1959, purporting to approve the appointment of the Defendant

No. 2 as a Director of the Defendant No. 13 and an alleged notice of the said, alleged general meeting were alleged to have been despatched on

November 30, 1959. /

(b) On May 31, 1961, another special resolution is alleged to have been passed at the general meeting of the Defendant No. 13 alleged to have

been held in Calcutta within the said jurisdiction on May 31, 1961, purporting to approve the appointment of the Defendant No. 1 as the Director

of the Defendant No. 13 and that the alleged notice'' of the said alleged general meeting were alleged to have been despatched on May 10, 1961.

(c) On July 18, 1962, another special resolution is alleged to havc been passed at the alleged general meeting of the Defendant No. 13 alleged to

have been held in Calcutta within the said jurisdiction on July 18, 1962, purporting to delete the relevant Articles of the Defendant No. 13 with

regard to holding of qualification shares by the Directors of the Defendant No. 13. The alleged notices of the said general meeting are alleged to

have been despatched on June 15, 1962.

(d) On September 27, 1962, another special resolution is alleged to have" been passed at the general meeting of the Defendant No. 13 alleged to

have been held in Calcutta within the said jurisdiction on September 27, 1962, purporting to approve the" payment of Rs. 2,95,883-40 as

promotional expenses of the Defendant No. 4 as also approving the payment of medical expenses to the extent of Rs. 10,065-68 to the said

Gopalkrishna Jalan, an assistant of the Plaintiff No. 1. .The alleged notices of the said alleged general meeting of the company are alleged to have

been despatched on September 6, 1962.

(e) No cpnsent of jthc Defendant No. 13 appears to have been accorded either by, a special resolution or otherwise with regard to the

appointment of the said Gopalkrishna Jalan as an assistant of and or holding an office of profit under the Defendant No. 13 upon payment of

remuneration of over Rs. 500 per month. .

(f) Sometime in June 1962 the Defendant No. 4 appears to have allotted 6,650 equity shares, 1,900 equity shares and 1,900 equity shares in the

Defendant No. 4 in favour of the Defendants Nos. 1, 2 and 3 respectively in exchange of all the equity shares held by the said Defendants Nos. 1,

2 and 3 in the" Defendant No. 13 at the rate of 38 equity shares in Defendant No. 4 for 10 equity shares in the Defendant No. 13. In the

circumstances it further appears that the said Defendants Nos. 1, 2 and 3 cease to hold any equity shares in the Defendant No. 13.

16. It is alleged in para 14 of the plaint that each of the said alleged notices of each of the said alleged. general meetings of the Defendant No. 13

and each of the said alleged special resolutions purported to have been passed in the alleged meetings and/or all business alleged to have been

transacted in those meetings ""were and are illegal, null and void and not binding either on the Defendant No. 13 or any of the share-holders

thereof, inter alia, for the reasons hereinafter mentioned:

(a) Re: Alleged special resolution dated December 21, 1959:

(i) No notice calling the said alleged general meeting and no notice and - or special notices of the intention to move the alleged resolution as special

resolution and no explanatory statement as required by law were issued to and or received by the Plaintiff No. 3 and so far as the Plaintiff No. 3 is

aware no such notices or explanatory statement were issued to and received by the Plaintiff No. 2.

(ii) 28 days" clear ""notice and or 21 days" clear notice as required by law and or Articles of Association of the Defendant No. 13 were not given

of the said alleged general meeting or of intention to propose the alleged resolution as special resolution.

(iii) In any event, neither the notice of the said alleged general, meeting nor the notice and or special notice specifying the intention to propose the

special resolution nor any explanatory statement were issued and or despatched to. the said Baijnath Jalan and received at the registered address

of the said Baijnath Jalan since deceased.

(iv) As far as the Plaintiffs are aware, no such notice of the. alleged general meeting nor the notice nor the special notice of the intention to propose

the same as a special resolution were advertised in any newspaper having an appropriate circulation in Calcutta; in respect of the meetings held on

May 31, 1961, July 18, 1962, and September 6, 1962, identical averments as. noted earlier have -been made in sub-cls. (b),"" (c) and (d)-.of the

said. para 14 of the plaint.

17. The Plaintiffs allege in para, lj? of the plaint that in the premises the Defendant No. 1 or the Defendant No. 2-were not validly appointed

Directors of the Defendant No. 13 and/or are deemed to have vacated their office as Directors of the Defendant No. 13 and/of. ceased to be

Directors of the Defendant No, 13 ; and in any event the said Defendants Nos. 1 and 2 are no longer Directors of the Defendant No. 13 at any

rate since prior to the middle of the year 1961.

18. The Plaintiffs state in para 16 of the plaint that thus the only Director of the Defendant No. 13 between the middle of 1961 and middle of 1962

was the Defendant No. 3 who alone could not validly act as Director nor transact any business of the Defendant No. 13 and, furthermore, the

Defendants Nos. 1, 2 and 3 having in the circumstances hereinbefore stated ceased to hold the qualification shares, they and each of them ceased

to be the Directors of the Defendant No. 13 with effect from, their ceasing to hold of such qualification shares.

19. The Plaintiffs allege in para 17 of the plaint that the Defendants Nos. 1, 2 and 3 are wrongfully alleging"" that at all material imcs they were and

still are the Directors of the Defendant No. 13 and the said Defendants are also wrongfully and illegally continuing to act and hold themselves out

as Directors of the Defendant No. 13 although they have no right to do so.

20. It is averred in para 18 of the plaint thai at all material limes the Plaintiff Surajmull Nagarmull was and still is the holder and/or owner of

practically all the shares in the Defendant No. 10 Coochbehar Trading Company Pvt. Ltd.; and the Plaintiff No. 3 Deokinandan Jalan is the holder,

and owner of substantial and/or large, block of shares in the Plaintiff No. 2 Howrah Trading Company Pvt. Ltd.; and the Plaintiff Surajmull

Nagarmull is the holder and owner of substantial and/or large block of shares in Orient Trading Company Ltd., the Defendant No. 11 herein, and

Raigarh Trading Company Ltd:, the Defendant No. 12 herein.

21. It is alleged in para 19 of the plaint that the Plaintiff Surajmull Nagarmull," either by itself, or through its nominees and/or benamdars and/or

through the said Defendants Nos. 10,, 11 and 12, and the Plaintiff No. 2 have been the holders and owners of all the shares of the Defendant No.

13.

22. In para 20 of the plaint the Plaintiffs refer to the promotion and/or floating Asiatic Oxygen and Acetylene Company Ltd., the Defendant No. 4:

herein, and the Plaintiffs allege that the said Defendant No. 4 was floated and/or promoted by the Defendants Nos. 1, 2 and 3 and their relations

and friends in collusion and conspiracy with the Defendants Nos. 5 and 7,'' the original Defendant No. 8 and the Defendant No. 9 and/or their

friends and relations, inter alia, with the object of depriving the Plaintiffs Nos. 1 and 2 of, their controlling interest and/or power in the Defendant

No. 13."

23. The Plaintiffs aver in para 21 of the plaint that the Defendants Nos. 1, 2, 3 and 5 as Directors of the Defendant No. 4 and other Directors

thereof wrongfully and illegally and without any authority alleged and/or announced that an arrangement had purported to have been reached

between the Defendant No. 4 and the majority of the share-holders of the Defendant No. 13 whereby their holding would be transferred to the

Defendant No. 4 in exchange of equity shares in the Defendant No. 4 at the rate of 38 shares in the Defendant No. 4 for 10 shares in the

Defendant No. 13, and in fact the Defendant No. 4 has purported to issue a profpectus incorporating the announcement to the above effect...

24. In para 22 the Plaintiffs deny the factum and/or the validity and/or the legality of any such alleged arrangement between the majority of the

share-holders of the Defendant No. 13 and the Defendant No. 4, and the Plaintiffs state that the said'' allegation and/or the alleged arrangement is

not only false/ wrongful and illegal but is intended to defraud the share-holders of the Defendant No. 13 including the Plaintiffs Nos. 1, 2 and 3.

25. In para 23 the Plaintiffs refer to the announcement in the prospectus of the proposal to appoint the Plaintiff No. 1 as ihc Managing Agent of the

Defendant No. 4 for a period of ten years and td the obtaining of the necessary approval of the Government sometime in January. 1962 and that

upon such appointment the Plaintiff No. 1 would resign from the Managing Agency of the Defendant No. 13.

26. In para, 24 the Plaintiffs state that the Plaintiff No. 3 Deokinandan Jalan in his capacity as a partner of the Plaintiff No. l Surajmull Nagarmull

had expressly prohibited all other partners of the, said firm and the Defendants Nos. 1, 2, 3, 5 and 7, the original Defendant No. 8. and the

Defendants Nos. ''9, 10, 11 and 12 from transferring any share of the Defendant No. 13 standing in the name of the Plaintiff No. 1 and/or in the

name of the said Defendants; and the Plaintiff No. 3 in his capacity as a Director of the Plaintiff No. 2 had also expressly prohibited the ""Defendant

No. 1 who at all material limes was and still is the only other Director of the Plaintiff No. 2 from transferring among others any share of the

Defendant No. 13 standing in the name of the Plaintiff No, 2, and in spite of the above the Defendants Nos. 1, 2, 3 and 5 in collusion and

conspiracy with the Defendant No. 4 are wrongfully and illegally alleging that the Defendant No. 4 had upto September 30, 1962, already

acquired 59,000 equity shares in the Defendant No. 13 in exchange of the shares of the Defendant No. 4 at the rate of 38 shares in the Defendant

No. 4 for every 10 shares in the Defendant No. 13, and the Plaintiffs deny the factum and/t)r validity and/or legality of the alleged transfer and/or

allotment and/or exchange of shares.

27. In para 25 the Plaintiff;, state that the aforesaid purported transfer of the shares in the Defendant No. 13 made by persons who were

nominees, benamdars and trustees for the Plaintiff No. 1 without the knowledge, consent or approval of all the partners of the Plaintiff No. 1 and in

spite of express prohibition by the Plaintiff No. 3 was and is void, invalid, illegal and of no effect and it should be declared as such. The Plaintiffs

further state that the said purported transfer of shares in the Defendant No. 13 held by the Plaintiff No. 2 having been made without any resolution

of the Board of Directors of the Plaintiff No. 2 and in spite of express prohibtion of the Plaintiff No. 3 was and is also void, invalid,'' illegal and of

no effect, and it should be declared as such and so far as the purported transfer of. the shares in the Defendant No. 13 held by the Defendant No.

10 in which the Plaintiff No. 1 is the holder of practically all its shares is concerned and so far as the alleged transfer of shares held by the

Defendants Nos. II and 12 are concerned, the said transfers were made in spite of protest and/or express prohibition by the Plaintiff No. 3 and, so

far as the Plaintiff No. 3 is aware, the said transfer was without any valid resolution of the Defendants Nos. 10, 11, 12 and as such the same was

void, illegal and invalid, and/or of no effect and the same should be declared as such. The Plaintiffs further allege that the Defendant No. 4 is or

must be deemed to have knowledge of all the material facts including the fact of the express prohibition and/or protest of the Plaintiff as

hereinbefore stated.

28. It is averred in para 26(a) of the plaint that the issued capital of the Defendant No. 4 is Rs. 1,60,00,000 divided into 16,00,000 equity shares

of Rs. 10 each. According to the alleged exchange of shares of the Defendant No. 13 the share-holders of the Defendant No. 13 arc alleged to

have been allotted 2,66,000 equity shares of Rs. 10 each in Defendant No. -4,. and in this way all the share-holders of the Defendant No. 13

would be having a voting power only to the extent of 16-62 % in the Defendant No. 4 and the Defendant No. 13 will be reduced to the position of

a subsidiary company of the Defendant No. 4 and the share-holders of the Defendant No. 13 will be reduced to a hopeless minority in the

Defendant No. 4 and would practically have no controlling power in the Defendant No. 4.

29. In para 26(b) it is alleged that in the premises the said alleged arrangement for transfer and/or transfer of shares in the Defendant No. 13 in

favour of the Defendant No. 4 was and is in fraud of the Defendant No. 13 and its share-holders and in any event in fraud of the Defendant No. 4.

30. The Plaintiffs state in para ''27 that the reasonable and the market value of the shares, of the Defendant No. 13 at all material times was and

still is worth ''over Rs. 70 lakhs and according to the alleged arrangement and/or transfer the share-holders of the Defendant No. 13 are likely to

be allotted 2,66,000 equity shares of Rs. 10 each in the Defendant No. 4 valued at Rs. 26,60,000 and in the premises the Plaintiffs state that in

any event the alleged arrangement and/or alleged transfer is absolutely arbitrary and based on gross cinder-valuation of the assets of the Defendant

No. 13 and is of great pecuniary loss and/or disadvantage to the Defendant No. 13 and/or its share-holders and/or the Plaintiff No. 1 and its

partners and in any event to the Plaintiff. No. 3.

31. The Plaintiffs aver in para, 28 that to the knowledge of the Plaintiff No. 3 the Plaintiff No. 1 never agreed to resign from the Managing Agency

of the Defendant No. 13 as alleged, and furthermore up to now the Plaintiff No. 1 has not been appointed as. the Managing Agent of the

Defendant No. 4 and, as far as ""the Plaintiff No. 3 is aware, no such proposal has uptil now been offered to the Plaintiff No. I and in the premises

the statements contained in the prospectus issued by'' the Defendant No. 4 to the aforesaid effect are false on material particulars and in any event

the statements in the prospectus to the effect that the'' Plaintiff No. 1 is proposed to be appointed as Managing Agent appears to be made without

any intention to appoint the Plaintiff as the Managing Agent of the Defendant No. 4 and is mainly to get the transferof the shares of the Defendant

No. 13 in favour of the Defendant No. 4 and also to invite the public to subscribe to the shares of the Defendant No. 4 by misleading them.

32. The Plaintiffs allege in para 29 that the Defendants Nos. 1, 2 and 3- purporting to act as Directors of the Defendant No. 13 have wrongfully

and illegally purported to agree to"" charge arid/or create a mortgage of the fixed assets of the Defendant No. 13 in favour of Industrial Finance

Corporation of India Ltd. for acquiring-a loan of Rs. 1,50,00,000 agreed to be advanced by the said Industrial Finance Corporation of India Ltd.

to the Defendant No. 4 ; and the Plaintiffs state that the Defendants Nos.,1, 2 and 3 not having been legally appointed Directors and/or having

vacated their office as'' Directors'' and having ceased to be as such the alleged agreement, if any, for charging and/or creating the said mortgage

was not sanctioned by any Board of Direcrtors of the Defendant No. 13 and as such was and is invalid, void, illegal and of no effect and it should

be declared as such...

33. In para 30 the Plaintiffs allege that the Defendant No. 13 had in order to extend their business acquired and obtained from the Government of

India the licence No. L/9/N-3.8/59 for manufacture, of 9,000 units of regulators, 7,500 units of torches and 150 units of oxy-cutting machines per

annum ; and the Defendants Nos. 1, 2 and 3 purporting to act as the Directors Of the Defendant No. 13 and the Defendants Nos. 4 and 5 in

collusion and conspiracy with each other having also wrongfully and illegally purported to transfer and /or agreed to transfer the said most valuable

licence to the Defendant No. 4 without any advantage or benefit to the Plaintiff''s and to the Defendant No. 13 resulting in the prevention of further

expansion of business activities and consequential profits to the Plaintiffs and to the Defendant No. 13.

34. The Plaintiffs state in para 31 that the Defendant No. 13 had also procured an import licence from the Government of India for import of

cylinders of the value of over Rs. 4,48,000 out of which cylinders worth about Rs. 2,64,000 had been utilised by the Defendant No. 13, and the

Defendant No. 13 had placed necessary orders for the import of cylinders for the remaining amount of the said licence and had opened necessary

letters of credit, and the Defendants Nos. 1, 2 and 3 purporting to act as Directors of the Defendant No. 13 and the Defendants Nos. 4 and 5 in

collusion and conspiracy with each other have also wrongfully and illegally purported to sell and/or agreed to sell the said cylinders at cost price as

and when they arrived in India although the Defendant No. 13 itself required the same for its own use in business and although the same are not

easily available in the market and although the market price thereof is very much higher.

35. The Plaintiffs state in para 32 that the aforesaid alleged agreement and transfer and/or the transfer of shares to the Defendant No. 13

mentioned in paras. 24 and 25 of the plaint and the purported agreement to charge and/or mortgage of the assets or properties of the Defendant

No. 13 in favour of Industrial Finance Corporation of India Ltd. as mentioned in para 29 of the plaint, the purported transfer and/or agreement to

transfer the said manufacturing licence mentioned in para 30 of the plaint, the sale and/or agicement for sale of the cylinders as mentioned in para;

31 of the plaint and all acts and all other acts and deeds, if any, in connection with the aforesaid dealings and transactions were and are in fraud of

the Defendant No. 13, its shareholders, the Plaintiff No. 1, its partners and in any event the Plaintiff No. 3 as will appear from the facts

hereinbefore stated and as such the same are void, illegal and/or of no effect and it should be so declared.

36. In para 33 the Plaintiffs allege that reason of the said alleged transfer of manufacturing licence and/or the sale of the said cylinders mentioned in

paras. 30 and 31. of the plaint, the Defendant No. 13 has suffered loss and/or damage which it assessed at Rs. 1,00,00,000 and, in the alternative,

the Plaintiffs claim an enquiry into such damages.

37. To Para 31 the Plaintiffs allege that the Defendant Nos. 1, 2 and 3 purporting to act as the Directors of the Defendant No. 13 have grossly

mismanaged the affairs of the Defendant No. 13 and have been acting with a view to defraud the Plaintiffs and the Defendant No. 13 and other

share-holders of the Defendant No. 13, the Plaintiff No. 1 and/or its partners and in any event the Plaintiff No. 3.

38. In Para 35 the Plaintiffs state that, assuming but not admitting in any way the factum or validity of the alleged transfer of shares, the Plaintiffs

allege that such, alleged transfer of shares, if any, must have been made on the basis of the statements contained in the prospectus issued by the

Defendant No. 4 which as hereinbefore stated were false and were appeared to have never been intended to be implemented nor have the same

been implemented and, in the premises, the said alleged transfer of shares, if any, is void and/or voidable and the Plaintiff for self and on behalf of

the Defendant No. 3 and the Defendant No. 13 have avoided the same and the Plaintiffs hereby avoid the same.

39. In para 35,(a) the Plaintiffs refer to the death, of the original Defendant No. 8 Nandkisore Jalan and to his heirs and legal representatives who

have been brought on record.

40. In Paras 38, 39, 40, 41 and 42 of the plaint, introduced by way of. further amendments, the Plaintiffs refer to earlier proceedings beiween the

parties in this suit and contend that in view thereof norie of the Defendants are entitled to reagitete the defence of non-maintainability of the suit on

any ground whatsoever and all such grounds of non-maintainability are barred by res judicata and/or constructive res judicata and/or principles

analogous thereto.

41. On the basis of the aforesaid averments the Plaintiffs ask for the following reliefs:

(1) A declaration that the alleged special resolution ""mentioned in paras. 13 and 14 of the plaint are void, illegal and not binding either on the

Defendant No. 13 or any of its shareholders.

(2) A declaration that'' the Defendants Nos. 1, 2 and 3 were and are not the Directors of the Defendant No. 13.

(3) A declaration that the Defendants Nos. -1, 2 and 3 have ho right or power or authority to act or manage the affairs of the Defendant No. 13

either as Directors or otherwise or to deal with or dispose of or offer or encumber or charge or mortgage any of the assets or properties of the

Defendant No. 13.

(4). Permanent injunction restraining the Defendants Nos. 1, 2 and 3 from acting as Directors of the Defendant No. 13 or from dealing with and/or

disposing of and/or alienating any of the assets or properties of the Defendant No. 13.

(5) A declaration that the arrangement and/or agreement,, if any, entered into between the Defendant No. 13 and the Defendant No. 4 and the

Industrial Finance Corporation of India for financing and giving loan to the Defendant No. 4 upon mort gage and/or charge of any of the assets or

properties of the Defendant No. 13 is invalid, illegal and not binding on the Defendant No. 13 or any of its'' share-holders.

(6) A declaration '' that the alleged agreement for transfer and/or transfer of any of the shares of the Defendant No. 13 to the Defendant Not 4

either in exchange of the shares of the defen dant No. 4 or otherwise were and are invalid, illegal and of no effect.

(7) Rectification of the share register of the Defendant No. 13 and/or of the Defendant No. 4.

(8) A declaration that the alleged transfer of the manufacturing licence mentioned in para 30 herein is illegal, void and of no effect and that the

Defendant No. 4 should not use or utilise the said licence in any way whatsoever.

(9) A declaration that the sale and/or agreement for sale of the cylinders mentioned in para 31 is illegal, void and of no effect.

(10) Premanent injunction restraining the Defendant No. 4, its agents and servants from using or in any way utilising the manufacturing licence

mentioned in para 30.

(11) Permanent injunction restraining the Defendants Nos. 1, 2 and 3, their servants and agents from charging and/or creating any mortgatge in

respect of any of the assets or properties of the Defendant No. 13. either in favour of the Industrial Finance Corporation of India or otherwise.

(12) A decree in favour of the Defendant No. 13 directing the Defendants Nos, 1, 2 and 3 to refund or restore all monies or advantages received

by them as Directors of the Defendant No. 13.

(13) A decree for Rs. 1,00,00,000 or alternatively an enquiry into damages.

(14) A decree in favour of the Defendant No. 13 against the Defendants Nos. 1, 2, 3 and 4 directing refund of all promotional expenses mentioned

in paras. 13 and 14.

(15) Receiver.

(16) Injunction.

(17) Costs.

(18) Leave under Order 2, Rule 2 of the Code of Civil Procedure.

(19) Further and/or other reliefs.

42. Three separate written statements have been filed on behalf of the Defendants. One joint written statement was filed on behalf of the

Defendants Nos. 1 to 10. After the death of Nandkisore Jalan, the Defendant No. 8, his heirs and legal representatives were brought on record.

The written statement which was originally filed on behalf of the said Defendants Nos. 1 to 10 has been verified by Shew Bhagwan Jalan, the

Defendant No. 1 herein. On behalf of the Defendant No. 11, Orient Trading Company Ltd., a written statement has been" filed and the said

written statement has been verified by Kisorilal Jalan as Director of the said company. It may be noted that Kisorilal Jalan in his individual capacity

is also one of the Defendants in the suit and is the Defendant No. 7. Asiatic Oxygen and Acetylene Company Ltd., which was originally the Plaintiff

No. 1 and was subsequently transposed to the category of the Defendant and is now the Defendant No-13, has filed a written statement. Although

the defence of the Defendants in the written statement is more or less similar and the Defendants though separately represented are fighting really a

common case, the main written statement, treated as such by all the appearing Defendants, is the written statement filed on behalf of the Defendant

No. 13 Asiatic Oxygen and Acetylene Company Ltd. It may be noted that because of some amendments in the plaint certain additional written

statements have also been filed by the Defendants. The case made by the Defendant No. 13 Asiatic Oxygen and Acetylene Company Ltd. in its

written statement may be noted.

43. In para 1 of the written statement this Defendant denied that this Defendant carries on business at No. 8 Dalhousie Square East and this

Defendant states that since November 3, 1968, this Defendant has ceased to carry on business at the above address.

44. In para 2 of the written statement this Defendant states that on and from April 1, 1967, the Plaintiff No. 1 Surajmull Nagarmull ceased to be

the Managing Agent of this Defendant and the said Plaintiff No. 1 does not any longer have any right to appoint any Director of this Defendant and

in any event no appointment of any Director was made at any material time under the provisions of the articles of association referred to in para 3

of the plaint.

45. Dealing with the allegations made in para 4 of the plaint this. Defendant states that Baijnath Jalan was a registered holder of 350 equity shares

of this Defendant and that Baijnath Jalan died in the year 1954 leaving the Plaintiff No. 3 as his only son. This Defendant further states that no

application has been made to this company for transmission of the said shares which stood in the narne of the said Baijnath Jalan nor has this

company been informed of the issue of any succession certificate or any other representation in respect of other properties or the said shares left

by the said deceased. In para 4 this Defendant, dealing with the allegations made in para 5 of the plaint, denies that the Plaintiff No. 3 ever Was or

still is a share holder of this Defendant and this Defendant craves reference to its register of members.

46. In para 5 this Defendant denies each and every allegation made in para 6 of the plaint. In para 6 of the written statement this Defendant denies

that on and from July 18, 1962, the qualification shares required to be held by a Director of this Defendant under its Articles were and are 500

equity shares as alleged oi at all.

47. In para 7 this Defendant, dealing with the allegations made. in para 13(a) of the plaint, states that the meeting referred to therein was duly held

upon due notice to the members and the appointment of the Defendant No. 2 as"" a Director of this company was duly made and/or approve d and

this Defendant denies all allegations contrary to tl)e aforesaid.

48. In para 8 of the written statement this Defendant deals with the allegations made in para 13(b) of the plaint and this Defendant states that the

meeting referred to therein was duly held upon due notice to the members and the'' appointment of the Defendant No. 1, as a Director of this

company, was duly made and/or approved and this Defendant denies all allegations contrary to the aforesaid.

49. This Defendant deals with the allegations made in para 13(c) of the plaint in para 9 of the written statement and this Defendant states that the

meeting referred to in para 13(c) of the plaint was duly held upon due notice to the share-holders of this Defendant and the notice of the general

meeting referred to in the said paragraph was received by the members on June 25, 1962, and the resolutions passed in the said meeting were and

are valid and this Defendant denies all allegations contrary to the aforesaid. This Defendant further states that the Plaintiffs Nos. 1 and 2 attended

the said meeting and excercised their rights in the said meeting and cannot, therefore, challenge or deny the validity of the resolution passed and

businesses transacted at the meeting or the sufficiency of the notice thereof by virtue of the laws of estoppel and/or waver and/or acquiescence.

50. In answer to the allegations made in para 13(d) of the plaint this Defendant in para 10 of the written statement states that the meeting referred

to in the said paragraph of the plaint was duly held on proper notice and the resolution passed and the businesses transacted there are valid and

lawful and that the Plaintiff No. 1 attended the said meeting and exercised its power therein and cannot now challenge or deny the validity of the

resolutions passed or businesses transacted at the said meeting or the sufficiency of the notice thereof by virtue of the laws of estoppel and/or

waver and/or acquiescence.

51. This Defendant further contends that in any event no resolution was necessary to approve the payment of Rs. 2,95,883-40 as promotional

expenses of the Defendant No. 4 being expenses incurred by this Defendant in the usual course of business.

52. In para 11 this Defendant denies each and every allegation made in para 13(e) of the plaint.

53. In para 12 this Defendant, dealing with the allegations made in para 13(f) of the plaint, denies that the Defendant No. 1 acquired 6,650 or any

equity shares in the share capital of the Defendant No. 4 in exchange of any equity shares held by the Defendant No. 1 in the share capital of this

Defendant;. and this Defendant states that the Defendants Nos. 2 and 3 acquired, at all material times, held and still holds one equity share in this

Defendant and the Defendant No. 1 at all material times, held and still holds 1,751 equity shares in this Defendant. This Defendant denies that the

Defendant No. 1 or 2 or 3 ceased, at any material time, to be holder of any equity shares in this Defendant.

54. In para 13 of the written statement this Defendant denies each and every allegation made in para 14 of the plaint.

55. In para 14 of the written statement this Defendant deals with the various sub-paragraphs of para 14 of the plaint and this Defendant states as

follows:

14. (a) Re: Special Resolution dated December 21,1959:

(i) This Defendant states that notice calling the general meeting or of the intention to move the resolution as a special resolution with explanatory

statement was not required to be served upon the Plaintiff No. 3. Save as aforesaid this Defendant denies each and every allegation contained iri

para 14(a)(i) of the plaint.

(ii) This Defendant denies that 28 days'' clear notice was required to be given as alleged or at all. Save as aforesaid this Defendant denies each and

every ""allegation contained in para 14(a)(ii) of the plaint.

(iii) This Defendant denies each and every allegation contained in para 14(a)(iii) of the plaint. At all material times; this Defendant and all its share-

holders and management had noticed that Baijnath Jalati died in 1954 and there had been no transmission of the shares which stood in his name. In

any event, this Defendant denies that such notice was required to be issued or despatched lo the said Baijnath Jalan.

56. In sub-paras, (b), (c) and (d) of the said para 14 of the written statement, this Defendant, with reference to the meeting dated May 31, 1961,

meeting dated July 18, 1962, and the special resolution dated September 27, 1962", makes similar averments as made in sub-para, (a) of the said

paragraph.

57. In para 15 of the written statement this Defendant contends that the Plaintiff No. 3 has no locus standi, right or authority to challenge the

validity of the notices and resolutions referred to in paras. 13 and 14 inasmuch as the Plaintiff No. 3, at no material time, was or now is a share-

holder of this Defendant. This Defendant also challanges the locus standi of the Plaintiff No. 2 to challenge the validity or legality of the said notices

and resolutions referred, to in paras. 13 and 14 of the plaint on the allegation that the Plaintiff No. 2 has ceased to hold any shares in this

Defendant on and from September 29, 1962, and this Defendant states that as the Plaintiff No. 2 has ceased to have any interest in this Defendant

or its affairs the Plaintiff No. 2 is not entitled to file this suit in respect of the affairs of the company.

58. In para 16 of the written statement this Defendant denies each and every allegation made in para 15 of the plaint and this Defendant denies, in

particular, that the Defendants Nos. 1 and 2 are no longer Directors of this company since prior to the middle of the year 1961 and this Defendant

states that, the Defendants Nos. 1, 2 and 3 have, at all material times, duly retired by rotation from the Board of Directors of this Defendant and

have been duly re-elected as Directors of this Defendant and the said Defendants Nos. 1, 2 and 3"have, at all material times, been and still are the

Directors of this Defendant.

59. In paras. 17 and 18 of the written statement this Defendant denies and disputes each and every allegation made in paras. 16 and 17 of the

plaint and, in particular, this Defendant denies that the Defendant No. 1 or 2 or 3 ceased to hold the requisite qualification shares for the

directorship so long as such qualification was necessary or that the said Defendants have ceased to be Directors of this Defendant, at any material

times, as alleged or at all and this Defendant states that the Defendants Nos. 1, 2 and 3 have, at all material times, been and still are the Directors

of this Defendant.

60. In dealing with the allegations contained in para 18 of the plaint this Defendant states that save that the Plaintiff No. 1 held and still holds shares

in the Defendants Nos. 10, 11 and 12 and the Plaintiff No. 3 holds shares in Plaintiff" No. 2, this Defendant makes no admission of any of the

allegations contained in the said paragraph.

61. In para 20 this Defendant denies each and every allegation made in para 19 of the plaint.

62. Dealing with the allegations made in para 20 of the plaint this Defendant in para 21 of the written statement denies that the Defendant No. 4

was floated or promoted by the Defendants Nos. 1, 2 and 3 in collusion and conspiracy with the Defendant No. 5 or 7 or the original Defendant

No. 8 or 9. or their friends or relations or with anybody for the object as alleged or at all. This Defendant states that the Defendant No. 4 was

floated and promoted with full knowledge and consent of the Plaintiff No. 1, and all its partners including the Plaintiff No. 3 and the Plaintiff No. 1,

and all its partners, at all material times, agreed that the Plaintiff No. 1 was to be appointed as the Managing Agent of the Defendant No. 4,

Necessary approval of the Government of India was also obtained by the Directors ahd promoters of the Defendant No. 4 in January 1962 to

appoint the Plaintiff No. 1 as the Managing Agent; and in May 1962, Tolaram Jalan and Mohanlal Jalan, both sons of Mahabir Jalan, a partner of

the Plaintiff No. 1, in their capacities as Directors of the Defendant No. 12 duly signed and executed an appropriate transfer deed in respect of the

shares in the Defendant No. 12 in the share capital of this Defendant. .

63. In paras. 22, 23 and 24 of the written statement this Defendant dealing with the allegations made in paras. 22 and 23 of the plaint states that

the prospectus truly and correctly represents the decision of the partners of the Plaintiff No. 1, and save as appears from the prospectus this

Defendant denies the allegations contained in the said paragraphs of the plaint.

64. In para 25 this Defendant deals with the allegations made in para 24 of the plaint and denies each and every allegation contained in the first

sentence thereof and this Defendant states that in any event the majority of the partners of the Plaintiff No. 1 decided in favour of the transfer of

some of the shares held by the Plaintiff No. 1 in this Defendant and in any event the validity and legality of the alleged prohibition of the Defendant

No. 3 is denied and disputed and such prohibition had and has no legal consequence and was and is not binding on the Plaintiff No. 1 or its other

partners or the other Defendants. This Defendant denies other allegations contained therein and denies the allegation of any collusion and

conspiracy and this Defendant states that, in any event, this Defendant has no notice of the allegations made in para 24 of the plaint, and the

Plaintiff No. 3 never gave any notice of the same at any material time to this Defendant, and this Defendant was bound by law to register the

transfers referred to in the said paragraph. This Defendant denies that the Plaintiff can challenge the validity or legality of the transfer or allotment or

exchange of shares or are entitled to maintain the suit in connection with the same.

65. In para 26 this Defendant denies each and every allegation made in para 25 of the plaint.

66. In para 27 of the written statement this Defendant deals with the allegations made in para 26(a) of the plaint and this Defendant states that save

what would appear from the books of the Defendant this Defendant does not admit any of the allegations contained in para 26(a) of the plaint, and

this Defendant states that the public have subscribed to the share capital of the Defendant No. 4 to the extent of Rs. 67 lakhs and the Defendant

No. 4 has been floated in collaboration with a foreign company. Air Products Inc. The latter has subscribed Rs. 26 lakhs to the share capital of the

Defendant No. 4. There could be no question of this company or its shareholders, having the controlling power over or in the Defendant No. 4,

and this Defendant is a subsidiary of a huge concern like the Defendant No. 4 and has made immense extention and expansion of its business

activity including the enlargement of its assets which was the primary motive of the company becoming a subsidiary of the Defendant No. 4 and

also the intention and motive of the Plaintiff No. 1.

67. In paras. 28 and 29 this Defendant deals with the allegations made in paras. 26(b) and 27 of the plaint and denies the allegations made therein.

68. Dealing with the allegations made in para 28 of the plaint this Defendant in para 30 states that originally it was agreed by the partners of the

Plaintiff No. 1 that Surajmull Nagarmull would cease to be the Managing Agent of this Defendant and would become the Managing Agent of the

Defendant No. 4, but later on the partners of the Plaintiff No. 1 decided that for the time being the Plaintiff No. 1 would continue as the Managing

Agent of this Defendant and, as a matter of fact, the Plaintiff No. 1 continued as such till March 31, 1967. On account of the conduct of the

Plaintiff No. 3 and his obstructive attitude in connection with the affairs of the Plaintiff No. 1 and, in view of the institution of this suit as also suit

No. 1886 of 1963 filed in this Hon''ble Court, the Plaintiff No. 1 could not validly be appointed as the Managing Agent of the Defendant No. 4

and, save as stated herein, the other allegations contained in the said paragraph are denied and this Defendant denies that any statement contained

in the prospectus was and is false as alleged or at all.

69. In para 31 this Defendant states that save that this Defendant lawfully and validly agreed to charge and to create a mortgage of the fixed assets

of this Defendant in favour of Industrial Finance Corporation of. India Ltd. for securing a loan of Rs. 1,50,00,000 agreed to be advanced by the

said Corporation to the Defendant No. 4, this Defendant denies each and every allegation, contention and submission contained in para 29 of the

plaint; and this Defendant states that in any event the Plaintiffs are not entitled to or competent to. challenge or dispute the legality or validity of the

said acts and agreements for creating charge or mortgage of the fixed assets of this Defendant, and, in any event, the said agreement was made and

the said charge or mortgage was created upon notice to the share-holders of this company at the general meeting, of the share-holders of this

company, and the same had been duly approved or ratified by the members of this company and the Plaintiffs arc estopped from challenging the

legality and validity thereof.

70. This Defendant in para 32 of the written statement in answer to the allegations made in para 30 of the plaint denies that the Defendant No. 1 or

2 or 3 or any of them acted in collusion or conspiracy with each other or have wrongfully or illegally proposed the transfer and/or transferred in

favour of the Defendant No. 4, the licence referred to in the said paragraph or that the said transfer was without any advantage or benefit to this

Defendant or that the Defendant has thereby been prevented from making further extension of business activities or consequential profits. This

Defendant has been, at all material times, acting and is still acting as a subsidiary of the Defendant No. 4, and it was for the benefit of the business

activity of this Defendant that the said licence was transferred and consequently thereafter this Defendant has been able to extend its business; and

in any event, the said transfer was duly and lawfully effected. by the Board of Directors of this Defendant. This Defendant further states that, at all

material times, this Defendant contemplated the promotion of the Defendant No. 4 and obtained the said licence from the appropriate authority

with the object of transferring the same to the Defendant No. 4, as and when promoted and utilised such licence for the purpose of the Defendant

No. 4, and this Defendant alleges, that, as a result of the institution of this suit and other illegal activities of the Plaintiff No. 3, the Defendant No. 4

was unable to utilise the said licence and the same has lapsed or has been cancelled and save as aforesaid the Defendant denies each and every

allegation, contention and submission in para 30 of the plaint.

71. In para 33 this Defendant dealing with the allegations made in para 31 of the plaint admits that out of the import licence sanctioned by the

Government of India for import of cylinders of the value of Rs. 48 lakhs this Defendant itself utilised cylinders imported thereunder of the value of

Rs. 2,64,000. This Defendant states that this Defendant did not require the other part of the cylinders which it was entitled to import under the said

licence and for the purpose of its manufacturing business> and this Defendant duly and lawfully agreed to sell the cylinders which it would be

importing under the said licence (other than the cylinders worth Rs. ''2,64,000) at the cost price as and when they would arrive in India, because

this Defendant did not require them any more for the purpose of its business, and this Defendant had already opened a letter of. credit and was

committed to import cylinders of the value of over Rs. 48 lakhs under the said licence. This Defendant states that this Defendant did not require the

entirety of the said quantity of cylinders for the purpose of its business and there was no readily available market for the same either and the

decision of the Directors of this Defendant to sell at cost price the cylinders to the Defendant No. 4, and the above fact were duly brought to the

notice of the members of this Defendant at the annual general, meeting of this company, and the same were duly approved and ratified by the

members of this Defendant and the Plaintiffs are estopped from challenging the legality and validity of the same.

72. In paras. 34, 35 and 36 of the written statement this Defendant deals with the allegations made in paras. 32, 33 and 34 of the plaint and denies

the allegations contained therein.

73. In answer to the allegation made in para 35 of the plaint this Defendant in para 37 denies that the statements contained in the prospectus issued

by the Defendant No. 4 were or are false or were not intended to be implemented or that the transfer of shares was made on the basis as alleged

in the said paragraph or that the same is void or voidable or that the same has been avoided or that the Plaintiffs are entitled to challenge the said

transfer or to claim any alleged relief in respect thereof.

74. In para 38 of the written statement this Defendant dealing with the allegation made in para 35(b) of the plaint states that M/s. Leslie and

Khettry had no authority to act and this Defendant craves leave to the order dated June 12, 1969, and save as appearing therein this Defendant

does not admit any of the allegations made in para 35(b).

75. In para 40 of the written statement this Defendant states that the suit as framed is not maintainable any longer for the following reasons:

(a) This suit is bad for misjoinder of parties and cause of action.

(b) The Plaintiffs and each of them have and has no right to institute or proceed with the suit in respect of or any relation to the affairs of this

company as stated in the plaint and for the alleged reliefs claimed in the suit.

(c) Asiatic Oxygen and Acetylene Company Ltd. was originally made the Plaintiff No. 1 in this suit which was instituted by Surajmull Nagarmull

purporting to act as its Managing Agents whereas, in fact, at the material date Surajmull Nagarmull had no right or authority as such Managing

Agents to institute any suit on behalf of Asiatic Oxygen and Acetylene Company Ltd. and, as such, the original suit is bad.

(d) Deokinandan Jalan, who is purported to have instituted the suit on behalf of the Plaintiff No. 2, never had any authority or right to institute the

suit on behalf of the Plaintiff No. 2.

(e) The Defendants Nos. 1 to 7 are partners of the Plaintiff No. 1. The original Defendant No. 8 was the partner of the Plaintiff No. 1. The suit, as

framed, is not maintainable against the Plaintiff No. L"s own said partners and cannot be proceeded with.

(f) The Plaintiff No. 3 has no cause of action against any of the Defendants nor any right or authority to institute or proceed with the suit against any

of the Defendants.

(g) The suit has been filed by and at the instance of the Plaintiff No. 3 for the firm against the decision and wishes of the majority of the partners of

the Plaintiff No. 1 and, in any event, against the wishes of the majority of the said partners to proceed with or continue the suit. The majority of the

partners of the Plaintiff No. 1 do not desire or want to proceed with the suit.

76. In para 41 this Defendant states that the suit is barred by limitation as the Plaintiff No. 1 has been added as the Defendant No. 3 by order

dated June 12, 1969. This Defendant contends that none of the Plaintiffs has any cause of action and/or claim against this Defendant and cannot

claim any relief and that the suit should be dismissed with costs.

77. An additional written statement has also been filed on behalf of this Defendant to answer the allegations introduced in the plaint by way of

amendment for raising the question as to the contention. of the Defendants as to the maintainability of the suit of the Plaintiffs being barred by res

judicata or principles analogous thereto. In the additional written statement filed, this Defendant craves reference to the said earlier proceedings

and orders made and denies and disputes the claim and contention of the Plaintiffs as to the question of res judicata. In the written statement filed

on behalf of the Defendants Nos. 1 to 10, including the original Defendant No. 8, the claim and contention of the Plaintiffs in the suit are denied and

disputed. Similarly, in the written statement filed on behalf of the Defendant No. 11 the case of the Plaintiffs as made in the plaint and the claim of

the Plaintiffs have been denied and disputed. The averments in the written statement filed on behalf of these Defendants are more or less on the

same lines adopted in the written statement filed on behalf of the Defendant No. 13. As I have already dealt at length with the written statement

filed on behalf of the Defendant No. 13 and as the said written statement happens to be the most comprehensive one and covers more or less all

the defence raised by the other Defendants in the written statement filed by them, I do not consider it necessary to set out at any length the

averments made in the written state- ments filed on behalf of the other Defendants.

78. The following issues were settled:

1. Is the Plaintiff No. 3 a share-holder of the Defendant No. 13 as alleged in para 5 of the plaint ?

2. (a) Was the Plaintiff No. 1 the owner of the shares referred to in paras. 6 and 19 of the plaint ?

(b) Are the Defendants Nos. 10, 11 and 12 and the Plaintiff No. 2 the benamdars and nominees of the Plaintiff No. 1 as alleged in para 19 of the

plaint ?

3. Were 500 equity shares the qualifying shares of the Directors of the Defendant No. 13 after July 18, 1962 ?

4. (a) Are the notices referred to in paras. 13 ami 14 of the plaint illegal or null and void or not binding on the Defendant No. 13 or its share-

holders ?

(b) Are the proceedings of the meetings referred to in paras. 13 and 14 of the plaint and the resolutions passed therein illegal or null and void or

not binding on the Defendant No. 13 or its share-holders ?

(c) Was there no consent of the Defendant No. 13 to the holding of an office of profit by Gopalkrishna Jalan as alleged in para 13(e) of the plaint ?

5. Did the Defendants Nos. 1, 2 and 3 or any of them ceased to hold equity shares in the Defendant No. 13 as alleged in para 13(f) of the plaint or

at all ?

6. Has the Plaintiff No. 3 no right or authority or locus standi to dispute the validity of the notices and resolutions referred to in paras. 13 and 14 of

the plaint for reasons stated in para 15 of the written statement of the Defendant No. 13 ?

7. Did the Defendants Nps. 1, 2 and 3 cease to be the Directors of the Defendant No. 13 as alleged in paras. 15 and"" 16 of the plaint ?

8. Was the arrangement as to exchange of shares invalid or illegal or fradulent as alleged in the plaint ?

9. (a) Did the Plaintiff No. 3 prohibit the transfer of shares in the share capital of the Defendant No. 13 as alleged in para 24 of the plaint ?

(b) If so, was such prohibition valid or legal or binding on the Plaintiff No. 1 or its partners or any of the Defendants ?

(c) Were the transfers, allotments and exchange of shares invalid or illegal or made in collusion and conspiracy or without the knowledge or

consent or approval of the partners of the Plaintiff No. 1 as alleged in paras. 24 and 25 of the plaint ?

(d) Are the Plaintiffs entitled to dispute the validity and legality of such transfers, allotments and exchanges of shares?

10. (a) Was the agreement between the Defendant No. 13 and the Industrial Finance Corporation of India to secure loans to the Defendant No. 4

invalid or void or illegal or ineffective or without sanction of the Board of Directors of the Defendant No. 13 as alleged in para.29 of the plaint?

(b) Has the agreement been approved and ratified by the members of the Defendant No. 13 as alleged in para 31 of the written statement of the

Defendant No. 13 ?

(c) Are the Plaintiffs estopped from challenging the legality and validity of: the said agreement as alleged in the written statement of the Defendant

No. 13 ?

11. Was the manufacturing licence transferred to the Defendant No. 4 wrongfully or illegally or in collusion and conspiracy or without any

advantage or benefit to the Plaintiffs or the Defendant No. 13 ?

12 (a) Did the Defendants Nos. 1, 2 and 3 act in collusion and conspiracy with the Defendants Nos. 4 and 5 in selling or agreeing to sell the

cylinders at cost price as alleged in para 31 of the plaint ? .

(b) Was the sale or the agreement for sale of the said cylinders approved and ratified by the members of the Defendant No. 13 in general meeting

?

(c) Are the Plaintiffs estopped from challenging the legality or validity of the sale and /or the agreement for sale as alleged in the written statement of

the Defendant No. 13 ?

13. (a) Has the Defendant No. 13 suffered any loss or damage and, if so, to what extent ?

(b) Are the Plaintiffs or any of them entitled to any damages ? If so, what is the amount thereof ?

14. Is the suit not maintainable on the grounds set out in para 40 of the written statement of the Defendant No. 13 ?

15. Is the question of the suit being not maintainable barred by res judicata for reasons stated in paras. 38 to 42 of the plaint ?

16. Is the suit barred by the laws of limitation ?

17. Has the Court jurisdiction to try and entertain this suit ?

18. To what reliefs; if any, are the Plaintiffs entitled?

79. I have to note that apart from the aforesaid issues which were ultimately settled, the Learned Counsel appearing on behalf of the Defendant

No. 13 also sought to raise the following issues:

(i) Was the Defendant No. 4 promoted in collusion and conspiracy or with the object of depriving the Plaintiffs Nos. 1 and 2 of their alleged

controlling interest and/or power in the Defendant No. 13 as alleged in para 20 of the plaint?

(ii) Was the announcement as to the arrangement for exchange of shares wrongful or illegal or without authority as alleged in para 21 of the plaint?

(iii) (a) Was the arrangement for the transfer of shares made in fraud of the Defendant No. 13 or the Defendant No. 4 as alleged: in para 26(b) of

the plaint ?

(b) Were the arrangement and transfer of shares arbitrary or based on under-valuation of assets of the Defendant No. 13 as alleged in para 27 of

the plaint ?

(c) Have the said arrangement and transfer of shares caused pecuniary loss and disadvantage to the Defendant No. 13 or its shareholders and the

Plaintiff No. 1 or the Plaintiff No. 3 ?

(iv) (a) Were the statements contained in the prospectus of the Defendant No. 4 false as alleged in para 28 of the plaint?

(b) Was any statement made in the said prospectus with intentions as alleged in para 28 of the plaint ?

80. The Learned Counsel appearing on behalf of the other Defendants had also suggested certain issues.

81. As, in my opinion, the aforesaid issues sought to be raised on behalf of the Defendant No. 13 and the other issues which are suggested on

behalf of the other Defendants were not very material for adjudication of the real disputes in suit and the issues relevant and material for proper and

effective determination of the real disputes in suit have been raised and settled, I did not consider it necessary to raise specifically any of the said

other issues suggested. I, however, made it clear to the parties that, although no specific issues had been raised as suggested, the parties would be

entitled and at liberty to lead such evidence as they might consider proper on any of the aforesaid questions.

82. Evidences, oral and documentary, have been adduced. The Plaintiffs have called one Hariram Chamaria, and Hariram Chamaria was the only

witness on behalf of the Plaintiffs. Through this witness the Plaintiffs sought to prove and tender certain documents. The documents which the

Plaintiffs tendered through this witness are photostat copies of certain returns. filed with the Registrar of Companies, certain letters, prospectus of

the Defendant No. 4 Asiatic Oxygen Ltd. and an entry in Hindusthan Standard. These were mainly the documents which the Plaintiffs had tendered

in evidence in support of the case and, as I have already noted, Hariram Chamaria was the only witness that the Plaintiffs had called.

83. The Defendants had called as many as fifteen witnesses and had also caused a huge mass of documents to be exhibited. The documents which

the Defendants have caused to be exhibited consist of various returns filed with the Registrar of Joint Stock Companies including the originals of

the documents, photostat copies whereof have been tendered on behalf, of the Plaintiffs, balance-sheets, share ledgers, minute books, notices of

meetings and acknowledgments of receipt of such notices, share transfer deeds, cash books, dividend warrants, Bank statements and various

correspondences. The witnesses had all been called on behalf of Asiatic Oxygen and Acetylene Company Ltd., the Defendant No. 13, which has

also caused the most of the documentary evidence to be tendered. The other Defendants who have appeared have played a secondary role and

have merely lent support to the said Defendant No. 13.

84. It will be convenient, in the facts of the instant case, to deal with the evidence while considering the issues. I, however, propose to discuss the

evidence, generally before I take up the issues for consideration. .

85. The only witness called on behalf of the Plaintiffs is one Hariram Chamaria. He is in the employ of Tyroon Tea Company Ltd., Bhat Khaoa

Tea Company Ltd. and Raj Bhat Tea Company Ltd. He has never been in the employment of Surajmull Nagarmull or of Hpwrah Trading

Company Pvt. Ltd., or of any of the Defendant companies. Deokinandan Jalan is a Director and the Chairman of Tyroon Tea Company Ltd. of

which this Defendant is an employee. This Defendant has sought to prove--(i) Surajmull Nagarmull was the real owner of all the shares held in the

Defendant No. 13, Asiatic Oxygen and Acetylene Company Ltd., by the Defendants and the Defendants were the benamdars of Surajmull

Nagarmull; (ii) Deokinandan jalan had prohibited the other partners of Surajmull Nagarmull from transferring the shares held by the said partners

standing in the names of individual persons or of the companies in the Defendant No. 13 ; (iii) Deokinandan Jalan as Director of Howrah Trading

Company Pvt. Ltd. prohibited S.B. Jalan, who happens to be the other Director of Howrah Trading Company Ltd., from transferring the shares

registered in the name of Howrah Trading Company Pvt. Ltd. in the Defendant No. 13, Asiatic Oxygen and Acetylene Company Ltd.; (iv) The

books of accounts, records and documents of Surajmull Nagarmull are in the possession of other partner than D.N. Jalan ; and (v) That the ratio

of exchange of 10 shares of Asiatic Oxygen and Acetylene for 38 shares of Asiatic Oxygen Company Ltd., the Defendant No. 4 herein, is

improper. In course of his examination in chief this witness has stated that he goes very frequently to 61 Mahatma Gandhi Road where

Deokinandan Jalan resides and it is his evidence that since 1960 when Deokinandan Jalan started residing at the said premises he had been to 61

Mahatma Gandhi Road many times. It is his evidence that he had to go to the residence of Deokinandan Jalan for taking instructions in regard to

the work of the Tea companies as Mr. Deokinandan Jalan was the Chairman and Director of the three companies (see Qs. 7, 8 and 9). This

witness speaks of dissolution of the firm of Surajmull Nagarmull and of quarrels amongst the partners and litigations between them. This witness

has also referred to the situation of the office of Surajmull Nagarmull at 8 Dalhousie Square East and the gadi at 61 Mahatma Gandhi Road (see

Qs. 12-29). In Q. 31 this witness refers to an incident that took place in May 1962 at 61 Mahatma Gandhi Road where the witness had gone one

day to take instructions from Deokinandan Jalan and it is his evidence that in his presence on that day heated discussions had taken place among

Deokinandan Jalan, Babulal Jalan and Shew Bhagwan Jalan; and Shew Bhagwan Jalan and Babulau Jalan had ultimately left, saying: Chiranjilal and

Mohanlal have got McLeod, Davenport, India and Meghna, so we must have something exclusively for us and we are going to transfer the shares

of Asiatic Oxygen and Acetylene Company Ltd. to the shares of Asiatic Oxygen Ltd., This witness has referred to the announcement in

Hindusthan Standard in lien of prospectus of Asiatic Oxygen Ltd.. (Ex. A) and this witness has stated that after this announcement Deokinandan

Jalan wrote to Babulal Jalan, Shew Bhagwan Jalan, Nandkisore Jalan and Kisorilal Jalan and this witness delivered the letters to the respective

addressees. In Qs. 39 and 40 this witness says that he took these letters himself, went to 8 Dalhousie Square East where Shew Bhagwan Jalan,

Babulal Jalanj Kisorilal Jalan and Nandkisore Jalan were sitting in a room, and after waiting for sometime he handed over the letters to them. He

further says that he handed over these letters and they opened and read out the letters and then they called one of their clerks and told him to give

the witness the receipts, and the clerk brought the receipts back duly signed and stamped and gave the same to the witness. It is his further

testimony that while delivering the letters to the parties, namely, Babttlal Jalan, Shew Bhagwan Jalan, Nandkisore Jalan and Kisorilal Jalan, the

witness told them:

I have been asked by Mr. Deokinandan Jalan to tell them that the shares of Asiatic Oxygen and Acetylene Company Ltd. standing in the name of

Surajmull Nagarmull and their partners and other persons belong to the firm of Surajmull Nagarmull and they should not be transferred with the

shares of Asiatic Oxygen Ltd. and if they do so it will amount to a breach of trust. Thereafter, I also told Mr. S.B. Jalan that Mr. D.N. Jalan had

asked me to tell him that the shares of Asiatic Oxygen and Acetylene Company Ltd. standing in the name of Howrah Trading Company Pvt. Ltd

should not be transferred with the shares of Asiatic Oxygen Ltd. without the approval of the Board of Directors. (See Qs. 39 and 40).

A copy of the letter addressed by Deokinandan Jalan along with four receipts has been tendered and is marked as Ex. B. This witness states that

the exchange ratio of Asiatic Oxygen and -Acetylene Company Ltd. shares should have heen approximately 256 shares of Asiatic Oxygen Ltd. for

10 shares of Asiatic Oxygen and Acetylene Go. Ltd. This witness has sought to prove photostat copies of documents lying at the office of the

Registrar of Companies, West Bengal, filed by Asiatic Oxygen and Acetylene Company Ltd. with the Registrar of Companies. These documents

which the witness has exhibited are photostat copies of some Form No. 23 filed by Asiatic Oxygen and Acetylene Company Ltd. with the

Registrar of Companies setting out various resolutions as required under the provisions of the Companies Act. These photostat copies tendered by

the Plaintiffs are Exs. D, E, F and G. This witness has also exhibited a certified true copy of the list of share-holders of Asiatic Oxygen and

Acetylene Company Ltd. as on September 27, 1962, being an extract from the annual report made ''upto September 27, 1962, filed by Asiatic

Oxygen and Acetylene Company Ltd. with the Registrar of Companies, West Bengal, and this document is marked as Ex. H. This witness has also

exhibited a certified true copy of the list of share-holders of Coochbehar Trading Company Pvt. Ltd. as on August 18, 1960, being an extract from

the annual return made upto August 18, 1960, filed by Coochbehar Trading Company Pvt. Ltd. with the Registrar of Companies. In Q. 90 this

witness was asked as to who were the owners of shares in the Defendant No. 13 standing in the names of the original Defendants and the witness

says in his answer ''Surajmull''. In Q. 94 this witness states that the books of accounts, records and documents of Surajmull Nagarmull are in the

possession of other partners except Deokinandan Jalan.

86. This witness has been cross-examined at length. The purpose of the cross-examination is mainly directed to show that this witness is essentially

a creature of Deokinandan Jalan and he"" has no knowledge of any of the material facts and issues and has come to depose at the behest of

Deokinandan Jalan. This witness has been asked as to his academic qualifications, the nature of his employment and the nature of his duties. It has

been suggested to this witness that a person of the position and status of the witness could never be allowed to remain present at any discussion

between the partners of Surajmull Nagarmull and that he would never dare say anything to any of the partners of Surajmull Nagarmull and he

would not be allowed an audience by Shew Bhagwan Jalan, Babulal Jalan, Kisorilal Jalan and N.K. Jalan. The competency of this witness to

speak On the question of the ratio on the basis of which the shares of Asiatic Oxygen and Acetylene Company Ltd. have been exchanged for

shares in Asiatic Oxygen Ltd., has been questioned and his evidence has been seriously challenged.

87. The oral testimony of this witness, to my mind, is of no material consequence. It is established that this witness has nothing to do with the firm

of Surajmull Nagarmull, the Plaintiff No. 1, and with Howrah Trading Go. Pvt. Ltd., the Plaintiff No. 2. Triis witness has never been an employee

of the firm of Surajmull Nagarmull or of Howrah Trading Company Pvt. Ltd. This witness is also not in the personal employ of Deokinandan Jalan.

He was in the employment of McLeod & Co: Ltd. of which Mr. D.N. Jalan was the Dy. Chairman, and he calls himself a senior executive of the

three Tea companies of which Deokinandan Jalan is the Chairman. Though this witness is not in the personal employment of Deokinandan Jalan,

this witness states that he is looking after the legal affairs of D.N. Jalan and also this litigation on his behalf. Why this witness who is not in the

personal employment of Deokinandan and is in the pay of the three Tea companies of which Deokinandan Jalan is the Chairman should look after

the personal litigation of Deokinandan Jalan leaving aside his duties for which he is paid by the companies, passes my comprehension. I also see no

valid reason why this witness, who calls himself a senior executive of the company of which there is a Managing Director, will call at the residence

of Deokinandan Jalan, the Chairman of the Tea companies off and on to obtain instructions from Deokinandan Jalan with regard to the affairs of

the three companies. It is normally to be expected that such instructions, if necessary, would be obtained at the office. There may arise at times

unusual occasions when it may become necessary to call at the residence of the Chairman, but I fail to understand why should such occasions arise

so frequently. It also seems to be very unlikely that Shew Bhagwan Jalan and Babulal Jalan will discuss any matter of importance concerning the

affairs of Surajmull Nagarmull with Deokinandan Jalan in the presence of the witness and would have any heated arguments in his presence. This

witness appears to be a handy person available to Deokinandan Jalan and I cannot help forming the impression that this witness is indeed a mere

creature of Deokinandan Jalan and is prepared to say whatever will suit the case of Deokinandan Jalan to oblige him. The oral testimony of this

witness is absolutely unreliable and, in any event, of no material consequence. This witness has deposed in Q. 90 that Surajmull Nagafmull were

the owners of shares in the Defendant No. 13 standing in the name of the original Defendants and this statement is the only evidence in support of

this case. This witness docs not even say why and how is Surajmull Nagarmull the owner of the shares standing in the names of the original

Defendants and this witness docs not even mention that the said original Defendants were the benamders of Surajmull Nagarmull. As I have

already noted, this witness has never been associated with the firm of Surajmull Nagarmull and does not and cannot have any knowledge with

regard to the affairs of the said firm and the witness has chosen to make the aforesaid statement only in the belief that the testimony will help the

case of Deokinandan Jalan and, with the object of helping Deokinandan without having any knowledge of the matter in question, this witness made

the bald statement. This witness does not say a word about the shares which were held by the Plaintiff No. 2, Howrah Trading Company Pvt.

Ltd., in the Defendant No. 13, being the property of Surajmull Nagarmull. For the. same reason, namely, that this witness docs not and cannot

have any knowledge, the evidence of this witness that the books of account, records and documents of Surajmull Nagarmull are in possession of

the other partners except D.N. Jalan, is absolutely worthless. The testimony of this witness that the ratio of exchange of 10 shares of Asiatic

Oxygen and Acetylene Company Ltd. for 38 shares of Asiatic Oxygen Ltd: is wholly incompetent, unreliable and without any substance.

88. The evidence of this witness that he personally carried the letter addressed by Deokinandan to Shew Bhagwan, Babulal, Kisorilal and

Nandkisore dated May 25, 1962, (Ex. B) and handed over the said letter personally to the said Jalans and he further orally conveyed to the said

Jalans the instructions of Deokinandan Jalan, seems to be incredible. That Deokinandan Jalan had addressed the letter dated May 25, 1962, to the

said Jalans and the said letter was received at the receiving section of Surajmull Nagarmull is not disputed and is, in any event, established by the

four receipts granted by the receiving section of Surajmull Nagarmull. To my mind, this evidence of the witness of himself having carried the letter

and delivered the same personally to the four Jalans, has been sought to be given only for the purpose of introducing the story of the oral

prohibition alleged to have been communicated by this witness to the said four Jalans on instructions of Deokinandan Jalan. I see no reason why

Deokinandan Jalan should ask this witness to make any oral communication to the said four Jalans when he was in fact writing to them and why all

that Deokinandan wanted to be conveyed to the said four Jalans should not be stated in his letter. The oral testimony of the witness as to

Deokinandan"s instructions, which this witness, was to communicate to the said four Jalans, is not corroborated by the contents of the letter. The

said oral testimony sought to be introduced for the purpose of the case is clearly an afterthought and an attempt at the improvement of the case not

made by Deokinandari Jalan in the said letter. The oral testimony of the witness sought to be introduced by way of an improvement on the said

letter of Deokinandari Jalan (Ex. B) is not corroborated by D.N. jalan who has not come to give evidence, and the oral testimony appears to be

contradictory to the contents of the letter and to be in conflict with the spirit and letter of the contemporaneous written document. It is the testimony

of this witness that on May 25, 1962, this witness handed over the said letter (Ex. B) to the said four Jalans who were discussing some matter in

one of the chambers of these Jalans where he was called and the said four Jalans thereafter sent for a clerk from the receiving department and

instructed the clerk to grant the receipt. The receipts which have been discharged and tendered, appear to contradict the testimony of this witness,

as the receipts all appear to be dated May 29, 1962- It does not seem probable that the said four Jalans, while discussing any matter amongst

themselves, would send for the witness and would listen to any speeches from him. It also docs not seem probable that any special messenger

would be necessary for sending the letter in respect of which receipts had been prepared and would be obtained and it sounds absurd that the

witness, a senior executive of three Tea companies, will be the special messenger for carrying the letter and obtaining the receipts. As I have

already observed, this part of the evidence has been introduced in an attempt to improve the case and cover up the lacuna in the letter (Ex. 13). I

have no hesitation in rejecting the testimony of this witness.

89. I shall now deal with the documentary evidence tendered on behalf of the Plaintiffs through this witness. The first document which has been

exhibited is an announcement in lieu of prospectus, of Asiatic Oxygen Ltd., the Defendant No. 4 herein, in the Hindusthan Standard of May 22,.

1962 (Ex. 4). The second document tendered is the letter dated May 22, 1962, by Deokinandan Jalan to Babulal Jalan, Shew Bhagwan Jalan,

Nandkisore Jalan and Kisoriial Jalan and the receipts granted in respect thereof. This letter along with the four receipts have been marked as Ex.

B. Prospectus of the Defendant No. 4, Asiatic Oxygen Ltd., was also tendered through this witness (Ex. C). This witness has exhibited photostat

copies of Form No. 23 filed by Assiatic Oxygen and Acetylene Company Ltd., the Defendant No. 13 herein, with the Registrar of Companies

containing resolutions passed by the said Defendant No. 13 and the said photostat copies have been certified by the Asst. Registrar of Companies

to be true copies of Form No. 23 filed by Asiatic Oxygen and Acetylene Company Ltd. These photostat copies of these forms containing the

resolutions filed with the Registrar of Companies in From No. 23 have been marked as Exs. D, E, F and G. Another document exhibited on behalf

of the Plaintiffs through this witness is a certified true copy of the list of share-holders of Asiatic Oxygen, and Acetylene Company Ltd. as on

September 27, 1962, being an extract from the annual general return made up to September 27, 1962, filed by Asiatic Oxygen and Acetylene

Company Ltd. with the Registrar of Companies, West Bengal. This document has been marked as Ex. H. The other document tendered on behalf

of the Plaintiffs through this witness is a certified true copy of the list of share-holders of Coochbehar Trading Company Pvt. Ltd., as on August

18, 1960, being an extract from the annual return made upto August 18, 1960, filed by Coochbehar Trading Company Pvt. Ltd., the Defendant

No. 10 herein, and this document has been marked as Ex. I. These were mainly the documents which were exhibited by the Plaintiffs apart from

the correspondence between the Solicitors, marked as Ex. J, when the Plaintiffs closed their case. It has to be noted that the aforesaid documents

were tendered on behalf of the Plaintiffs and the same had been exhibited on their behalf without any reservation or qualification as to the

correctness or otherwise of the contents of the said documents. Hariram Chama-ria, the only witness called on behalf of the Plaintiffs, through

whom the said documents were tendered and exhibited, did not say a word with regard to the same. Documentary evidence adduced on behalf of

the Plaintiffs does not lend any support to the case made by the Plaintiffs; and in my opinion, the said documents seek to demolish the case of the

Plaintiffs sought to be made in the plaint.

90. Exhibit A is an announcement contained in Hindusthan Standard of May 22, 1962- The said announcement mentions the names of S.B. Jalan,

S.S. Jalan and H.L. Dey, amongst others, as Directors of the company. The said announcement further mentions that the company Asiatic Oxygen

Ltd. has been promoted by the Asiatic Oxygen and Acetylene Company Ltd. of Calcutta and the said announcement also records--

An arrangement (approved by the Government of India) has been reached with a majority of the share-holders of the Asiatic Oxygen and

Acetylene Company Ltd., whereby their share-holdings in that company are being transferred to the company in exchange for equity shares in the

company of equivalent nominal value by a rate stated hereinafter.

The announcement thereafter proceeds to state further under the caption "acquisition of the ordinary shares of the Asiatic Oxygen and Acetylene

Company Ltd."-

The Asiatic Oxygen and Acetylene Company Limited has been carrying on business of the manufacture of industrial gases since 1942. It has a

factory at Calcutta for the manufacture of oxygen and dissolved acetylene gases to which has recently been added a new single unit with a capicity

of 7,000 eft. per hour of oxygen and corresponding acetylene gases. It has another factory at Bhilai for the manufacture of dissolved acetylene

gases to which it has proposed to add an oxygen unit.

It is now also engaged in certain engineering and construction work. It undertook the sub-contract for the Indian portion of the work relating to the

Dugda Coal Washery in Bihar for Hindusthan Steel Ltd., the erection of which has since been completed. It has also entered into a similar sub-

contract for another coal washery being set up at Pathardih for Hindusthan Steel Limited.

The unit firm of Surveyors, Talbot & Company of Calcutta, made a valuation of the assets, of the Asiatic Oxygen and Acetylene Company

Limited. Based on their report and on the accounts of that company for the preceding three financial years, Singhi & Company Chartered

Accountants, made a valuation of the shares of that company. A majority of the share-holders agreed to exchange their shares @ 38 shares of this

company for 10 shares of Asiatic Oxygen and Acetylene Company limited, which rate was approved by the Company Law Administration

Department, the Government of India, vide their letter No. 8(29)-Cl. VI-61 dated the 16th September 1961. The Asiatic Oxygen and Acetylene

Company Limited paid a dividend of 40 % subject to tax in the last financial year, that is, 1960-61. This did not reflect the results of the working of

the new plant which increased the capacity of the company to produce oxygen by more than 100 % and the installation of which was completed

towards the end of that year. Should some or all of the share-holders be unwilling to transfer their shares in Asiatic Oxygen and Acetylene

Company Limited, the shares of a value representing the difference between Rs. 26,.60,000 being the value of the entire 70,000 shares at the

above rate of exchange and the value of shares in the Asiatic Oxygen and Acetylene Company Limited acquired by the company may be

subscribed for cash by all or some of the aforesaid share-holders who have agreed to exchange or their relatives or their friends or such shares will

be allotted to other Applicants.

91. Exhibit C is the prospectus of Asiatic Oxygen Ltd. and the prospectus also contains the very same provisions mentioned in the announcement

to which I have ""already referred.

92. Exhibit B is the letter dated May 25, 1962, addressed by D.N. Jalan to B. L. Jalan, S.B. Jalan, N.K. Jalan and K.L. Jalan. The said letter may

be set out in its entirety:

Sri B.L. Jalan

Sri S.B. Jalan.

Sri N.K. Jalan

Sri K.L. Jalan

25th May, 1962

Dear Sirs,

I have seen the announcement made in the papers regarding Asiatic Oxygen Limited. In this connection I have to put on record that this has been

done in contravention of the oath taken by all the partners of the firm of Messrs. Surajmull Nagarmull in the temple of God Ramchandraji before

His image, regarding the disputes of the firm and that you are full responsible for breaking the oath. ;

I further point out that the action in regard to Asiatic Oxygen Limited has been taken in spite of my protest and even after explaining by me to you

that such action on your part will render you liable for breaking the oath.

I met Messrs. B.L. Jalan, and S.B. Jalan on the 16th instant when they contended that since 51% shares in the new company, viz. Asiatic Oxygen

Limited, will be held by S.N. or their nominees, the new company for all purposes will belong to the firm of S.N. as is the present Asiatic Oxygen

and Acetylene Company Limited and, as such, there is no breach, of oath. I, however, did not agree to this contention of theirs and said that since

according to promises status quo should be maintained during the period of oath and as transfer of sale of shares has been a matter of serious

differences, any sale or transfer of shares during the period of oath would be change of status quo and, as such, your action in transferring the

shares of one company for that of the other company would amount to breach of oath. I also said that since differences have taken place on this

point and the same would be referred to Sri N.D. Bangur for his decision according to oath and that, till such decision is. received any further

progress in the matter must be held in abeyance to observe the oath. Your issuing of the prospectus in complete disregard of even this part of the

oath to refer the matter to Sri fiangur and get his decision is a further breach of oath and ypu are fully responsible for its consequences.

93. Four separate receipts which also form a part of Ex. B were granted by the Receiving Department of Surajmull Nagarmull on May 29, 1962.

The rubber stamp on each of the said receipts reads

Surajmull Nagarmull

Receiving Department

Contents not verified,

and beneath the rubber stamp the date "29.5.62" is put. I have set out this letter in extenso as it has been contended that by this letter D.N. Jalan

as partner of Surajmull Nagarmull prohibited the pther partners of Surajmull Nagarmull from transferring the shares of Surajmull Nagarmull. The

letter does not appear to contain any such prohibition either expressly or by any necessary implication. The letter is addressed to only four persons

and not to all the partners of Surajmull Nagarmull and the letter complained only of breach of oath on the part of the addressees. The letter makes

it quite clear that D.N. Jalan was aware of the announcement made in the papers and of the action taken. The letter at the highest indicates that

there were certain differences of opinion and there were certain protests of D.N. Jalan and the said four partners have been guilty of violation of an

alleged oath. The letter makes no mention of Howrah Trading Company Pvt. Ltd. or of any prohibition on S.B. Jalan as Director of Howrah

Trading Company The oral evidence of Hariram Chamaria to which I have earlier referred is not in any way corroborated by this letter. The said

oral testimony is really in conflict with the tenor of this document, as in the oral testimony Hariram Chamaria mentions of prohibition by D.N. Jalan

to be operative in future, whereas in this letter D.N. Jalan complains of acts already done. D.N. Jalan has not come forward to depose to the truth

of the contents of this letter. The letter, Ex. B, does not establish the fact of any prohibition by D.N. Jalan on the other partners.

94. Exhibit D is a photostat copy certified to be a true copy by the Asst. Registrar of Companies. Exhibit D mentions that the following special

resolutions were passed at a general meeting of the members of Asiatic Oxygen and Acetylene Company Ltd. held in Calcutta on December 21,

1959--

That pursuant to the provisions of Section 261 and, other applicable provisions (if any) of the Companies Act, 1956, the appointment of Sri S.S.

Jalan, a Director of the company who is also a relative of the partners of Messrs. Surajmull Nagarmull, the Managing Agents of the company, be

and is hereby made or approved as required by the'' provisions of the said section.

Resolved that the company hereby approves and consents to the tenancy arrangement with Messrs. Surajmull Nagarmull, the Managing Agents of

the company, for Occupying premises 57/1 Ballygunge Circular Road, Calcutta, lower flat by the company belonging to the said Managing Agents

on a rent of Rs. 750 per month with eifect from 1st April, 1959.

The said document also mentions that the date of despatch of notice as November 30, 1959, the date of passing the re:olutions as December 21,

1959, and also records--

At a general meeting of the members of the said company duly convened and held in the town of Calcutta on December 21, 1959.

The said document has beerr signed for and on behalf of the company by Surajmull Nagarmull, the Managing Agents.

95. Exhibit E is a similar document which records that--

At a general meeting of the members of the company duly convened and held in the town of Calcutta on the 21st of May, 1961, the following

special resolutions were passed. Resolved that: Pursuant to the provisions of Section 261 and other applicable provisions (if any) of the

Companies Act, 1956, the appointment of Sri S.B. Jalan, a Director of the company, who is also a partner of Messrs. Surajmull Nagarmull; the

Managing Agents of the company be and hereby made/or approved as required by the provisions of the said Section.

Tike document mentions the date of despatch of notice to be May 10, 1961, and the date of passing the resolutions as May 31, 1961, and the,

said document on behalf of Asiatic Oxygen and Acetylene Company Ltd. has been signed by the. Managing Agents Surajmull Nagarmull.

96. Exhibit F is a similar photostat copy of a document which records--

At an extra-ordinary general meeting of the members of the said company duly convened and held in the town of Calcutta on the 18th July, 1962,''

the following special resolution(s) was/ were passed. Resolved that: That the Articles of Association of the company to be amended as under:

that the Articles 114, 115 and 118(a) of the Articles of Association of the company be deleted''.

(ii) That the following Article be substituted in place of the deleted Article 114 of the Articles of Association ''unless otherwise determined by the

company in general meeting, a Director shall not be required to hold any shares in the capital of the company as his qualification''.

Explanatory statement

That Article 114 of the Articles of Association of the company provides that a Director should have 500 shares as his qualification shares for being

eligible to be a Director of the company. In view of the amended provisions of the Companies Act, 1956, the company has the option to provide

for not qualification shares for the Directors. It has, therefore, been thought desirable to dispense with the requirement for acquiring qualification

shares by Directors and for the purpose to delete the relative Articles of Association of the company. In view of the above, your consent is

necessary for the purpose of amending the Articles of Association of the company by deleting the said Article No. 114 as also Articles 115,

118(a) which are closely related to the said Article.

This document mentions the date of despatch of notices as June 25, 1962, and the date of passing of the resolutions as July 18, 1962, and this

document is also signed by Surajmull Nagarmull, the Managing Agents of the Asiatic Oxygen and Acetylene Company Ltd.

97. Exhibit G is also a photostat copy of another form No. 23 filed by Asiatic Oxygen and Acetylene Company Ltd. with the Registrar of

Companies. This document records--

At the general meeting of the company duly convened and held in the town of Calcutta on the 27th of September, 1962, the following special

resolutions were passed. Resolved that: ''(i) that the advance of a sum of Rs. 2,95,883-40 to meet the promotional expenses qÃ¯Â¿Â½ Asiatic Oxygen

Limited during the year ended on 31st March, 1962, be and is hereby confirmed'': ''(ii) that a payment of a sum of Rs. 10,065-68 to Sri G.K.

Jalan who is an associate of the Managing Agent and an assistant. of the company on account of medical expenses be and is hereby, confirmed''.

The date of despatch of notice is stated in this document to be September 6, 1962, and the date when the resolution is passed is September 27,

1962. This document, filed on behalf of the Asiatic Oxygen and Acetylene Company Ltd., is also signed by the Managing Agents Surajmull

Nagarmull.

98. Exhibit H is a photostat copy of the list of share-holders of Asiatic Oxygen and Acetylene Company Ltd. as on September 27, 1962, This list

contains the names of share-holders before transfer of shares in favour of Asiatic Oxygen Ltd. and is of little consequence.

99. Exhibit I is another photostat copy of the list of shareholders of Coochbehar Trading Company Pvt. Ltd"", as on August 18. 1960. This

document does not appear to have any bearing on any of the questions involved in the suit. The photostat copies of Form No. 23 (Exs. D, E, F

and G) filed by Asiatic Oxygen and Acetylene Company Ltd. with the Registrar of Companies, tendered on behalf of the Plaintiffs, unreservedly

without any qualification and further evidence, establish that the resolutions which the Plaintiffs seek to impeach in this suit, have been duly passed

at the meetings duly held and convened and the said documents tendered on behalf of the Plaintiffs clearly demolish the case of the Plaintiffs.

100. Exhibit J consists of letters exchanged between the Solicitors M/s. Khaitan & Company on behalf of D.N. Jalan and M/s. L.P. Agarwalla &

Company on biehalf of K.L. Jalan. The correspondence had taken place in 1959, long before the institution of the suit. In the letter of Khaitan &

Company dated May 8, 1959, various allegations had been made, and in para 8 of the said letter it was stated--

In any event and without, prejudice to what is stated above, our client hereby revokes the authority, if any, of the other partners of the firm,

including yourself to deal with the shares standing in the name of the firm.

These allegations have been denied in the letter of L.P. Agarwalla & Company dated May 14, 1959, and in the said letter the right of D.N. Jalan

to revoke the authority of the partners has also been challenged. No attempt has been made on behalf of the Plaintiff to prove the truth of the

allegations made in the said letters. It may also be noted that the alleged revocation of authority is only in respect of shares standing in the name of

the firm. From the nature and manner of adducing evidence on behalf of the Plaintiffs I could not help forming an impression that the Plaintiffs were

not serious about proving its case and did not make any proper attempt to prove the case made in the plaint.

101. I now propose to indicate generally and, in brief, the nature of evidence adduced on behalf of the Defendants. Although the Plaintiffs have not

made any serious attempt to prove the case made in the plaint, as many as fifteen witnesses have been called and a huge mass of documents have

been exhibited on behalf of the Defendants. On behalf of the Defendants, evidence has been led mainly through the Defendant No. 13, Asiatic

Oxygen and Acetylene Company Ltd., with which the other contesting Defendants have made common cause. The Defendant No-13 has in fact

called all the witnesses and the witnesses examined on behalf of the Defendant No-13 may be conveniently divided into four classes:

(i) Persons in the employment of the Defendant companies,

(ii) Auditors of the Defendant companies,

(iii) Two Solicitors and two persons who had been employed by the firm of Sandersons & Morgans, and

(iv) Others.

102. The first witness called on behalf of the Defendant No. 13 is one Mr. Sachindranath Kar. Mr. Kar, who is the Secretary of the Defendant

No. 13 and also of the Defendant No. 4, had been the Secretary of the Defendant No. 13 and also of the Defendant No. 4, had done the

secretarial work of these companies before his formal appointment as such Secretary and he had also done the secretarial work of various other

companies under the control and management of Surajmull Nagarmull. Various documents have also been tendered through Mr. Kar who has

sought to prove the share ledger, the minute books, the notices, returns filed with the Registrar of Companies and various transfer deeds of the

Defendant No. 13. This witness has been cross-examined at a very great length. The cross-examination of this witness to an extent has been

prolonged because of the nature Of the answers given by him. The testimony of this witness is rather Unsatisfactory and I find it extremely difficult

to place any reliance on the oral testimony of this witness. A number of times this witness has gone on contradicting himself and has given wrong

and incorrect answers. He has repeatedly tried to take shelter under the plea that he has made a mistake. This witness has himself stated that as a

result of an injury suffered from a fall, his memory has been affected and he suffers from loss of memory and is apt" to forget matters. I do not

consider it necessary to recount the number of contradictory, incorrect and wrong statements made by him in course Of his long ordeal in the

witness-box. Suffice it, however, to say that they are so many and on vital matters. I, however, wish to observe that, although I consider the

evidence of this witness to be very unsatisfactory and unreliable, this witness did not strike mc to be a person who is basically dishonest and

untruthful" and who came into the witness-box to give deliberately false testimony. His age, his lapse of memory, his easy going manner and his

assumption of various tacts without properly knowing or ascertaining the same have been largely responsible for the very unsatisfactory nature of

his evidence. I consider it to be very unsafe to act only on his oral testimony and I am unable to place any reliance on his oral testimony unless the

same is otherwise corroborated by acceptable documentary evidence or other facts and circumstances.

103. Rajmal Patni, a senior executive of Asiatic Oxygen and Acetylene Company Ltd., was called to explain the background of the formation of

Asiatic Oxygen Ltd., the Defendant No. 4.herein, to disprove the allegation of mala fides in the matter of floating the said company. He has also

deposed to explain the purpose of transferring the licence and the sale of cylinders by the Defendant No. 13 to the Defendant No. 4. This witness

had been working with Surajmull Nagarmull since 1944 and has been in the employment of Asiatic Oxygen and Acetylene Company Ltd. since

1956. This witness refers to the scheme of expansion of Asiatic Oxygen and Acetylene Company Ltd., the collaboration arrangement, in the first

instance, with a French company which failed and the ultimate collaboration with Air Products of U.S.A. and the formation of the company Asiatic

Oxygen Ltd. on the basis of agreement with Air Products of U.S.A. This witness had himself visited France and America and had participated in

the negotiations for collaboration. This witness created a very favourable impression on me. I am inclined to accept his testimony and, in my

opinion, this witness satisfactorily explains as to under what circumstances the company Asiatic Oxygen Ltd. came to be formed and the licence

and the cylinders were transferred by Asiatic-Oxygen and Acetylene Company Ltd. to Asiatic Oxygen Ltd.

104. Mr. M.E. Roy, another officer in the employ of Surajmull Nagarmull now drawing his salary from Asiatic Oxygen Ltd., was called to prove

essentially the exchange ratio on the basis of which the shares of Asiatic Oxygen and Acetylene Company Ltd. were to be exchanged for shares of

Asiatic Oxygen Ltd. This witness holds a very responsible position and had conducted the negotiations with the Government with regard to the

question of exchange of shares and the exchange ratio to be fixed. This witness appeared to be a witness of truth...

105. Hansraj Kothari, an employee of Howrah Trading Company Pvt. Ltd. who calls himself to be the principal officer of Howrah Trading

Company Ltd, has given evidence to prove the cash book and balance-sheet of Howrah Trading Company Pvt. Ltd. The oral testimony of this

witness might not have been very impressive, but this witness has satisfactorily proved the cash book and the balance-sheet of Howrah Trading

Company Pvt. Ltd. Cross-examination of its own employee in respect of its own books by the Plaintiff Howrah Trading Company Pvt. Ltd. was

indeed interesting to watch.

106. Joychandlal Boid has been in the employment of Surajmull Nagarmull for a pretty long time and he has served many of the concerns managed

and controlled by Surajmull. He has proved the dividend warrants and balance-sheets of Coochbehar Trading Company Pvt. Ltd. and the safe

custody receipt of the shares held by Coochbehar Trading Company Pvt. Ltd. This witness has also suggested that the books of Surajmull

Nagarmull are lying at 61 Harrison Road, and are under the custody of D.N. Jalan. The evidence of this witness that the books of Surajmull

Nagarmull are in the, custody of D.N. Jalan at 61 Harrison Road has been introduced, to my mind, to contradict the testimony of Chamaria and as

a counter to Chama-ria''s evidence. On this aspect of the matter it will not be safe, in my opinion, to rely on oral testimony of any of the said two

witnesses, Chamaria on behalf of the Plaintiffs and Boid on behalf of the Defendants, and I am not inclined to come to any conclusion on this

question merely on the oral testimony of these two witnesses. This witness Boid has, however, proved to my satisfaction the dividend warrants,

balance-sheets and the safe custody receipt of the shares of Coochbehar Trading Go. Pvt. Ltd.

107. Basant Vinayak Bapat is a partner of S.B. Dandekar & Company which happens to be the Auditors of Howrah Trading Company Pvt. Ltd,

and also of one of the Auditors of Asiatic Oxygen and Acetylene Company Ltd. S.B. Dandekar & Company has been acting as the Auditors of

Howrah Trading Company Pvt. Ltd. since its inception. This witness has testified to the books of Howrah Trading Company Pvt. Ltd., the

balance-sheet prepared by the Auditors and the physical existence of the shares mentioned in the balance-sheet of the company. Ram krishna

Venkatarama Iyer is the Auditor of Coochbehar Trading Company Pvt. Ltd., Orient Trading Company Ltd. and Raigarh Trading Go. Ltd. He has

been Auditor of these companies for years,"" practically from the very beginning. He has proved the balance-sheets of these companies and he has

also stated about the shares which are referred to in the balance-sheet of these respective companies as the holdings of these companies were in

actual possession of these companies and were held by these companies. I have no hesitation in accepting the testimony of these two witnesses.

108. Two Solicitors, Satyendra Nath Ganguli who at the material time was an assistant in Sandersons and Morgans in charge of the suit on behalf

of the clients of Sandersons and Morgans and now a partner of Fowler & Co:, and Mr. Auddy, a Solicitor of Sandersons 8c Morgans, now in

charge of the case, were called to prove the loss of documents which have been disclosed in the affidavit of documents filed on behalf of their

clients. Nilratan Bandopadhyay and Sisir Bose, two employees of the said firm of Solicitors, have also given evidence for proving the existence of

the original documents mentioned in the affidavit of documents and also for proving the preparation of the Judge"s Brief in suit correctly on the

basis. of the said documents. I see no reason to disbelieve the testimony of these witnesses. It is significant to note that in the present case even the

Judge"s Brief of correspondence and documents have not been prepared by Sandersons & Morgans, the Solicitors for the Defendants Nos. 1 to

10.

109. Santanu Banerjee, a lower division clerk, in the office of the Registrar of Companies, has been examined. The testimony of this witness is

really of no material consequence.

110. Kalipada Mukherjee, an officer under the Post and Telegraph department, was called to explain the. postal seal in respect of certain notices

issued under certificate of posting bearing postal mark "R.M.S.". This witness is now employed as the Asst. Postal Superintendent and has been in

service for some years. He appears to be quite familiar with the procedure and I see no reason to disbelieve the testimony of this witness who is an

employee under the Government and has no interest in the dispute between the parties.

111. San tosh Kumar Bhattacharjee, an employee in the Bank of India Ltd. was called to prove the safe custody register of Bank of India and the

safe deposit account of Coochbehar Trading Company Pvt. Ltd. with the said Bank. Satya Kinkar Banerjee, an employee of United Bank of India

Ltd. was called to prove the dividend war-, ranis and the statement of accounts of Howrah Trading Company Pvt. Ltd. with the said Bank. These

witnesses have satisfactorily proved the documents tendered through them.

112. I have merely indicated my general impression of the testimony of the witnesses called on behalf of the Defendant No. 13. I have already

noted that no other Defendants have called any witness. 1 shall refer to the testimony of these witnesses and the documentary evidence adduced as

far as the same may be considered necessary and relevant while discussing the issues.

113. I shall now take up the issues for consideration. The first issue is--Is the Plaintiff No. 3 a share-holder of the Defendant No. 13 as alleged in

para 5 of the plaint ?

114. It is not disputed that the Plaintiff No. 3 D.N. Jalan docs not hold any share in Defendant No. 13 (which is also referred to as the company)

in his. own name and the name of D.N. Jalan is not registered as the share-holder or member of the company and his name does not appear in the

share register of the company. The said Plaintiff No. 3 claims to be a share-holder of the Defendant No. 13 on the basis that Surajmull Nagarmull

is a share-holder of the company and the Plaintiff No. 3 is a partner of Surajmull Nagarmull. It is contended that as the firm of Surajmull Nagarmull

is a shareholder of the Defendant No. 13, all the partners of the said firm must be considered to be share-holders of the company. It has been

argued on behalf of the Plaintiffs that the firm of Surajmull Nagarmull is not a legal entity and is only a convenient mode of describing all the

partners of the said firm and is the compendious name for all of them. It is the contention of D.N. Jalan that as Surajmull Nagarmull is admittedly a

share-holder and the shares of Surajmull Nagarmull are the assets of the said firm, D.N. Jalan, who is admittedly a partner of the said firm and has

undoubtedly an interest in the said shares, must therefore be considered to be a member or share-holder of the company. Mr. Gupta, the Learned

Counsel appearing on behalf of the Plaintiffs has contended that all the partners of Surajmull Nagarmull must be considered to be joint share-

holders of the company and Mr. Gupta has referred to the decision of the Bombay High Court in the case of Narandas Munmohandas and Others

Vs. The Indian Manufacturing Co. Ltd., and to the decision of the Judicial Committee in the case of Senaji Kapurchand and Ors. v. Pannaji

Devichand AIR 1930 P.C. 301

115. On behalf of the Defendants it is disputed that D.N. Jalan is a share-holder of the company and it is contended that the shareholders of the

company are only those persons whose names appear in the share register of the company, and as D.N. Jalan''s name does not appear in the share

register of the company he cannot be considered to be a share-holder of the company. Mr. Mitter, the Learned Counsel appearing on behalf of the

Defendant No. 13, has submitted that, as far as the said company is concerned, its share-holder is Surajmull Nagarmull and the said company is

not concerned with the individual partners thereof and the said company cannot recognise the individual partners to be the share-holders of the

company.

116. Admittedly, Surajmull Nagarmull is a share-holder of the company and, admittedly, D.N. Jalan is a partner of Surajmull Nagarmull. As a

partner of Surajmull Nagarmull, D.N. Jalan has undoubtedly an interest in the shares held by Surajmull Nagarmull in the Defendant No. 13. The

interest that D.N. Jalan has in the shares held by Surajmull Nagarmull as partner thereof, however, does not make him personally a member or

share-holder of the company in his individual capacity.

117. Section 41 of the Companies Act contains the definition of member and provides--

Definition of member--(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the

company, and on its registration, shall be entered as members in its register of members. (2) Every other person who agrees in writing to become a

member of a company and whose name is entered in its register of members shall be a member of the company.

118. Under the provisions of the Companies Act a share-holder or a member of a company, entitled to the rights and privileges of a member, is

the person whose name appears in the share register of the company and the person whose name appears in the share register is the only person to

be recognised by the company as its member, for all purposes. So far as the company is concerned, Surajmull Nagarmull, therefore, must be

considered to be the share-holder of the company. It is true that Surajmull Nagarmull is not an individual and is only a firm. The firm may not have

a corporate or juristic personality and may be a convenient mode of describing all the partners who constitute the firm and a compendious name

for all of them. The validity of the existence of the firm as a firm apart form the existence of the partners constituting the firm, is, however,

recognised in law and it is well-settled that a firm enjoys a legal status for various purposes. A firm is entitled to enter into a contract and it is

common knowledge that firms frequently do so. A firm is entitled to own properties and to open banking accounts and operate on the same. The

Judicial Committee in the case of AIR 1948 100 (Privy Council) observed:

Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it,

and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further

than the English Partnership Act, 1890, in recognising-that a firm may possess a personality distinct from the persons constituting it, the law in India

in that respect being more in accordance with the law of Scotland than with that of England. But the fact that a firm possess a distinct personality

docs not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids

making a firm a corporate body enjoying the right of perpetual succession.

What happens to the contract, assets and. liabilities of a firm in the event of dissolution of the firm or change in the constitution, thereof,_ is entirely

a different question not relevant for consideration of the status of D.N. Jalan in the company as a partner of the firm. Such questions do not fall for

determination in the present case and the answer to such questions must necessarily depend on the facts and circumstances of the particular case.

It may only be noted that any partner of a firm does not have any particular and individual right to any property or assets of the firm.

119. Company Law recognises individual share-holders and joint share-holders and the rights and obligations of the share-holders, whether

individual or joint, and of the company are governed by the provisions contained in the Act. and in the Articles of the company. The Company

Law does not recognise any benami or any other kind of beneficial interest in any share of any person whose name does not appear in the share

register of the company. The Company Act only recognises the person or persons whose name or names appear on the share-register of the

company. Even in the case of joint share-holders, the company law recognises only these persons whose names appear on the share register of the

company as such joint share-holders. With regard to such joint share-holders suitable provisions are made in the Articles governing their

relationship with the company and the rights and privileges of such joint share-holders and also of the company are regulated accordingly.

120. The nrm of Surajmull Nagarmull became a member of the company by virtue of provisions contained in Article 16 which provides--

Shares may be registered in the name of Managing Agents'' firm (but not other) or of any limited company or other body corporate or individual.

Not more than four persons shall be registered as joint share-holders of any share.

121. A firm is not usually made a member of any company for avoiding the unnecessary complications which may arise because of the nature of

the legal position of a firm. In the instant case, specific provision was made in Article 16 with regard to the membership of Surajmull Nagarmull

making an exception only in its favour ; and by virtue of the specific provision contained in the said Article 16 Surajmull Nagarmull became a

share-holder or member of the company. The said Article 16 which makes provision for membership of Surajmull Nagarmull itself further provides

that not more than four persons shall be registered as joint share-holders of any share. It is not in dispute that at the relevant time when Surajmull

Nagarmull was registered as a share-holder of the company and, at all material times, there were many more than four partners of the said firm!

Because of the provisions contained in Article 16 all the partners (c)f Surajmull Nagarmull could not, therefore, be considered or recognised as

joint share-holders of the shares registered in the name of the firm. The relevant provisions contained in the Articles in relation to joint shareholders

can also have no application to the shares registered in the name of Surajmull Nagarmull. By way of an illustration, reference may be made to

Article 103 which reads--

where there are joint registered share-holders of any sliare, any one of such persons may vote at any meeting either personally or by proxy in

respect of such share as if he were solely entitled thereto, and if more than one of such joint share-holders be present at any meeting either

personally or by proxy, that one of the said persons so present whose name has been the first on the register in respect of such share shall alone be

entitled to vote in respect thereof. Several executors or administrators of a deceased member in. whose name any shares stand shall for the

purpose of this Article be deemed joint share-holders thereof.

122. As the only name that appears on the register is the name or the firm, namely, Surajmull Nagarmull, the said provisions cannot have any

application.

123. The partners of the firm of Surajmull Nagarmull including D.N. Jalan cannot, therefore, be considered to be joint shareholders of the shares

registered in the name of the firm.

124. The partners of the firm of Surajmull Nagarmull can never be considered to be individual share-holders of the company in respect of the

shares registered in the name of Surajmull Nagarmull. If each individual partner is to be considered as a member of the company, it will create a

situation contrary to sense and all provisions of law and will lead to absurd results. If individual partners of the firm are to be considered to be

members of a company in their individual right, separate notices to all such persons will have to be given. All such individual share-holders will then

also have the right to attend and participate and they will also have the right to cast votes separately in respect of the same holding. The number ""of

votes which a firm may have in respect of this holding in any company will necessarily get multiplied by the number of persons constituting the firm;

and the individual persons, if they are treated as individual members of the company, will each be entitled to claim the amount of dividend to be

paid on the shares held by the firm, and the company in respect of the same shares registered in the name of a firm will be liable to pay the dividend

as many times over as there are partners of the firm.

125. In the instant case, the firm has been accepted as the member of the company by virtue of and in accordance with provisions contained in

Article 16. The said Article clearly indicates the intention that the firm was to be the member. Only the name of the firm appears on the share

register. Under the provisions of the Company Law and also under the Articles of the company, the firm, whose name only is registered as share-

holder, alone becomes share-holder and member of the company. The company can only recognise Surajmull Nagarmull which name appears on

the share register as its member and it is not open to the company to recognise anybody who may be interested in the shares registered in the name

of Surajmull Nagarmull as partners thereof, or otherwise, unless the names of, such persons appear on the share register of the company; How

Surajmull Nagarmull, which happens to be a firm, is to act as such share-holder or member of the company and is to represent itself in the affairs of

the company, is a matter essentially for the firm and its partners. The company, however, cannot recognise and treat the individual partners who

constitute the firm as share-holders or members of the company and the company must proceed to act only on the basis that the party whose name

appears on the share register of the company is the member and share-holder of the company. Any person who may have any interest in any share

registered in the nair of somebody else may take such appropriate steps, as he may be advised for protection of his interest. The company,

however, will not recognise such interest of any such person and will not accept such person as member of the company, so long as his name is not

brought in the register of members of the company. D.N. jalan, though a partner of Surajmull Nagarmull, cannot therefore be considered to be a

share-holder of the company, whatever may be nature of his interest in the shares held by Surajmull Nagarmull and the company is not to recognise

D.N. Jalan as a member of the company in his individual capacity.

126. The decision of the Bombay High Court in the case of Narandas Munmohan Das and Ors. v. The Indian Manufacturing Company Ltd.

(Supra), relied on by Mr. Gupta, the Learned Counsel for the Plaintiffs, deals with a case of joint share-holders whose names as such-joint share-

holders appeared in the share-register and the said decision is of no assistance in the present case. The said decision does not deal with any case

of any share registered in the name of a firm and is no authority for the proposition that the partners of a firm are to be considered to be the joint

share-holders of any share registered in the name of the firm in any company. The other decision in the case of Sendji Kapurchand and Ors. v.

Pannaji Devichand (Supra), referred to by Mr. Gupta, deals with the question of construction of Section 4 of the Companies Act of 1913 and lays

down that where persons exceeding 20 in number calling themselves as partners of unregistered firms, entered into a partnership to carry on

business, and each person is individually entitled to the benefit of the contract, the partnership was illegel u/s 4(2), although the persons represented

themselves to be partners of unregistered firms, for the word "person" in Section 4 denotes individuals and does not include bodies of individuals

whe-there corporate or not. The said decision of the Privy Council is of no assistance in the instant case and has no bearing on the question of the

status of an individual partner of a firm vis-a-vis the company in respect of any share of the company registered in the name of the firm.

127. It is only on the ground that D.N. Jalan happens to be a partner of Surajmull Nagarmull and Surajmull Nagarmull is a shareholder of the

Defendant No. 13 ; the contention that D.N. Jalan is a share-holder of the Defendant No. 13 has been put forward. B.N. Jalan, the adoptive

father of D.N. Jalan, since deceased, held certain shares in the company in his name. No representation has yet been obtained in respect of the

said shares and the name of D.N. Jalan or any other person has not been registered in the books of the company in place of the said B.N. Jalan.

No contention was raised, and it could not have been raised, that D.N. Jalan should be considered to be a share-holder of the company in place of

B.N. Jalan, There would, in any event, be no force in such contention so long as proper representation was not taken by D.N. Jalan and so long as

his name is not registered in place of B.N. Jalan in the share register of the company. I must, therefore, hold that the Plaintiff. No. 3 D.N. Jalan is

not a share-holder of the Defendant No. 13 and this issue must, therefore, be answered accordingly in the negative.

128. Two allied issues have been combined in issue No. 2 which. consists of issues Nos. 2(a) and 2(b). Issue No. 2(a) reads as follows: Was the

Plaintiff No. 1 the owner of the shares referred to in paras. 6 and 19 of the plaint ? Issue No. 2(b) is--Are the Defendants Nos. 10, 11 and 12 and

the Plaintiff No. 2, the benamdars and nominees of the Plaintiff No. 1 as alleged in para 19 of the plaint ? These two issues are considered

together.

129. Apart from the bare statement of Chamaria from the witness-box that Surajmull Nagarmull is the owner of the shares standing in the names of

the original Defendants and the Defendant No. 13, there is no other evidence in support of the case, made in the plaint that Surajmull Nagarmull is

the owner of the shares standing in the names of the original Defendants and the Plaintiff No. 2, and the said Defendants and the Plaintiff No. 2,

namely Howrah. Trading Company Pvt. Ltd., in whose names various shares stand registered, are the benamdars and nominees of Surajmull

Nagarmull. In Q. 90 Chamaria was asked by the Learned Counsel appearing on behalf of the Plaintiffs--"Who were the owners of shares in

Defendant No. 13 standing in the names of the original Defendants ?" The answer given by him was--"Surajmull Nagarmull". This is the entire

evidence adduced on behalf of the Plaintiffs to prove the case of benami and real ownership of Surajmull Nagarmull. Chamaria does not say how

Surajmull Nagarmull happens to be or can be the owners of shares standing in the names of the original Defendants. Chamaria does not even

choose to say that the original Defendants are the benamdars or nominees of Surajniuli Nagarmull. Chamaria does not mention any fact on the

basis of which he makes the aforesaid statement and Chamaria also does riot say a word as to how and under what circumstances Surajmull

Nagarmull comes to be the owner of the shares standing in the names of the original Defendants. It is also interesting to note that Chamaria in his

evidence does not even mention that Surajmull Nagarmull is the owner of the shares standing in the name of the Plaintiff No. % Howrah Trading

Company Pvt. Ltd. Chamaria also does not state any facts on the basis of which he gave the said answer and he does not choose to say as to how

he happens to know that Surajmull Nagarmull is the owner. In the facts of the instant case, I am of the opinion that the said statement of Chamaria

is not admissible in evidence. The facts of the case clearly go to indicate that Chamaria at no point of time had anything to do with Surajmull

Nagarmull and, therefore, Chamaria cannot possibly have any personal knowledge on this subject. Chamaria''s statement must necessarily be

based not on his personal knowledge but on what he must have heard from others. The statement of Chamaria, therefore, appears to be hearsay

evidence not admissible in law. Even if I consider the statement of Chamaria to be admissible, I have no hesitation in coming to the conclusion that

the said statement is worthy of no credence and no reliance can be placed on the same.

130. Mr. Gupta, the Learned Counsel appearing on behalf of the Plaintiffs, has contended that the evidence of Chamaria should be accepted as

there has been no cross-examination of Chamaria on this particular aspect. He has argued that the fact that the Defendants have hot chosen to

cross-examine Chamaria on this statement goes to show that the Defendants accept the truth of the statement and in the absence of any cross-

examination of Chamaria on this important matter the Court should accept the testimony of. Chamaria. Mr. Gupta in this connection has referred to

the decision of this Court in the case of A.E.G. Carapiet Vs. A.Y. Derderian, and he has also relied on the decision of the Punjab High Court in

the case of Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd. and Another, Mr. Gupta''s contention, in my opinion, is clearly

untenable. The effect of not cross-examining any witness on any vital matter of evt dence of fact is well-known and it is not necessary to consider

the decisions cited. In the instant case, it is, however, not correct to say that there has been no ""cross-examination on this important aspecf to

holdthe Defendants bound by the said statement of Chamaria. It is true that there has been no direct cross-examination on the particular statement

but the veracity of the statement has undoubtedly been challenged by showing that this witness had nothing to do with Surajmull Nagarmull and

could possibly have had no knowledge about the affairs of Surajmull Nagarmull. In the facts of the instant case, even if there had been no cross-

examination at all on the said testimony of Chamaria, I would have had no hesitation in rejecting the said testimony. Even if the suit had been

undefended, I would have refused to pass a decree in favour of the Plaintiffs declaring Surajmull Nagarmull to be the owners of the said shares and

the parties in whose names the shares stand to be the benamdars of Surajmull Nagarmull on the basis (of the said statement only. To establish a

case of benami, as is well-known, certain basic elementary facts as to consideration, possession, enjoyment, treatment of the property must of

necessity be established. A mere statement by anybody even if he be a competent witness in an action for a declaration of benami, that A happens

to the real owner and B is only his benamdar in the absence of any other evidence, is not evidence at all of the benami transaction and is really in

the nature of opinion and, in any event, is not sufficient evidence on which the Court can rely and act even in an undefended suit. The necessary

and relevant facts as to the payment of consideration, custody and possession of the property, nature of, the transaction and the nature of the

relationship and the conduct of the parties will have to be satisfactorily established, and on the basis of these relevant facts and materials properly

established, the Court may be pursuaded to come to the conclusion that the transaction is really not what it appears to be and the ostensible owner

is not the real owner and only a benamdar.

131. Before any contention can be raised or any argument founded that the evidence on any particular question has to be accepted for want of

cross-examination, the Court must be satisfied that the evidence is sufficient, legitimate, proper and satisfactory. In the facts of the instant case, I

am of the opinion that the Learned Counsel for the Defendants had acted wisely by not cross-examining Chamaria directly on this statement.

Chamaria in course of his examination-in:ehief has really said nothing and the bare statement of Chamaria is useless and worthy of no consideration

at all. Cross-examination on the statement might have had the effect of introducing matters in evidence which are not there and \vhich if material

and relevant should have been introduced by the Plaintiffs themselves. In a. benami action it is essentially, the duty of the Plaintiff who claims to be

the true owner and asks for a declaration of benami to lead necessary and proper evidence for establishing the relevant and material facts. In such

an action it is not proper for the Plaintiff from the witness box to say merely that he is the owner of the property standing in the name of the

Defendant in expectation and anticipation that he will disclose the relevant facts in course of cross-examination. In the instant case, it is further to be

noted that Chamaria is not even one of the Plaintiffs and the real Plaintiff D.N. Jalan has not cbme forward even to make this assertion from the

witness-box. Chamaria, as already indicated, is not in my view a competent witness.

132. In view of the fact that evidence had been led on both the sides, the question of onus really becomes immaterial. Mr. Gupta, realising the

weakness of the evidence adduced on behalf of the Plaintiffs has sought to draw on the evidence adduced on behalf of the Defendants. He has

referred to evidence of Mr. Kar in Qs, 736-37, 744, 745 and 408 and of M.K. Roy in Qs. 168 to 172 and 200 to 210.-Mr. Gupta has also

referred to the evidence of Boid-in Q. 226. Relying on this evidence Mr. Gupta contends that these witnesses called on behalf of the Defendant

No. 13 have really admitted that Asiatic Oxygen and Acetylene Company Ltd. was under the control of Surajmull Nagarmull and was a company

of Surajmull Nagarmull, and it is the contention of Mr. Gupta that in view thereof and as no positive evidence has been adduced on behalf of the

Defendants to prove the consideration, the ""Court should hold that Surajmull Nagarmull is the real owner of the said shares and the persons in

whose names the shares stood were only the benamdars of Surajmull Nagarmull. This contention of Mr. Gupta is clearly unsound. Surajmull

Nagarmull was undoubtedly the Managing Agent of the company for years and was. certainly controlling and managing the affairs of the company.

Surajmull Nagarmull also held a large naumber of shares in the company in its own name. Others including some partners of Surajmull Nagarmull

also held various shares in their names. Various other companies in which Surajmull Nagarmull were interested and of which Surajmull Nagarmull

were in-charge are considered and described loosely in common parlance as Surajmull Nagarmull concerns. The fact that a particular company is

a Surajmull Nagarmull concern or is under the control and management of Surajmull Nagarmull, does not establish that all the shares of the said

company are held by Surajmull Nagarmull and that the other share-holders of the company must necessarily be the benamdars of Surajmull

Nagarmull. Mr. Gupta has placed particular reliance on the evidence of Kar in Order 408 and has contended that Kar has there admitted that all

the shares of Asiatic Oxygen and Acetylene Company Ltd. were owned by Surajmull Nagarmull. The evidence of Mr. Kar has to be read as a

whole and it is not proper, in my opinion, to read the answer in one particular question to find out what the evidence of Mr. Kar is on this aspect. I

have earlier observed that the evidence of Mr. Kar is very unsatisfactory and his answer to Q. 408 does not appear to make any sense. Taking

into consideration the nature of evidence of Mr. Kar and reading his evidence in its entirety, I cannot accept Mr. Gupta"s submission that Mr. Kar

in his evidence admits that Surajmull Nagarmull is the owner of all the shares of Asiatic Oxygen and Acetylene Company Ltd. and the persons in

whose names the shares stand are all benamdars. Even if I had considered that there was any such admission on the part of Mr. Kar in his

evidence in Q. 408, I would have hesitated to place any reliance on any such testimony of Mr. Kar. In any event, if there be any such admission in

the evidence of Mr. Kar, the said admission is certainly not binding on the parties in whose names the shares stand. Mr. Kar was only a witness on

behalf of the Defendant No. 13. The documentary evidence adduced clearly goes to show that Surajmull Nagarmull could not be the owners of the

shares registered in the name of Howrah Trading Company Ltd., Coochbehar Trading Company Pvt. Ltd., Orient Trading Company Ltd. and

Raigarh Trading Company Ltd. The balance-sheets which have been proved clearly go to show that these shares were properties of these

companies and have been treated and held as such. The shares had remained in the custody and control of the companies concerned and

dividends paid in respect of these shares had gone to the companies and had been treated as assets and properties of these companies. I fail to

understand how consideration money in respect of the shares purchased in the names of these companies could be paid by anybody other than

these companies themselves. The evidence on record, therefore, clearly shows that the shares registered in the name of the companies belong to

these companies which asserted all rights of ownership over the same and were the real owners thereof. It is not for the other parties to show that

they had paid the consideration money and it is essentially for the Plaintiffs to establish the case of benami made in the plaint. The question of onus

may be immaterial, but the burden of proof still rests with the Plaintiffs. On the evidence on record I have no hesitation in coming to the conclusion

that the Plaintiffs have not only failed to discharge the burden but the totality of the evidence on record establish that Surajmull Nagarmull was not

the owner of the shares referred to in paras. 6 and 19 of the plaint and the persons in whose names the shares stood registered were not the

benamdars and nominees of Surajmull Nagarmull. I also fail to understand how a limited company can act as a benam-dar for somebody else in

respect of any shares registered in its name. I do not think that the memorandum of association and the articles of association of any company will

ever permit any company to act as such benamdar. I have only to observe that I have not considered it necessary to refer to the large number of

decisions cited by Mr. Mitter on this aspect, as I am clearly of the opinion on the evidence on record that the case of benarrii has not been

established. Issues Nos. 2(a) and 2(b) both must, therefore, be answered in the. negative.

133. The answer to issue No. 3 will depend upon mainly on the findings of issue No. 4 and it will, therefore, be convenient to take up issue No. 3

after considering issue No. 4. I shall now, therefore, take issue No. 4. There are really three issues in issue No. 4 which reads--

4(a) Are the notices referred to in paras. 13 and 14 of the plaint illegal or null and void or not binding on the Defendant No. 13 or its share-holders

?

(b) Are the proceedings of the meetings referred to in paras. 13 and 14 of the plaint and the resolutions passed therein illegal or null and void or

not binding on the Defendant No. 13 or its share-holders ?

(c) Was there no consent of the Defendant No. 13 to the holding of the office of profit by Gopalkrishna Jalan as alleged in para 13(e) of the plaint

?

It will be convenient to consider issue No. 4(a) & (b) together. The notices and the proceedings referred to in paras. 13 and 14 of the plaint are

the notices in respect of the following meetings of the Defendant No. 13-

(i) The Annual General Meeting held on December 21, 1959.

(ii) The Annual General Meeting held on May 31, 1961.

(iii) The Extra-Ordinary General Meeting, held on July 18, 1962, and

(iv) The Annual General Meeting held on September 27, 1962.

So far as the annual general meeting of the Defendant No. 13 held on December 21, 1959, in which S.S. Jalan was elected as Director is

concerned, the notice in respect of the said meeting and the validity of the proceedings of the said meeting including the special resolution passed

therein appointing S.S. Jalan as a Director of the Defendant No. 13 are challenged in paras. 13 and 14 of the plaint on the following grounds:

(i) Shortness of notice.

(ii) Non-service of notice upon Deokinandan Jalan.

(iii) Non-service of notice upon Baijnath Jalan, the adoptive father of D.N. Jalan, who is dead and was dead at the material time, but whose name

still appears on the share register of the company.

(iv) Non-service of notice upon Howrah Trading Company Pvt. Ltd., the Plaintiff No. 2, and

(v) No notice of intention to propose as special resolution and want of explanatory statement.

On identical grounds the notices in respect of the other meetings held on May 31, 1961, July 18, 1962, and September 27, 1962, and the validity

of the proceedings of the said meetings have also been challenged in the plaint in paras. 13 and 14 thereof. It may be noted that the special

resolution appointing S.B. Jalan as Director at the annual general meeting on May 31, 1961, has been specifically challenged on the same grounds

and the special resolution alleged to have been adopted at the meeting of the company on July 18, 1962, which was an extra-ordinary general

meeting amending the articles of association of the Defendant No. 13 and deleting from the articles of association the provisions with regard to

share qualification of Director has also been specifically challenged. Two special resolutions alleged to have been passed at the annual general

meeting of the Defendant No. 13 on September 27, 1962, one relating to promotional expenses of Asiatic Oxygen Ltd., the Defendant No. 4

herein, and the others relating to payment of medical expenses to Gopalkrishna Jalan have been also specially mentioned and specifically

challenged also on the very same grounds. The aforesaid analysis of the charges made in the plaint on the basis of the allegations contained in

paras. 13 and 14 of the plaint clearly goes to indicate that the issuing of the notices in respect of the aforesaid meetings of the Defendant No. 13 is

not disputed. Surajmull Nagarmull is one of the Plaintiffs and is one of the share-holders of the Defendant No. 13 and there is no averment or

charge in the plaint that notices of the aforesaid meetings were not served on Surajmull Nagarmull. The plaint, on the other hand, clearly proceeds

on the basis that the notices of the aforesaid meetings had been issued but had not been served on D.N. Jalan, Baijnath Jalan and Howrah Trading

Company Pvt. Ltd and the notices were short notices. The question of shortness of notices can only arise if notice had not merely been issued but

had in fact served.

134. It is also interesting to note that although the Plaintiffs had made these allegations in the plaint and had levelled the aforesaid charges

challenging the validity and the legality of the notices and of the proceedings of the said four meetings including the resolutions specifically

mentioned in the plaint, the Plaintiffs did not really make any endeavour to prove the said allegations at the trial. I have already dealt with the

evidence adduced on behalf of the Plaintiffs. The only witness called on behalf of the Plaintiffs docs not say a word with regard to the notices of the

said meetings. The certified photostat copies of documents filed with the Registrar exhibited on behalf of the Plaintiffs indicate that notices in

respect of the aforesaid three annual general meetings would be short by a day, if 21 clear days'' notice was required, but the said documents

clearly establish that notices had been duly despatched, the meetings had been duly held and the resolutions had been duly passed. Evidence,

however, has been led on behalf of the Defendant No. 13 to disprove the allegations made in the plaint. As evidence has been led on either side,

the question of onus has ceased to be. material although the burden of proof still rests with the Plaintiffs. Having appreciated the very weak nature

of the evidence adduced on behalf of the Plaintiffs and having realised the difficulties of establishing the case made by the Plaintiffs in the plaint,

strenuous and unsparing attempts have been made by and in course of cross-examination, to discredit the evidence adduced on behalf of the

Defendant No. 13 and to seek to establish the Plaintiffs'' case by means thereof.

135. I propose to take up the notice and the proceedings of the annual general meeting held on December 21, 1959,and to consider the nature of

evidence adduced and submissions made in respect thereof. The only evidence adduced on behalf of the Plaintiffs is Ex. D, which is a photostat

copy, certified to be a true copy by the Assistant Registrar of Companies. This Ex. D mentions the date of despatch of the notice, mentions due

holding of the meeting and the passing of the special resolution appointing S.S. Jalan as a Director of the Defendant No. 13. Apart from this

photostat copy there is not an iota of evidence from the Plaintiffs'' side on the question of the notice, the meeting held on December 21, 1959, and

the proceedings thereof.

136. Called on behalf of the Defendant No. 13 Mr. Kar has given evidence. He has sought to prove due service of notice and of the holding of the

meeting and the resolution passed at the said meeting. He has also produced documentary evidence. He has proved the printed balance-sheet''

containing the printed notice (Ex. 003). Original of Ex. D, which happens to be the return filed in From No. 23 filed with the Registrar of Joint

Stock Companies, produced from the custody of the Registrar, has also been proved (Ex. 004). From the printed notice it appears that the notice

was issued under the signature of Surajmull Nagarmull which happens to be the Plaintiff No. 1 in the suit now and which was the Managing Agent

of the Defendant No. 13. From Ex. D, the photostat copy tendered on behalf of the Plaintiff of Ex. 004 and the said Ex. 004, it further appears

that the said Form No. 23 had been filed with the Registrar by Surajmull Nagarmull, the Managing Agent of the Defendant No. 13. The minutes of

the meeting have also been proved by Mr. Kar and exhibited (Ex. 001 A). The Board meeting at which it was decided to call the annual general

meeting on December 21, 1959, was held on October 23,1959, is Ex. N22. In the Board meeting of this date there is a resolution to call the

annual general meeting, but there: is no resolution to pass any special resolution approving or making the appintraent of S.S. Jalan and it does not

appear that the notice or explanatory statement was settled in the Board meeting, although Mr. ''IKar has hi many places said that the notice and

explanatory statement for passing any special resolution arc settled in the Board meeting: sac Kar Qs. 1014, 1015, 5156, 5157, 5246 and 5265.

The evidence of Mr. Kar as to when the printed notice contained in the balance-sheet came into existence is very unsatisfactory. He says in Q.

3355 that the same (Ex. 003) was in existence on November 20, 1959: see Kar Q. 3355. Then he says something entirely different. (Qs. 3380,

3381, 3393 and 3394) and later on faced with this contradictory answers seeks to make out a story which is as confusing as incredible: sec Kar

Qs. 3395 to 3487. Mr. Kar has also been cross-examined at length on the minute book and on the minutes of the meeting (Ex. 001 A). The

minutes of this particular meeting are typed and pasted in the minute book, although the first minute in"" this minute book is hand-written. Mr. Kar is

unable to explain why the typewritten minutes of this particular meeting had been pasted although the first minute in the same minute book is hand-

written: see Kar, Qs. 3198 to 3216.

137. Relying on the unsatisfactory nature of evidence adduced on behalf of the Defendant No. 13 Mr. Gupta has contended -that no notice had in

fact been issued and served on any of the share-holders,-no meeting had in fact been held and no resolutions had at all been passed and the

documents have all been fabricated and manufactured for the purpose of this suit. It is the contention of Mr. Gupta that in fact and in reality no

meeting of the company would, c\ er be held and necessarily no notice would ever be issued and served and as there would be no meeting there

would be no question of any resolution being passed at any such meeting. He argues that for the purpose of giving an appearance of purported

compliance with the provisions of the Companies Act, necessary documents would be prepared and would be submitted with the Registrar of Joint

Stock Companies as required under the law, but, in reality, the transactions which would be referred to in such documents would not at all take

place. It is his argument that annual returns and returns in Form No. 23 would be filed with the Registrar of Joint Stock Companies in pretended

compliance with the provisions of the Companies Act to avoid the consequences of non-filing of the same, but nothing in fact and reality would be

done by the company and the company would make appropriate entries in necessary books as and when occasion would arise. Mr. Gupta argues

that as Xhe meeting and resolutions were all sham transactions, there was no question of maintaining the statutory books regularly and properly and

discrepancies and mistakes had appeared in the statutory books including the minute books, because those books were not regularly written out

and they had, in fact, been written out for the purpose of the suit. It is the submission of Mr. Gupta that the evidence on record and the manner in

which the statutory books, including the minute books of the company, had been maintained, go to show that the books of the company are not

genuine books and they are not the books which the company is required to maintain under the provisions of the statute regularly and properly.

Mr. Gupta, therefore, argues that there cannot be any presumption of the correctness of the minutes u/s 195 of the Companies Act as the minute

book is not kept in accordance with Section 193 and it is ""Mr. Gupta''s submission that the said minute book has, in fact, been fabricated for the

purpose of this suit. Mr. Gupta contends that if in fact a Board meeting had been held on October 23, 1959, deciding to call the annual general

meeting on December 21, 1959, and in fact a general meeting of the company had been held on December 2L 1959, the notice and the

explanatory statement would undoubtedly have been settled at the Board meeting and the Board meeting would also mention the special resolution

necessary for the appointment of S.S. Jalan. He has referred to the minutes of the Board meeting of October 23, 1959, (Ex. N22) and has,

pointed out that there is no mention of the notice, or of the special resolution for appointment of S.S. Jalan or of the explanatory statement for

passing the said special resolution. Mr. Gupta also, points out that subsequent to this Board meeting there is no other Board-meeting at which

either the notice or the special resolution or the explanatory statement for. the special resolution has been considered by the Board and he refers to

the evidence of Mr. Kar who has stated that notice and explanatory statement for passing any special resolution would be settled in the Board

meeting: see Kar Qs. 1014-5, 5155-6, 5246, 5265. Referring to the proceeding of the meeting on December 21, 1959 (Ex. 001 A) Mr. Gupta,

comments that Coochbehar Trading Company Pvt. Ltd. has been shown as present at the meeting through K.L. Jalan, but K.L. Jalan has not been

shown as present for. himself. He argues that K.L. Jalan was, therefore, not present and K.L. Jalan''s authority to represent Coochbehar has also

not been exhibited and there would, therefore, be no quorum as required u/s 174(1) of the Companies Act, as the number of members present,

ignoring K.L. Jalan and Goochbehar''s presence will be les s than five; He contends that if there was no quorum present, then there was in the eye

of law no meeting and the proceedings of the purported meeting must be held to be invalid. In support of this contention Mr. Gupta has referred to

the decision in the case of Romford Canal Company (1883) 24 Ch.D. 85. Mr. Gupta has commented that the notice of the meeting, on the

Defendants'' own showing, was dispatched on November 30, 1959, and the meeting was held on December 11, 1959, and he conlends that the

notice, therefore, is clearly short as it falls short of 21 clear days as required u/s 171 of the Companies Act. He argues that the meeting called on a

short notice is illegal and the proceedings of the meeting are, therefore, invalid and of no consequence. In support of his contention that a meeting

called at a short notice is illegalahd invalid, Mr. Gupta has referred to the decision of the Madras High Court" in the case of N.V.R. Nagappa

Cheliiar and Anr. v. The Madras Race Club by its Secretary Mr. H.L. Raja Urs and Ors. AIR 1951 Mal. 831. Mr. Gupta has also referred to the

decision in the case of Young v. Ladies Imperial Club (1920) 2 K.B. 523 for the proposition that failure to give notice to one member of the

meeting would render the resolution passed invalid.

138. Mr. Mitter, the Learned Counsel appearing-on behalf of the Defendant No. 13, has mainly argued the case on behalf of the contesting

Defendants. Mr. Mitter has argued that the main grounds on the basis of which the notice and the validity of the resolution appointing S.S. Jalan as

one of the Directors have been challenged in the plaint are--

(i) Shortness of the notice.

(ii) Non-service of notice upon Deokinandan Jalan.

(iii) Non-service of. notice upon Baijnath Jalan, deceased,

(iv) Non-service of notice upon Howrah Trading Company Pvt. Ltd.

(v) No notice of intention to propose the resolution as a special resolution and no explanatory statement for the special resolution.

139. Mr. Mitter argues that the Plaintiffs should not be allowed to travel beyond the case made in the plaint and should not be permitted to make

any new case not made in the pleading. Mr. Mitter contends" that the plaint has really proceeded on the basis that notice had in fact been issued

and notice had been served, .but the notice has not been served on Deokinandan Jalan, Baijnath Jaian and Howrah Trading Company Pvt. Ltd.

and the notice is short. Mr. Milter points out that, although Surajmull Nagarmull has been made a Plaintiff in the suit, there is no averment in the

plaint that notice has not been served on Surajmull Nagarmull. It is the contention of Mr. Mitter that, on the basis of the case made in the plaint, it is

not open to the Plaintiffs to make the case that there was no notice and no notice had, in fact, been issued or served on any of the share-holders.

Mr. Mitter argues that the printed notice (Ex. 003), which has been properly proved, establishes clearly that there was the notice. Mr. Mitter

comments that no evidence has. been adduced on behalf of the Plaintiffs that the said notice was not served on -Howrah Trading and on Baijnath

Jalan. Mr. Mitter argues, that documentary evidence on record clearly establishes service of the notice on Howrah Trading and Baijnath Jalan and,

in the absence of any evidence from the side of the Plaintiff, there is no "reason why the Court should not accept the evidence adduced on behalf

of the Defendants proving due service of the notice. Mr. Mitter has argued that service of notice on Deokinandan Jalan is not necessary as

Deokinandan Jalan is not a share-holder of the company and is not entitled to any notice. Mr. Mitter has submitted that if the requirement of

Section 171 of the Companies Act is that 21 clear days'' notice should be given, then the. notice in question is short by a day, but if the

requirement is hot 21 clear days, then the notice will not be a short notice. He has, however,, frankly stated that he cannot seriously contend that

21 days'' clear notice is not necessary and he has proceeded to argue on the basis that the notice is short by a day. Mr. Mitter has commented that

the evidence of Mr. Kar -may be unsatisfactory and the maintaining of the books of the company may not be as happy and satisfactory as

desirable, but there cannot be any question about the genuineness of the said books and the correctness of the contents of the same. Mr. Mitter

argues that the printed notice along with the balance-sheet and the report of the Directors and Auditors, contained in the booklet exhibited in the

proceeding (Ex. 003), could not possibly have been manufactured. He points out that the said balance-sheet, printed booklet containing the notice,

the reports and the accounts of the company had been duly filed with the Registrar and has been produced from the Registrar''s custody. He points

out that the necessary returns including the return in Form No. 23 had been submitted by Surajmull Nagarmull and the same have also been

produced from the custody of the Registrar. He argues that these facts clearly go to show that the suggestion of fabrication of the documents is

absolutely baseless and he submits that it is astonishing that such suggestion of fabrication and manufacturing of documents signed by Surajmull

Nagarmull could be made on behalf of the Plaintiffs of which Surajmull Nagarmull happens to be one. Mr. Mitter points out from the said notice

that the notice speaks of the necessary special resolution and also contains necessary explanatory statement. Mr. Mitter contends that there is no

basis of. any of the charges made in the plaint excepting the charge that the notice is short. Mr. Mitter contends that the shortness of the notice by a

day, in the facts of the instant case, docs not and cannot vitiate the proceedings. Mr. Mitter has argued that not one of the share-holders has raised

any objection to the shortness of the notice and most of the share-holders including Howrah Trading Company Pvt. Ltd. and Surajmull Nagarmull

were present at the meeting and they, had all participated in the meeting without raising any objection as to the shortness of the notice. Mr. Mitter

comments that the resolutions passed at the meeting had in fact been implemented and acted upon and all the share-holders including Surajmull

Nagarmull and Howrah Trading have received the dividend declared at the said meeting and had enjoyed the benefits, and Mr. Mitter contends

that with the dividend moneys still in their pockets the share-holders cannot be allowed to impeach the validity of the notice or of the meeting. Mr.

Mitter points out that Surajmull Nagarmull who, as Managing Agent of the company, was responsible for the notice and its proper service, had

issued" the notice in question and as such Managing Agent had submitted to the office of the Registrar of Companies the annual return and the

necessary return in Form No. 23. Mr. Mitter has submitted that tne return in Form No. 23 submitted by Surajmull Nagarmull as Managing Agent

has been relied on by the Plaintiffs and a photostat copy of the same has been tendered by the Plaintiffs in the suit, and Mr. Mitter contends that

the said evidence produced and. relied on by the Plaintiffs, falsifies the entire case of the Plaintiffs apart from the case of short notice.

140. It is to be noted that the position is more or less the same with regard to all. the meetings and similar submissions on the genuineness of the

documents and transactions of the other meetings have been made.

141. Mr. Gupta"s criticism of Mr. Kar"s evidence is largely justified. I have already observed that Mr. Kar"s testimony is very unsatisfactory and I

consider it very unsafe to come to any conclusion merely on the basis, of his oral testimony. There is also some justification for the comments of

Mr. Gupta on the manner the statutory books have been maintained by the company. I cannot help observing that the manner in which the

statutory books of the company are maintained is rather unsatisfactory and leaves much to be desired. It is essential that the statutory books of the

company should be maintained regularly and properly. It is eminently desirable that there should be no rubbing out or erasing of anything written

out in any of the statutory books and, if there be any mistakes; the same should be corrected by scoring or striking out the same in such a manner

as to keep the original writing legible and discernible and. each and every correction so made should be initialled ""by the appropriate persons

making the correction. It is indeed the duty of the company to maintain these statutory books with due care and caution and to see that no such

mistakes are made; but as it is possible that mistakes may still be made in spite of due care and caution, such mistakes should be corrected in the

manner earlier suggested to avoid all questions of manipulation, interpolation and fabrication.

142. It is indeed to be regretted that the statutory books of the company arc not maintained with due care and caution. It appears that there arc Jar

too many mistakes. Rubbing out and erasing appear to have been resorted to very frequently. A good deal of scoring out and a large number of

corrections not initialled by anybody are also there. Discrepancies, though in most cases of a minor nature,, occur regarding the contents of the

minute books and the returns in Form No. 23 which are expected to be prepared on the basis of the relevant minutes of the meetings. Apart from

the various mistakes of these types some very curious mistakes, which cannot be easily accounted for, also find place. The return in Form No. 23

(Ex. 0042) of the appointment of S.S. Jalan in the annual general meeting held On December 29, 1956, speaks of a special resolution, whereas the

minutes of the meeting (Ex. T5) show an ordinary resolution. S.S. Jalan was to have retired by rotation at the annual general meeting held on

September 27, 1962, but in his place another Director Dr. H.L. Dey was made to retire and he was re-elected. S.S. Jalan who was again due to

retire at the annual general meeting held on September 30, 1963, was re-elected at the said meeting (Exs. 001(b), A3), which meeting, however,

had to be adjourned as the accounts were not ready. Although S.S. Jalan had already, been re-elected on September 30, 1963, the notice of the

adjourned meeting (Ex. 0030) and the report of the Directors included the question of re-appointment of S.S. Jalan as Director at the adjourned

meeting held on January 10, 1964. The Chairman, however, at the adjourned meeting (Exs. A6, 001(k)) pointed out that S.S. Jalan had already

been re-elected. Although S.S. jalan had been appointed on September 30, 1963, notice (Ex. 0033) of the annual general meeting held on

September 30, 1966, mentions that S.S. Jalan was appointed Director on January 10, 1964, the date on which the adjourned meeting had taken

place and at which S.S. Jalan was not elected at all, having been earlier elected on the first date of the meeting held on September 30, 1963. There

appears to be two Board meetings and two Board resolutions, one on August 31, 1964 (Ex. N19) and another on September 15, 1964, (Ex.

N23) for calling the annual general meeting on September 30, 1964. There, however, appears to be no Board meeting or resolution for the general

meeting on August 13, 1960, (Ex. 001(L), also Ex. ''Alj. Relying on these and other infirmities and the unsatisfactory nature o(Mr. Kar''s evidence

and explanations, Mr. Gupta, the Learned Counsel for the Plaintiffs, has contended that all the books and documents"" are fabricated, transactions

are all sham transactions which had not in fact taken place, no notices of any meeting were ever issued or served, no meetings had in fact been held

and no resolutions were in fact passed.

143. Notwithstanding the various irregularities, defects, and infirmities noted above, I have no hesitation in rejecting the contention it of Biff. Gupta

that the documents are fabricated and manufactured and arc sham documents and the transactions mentioned are all sham and fictitious and had

never actually taken place. There are undeniable"" facts and cogent factors which clearly establish that the documents arc all genuine documents and

the transactions are not sham transactions. The printed books, containing the notices of the meetings, the reports of the Directors and Auditors and

the balance-sheets, have all been produced from the custody of the Registrar of Companies. From the said documents which bear the seal of the

Registrar, it appears that the said documents have been duly filed with the Registrar as and when filing of the same was necessary, years ago. The

printed book (Ex. 003) containing the notice along with explanatory note, the Director''s report, the Auditor''s report and the balance-sheet of the

company as on March 31, 1959, was received at the office of the Registrar on February 2, 1960. The said date clearly appears from the

endorsement made by the Registrar''s office. This notice was in respect of the annual general meeting which was held on December 21, 1959, and

which is one of the meetings under challenge in. this suit. The printed book (Ex. 006) containing the notice, the explanatory statement, the

Director''s report, the Auditor''s report and the balance-sheet for the year ending on March 3, 1961, was received at the Registrar''s office on July

21, 1961. This notice was for the annual general meeting which was held on May 31, 1961, and the validity of this meeting has been challenged in

this suit. The printed book (Ex. 0029) containing the notice along with the explanatory note, the Director''s report, the Auditor''s report and the

balance-sheet of the company for the year ending on March 31, 1962, was received at the Registrar''s office on December 28, 1962. This notice

was in respect of the annual general meeting held on September, 27, 1962, and the validity of this meeting is impeached in this suit. The printed

books containing the notices, the Director''s reports, the Auditor'' reports and balance-sheets of the, company for all the years commencing from

the year ending on March 31, 1959, till the year ended on March 31, 1968, have been produced from the Registrar''s custody and have been

exhibited in this suit. I have already referred to Exs. 003, 006"" and 0029, mentioning the dates'' on which the said documents had been filed with

the Registrar'' of Companies, as the validity of the annual general, meetings covered by the notices contained in the said three exhibits is under

challenge in this suit. I do not consider it necessary to make any specific mention of the dates when the other printed books were'' received at the

office of the Registrar of Companies, and Tmay only observe that the other printed books had been duly filed with the Registrar of Companies at

or about the time the same should have been submitted. These printed books produced from the custody of the Registrar could never been

fabricated by the company and could never have been manufactured for the purpose of this litigation. Various annual returns after the annual

general meetings and the returns in Form No. 23 of. all the special resolutions passed at the meetings, the validity of which is challenged in the

plaint; had all been filed with the Registrar in time and had all been produced from the custody of the Registrar and exhibited in this suit. The annual

returns of other annual general meetings and the returns in Form No. 23 of various other special resolutions passed at various Other meetings, not

challenged in the suit and many subsequent to the institution of the suit, have also been produced from the custody of the Registrar and exhibited.

These returns produced from the custody of the Registrar, which had been filed within the time prescribed, could not possibly have been

manufactured. The relevant notices of the meetings had already been issued by Surajmull Nagarmull as. Managing Agent of the company and all

the relevant returns have also been filed by Surajmull Nagarmull who acted as Managing Agent of the company till March 31, 1967. It is signi:

Meant to note that in this suit in which Surajmull Nagarmull figures as one of the Plaintiffs, no charge has been made in the plaint that the notices of

the meetings, the validity of which has been challenged in the suit, were not served on Surajmull Nagarmull, although it has been alleged that the

said notices had not been served on Howrah Trading Go. Pvt. Ltd., Baijnath Jalan and D.N. Jalan. No such allegations that no notices were ever

issued or served on Surajmull Nagarmull was made in the plaint, as no such allegation could be made as Surajmull Nagarmull itself had issued the

relevant notices and must have received the same. The relevant returns in Form No. 23 of the special resolutions passed at the meetings

complained of had also been filed by Surajmull Nagarmull and it is important to note that the Plaintiffs have caused photostat copies of the said

returns to be tendered in evidence in support of the Plaintiffs'' case. The said documents exhibited by the Plaintiffs Clearly establish that the said

meetings had been held and the resolutions had been passed. It is indeed strange that in this'' situation any suggestion could be made on behalf of

the Plaintiffs, which include Surajmull Nagarmull, that the documents which had been prepared by Surajmull Nagarmull were fabricated

documents. These facts are sufficient to show that the documents are genuine documents and the suggestion that they had been manufactured and

fabricated for this suit is unwarranted and untenable. There are, however, still more compelling reasons for holding that the documents are genuine.

The resolutions which had been passed at the said meetings held pursuant to the said notices, genuineness of which and of the meetings in

pursuance thereof is sought to be questioned, had all been acted upon by all concerned. Dividends declared at the said meetings had been paid to

the"" share-holders including Surajmull Nagarmull and Howrah Trading Company Pvt. Ltd. and they had received the same and enjoyed the

benefits thereof. The Directors and Auditors appointed at such meetings had functioned acting on the basis of the said resolutions. It is significant to

note that there was never any protest or objection from any of the share-holders including Surajmull Nagarmull and Howrah Trading about non-

service of notice or not holding any of the meetings in terms of any of the notices. The evidence of the Auditors and the balance-sheets prepared

by them clearly establish that the audited accounts and the balance-sheets used to be duly prepared. It was necessary to consider the same at the

annual general meeting of the company and the law enjoins that the company must hold its annual general meetings. The printed notices, the

genuineness of which though sought to be challenged is, in my opinion, beyond question and clearly established as genuine show that the meetings,

were to be held. The annual returns and the returns in Form No. 23, duly filed with the Registrar within the time prescribed, go to show that the

meetings must h\ave been held. The minutes of the meetings prove that the meetings had in fact been held and the resolutions had been passed. The

resolutions are all duly given effect to and acted upon they all concerned. In this state of affairs, is it conceivable that no meetings in fact had been

held and the resolutions recorded are all sham and fictitious transactions and the documents are all fabricated ? I am clearly of the opinion that any

such conclusion is utterly impossible, even, though the minute books might'' not have been very properly maintained and there might have been any

number of mistakes, corrections, rubbing out and scoring out. It is not in dispute, as it cannot be disputed and was not disputed by Mr. Gupta, that

it was within the power and competence of the company and was easily possible for S.B. Jalan and his group controlling the company, to hold the

said meetings properly and to pass any and every resolution which the company or S.B. Jalan or his group wanted to be passed and there was

really no question of S.B. Jalan and his group''s complete control over the company and its affairs. Indeed, it appears that there were really no

rival-groups inside the company at any material times and at all material times the share-holders acted more or less in a body and were solidly

behind S.B. Jalan who was indeed the dominant personality in the company both in his capacity as Director and partner of Surajmull Nagarmull,

the Managing Agent. I fail to understand why the company after having issued the notices to the share-holders for the meetings would not choose

to hold the same and would merely write out the minutes of the meetings and would submit necessary returns to the Registrar without holding in

fact any. such meeting and without passing any of the resolutions, when there was no possible impediment to the holding of the meeting and to the

passing of any and every resolution. I can see or imagine no possible reason for such a peculiar, if not absurd, course being adopted. The only

explanation that Mr. Gupta, the Learned Counsel for the Plaintiffs, could offer was that if the documents had not been sham and fabricated and if

the meetings and the transactions at the meetings"" had all been genuine, there would not have been so many cases of mistakes, discrepancies,

corrections, scoring out and rubbing out in the minute books and the documents produced. When asked how could Surajmull Nagarmull suggest

that documents prepared by itself in the normal course of its business and duties as Managing Agent of the company were fabricated and not

genuine, the only explanation that the counsel could offer was that D.N. Jalan was not a party to these documents and Surajmull Nagarmull

represented by S.B. Jalan and his'' group had prepared the said documents. The explanation sought to be offered by Mr. Gupta is indeed one of

utter despair and is clearly untenable. The Managing Agent of the company was the firm of Surajmull Nagarmull and not S.B. Jalan or D.N. Jalan

or any of the other partners of the firm. The firm was appointed as the Managing Agent and had acted as such. How the firm would function as

such Managing Agent, whether through any particular partner or partners, or through all of them, was essentially a matter for the firm and its

partners and the company had really no concern with the same. If there would arise any dispute among the partners that would essentially be a

matter for the partners and it would be for the partners to take such steps as they might have been advised for resolving the disputes or for

protection of the individual rights of any partner. So long as the firm remained the Managing Agent of the company and continued to function as

such, internal disputes, if there were any, would be of no concern of the company. In the instant case, it is clcaily established that the firm had

continued to function as such Managing Agent till December 31, 1967, trom the inception of the company. The firm had enjoyed all the rights and

privileges and the benefits, including remuneration, for having aclcd as such Managing Agent. While acting as the Managing Agent, the firm had

necessarily to discharge its duties and obligations. In the course of duties of the firm as such Managing Agent the firm had issued the relevant

notices for the meetings and the firm had caused the necessary returns, the annual returns and the returns in Form No. 23 to be filed with the

Registrar under its signature as the Managing Agent. Whether the firm had functioned as such Managing Agent through S.B. Jalan or some other

partner and whether all the aforesaid acts of the firm done in the normal course of duty as Managing Agent, had been done through S.B. Jalan or

somebody else, is not of any consequence and they constitute the acts of the firm and must necessarily bind the firm and all its partners. To my

mind, it is absurd and indeed ridiculous for the Plaintiffs which include the firm of Surajmull Nagarmull to suggest that the said firm of Surajmull

Nagarmull had fabricated and manufactured documents and had itself been a party to. transactions and documents which are false, fabricated and

fictitious. It appears that the Learned Counsel for the. Plaintiffs having appreciated the effect of the very weak nature of the evidence adduced on

behalf of the Plaintiffs could hardly find any way out, when confronted with the overwhelming documentary evidence produced against the Plaintiffs

in the case, and he must have been instructed to impeach the genuineness of the documents which, if unchallenged, would completely demolish and

falsify ""the case of the Plaintiffs, sufficiently bad and weak, as it is otherwise. The unsatisfactory manner of keeping the books and the very

unsatisfactory nature of Mr. Kar''s testimony gave the Learned Counsel the opportunity of seeking to build up some kind of a case and the

Learned Counsel naturally tried to make the best of a bad job. In this connection, it is of interest to note that the books of account of Howrah

Trading produced by Hansraj Kothari, an employee of Howrah Trading who calls himself to be"" the principal officer of Howrah Trading, was also

challenged by the Plaintiffs which include Howrah Trading, and it was suggested on behalf of the Plaintiffs that the books of Howrah Trading

produced by the said witness are not properly maintained. The books of account of Howrah Trading had been produced only to show receipt by

Howrah Trading of dividend declared by the company. The receipt of dividend is also clearly established by the balance-sheets of Howrah Trading

exhibited in this suit. These books of Howrah Trading have been duly audited by the Auditors of the company, and I have no hesitation in

accepting the correctness of the said books of Howrah Trading. These stfange and desperate suggestions challenging the genuineness, veracity and

correctness of ""the documents prepared and signed by Surajmull Nagarmull and of the bboks of Howrah Trading, were possible only on the

instructions of D.N. Jalan who happens to be the real Plaintiff in the suit which he has instituted also in the names of Surajmull Nagarmull and

Howrah Trading. If Surajmull Nagarmul) and Howrah Trading had been the real Plaintiffs in this suit, these suggestions about the documents for

which they have to bear the entire responsibility could not possibly have been made on their behalf. I have also to note that Mr. Gupta has

commented on the pin-holes in Ex. 0037 which happens to be the notice of the meeting of August 20, 1956, and on the rust marks, in Ex. 0041

which is the return in Form No. 23 filed with the Registrar on September 4, 1956, and produced in Court from the custody of the Registrar. It is

trie contention of Mr. Guptav that these pinholes in Ex. 0037 and the rust marks in Ex. 0041- go to show that these documents must have been

fabricated and not genuine. This contention of Mr. -Gupta on the basis of pin-holes and rust marks is indeed like the attempt of the proverbial

drowning man trying to catch a straw and does not deserve any serious consideration. Relying on the postal mark ''R.M.S. Calcutta'' in Ex. 0011

showing service of notice on B.N. Jalan, deceased, in respect of the meeting of July 18, 1962, and the same postal mark in Ex. Y which shows

service of notice on share-holders including the dead share-holder B.N. Jalan and on the Auditors of the company in respect of the meeting of

September 27, 1962, Mr. Gupta has submitted that the said postal marks would not have been there on any letters sent under certificate of posting

from G.P.O. and the said documents must, therefore, have been manufactured. Mr. Gupta in course of his arguments has sought to refer to a

postal guide. Mr. Ralipada Mukherjee, an officer under the Post'' and Telegraph department, now employed as the Assistant Postal

Superintendent in R.M.S. department, has proved the genuineness of the postal seals on the said documents and has clearly explained the position.

I see no reason to disbelieve his evidence. The guide on which Mr. Gupta sought to rely in course of his arguments was not shown to this witness

who might have clarified the position. Mr. Mitter, in course of his reply to the argument of Mr. Gupta, had placed reliance on another guide and to

the Telephone Directory to show the existence of ''R.M.S. Calcutta''. The way Mr. Gupta sought to develop his case on this aspect, starting with

mail service at running trains to service at Railway platforms, also indicates that the Plaintiffs have no clear idea on the subject and can give no

correct instruction in the matter. It was not necessary for the company to manufacture any of these documents for the purpose of this suit and it

was within the absolute power and easy competence, of the company to do all the things necessary without any difficulty whatsoever.

Responsibility for most of these documents, now sought to be challenged on behalf of the Plaintiffs, rested, with Surajmull Nagarmull., No evidence

has been led on behalf of the Plaintiffs to show that contents of these documents are not true and correct and no notice addressed to B.N. Jalan at

the address mentioned was in fact received. Not a single share-holder could be produced to say that the notices covered by Ex. Y were not

received by tnem. From the proceedings of the meeting it appears that many " of the share-holders had in fact attended and it is abundantly in

evidence that the resolutions passed at the meeting have been duly given effect to and have been accepted by all the share-holders including

Surajmull Nagarmull and Howrah Trading without any protest oar objection. I, therefore, hold that the documents produced on behalf of the

company including the notices, minute books, both the Director"s minute book and the share-holders" minute book, and the minutes of meeting

recorded therein, the returns filed with the Registrar and all the documents relating to service of notice are genuine documents, notwithstanding the

various infirmities complained of. I have no hesitation In coming to the conclusion that the notices had in fact been served on the share-holders of

the company and the meeting had in fact been held and the resolutions recorded in the minutes had in fact been passed. It is to be noted that no

share-holder had ever protested against non-service of notice or of not holding any meeting in terms of any such notice. No attempt had in fact

been made on behalf of the Plaintiff to prove at the trial any of the allegations or suggestions made. Howrah Trading which happens to be one of

the Plaintiffs and which complains in the plaint of non-service of notice on itself, chooses to lead no evidence whatsoever. The suggestions given in

course of cross-examination without leading any evidence, and after exhibiting the photostat copies, and the case sought to be made in course of

such cross-examination and arguments without laying any foundation for the same in the plaint and in course of evidence adduced on behalf of the

Plaintiffs, challenging the genuineness of the transactions and the documents, are, in my opinion, unwarranted and unjustified and without any basis

or foundation. The evidence on record clearly establishes that notice had in fact been issued and served. The nature of allegation made in the plaint

and the way the isssue No. 4(a) has been settled indicate further that the factum of the issue of the notice was not really in dispute, although the

said fact also came to be questioned in course of the cross-examination of Mr. Kar.

144. I only wish to add that I have come to the above finding on the basis of the evidence on record and in view of my aforesaid findings on the

basis of the evidence on record. I do not think it necessary to consider the question of any presumption under Sections 164 and 195 of the

Companies Act.

145. The evidence on record establishes that the notices in respect of the annual general meetings held on December 21, 1959, on May 31, 1961,

and on September 27, 1962, complained of in the plaint, fall short of 21 clear days and must be considered to be short,, if the requirement of the

statute is that 21 clear days'' notice should be given. The notice in respect of the extra-ordinary general meeting held on July 18, 1962, cannot,

however, be considered to be short as it is more than 21 clear days.

146. Section 171 of the Companies Act provides:

Section 171. Length of notice of calling meeting--(1) An annual general meeting of the company may be called by giving not less than 21 days''

notice in writing. (2) An annual general meeting may be called after giving shorter notice than that specified in Sub-section (1), if consent is

accorded therein--

(i) in the case of an annual general meeting by all the members entitled to vote there, and...

(ii) in the case of any other meeting by members of the company.(a) holding, if the company has a share capital, not less than 95 % of such part of

the paid-up share capital of the company as gives a right to vote at the meeting, or (b) having, if the company has no share capital, not less than 95

% of the total voting power exercisable at the meeting.

Provided that whether any members of a company arc entitled to vote only on some resolution or resolutions to be moved at a meeting and not on

the others, those members shall be taken into account for the purposes of this Sub-section in respect of the former resolution or resolutions and not

in respect of the latter.

147. The provision of the said Section 171(1) that not less than 21 days'' notice to be given; requires, in my opinion, that at least 21 days'' notice in

the minimum has to be given and necessarily implies that 21 days'' notice is to be given. In the case of Jai Charan Lal Vs. State of U.P. and Others,

while construing the expression ''not earlier than so many days'' and ''not less than so many days'' the Supreme Court observed:

In our judgment the expression ''not earlier than 30 days'' is not to be equated to the expression ''not less than 30 days''. It is no doubt true that

whether the expression is ''not less than so many days'' both the terminal days have to be excluded and the number of days mentioned must be

clear days, but the force of the words ''not earlier than 30 days'' is not the same. ''Not earlier than 30 days'' means that it should not be the 29th

day, but there is nothing to show that the language excludes the 30th day from computation.

148. In view of the decision of the Supreme Court it is not necessary to consider any other authority. On a proper construction of the section

which prescribes 21 days'' minimum notice and on the authority of the decision of the Supreme Court, I hold that 21 clear days'' notice is required

u/s 171(1) of the. Act. This period of 21 days'' clear notice may, however, be shortened in accordance with the provisions contained in Section

171(2) of the Act. In case of any annual general meeting of the company, this period of 21 days'' clear notice may be shortened by all the members

entitled to vote thereat; There is no evidence in the instant case that any such consent was accorded by all the members entitled to vote at the

annual meetings held on short notices on December 21, 1959, on May 31, 1961, and'' on September 27, 1962. I must, therefore, hold that the

charge of the Plaintiffs in the plaint that the notices in respect of the said three annual general meetings held on December 21, 1959, May 21, 1961,

and September 27, 1962, were short, is established and the said charge of short notice in respect of the extra-ordinary general meeting held on

July 18, 1962, fails. I only wish to add that this charge of short notice in respect of the aforesaid three annual general meetings levelled, by the

Plaintiffs could not be seriously disputed by Mr. Mitter, and he has proceeded to make his submissions on the basis that the aforesaid three notices

complained of are short. The question that requires consideration is what is the effect of the short notices and whether they are null and void and

render the meetings held in pursuance thereto null and void. As already noted, Mr. Gupta has contended that any short notice in breach of the

statutory requirement is illegal, null and void, and the meeting held pursuant to any short notice is consequently null and void and of no effect.

149. Sections 171 to 186 of the Companies Act apply to meetings of the company and Section 170 makes it clear that the provisions contained in

these sections are to apply with respect to general meetings of a public company and of a private company which is a subsidiary of a public

company, notwithstanding anything to the contrary in the Articles of the company. In the interest of the company and its members these provisions

in Sections 171 to 186 have been enacted for the proper holding of the meetings of the company. The object of these sections is to see that the

members of the company get necessary and proper opportunity of attending and presenting their views effectively at the meetings and that the

meetings of the company are conducted properly. Section 171(1) lays down that the company must give 21 days'' clear notice in writing for calling

an annual general meeting of the company. This period of 21 days has been prescribed by the Legislature in its wisdom. The Legislature, however,

appreciate? that it will npt be desirable to lay down any rigid, inflexible and fixed period, as the same may lead to serious practical difficulties and

cause incalculable hardship in case of any emergency and the Legislature makes necessary provisions for meetings on shorter notice in Section

171(1) of the Act. Taking into consideration the various factors involved, including fallibility of human nature and the serious difficulties and

inconvenience that may be caused to a company and taking a realistic view of the entire situation, the Legislature has provided in Section 172(3)

that--

The accidental omission to give notice to," or the non-receipt of notice by any member or other person to whom it should be given shall not

invalidate the proceedings at the meeting.

150. The provisions contained in Section 171(1), prescribing the period of 21 clear days" notice, is in the nature of a staturory directive given - to

a company in the larger interests of the members of the company. The statutory provision imposes a duty and obligation on the company to give

ordinarily to the members of the company 21 days" clear notice and confers the right or privilege on the share-holders of the company to be given

21 days" clear notice. This statutory right or privilege is conferred on the share-holders of the company essentially in the interest of the share-

holders. It is well-settled that any statutory right or privilege created for the benefit of any particular person or class of persons may ordinarily be

waived by the person or persons for whose benefit the said right or privilege is created by any statute. Reference may be made to the following

passage in Halsbury"s Lotus of England (3rd ed., vol. 14, Article 1175, p. 637):

Waiver is the abandonment of a right and is either express or implied from contract. A person who is entitled to the benefit of a stipulation in a

contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not

exist.

151. Section 171(2) provides for shorter notice with the consent of the members of a company, as stated therein. The, said provision as to shorter

notice with the consent of the members of the company, as laid down in Section 171(2), recognises, to my mind, the power of the members to

waive their right or privilege of 21 clear days" notice and is indeed on the footing that it is open to the members to do so. The waiver by any

individual member of his statutory privilege or right of receiving 21 clear days" notice by consenting to a shorter notice, is not conditional or

dependent on the consent of any other member, unless the member who waives his right chooses to make it so, although the company may or may

not acquire the right to call a meeting on a shorter notice in terms of the provisions contained in Section 171(2). Any individual member, who has

chosen to waive his right or privilege of having 21 days" clear notice, cannot be heard to complain about the shortness of the notice whether the

result of the waiver on his part has the effect of conferring the right on the company to hold a meeting at a shorter notice in terms of the provisions

contained in Section 171(2) of the Act or not. Suppose, a company, through inadvertence or otherwise, has given a notice of an annual general

meeting shorter than 21 clear days'' and suppose all the members of the company have attended the meeting and -have passed the resolutions at

the meeting unanimously. Can it be said that the meeting is illegal and invalid and the resolutions passed are null and viod as the notice convening

the meeting is short and no consent has been obtained of the members for giving the short notice ? To my mind, that cannot be the position.

Suppose again, at any such meeting called at a shorter notice without the consent of the members, all the members of the company participate

without raising any objection to the validity of the notice and certain resolutions are passed by a majority after due deliberation on proper footing.

Can the members, who had voted against the resolutions and had lost, challenge the validity of the resolution on the ground that the meeting was

invalid and the resolution, consequently, a nullity as the notice was short ? In my opinion, the resolution cannot be considered to be a nullity and the

meeting cannot be said to be invalid. Suppose again, a company with 50 members cause the annual general meeting on a shorter notice without the

necessary consent of the members and all the 50 members are present at the meeting and two members, with an insignificant number of votes,

protest against the short notice and under protest choose to participate at the meeting. Suppose, at the meeting a resolution is passed after due

deliberation against the wishes of these two members by an overwhelming majority by other 48 members on proper voting. Can these two

members challenge the validity of the resolution on the ground that the meeting was a nullity, as the same was not called on a proper notice as

required by the statute ? In my view, such a contention cannot be entertained and the resolution must be held to be valid. Now suppose, at any

such meeting called on short notice without the necessary consent of the members of the company having 50 members, 26 members choose to

protest against the shortness of the notice and leave the meeting, protesting that the meeting -has not been lawfullly called and the remaining

members present proceed with the meeting and pass certain resolutions. It will, undoubtedly, be open to the members who protested against the

holding of the meeting to challenge the validity of the resolutions passed on the ground that the meeting has not been lawfully called and held as the

notice is short.

152. These examples, to my mind, show that any short notice in breach of the provisions contained in Section 171 is not null and void in the sense

that any and every meeting held pursuant to any such short notice necessarily becomes invalid rendering the proceedings thereof illegal, ineffective

and void. The provisions contained in Section 172(3) to the effect that

any accidental omission to give notice to, or the non-receipt of notice by, any member or other person to whom it should be given shall not

invalidate the proceedings at the meeting,

clearly indicate that the Legislature never intended that the provisions of Section 171 would be mandatory in the sense that any breach of the said

provisions would invariably invalidate the meeting and the proceedings thereof held in pursuance of the short notice. The provisions contained in

Sections 171, 172 and 173 of the Companies Act relating to notice, its length, contents, manner of service and the explanatory statement, have

been enacted for the benefit of the share-holders of the company to enable them to participate properly and effectively at the meetings of the

company. These provisions cast no obligation on the share-holders and impose duties only on the company to ensure that the share-holders get

proper and reasonable opportunity to participate effectively, if they so desire, at the meetings of the company. As these provisions are all for the

benefit of the share-holders, they may, if they so desire, waive the non-performance of any of these statutory regulations; and if the share-holders

choose to waive the benefits conferred on them by these statutory regulations, the nonperformance by the company of any of these regulations may

not invalidate the meeting and its proceedings, although the company may or may not be otherwise liable to be penalised, for breach of these

statutory regulations. The Legislature has provided for 21 days'' clear notice in the minimum as the Legislature in its wisdom considers the said

period to be reasonable and proper; but the Legislature in its wisdom does not choose to make the said period rigid and inflexible and makes

provisions for shorter notice at the option of the members for whose benefit the said period is prescribed. To my mind, it will be unreasonable to

construe Section 171(2) to mean that prior consent of the members must necessarily be obtained for calling a meeting at a shorter notice. The

object of Section 171(2) is, in my opinion, to enable the company to meet cases of urgency when the usual notice of 21 clear days may prove

inconvenient and cause prejudice to the interests of the company. If before the issuing of any short notice calling a meeting of the company, consent

of the share-holders has to be obtained in terms of the provisions contained in Section 171(2), the very purpose will necessarily be frustrated and

the time that will be taken in securing necessary consent, apart from the possibility of not hearing from all the members and not obtaining the

necessary consent, will defeat the very object. If such construction of prior consent of the members, before the issuing of the notice calling the

meeting, is to be given, Section 171(2) will be rendered completely nugatory and the company will not be in a position to get any benefit intended

to be conferred by the said section and, it may mean sheer waste of valuable time for the company in an emergency, and it "will be more

businesslike for the company not to seek recourse to the said provision for obtaining prior consent for avoiding further delay "" in holding a meeting

necessary for dealing with an emergency. In my opinion, "consent" referred to in Section 171(2) need not necessarily be obtained before calling

any meeting and the consent may be obtained both before or after the calling of the meeting and also at the meeting called. This consent need not

be express or in writing and may be implied and inferred from the conduct of the members.

153. As already noted, these provisions relating to notice have been enacted essentially in the interest of the share-holders to give the share-

holders proper and reasonable opportunity of effectively participating in the meetings of the company, and such requirements can always be

waived by the share-holders. In the case of In Re: Oxford Motor Company Ltd. (1921) 3 K.B. 32 (37-38) Lush J. dealing with the requirement

of the English Act observed:

It is contended that unless the notice contemplated by that section has been given a resolution is invalid as an extra-ordinary resolution, and it is

said that notwithstanding that all the shareholders in the company were present and were dealing with a matter which was intra vires and

notwithstanding that there was no fraud, still the resolution was invalid on that account. In my opinion, that contention is not well founded. It would

be an extra-ordinary result if after all the share-holders have been present at a meeting and passed a resolution to wind up the company afterwards

any one else could impeach that resolution on the ground that the share-holders had not had notice of intention to propose the resolution as an

extra-ordinary resolution and that therefore the requirement of see. 69 had not been complied with. In my opinion, the share-holders are entitled to

waive the formality of notice. In re Express Engineering Works, (1920) 1 Ch. 466, is an authority in support of the view that the statutory

requirements as to notice can be waived. It is true that in that case the resolution was not a resolution to wind up the company, but a resolution to

issue certain debentures. What happened there was this: all the share-holders of the company--there were only 5--met as Directors at a Board

meeting and afterwards in"" their capacity of Directors, passed the resolution to issue debentures without any notice having been given for the calling

of a general meeting of the share-holders, as required by Section 67 of the Companies (Consolidation) Act, 1908. The company was afterwards

wound up, and it was contended by the Liquidator that as the requirement of the statute had not been complied with, the resolution to issue the

debentures was invalid. The Court of Appeal held, affirming Ast-bury J. that the requirements of the statute were intended for the protection of the

share-holders, and that if the resolution was in a matter inter vires the members of the company, and there was no fraud, the share-holders were

able to waive all formalities as regards notice and that the resolution that had been passed was just as valid as there had been the requisite notice.

Warrington L.J. said, (1920) 1. Ch. 470: It happened that these 5 Directors were the only share-holders of the company, and it is admitted that

the 5, acting together as share-holders, could have issued these debentures. As Directors they could not but as share-holders acting together they

Could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meetings etc. and to resolve this

into"" a meeting of share-holders and unanimously pass the resolution in question. If that is true in the case of resolution to issue debentures it seems

to me that it is equally true in the case of a resolution to wind up a company voluntarily, such as the resolution in the present case. It is said that in

the case of an extra-ordinary resolution the Legislature has made it imperative that the notice required by Section69 should be given in order to

give an opportunity for the share-holders to consider whether the resolution should be passed, and that it is not competent to waive that formality. I

cannot see any reason why share-holders should not be able to do in that case what they can do in any other case. In the absence of fraud I think

that share-holders can waive notice in this case as freely as they could In re Express Engineering Works.

154. In the case of Narayandas Shreeram Somani Vs. The Sangli Bank Ltd., the Supreme Court while considering Section 91(B) of the

Companies Act of 1913 held that the said section had been enacted for the benefit of the company and the company may, if it so chooses, waive

the requirement, and the Court observed:

Section 91B is meant for the protection of the company, and the company may, if it chooses, waive the irregularities and affirm the contract.

155. It is to be borne in mind that these provisions regarding meetings of company, the notice and proceedings thereof relate essentially to internal

management of the company. In the larger interest, of the share-holders of the company and proper and efficient participation by the members in

the affairs of the company, the Legislature had considered it necessary to give these directions. These provisions are, therefore, in the nature of

statutory directions or instructions to the company for the proper preservation of the interest of the share-holders of the company and for the

proper administration of the affairs of the company. These provisions are not imperative in the sense that they cannot be waived and any breach

thereof will render the proceedings invariably null and void; and it is open to the share-holders for whose benefit they are enacted to waive the

requirement. These provisions cannot, therefore, be considered to be mandatory in the sense that any breach thereof will necessarily and invariably

have the effect of invalidating the meeting and the proceedings of the meeting, called and held in breach of any of the said provisions. These

provisions must be considered to be directory even though any breach thereof may entail penalty being imposed. A statutory provision does not

necessarily become mandatory because any breach thereof may attract penal consequences.

156. In the case of Seth Banarsi Das Vs. The Cane Commissioner and Another, the Supreme Court observed:

The learned Attorney-General, however, contends that the prescription of Section 18(2) being mandatory they had to be followed to the letter. He

urges that inasmuch as the Act and the Rules prescribe a penalty for breach the Section cannot but be regarded as mandatory in all its particles. He

assumes that the Appellant may be guilty and punished but, says he, the mandatory provision not having been followed according to the letter there

can be no resulting valid contract. A large number of ruling on how to distinguish between mandatory and directory provisions of law were cited

before us in support of the contention. More cases were cited to show that where a form is prescribed the form alone must be used otherwise

there is no contract. We shall only briefly refer to them.

The general rule as, to which provision of law can be regarded as mandatory and which directory is stated in Maxwell on The Interpretation of

Statute (p. 364):

It has been said that no rule can be laid down for determining whether the command (of this statute) has to be considered as a mere direction or

instruction involving no invalidating consequence in its disregard or as imperative with an implied nullification for disobedience, beyond the

fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the

natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justice (R. v. Ingall

(1867) 2 Q B.D. 199 at page 208, Per Lush J.), and, when that result would involve general inconvenience or injustice to innocent persons or

advantage of those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the

Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment

must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

This rule has been applied in many cases both in India and in England. In State of U.P. Vs. Manbodhan Lal Srivastava, , this Court observed that

no general rule can be laid down but the object of the statute must be looked at and even if the provision be worded in a mandatory form, if its

neglect would work serious general inconvenience or injustice to'' persons who have no control over those entrusted with the duty and at the same

time would not promote the main object of the Legislature, it is to be treajted only as directory and the neglect of it though punishable would not

affect the validity oÃ¯Â¿Â½ the acts done. These observations have been followed in other cases and recently in Seth Bikhraj Jaipuria Vs. Union of

India (UOI), at page 119, it is observed that where a statute requires that a thing shall be done in a particular manner or form but does not itself set

out the consequence of non-compliance the question whether the prescription of law shall be treated as mandatory or directory could only pe

solved by regarding the object, purpose and scope of the law. If the statute is found to be directory, a penalty may be incurred for non-

compliance, but the act or thing done is regarded as good. It is unnecessary to multiply these cases which are based upon the statement in Maxwell

which is quoted over and over again.

157. The Supreme Court in the case of Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, held:

It is well-established that in an enactment in form mandatory might in substance be directory, and that the use of the word "shall'' does not

conclude the matter. This question was examined at length in Julias v. Bishop of Oxford (1880) 5 A.C. 214, and various rules were laid down for

determining when a statute might be construed as mandatory and when as directory. They are well-known and there is no need to repeat them. But

they are, all of them, only aids for ascertaining the true intention of the Legislature which is the determining factor, and that must ultimately depend

on the context.

158. The real, if not the only, object of these provisions is to give the share-holders proper and reasonable opportunity for participating effectively

in the meetings of the company and, it is with this object in view, these provisions have been enacted in the interest of the share-holders. The length

of notice, the contents and manner of the service of notice and the explanatory statement have all heen prescribed with this end in view. The

Legislature has prescribed 21 days'' clear notice in the minimum in the hope that that period will be ordinarily sufficient, leaving it to the choice of

the share-holders to agree to a shorter period. It cannot possibly be said that any real prejudice must necessarily be caused to share-holders and

the real object of the statute cannot properly be served whenever a shorter notice is given. It is essentially for the share-holders to consider and

decide whether they have got the necessary opportunity and, if it be established that the share-holders had the necessary opportunity of properly

and efficiently participating in the meeting or had in fact so participated in the meeting, notwithstanding any non-compliance with any of the

requirements, the object of the statute is clearly served. The position of companies and share-holders varies from companies to companies, but

these provisions are in the nature of general regulations covering every public company and every private company which happens to be a

subsidiary of a public company whatever may be the nature of composition of such company. In a case where the share-holders of the company

may not have any grievance or may not have any proper cause for any genuine grievance with regard to any meeting of the company, it will indeed

be unjust to. hold that the meeting is invalid and the proceedings thereof are null and void, merely because of any non-compliance of these statutory

requirements. In such circumstances, where the share-holders have no grievance or have no real cause for any genuine grievance with regard to

any meeting, a conclusion that the meeting is invalid and the proceedings thereof are void because of non-compliance of any of these statutory

formalities, will not only not promote the real aim and object of the enactment but will involve general inconvenience and injustice to various

innocent persons connected with the company in the usual course of its business and working, creating an uncertainty and instability in the affairs of

the company and resulting in chaos and confusion. These statutory provisions enacted for promoting and protecting the interest of the share-

holders, in general, of companies, are indeed salutary and it is the duty of the companies to comply with them. Non-compliance of these provisions

is not to be normally expected and, if made, may even be visited with penal -consequences. These provisions, however, are not so imperative that

the requirements thereof cannot be waived at all and are not mandatory in the sense that any breach thereof will necessarily and invariably

invalidate the meeting and the proceedings thereof. These provisions, relating to notice, contained in Sections 171, 172 and 173 of the Act, are, in

my opinion, in the nature of statutory directions or instructions to the company, enacted in the interest of the shareholders to enable them to

participate effectively at the meetings of the company. Any breach of these provisions or requirements does not necessarily have the effect of

invariably invalidating the meeting and nullifying the proceedings thereof. The effect of any breach of these provisions on the meeting and its

proceedings will depend on the facts and circumstances of each. case. Any breach of these statutory requirements may in appropriate cases

invalidate the meeting and the proceedings thereof; and in proper cases, the meeting and the proceedings thereof may be held to be valid

notwithstanding any such breach. In considering the consequence of the breach, the Court is usually guided by the principles of justice. The Court

takes into. consideration the nature and effect of the breach complained of and the requirement of justice of the case, and acts in the manner as will

serve trie ends of justice best, bearing in mind the real object of these provisions and the true intent of the Legislature. Non-compliance with these

statutory requirements does not, in my opinon,"" render the notice or the meeting and the proceedings thereof necessarily and invariably void; it may

render the same voidable and in appropriate cases any such breach of the statutory requirements may have the effect of invalidating the notice, the

meeting and the proceedings thereof.

159. In the facts of the instant case, I am of the opinion that the short notices complained of do not invalidate the meetings and the proceedings

thereof. The composition of the members of the company clearly indicates that the members were all under the control of Surajmull Nagarmull who

had issued the said notices. Not one of the share-holders had protested against the short notices before the meeting, after the meeting or at any

point of time thereafter before the institution of the suit. It is significant to note that no objection appears to have been taken by the Registrar of

Companies as to the shortness of the notices when the relevant returns were filed. Excepting the Plaintiffs, no share-holders who are all parties to

the suit have made any grievance even at the trial as to the shortness of the notices. In fact, all the appearing Defendants, who happen to be share-

holders of the company, have supported the company. The Plaintiff Surajmull Nagarmull had issued the notices in question and had attended the

meetings held on March 31, 1961, and ""on September 27, 1962, and had submitted all the relevant returns to the Registrar in connection with all

the meetings mentioning in the returns that the meetings had all been duly held. Howrah Trading Company Pvt. Ltd. is a concern under the control

of Surajmull Nagarmull. D.N. Jalan is a partner of Surajmull Nagarmull. He is, however, not a member of the company and is not entitled to any

notice. It appears that short notices have been given by the company as the company did not have a clear idea that 21 days'' clear notice was

necessary under the law and had not considered it necessary to ascertain the correct position, as in view of the composition of the shareholders of

the company, the notice had been considered to be a mere formality of law. The company does not appear to have been seriously worried and

exercised over the requirements, as the company had never expected any trouble from any of the share-holders who were all under the control of

Surajmull Nagarmull and accepted and were all expected to accept and abide by whatever were done by Surajmull Nagarmull and its partner S.B.

Jalan who had been managing the affairs of the company. In view of this and in this, background the company had functioned with a degree of

informality in the matter of these statutory requirements and no objection had been lak cn by any of Lhc share-holders of the company. Indeed, but

for the internecine quarrels among the pari tiers of Surajmull Nagar-IDUI), these breaches would have all remained unnoticed. Not only that any

member of the company did not ever protest against any short notice, the members of the company and Lhc company appear to have accepted

the same unequivocally and the company and its members adopted the proceedings and acted on the resolutions passed at the said meetings and

gave full effect to the same. The Directors and Auditors appointed at the meeting were allowed to act and had in fact acted without any objection

from anybody. The dividends declared at the meetings must have been paid lo the share-holders-- no share-holders ever protested against not

receiving the dividends and it is clearly established that Howrah Trading Company Pvt. Ltd. had received the dividends and enjoyed the benefits

thereof. It is further significant to note that both Surajmull Nagarmull and Howrah Trading were present at extra-ordinary general meeting held on

July 18, 1962. It is also important to bear in mind that various other meetings of the company including annual general meetings have been

subsequently held after these four meetings and the validity of the four meetings and of the notices in respect thereof has only been challenged in

this suit. The Plaintiffs have not challenged the validity of the various other meetings of the company held prior to the institution of the suit, and the

Plaintiffs look no sleps after the institution of the suit for preventing further meetings being held. In these circumstances and in the facts of the

present case, I have no hesitation in coming to the conclusion that these notices, though short, were not null and void and arc binding on the

Defendant No. 13 and its share-holders.

160. The case of Young v. Ladies" Imperial Club (Supra) relied on by Mr: Gupta is of no assistance in the facts of the present case. This case

was concerned with a club dispute and the question of expulsion of a member of a club. Notice was not served on a member of the Executive

Committee of the club, of a meeting which had for consideration the question of expulsion of a member of the club, and it was held that in the

absence of the notice the meeting was not properly held and was invalid. In the Madras case, the case of N.V.R. Nagappa Cheltiar and Anr. v.

Madras Race Club by its Secretary Mr. H.L. Raja Urs and Ors. .(Supra (839-40)), referred to by Mr. Gupta, the question of validity of a meeting

called on a short notice had come up for consideration before a Division Bench of the Madras High Court. Dealing with this question the Court

observed:

The next branch of argument on behalf of the Respondents in this part of the case was that as none of the members including the Plaintiffs who,

though absent appointed proxies on their behalf, objected at the time of the meeting, it must therefore be deemed that the members present either

in person or by proxy had waived the objection. This plea was not specifically raised in the written: statement nor in the issues. All that was said in

para 3 of the written statement was that the Plaintiffs had received notices of the meeting in due time and raised no objection to the validity of the

notice at any time at or about the meeting though they were present by proxy at the meeting. Issue 2 raises in a general form the question whether

the Plaintiffs were entitled to question the validity of the notices of the meeting or the proceedings of the meetings at the general body of 7. 11.

1947 as stated in para 3 of the written statement. As the facts have been pleaded in the written statement, though the point was not specifically

raised in the form of waiver, we thought that the Respondents should be allowed to argue the question. The Respondents wanted also to raise a

point based on the proviso to Sub-section (2) of Section 81 ; but as it was nowhere raised, we refused to grant them permission to raise and argue

for the first time in appeal. In 31 Halsbury, ed. 2, at page 559, it is stated that, ''a statutory right which is granted as a privilege may be waived

cither altogether or in a particular case''. If the Plaintiffs had waived their right to question the legality of the notice, it is urged, that they are

precluded from maintaining the suit not only on their behalf but also on behalf of other members. '' Strong reliance was placed on the decision in

Burt v. British National Life Assurance Assocn. (1859) 4 De G & J. 158 : 124 E.R. 201, where it was held that a Plaintiff who has a right to

complain of an act done to a member society of which he is a member, is entitled to sue on behalf of himself and all others similarly interested,

though no other may wish to sue, so although there are a hundred who wish and are entitled to sue, still, if they sue by a Plaintiff who is personally

precluded from suing,- the'' suit cannot proceed, although other persons on whose behalf the suit was instituted might maintain the action as

Plaintiffs. The question therefore resolves itself into this, namely, whether in view of the imperative provisions regarding the notice in Section 81(2)

it is open to the Plaintiffs to waive their right to object to an illegality, the rightieing certainly not their personal right but a right belonging to them in

their corporate character. The proviso to Section 117(2) of the English Act was added for the first time in 1929 in view of the decision of In Re:

Oxford Motor Company (1921) 3 K.B. 32 : 90 L.J.K.B. 1145, which decided that it was competent for the share-holders of the company acting

together to waive the formalities required by Section 69 of the Companies (Consolidation) Act, 1908, as to notice of intention to propose a

resolution as an extraordinary resolution. In that case all the share-holders met and passed a resolution without objection and it was held that the

want of notice could be waived. The Indian Companies Amending Act of 1936 introduced a similar proviso in Section 81(2). Under this proviso it

would be seen that the requirement as to 21 days'' notice may be dispensed with by an agreement of all the members ''entitled to attend and vote''

and not merely of all the members ''entitled to vote and present in person or proxy at the meeting''. It requires therefore an agreement of all the

members of the club in order to dispense with the requirement of 21 days'' notice. The proviso in other words indicates the intention on the part of

the Legislature that the provision in Sub-section (2) is mandatory and that it can be dispensed with only by the agreement of all the members. It is

not enough lhat the members present at the meeting indicated either expressly or impliedly they consented to or acquiesced in shortening the period

of notice. An express consent of all the members to waive the notice has not been established in this case. Even if the members present agreed to

waive the defect in the notice the meeting would not be a valid meeting. The Plaintiffs therefore are not precluded from raising the contention that

the notice contravened the provision of Sub-section (2) of Section 81.

161. These observations, to my mind, were made in the context of the particular facts of the case and were not intended to lay down a general

proposition of law that, a short notice in breach of the provision of the Act, necessarily invalidates the meeting and renders the proceedings void. In

my opinion, the said observation should not be construed to mean that the requirement as to notice is imperative and mandatory in the sense that

any breach thereof necessarily invalidates the meeting and invariably renders the proceedings thereof null and void. Any such interpretation of the

observations will necessarily imply, that any breach of the said requirements of the statute, if considered mandatory and imperative, cannot be

waived under any: circumstances except as provided in the statute itself. Such, interpretation, to my mind, is not warranted and will be inconsistent

with the well-recognised principle of law enunciated in Halsbury''s Laws of England (3rd ed:, vol. XIV, p. 637, Article 1175), which I have earlier

quoted and to which reference has been made in the judgment of the Madras High Court as well, and such interpretation will also be contrary to

the view expressed by the Supreme Court In the ease of Ttiamyandas Sreeram Somani v. Sanghi Bank (Supra) to which reference has also been

made earlier. It is of interest to note that while dealing with the question as to whether the notice in question was insufficient in that it did not give full

particulars, the Madras High Court held in that case,(Supra (840)) that substantial compliance was sufficient and observed:

The next objection is that the notice was insufficient, in that it did not give full particulars, of the nature of the business. Under the Articles the notice

should indicate the general nature of the business intended to be transacted at the meeting. The draft proposed amendments to the Articles of

Association did not accompany the notice and were in fact posted only on the 21st October, and therefore must have been received On the 22nd:

On this question there is no evidence on record, but it was agreed before us by the learned Advocate appearing for the Appellants and the

Respondents that ""the printed draft was posted on the 21st of October. It is therefore urged that the notice did not indicate general nature of the

business. We are not prepared, however, to agree with this contention. It was on the initiative of the general body that a special committee was

appointed to consider the amendments, if any, to the Articles of Association. The notice clearly stated that a print of the proposed amended

Articles of Association will follow shortly. From 22nd October to 7th November the members had ample time to consider the proposed amended

Articles. We do not think that the notice was insufficient and therefore bad on this ground. No useful purpose would be served by referring to the

decisions to which our attention was drawn, as the decision of that question would invariably rest on the facts of each case.

In Palmer"s Company Precedents, part I, at page 1002, it is pointed out that--"Where a large number of alterations have to be made, it is

generally more convenient to adopt a new set of Articles altogether. Where this course is adopted, a copy of the new regulations should lie for

inspection at the office and the notice convening the meetings should state the fact; and in some cases it may be deemed expedient to send printed

copies of the proposed new Articles with the notices. According to the decision of Kekewich J. in Normandy v. Ind. Coope & Company (1908) I

Ch 84, the notice should call attention to any material alterations ; and in Baillie v. Oriental Telephone & Electric Company (1915) 1 Ch. 503, the

Court of Appeal held that a notice of a proposed resolution to alter Articles involving a large increase in the remuneration of the Directors was

invalid on the ground that the proposed increase was not fully and frankly disclosed....

The notice should state that a copy of the new Articles is enclosed, or that a copy of the proposed hew Articles may be seen at the company''s

office.

In this case in the notice it was stated that the proposed Articles would be sent shortly and they had been posted within six days from the date of

posting of the notice. In the light of the principles stated above we think that there is substantial compliance with this requirement of law and that the

notice was not bad on this ground.

162. In this connection it will be convenient to refer to the decision of the Gujarat High Court relied on by Mr. Gupta in the case of Mohanlal

Ganpatram and Anr. v. Sree Sayaji Jubilee Cotton and Jute Mill Company Limited and Ors. AIR 1965 Guj. 96 (104). While dealing with the

question whether the provisions contained in Section 173 of the Companies Act of 1956 arc mandatory or directory, Bhagwati J. observed:

This raised the question whether the provisions of s- 173-are mandatory or directory. Now the question as to whether a statute is mandatory or

directory is a question which has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and scope of the

statute. If the statute is mandatory, the thing done not in the manner or form prescribed can be of no effect or validity; if it is directory, penalty may

be incurred for non-compliance, but the act or thing done is regarded as good. As observed by Maxwell on Interpretation of Statute, 10th ed.,

376:

It has been said that no rule, can be laid down for determining whether the command is to be considered as a mere direction or instruction

involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one

that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual

consequence of disobedience, but the question is in the main governed. by considerations of Convenience and justice:, and when that result. would

involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect without promoting the real aim and object

of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must

be regarded.

Lord Campbell in Liverpool Borough Bank v. Turner (1860) 30 L.J.Ch. 379 observed:

No universal mic can be laid down as to whether "mandatory enactments shall be considered directory only or obligatory with an implied

nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention ol the Legislature by carefully attending to the whole

scope of the statute to be construed.

It is, therefore, clear that regard must be had to the whole scope and purpose of the statute for the purpose of determining whether the statute is

mandatory or directory. Judged by that test, the conclusion is irresistible that Section 173 enacts a provision which is mandatory and not directory.

The object of enacting Section 173 is to secure that all facts which have a bearing on the question on which the share-holders have to'' form their

judgment arc brought to the notice of the share-holders so that the shareholders, can exercise an intelligent judgment. The provision is enacted in

the interest of the share-holders so that the material facts concerning the item of business to be transacted at the meeting are before the share-

holders and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the share-

holders may not be deputed by the management and may not be persuaded to act in the manner desired by the management unless they have

formed their own judgment on the question after being placed in full possession of all material facts and appraised of the interests of the

management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in Section 173, I am of

the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken. If,

therefore, there was any contravention of the provisions of Section 173, the meeting of the company held on 5th September, 1961, would be

invalid and so also would the resolution passed at that meeting be invalid.

163. With very great respect to the learned Judge, I regret my inability to agree with his view that the requirement of Section 173 is mandatory and

the breach thereof necessarily invalidates the meetings and the proceedings thereof. I have earlier stated my reasons as to why these provisions

should not be considered mandatory. If the requirement of Section 173 was so mandatory as to necessarily render the meeting and the

proceedings thereof null and void in the case of any breach, there cannot possibly be any question of any waiver of the breach of the requirement

and it will not be open to the members to adopt and affirm the proceedings which the statute renders void. It does not appear that the decision of

the Supreme Court in the case of Narayandas Sreeram Somani v. Sangli Bank Ltd. (Supra) to which I have earlier referred and in which the

Supreme Court considered the effect of breach of Section 97(B) of the Companies Act of 1913. The Privy Council in the case of Parashuram

Dattaram Shamdnsani and Anr. v. Tata Industrial Bank Ltd and Ors. 55 I.A. 274 (284) lays down the. principle that of a share-holder is aware of

the facts, it is not for him or for her to complain of the insufficiency of notice of meeting. Lord Blanesburgh observed:

No possible complaint of the notice or circular on the ground of insufficiency is therefore open to him.

164. P.B. Mukharji J., as his Lordship then was, referred to this decision of the Judicial Committee in the case of Maharani Lalita Rajya Lakshmi

M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others, and held after referring to the aforesaid observations of Lord Blanesburgh:

There his Lordship is emphasising the aspect that a share-holder who by his conduct shows that he knew the real effect of the work to be

transacted at a meeting cannot complain of a notice on the ground of insufficiency.

The further observation of his Lordship was to the effect--

Although it imposes by Section 173(2) an obligation that there shall be annexed to the notice of meeting a statement of the type and nature which I

have discussed above, the question is, does failure to comply with the details of Section 173(2) of the Companies Act make it a case ipso facto of

oppression in conducting the affairs of the company within the meaning of Section 397(1) of the Companies Act ? I do not see how it can be the

kind of oppression which Section 397 contemplates because breach of Section 173(2) can at best make the meeting called invalid and no more. If

such meeting is invalid, then the Companies Act provides procedure for calling valid or regular meetings or for regularising irregular proceedings.

These observations do not lay down and, in my opinion, cannot be construed to lay down that any breach of Section 173(2) necessarily nullifies

every meeting and the proceedings thereof. In appropriate cases, undoubtedly, the breach of these requirements may invalidate the meeting and the

proceedings thereof.

165. The decision of the Privy Council in the case of Pacific Coal. Mines Ltd. and Ors. v. Arbuthnol and Ors. AIR 1917 P.C. 52 relied on by Mr.

Gupta is not of any assistance in construing Sections 171, 172 and 173 of the Companies Act of 1956. Sections 9 and 629(1) of the present

Companies Act on which Mr. Gupta strongly relies do not have the effect, in my opinion, of making these provisions mandatory and imperative in

the sense that any breach of the provisions contained in Sections 171, 172 and 173 will necessarily and invariably have the effect of rendering the

notice, the meeting and the proceedings null and void as contended by Mr. Gupta.

166. It may be of interest to note the view expressed on the question of such requirements in a recent English"" decision. In the case of In Re:

Duomatic Limited (1969) 1 All E.R. 161 Buckley, J. had to consider the effect of non-compliance with necessary requirements in the matter of

payment of remuneration to Directors. The affairs of the company had been carried on in an informal way and various payments had been made to

Directors without any resolution of the Board or of the company on account of their remuneration or otherwise. The material share-holders were,

however, aware of most of the payments made. The company thereafter went into voluntary liquidation. The Liquidator started a proceeding for

recovery of such amounts paid to the Directors. It was common ground in the proceeding that none Of the sums which were claimed were

authorised by any resolution of the company in the general meeting, nor were they authorised by any resolution of any formally constituted Board

meeting. It was, however, contended on. behalf of the Directors that the payments had been made with the full knowledge and consent of all the

shareholders of voting shares in the company at the relevant times and it was contended that in those circumstances the absence of a formal

resolution by the company in duly convened meeting of the company was irrelevant, and in support of the contention reference was made to the

case of Re Express Engineering Works Ltd. (1920) 1 Ch. 466 (471) and to the case of Parker and Cooper Limited v. Reading (1926) Ch. 975.

Buckley J. quoted the following observations of Lord Sterndale M.R.

In the present case five persons were all the Corporators of the company and they did all meet, and did all agree that these debentures should be

issued. Therefore, it seems that comes Within the meaning what was stated by Lord Davey in Solomon v. Solomon and Company Ltd., (1897)

A.C. 22 at p. 757, and he quotes from Lord Davey.

Lord Sterndale M.R. went on--

It is true that a different question was there under discussion, but I am of opinion that this case falls within that Lord Dayey said. It was said there

that the meeting was a Directors'' meeting, but it may well be considered a general meeting of the company, for although it was referred to in the

minutes as a Board meeting, yet if the five persons present had said, ''we will now constitute this a general meeting'', it will have been within their

powers to do so and it appears to me that was in fact what they did.

167. Buckley J. then quolcs the following observations of Warrington L.J. (Supra (470-1))

It was competent to them (the five Corporators of the company) to waive all formalities as regards notice of meetings etc., and to resolve

themselves into a meeting of share-holders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectively

do what was required but could do it in another, it is to be assumed that as businessmen they would act in the capacity in which it appeared to act.

In my judgment they must be held to have acted as share-holders and not as Directors, and the transaction must, be treated as good as if every

formality had been carried out.

168. Thereafter the learned Judge quotes the following observations of Younger L.J. (Supra.(ill))-

...I agree with the view that when all the share-holders on a company are present at a meeting that becomes a general meeting and there is no

necessity for any further formality to be observed to make it so. In my opinion, the true view is that if you have all the shareholders present, then all

the requirements in connection with a meeting of the company arc observed, and every competent resolution passed for which no further formality

is required by statute becomes binding on the company.

169. The learned Judge then proceeds to quote the following observations of Astbury J. in the case of Parker and Cooper Limited v. Reading

(1926) All E.R. 328:

Now the view I take oif both these decisions is that one transaction if intra vires and honest, and especially if it is for the benefit of the company, it

cannot be upset if the assent of all the Corporators is given to it. I do not think it matters in the least whether that assent is given at different times or

simultaneously.

170. After quoting the aforesaid view of Astbury J., Buckley J. himself observes (Supra (167)):

So that the effect of his judgment was to carry the position little further than it had been carried in the Express Engineering Works'' case (Supra),

for Astbury J. expressed the view that it was immaterial that the assent of the Corporators was obtained at different times, and that it was not

necessary that there should be a meeting of them all at which they gave their consent to the particular transaction sought to be upheld.

The learned Judge holds (Supra (168)):

It seems to me that if it had occured to Mr. Elvins and Mr. East, at the time when they were considering the accounts, to take the formal step of

constituting themselves a general meeting of the company and passing a formal resolution approving the payment of Directors'' salaries, that would

have made the position of the Directors--that is to say, Mr. Elvins and Mr. Hanley,-- who received the remuneration,--secure, and nobody could

thereafter have disputed their right to retain their remuneration. The fact that they did not take that formal step but that they nevertheless did apply

their minds to the question of whether the drawings by Mr. Elvins and Mr. Hanley should be approved, as being on account of remuneration

payable to them as Directors, seems to me to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a

general meeting of the company. In other words, I proceed on the basis that where it can be shown that all share-holders who have a right to

attend and vote at a general meeting of the company assent to some matter which a general meeting of the company should carry into effect, that

assent is binding as a resolution in a general meeting would be.

171. In this connection the decision in the case of H.L. Bolton (Engineering) Company Ltd. v. T.J. Graham and Sons (1956) 3 All E.R. 624 (629,

630) may also be usefully noted. In this case a question arose whether without the decision of the Directors at a formal meeting, it can be said that

the company had properly expressed its intention to occupy the premises for its own business and was entitled to oppose an application of the

sub-tenants for a new tenancy on that ground. It was contended that the proper intention had not been established and there should be a Board

meeting. In view of the decision in Austin Reed Limited v. Royal Assurance Company Ltd. it had to be conceded that the decision of the Board

need not formally be recorded in a minute. It was, however, argued that even though formal recording of the decision in a meeting might not be

necessary, there must in any event be a Board meeting by which there would be a collective decision and it was not sufficient that individual

Directors should individually be of one mind. This contention raised before the trial Judge was rejected and the learned trial Judge made the

following observations which are quoted in the judgment of the Court of Appeal:

I am told their Board only meets once a year and it seems to me that the mode of conducting their business is to leave mearly everything to their

agents, and so far as their agents are concerned, I think there is No. doubt about what they mean to do...So far as the agents of the company, the

business managers, or the Directors of the company who manage the business (to use a more accurate expression) are concerned, they in their

managerial capacity have certainly affirmed the intention to occupy the premises in question. An intention of a company, of course, cannot be

formed in the company--a company is an abstract being and must act by agents or by their Bqard of Directors, particularly in matters of

importance. It is not necessary, so far as I understand it, that any resolution by the Board should have been expressed by a minute although it ought

to be so. However, I do not want to be understood as "finding, and I do not find, that the Board of this company has ever met or passed any

resolution that the company intend to occupy these premises for their own purposes. I do not propose to find that at any effective time the Board

of this company has passed a resolution of the intention to occupy these premises, but the business of the company has been so conducted and the

position of the company is as such that matters of this sort, which are business matters, are dealt with by agents of the company, the people who

manage the business. Their intention is quite clearly to occupy these premises as soon as they can. There is another point to which I ought to refer.

Instructions had been given to architects to prepare certain plans with regard to alterations to the premises and this had been agreed from time to

time. Plans had been framed and submitted to the managers, the business managers of this company, and I think it would be difficult for the Board

of this company, after all that had been going on, to meet and say "we will proceed no further in this business". They have already made a contract

in relation to building and erection of an office block on adjoining land, all in preparation for occupation of the company of this land and, therefore,

on the whole I think it is right to find that the intention of the company is to occupy this land and they are entitled, therefore, to succeed in their

opposition on the grounds which they set out in their notice of October 1955, namely, on the grounds of para (g).

172. In the appeal preferred against the said decision Denning L.J., after having quoted" the aforesaid observations of the learned trial. Judge,

proceeds to make the following very interesting observations:

So the Judge has found that the landlord company, through their managers, intend to occupy the premises for their own purposes. Counsel for the

tenants contests this finding and he has referred to cases decided in the last century, but I must say that the law on this matter and the approach to

it have developed very considerably since then. A company may in many ways be likened to a buman body. They have a brain and a nerve centre

which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people

in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will.

Others are Directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these

managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault

as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane"s speech in

Lennard"s Carrying Company Ltd. v. Asiatic Petroleum Company Ltd. (1915) A.C. 705 at pp.713, 714. So also in the Criminal law, in cases

where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company

themselves guilty. This is shown by R. v. C.R. Haulage Ltd. (1944) I All E.R. 691, to which, we were referred this morning. The Court said at

page 695--whether in any particular case tliere is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention,

knowdedge, or belief is the act of the company...must depend on the nature of the charge, the relative position of the officer or agent and the other

relevant facts and circumstances of the case.

So here the intention of the landlord company can be derived from the intention of their officers and agents. Whether their intention is the

company"s intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other facts and

circumstances of the case. Approaching the matter in that way, although there was no Board meeting, nevertheless having regard to the standing of

these Directors in control of business of the company, having regard to the other facts and circumstances which we know, whereby plans had been

prepared and much work done, it seems to me that the Judge was entitled to infer that the intention of the landlord company was to occupy the

holding for their own purposes. I am of opinion, therefore, that the Judge"s decision-, on this point was right.

173. The English Courts appear to take a realistic view of the working and management pf the affairs of the company and consider the problems of

a company from a practical business point of view. The approach of the English Courts to the question of; these requirements is not generally a

narrow and a legalistic one and is essentially a realistic one from the viewpoint of the actual working of a company in practice bearing, however, in

mind the requirements of justice in each case. The approach of the English Courts, to my mind, is eminently reasonable and sound. The said

approach serves tlic purpose for which the said provisions have been made and at the same time promotes the cause of justice and results in

effective and proper working of the company.

174. Apart from the allegations of short notices which do not have the effect of invalidating the meetings and the proceedings thereof in the facts of

the instant case, the other charges in the plaint impeaching the validity of ""the meetings and the proceedings thereof have not been substantiated.

The facts and circumstances of the present case,, to which I have earlier referred, go to show, in my opinion, that notices had been duly served on

all the persons entitled. to such notice, and D.N. Jalan was not entitled to any notice. As in the facts of the instant case, I am of. the opinion that

notices had been duly served on all persons entitled to such notice, including Baijnalh Jalan who happens to be dead, I do not consider it necessary

to deal with the further argument of Mr. Mitter that even if the dead member Mr. Baijnath Jalan, the adoptive father of D.N. Jalan, had not been

served, the meeting and the proceedings thereof would not be bad and invalid, and I, therefore, do not consider it necessary to deal with the cases

cited from the Bar on this aspect. I may, however, indicate that there are reasons more cogent and fundamental which prevent the Plaintiffs from

challenging the validity of the said meetings and the proceedings thereof, even if the Plaintiffs had any proper grounds for doing so. On the basis of

the averments made in the plaint, issues Nos. 4(a) and (b) must be answered against tne Plaintiffs in the negative. So far as issue No. 4(c) is

concerned, the minutes of the meeting held on August 20, 1956, (Kx.()02(j)) dearly establish that consent of the Defendant No. 13 had in fact

been given. Surajmull Nagarmull and""Howrah Trading were both present at the meeting held on August 20, 1956, and the necessary resolution

had been passed unanimously. The necessary return in Form No. 23 (Ex. 0041) signed by Surajmull Nagarmull had also been duly filed with the

Registrar of Companies, It is to be noted that in the plaint the factum of the consent, on the part of the Defendant No. 13 to Gopalkrishna Jalan

holding an office of profit has been challenged and the issue that has been raised is also an issue of fact. The factum of consent is clearly established

by the special resolution unanimously adopted by the company at the meeting of the members held on August 20, 1956 (Ex. 001 (j)). Surajmull

Nagarmull and llowrab Trading were both present at the meeting and the special resolution according to the consent of the company was passed

un-animously. Similar arguments to the effect that no meeting had in fact been held, the minutes are fabricated and the transactions recorded arc

not genuine and are sham transactions, were advanced by Mr. Gupta, relying on the same grounds, namely, nature of evidence of Mr. Kar,

unsatisfactory manner of maintaining the books and discrepancies in the evidence of Mr. Kar in the minutes and in returns filed. I have earlier dealt

with this aspect of Mr. Gupta''s contention and for reasons already stated, I have come to the conclusion that in spite of various infirmities in the

evidence, the minute books of the company are genuine books and the minutes recorded therein are not fabricated and manufactured and the

transactions recorded therein are not sham. So far as the meeting of August 20, 1956, (Ex. 001 (j)) is concerned, both Surajmull Nagarmull and

Howrah Trading were present and were parties to the resolution. It does not appear that, there was any serious dispute amongst the partners of

Surajmull Nagarmull at that time. In the event, D.N. Jalan must have known of the appointment in the company of G.K. Jalan who is a very near

relation of him. No protest or objection had at any point of time been raised by any party to the holding of the office of profit by G.K. Jalan and

the same only came to be challenged in the suit in 1963 after a lapse of over six years when D.N.Jalan fell out and started this suit. The conduct of

the parties in the instant case furnishes very strong evidence as to the genuineness of the books and the transactions recorded, even though the

manner of maintaining the books might not have been satisfactory and the meetings and the transactions might have taken place with a degree of

informality and the necessary formalities might not have been strictly complied with. Both Surajmull Nagarmull and Howrah Trading were present

at the meeting and the special resolution had been passed unanimously. Surajmull Nagarmull and Howrah Trading happen to figure as Plaintiffs in

the suit. No attempt was even made on behalf of these Plaintiffs to show that the minutes were false and Surajmull Nagarmull and Howrah Trading

were not present excepting making such suggestions to Mr. Kar. The necessary return in Form No. 23 (Ex, 0041) signed by Surajmull Nagarmull

as Managing Agent of the company was duly filed with the Registrar. The said return (Ex. 0041) which was filed within the time stipulated years

ago before any serious dispute, and in any event, long before the suit, clearly negatives the case of fabrication and manufacturing of the books. In

any event, in view of the participation of Surajmull Nagarmull and Howrah Trading at the meeting of August 20,1956, the contention of the

Plaintiffs is not only clearly untenable but it is also not open to them, and any cause of action for challenging the validity of the special resolution

which was passed on August 20, 1956, is also barred by limitation. The submission of Mr. Gupta that it is a case also of continuing wrong is

untenable and of no avail.

175. I have, however, to note that certain other grounds, not taken in the pleadings, have been urged on behalf of the Plaintiffs to impeach the

validity of the meetings and the proceedings thereof, including the validity of the special resolution according sanction to Gopalkrishna Jalan holding

an office of profit. It has been argued" by Mr. Gupta that in view of the provision contained in Section 314 of the Companies Act, 1956, which

came into effect on and from April 1, 195(5, S.B. Jalan and S.S. Jalan must be deemed to have vacated their office of Directors on and from that

date. The relevant portion of the said Section 314 of the Companies Act in force on April 1, 1950, reads ;

314. (i) Except with the previous consent of the company, accorded by a special resolution, no Director of a company, no partner or relative of

such Director, no firm in which such a Director or a relative is a partner, no private company of which such a Director is a Director or member,

and no Director, Managing Agent, Secretaries and Treasurers, or Managers of such private company shall hold any office or place of profit,

except that of Managing Director, Managing Agent, Secretaries and Treasurers, Manager, Legal or Technical Advisor, Banker, or Trustee, or the

holders of the debentures of the company,--

(a) under the company, or (b) under any subsidiary of the company, unless the remuneration received from such subsidiary in respect of such office

or place is paid over to the company or its holding company.

(ii) If any office or place of profit under the company or a subsidiary thereof is held in contravention of the provisions of Sub-section (1) the

Director concerned shall be deemed to have vacated his office as Director with effect from the first day on which the contravention occurs, and

shall also be liable to refund to the company any remuneration received or the monetary benefit equivalent to any perquisites or advantage enjoyed

by him in respect of such office or place of profit.

176. Mr. Gupta has argued that G.K. Jalan was holding an office of profit under the company before April 1, 1956, and S.B. Jalan and S.S. Jalan,

who are relations of G.K. Jalan, were holding the officer of Directors before April 1, 1956; G.K. Jalan continued to hold his oficc of profit after

April 1, 1956, and therefore, there was or could be no previous consent of the company as required u/s 3, 14. It is the argument of Mr. Gupta that

subsequent .consent of the company is of no avail, as the statute requires previous consent and Mr. Gupta contends that, as there was no previous

consent of the company, S.B. Jalan and S.S. Jalan must be deemed to have vacated their office as Directors in accordance with the provisions of

the said Section 314 on and from April 1, 1956, when the contravention of the requirements of the statute took place. Mr. Gupta has further

contended that, as S.B. Jalan and S.S. Jalan had vacated their office as Directors, there was no proper Board of Directors, as with the vacating of

office by S.B. Jalan and S.S. Jalan the minimum number of Directors would not be there; and it is the contention of Mr. Gupta that, as there was

no valid Board of Directors of the company, all the subsequent meetings including the meeting of August 20, 1956, are without any authority, illegal

and of no consequence.

177. In my view, the contention of Mr. Gupta is not tenable. To put any such construction on Section 314 would result in utter chaos and

confusion in the administration of the affairs of the company. When G, K. Jalan was appointed, there was no impediment to the appointment. S.B.

Jalan and S.S. Jalan were Directors of the company long before appointment of G.K. Jalan and restriction sought to be imposed by Section 314

was not there when these three persons, namely, S.B. Jalan, S.S. Jalan and G..K. Jalan were holding their respective offices. It is not disputed that

all these gentlemen were holding their offices lawfully and properly before the Act of 1956 came into force on April 1, 1956. The question is

whether the imposition of the restrictions by Section 314 affects the position then existing and makes the holding of office as Directors unlawful. It

is quite clear that in the facts of the instant case it was not possible for the company to comply with the requirements of obtaining previous consent.

Mr. Gupta''s submission that steps should have been taken in anticipation to obtain necessary consent of the company and consent of the company

should have been obtained before April 1, 1956, is clearly unsound. The contention of Mr. Gupta that there has been a contravention of the statute

is based on the expression ''shall hold any, office'' used in Section 314(i) and he contends that as on April 1, 1956, Mr. G.K. Jalan was holding the

office without previous consent, S.B. Jalan and S.S. Jalan necessarily go out as Directors by virtue of the provisions contained in Section 314(2).

178. In the case of Bhudan Singh and Another Vs. Nabi Bux and Another, the Supreme Court had to consider the same expression ''held'', of

course, in a different context and used in a different statute, namely, U. P. Zamindari Abolition and Land Reforms Act, 1950 (I of 1951). Section 9

of the said Act with which the Supreme Court was concerned provided--

All wells, trees in abadi, and all buildings situated within the limits of an estate, belonging to or held by an intermediary or tenant or other persons,

whether residing in the village or not, shall continue to belong to or be held by such intermediary or tenant or persons, as the case may be, and the

site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms

and conditions as may be prescribed.

The Supreme Court observed:

Before considering the meaning of the word ''held'' in Section 9, it is necessary to mention that it is proper to assume that the law-makers who are

the representatives of the people enact laws which the society considers honest, fair and equitable. The object of every legislation is to advance

public welfare. In other words, as observed by Crawford in his book on Statutory Constructions the entire legislative process is influenced by

considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently,

where the suggested constuction operates harshly, ridiculously or in any other manner contrary to prevailing concept of justice and reason, in most

instances; it would seem that the apparent of suggested meaning of the statute, was not the one intended by the law makers. In the absence of

some other indication that the harsh or ridiculous effect was actually intended by the Legislature, there is little reason to believe that it represents

legislative intent.

We are unable to persuade ourselves to believe that the Legislature intended to ignore the rights of persons having legal title to possession and

wanted to make a gift of any building to a trespasser howsoever recent the trespass might have been if only he happened to be in physical

possession of the building on the date of vesting.

179. The Supreme Court held that the expression "held" used in Section 9 must be considered to mean "lawfully held".

180. To my mind, it is impossible to attribute to the Legislature the intention that the persons lawfully holding any office of profit or of Directors will

cease to hold such office lawfully when the Legislature in its wisdom did not choose to put a complete ban on such appointment without giving any

opportunity of complying with the requirements to be complied with for the holding of such office. To attribute such intention to the Legislature and

to put such construction on Section 314 will not only operete harshly but will bring about a ridiculous situation of utter chaos and confusion in the

administration of the affairs of the company. The Legislature, in my opinion, never intended Section 314 to apply to the prevailing state of affairs of

any company as existing on April 1, 1956, or to apply the said provision to existing appointments on that date. As a precaution against nepotism

and favouritism on the part of the Directors, and by way of reasonable safeguard, the Legislature introduced the provisions contained in Section

314 which will apply to all appointments to be made after the said Act came in force. It is to be noted that the said Section 314, as originally

enacted, has undergone changes by subsequent amendments with which this case is not directly concerned. The subsequent amendments,

however, suggest that the Legislature never intended the result contended for by Mr. Gupta. Some indication of the legislative intent may also be

gathered from Section 261 (4) which does not appear to fit in very well u/s 261 and the said Section 261(4) reads--

Nothing in this section shall be deemed to prevent any Director from holding any office immediately before the commencement of this Act from

continuing to hold that office upto next annual general meeting.

181. Even if I had come to the conclusion that Section 314 affected theexisting position and S.B. Jalan and S.S. Jalan had vacated their office as

Directors, I would then have had no hesitation in holding that all acts done by them as Directors were protected u/s 290 of the Companies Act and

all the meetings of the company subsequently held under the authority of the Board with S.B. Jalan and S.S. Jalan were valid.

182. I am further of the opinion that in the absence of necessary pleading it is not open to the Plaintiffs to raise this contention. It is rightly argued

on behalf of the Defendants that this contention sought to be raised on the question of S.B. Jalan and S.S. Jalan having vacated their office as

Directors by virtue of the provisions contained in Section 314, is not a pure question of law and depends largely on relevant facts being

established, and in the absence of proper pleading of the material facts, it is not open to the Plaintiffs to raise this contention. A pure question of

law may, undoubtedly, be urged at any stage and without necessary pleading, but it will not be proper to entertain a mixed question of law and

fact, particularly when the question of law essentially depends on certain facts being established unless the relevant facts are properly pleaded. It is

well-established that in the absence of any pleading or issue such a contention cannot be entertained on the basis of some stray evidence on

record. In the case of Ram Prasad Mathur Vaishya Vs. The State of Madhya Pradesh and Another, the Supreme Court observed:

The question whether an Agent can enforce his lien in a particular case is a mixed question of law and fact. Therefore, in the absence of any

specific plea, that question cannot be gone into.

183. It has next been contended on behalf of the Plaintiffs that S.S. Jalan, who was longest in office, must have retired by rotation u/s 256(2) of the

Companies AcL at the annual general meeting held on September 27 1962, and as he was not re-elected and H.L. Dey had been elected at the

said meeting, S.S. Jalan must have ceased to be a Director after September 27, 1962, and had no authority to act as such after that date. It is the

contention of the Plaintiffs that all acts purported to have been done by S.S. Jalan as Director thereafter are illegal and void and Section 290 of the

Companies Act affords no protection to such unlawful acts. Reliance has been placed on the decision of Law J., in the case of In Re: Hindusthan

Co-operative Insurance Society Ltd. 65 CW.N. 68. Mr. Gupta has, further submitted that after S.S. Jalan had ceased to be a Director, having

retired by rotation under the statute, there, was no, valid Board" and all acts done by S.S. Jalan or the Board after September 27, 1962, are illegal

and of no efTect. On behalf of the Defendant it has been argued that in the absence of any such case being made in the plaint, it is not open to the

Plaintiffs to raise any such contention and it is the argument of the Defendants that, if any such case had been made, they would have been in a

position to meet the same and to adduce necessary evidence to give the real picture of the position and to explain the same. It has been contended

that S.S. Jalan must be considered to have been automatically re-elected u/s 256(4). It is further submitted that in any event all acts done by S.S.

Jalan as Director are valid and protected u/s 290 of the Companies Act. It is argued that the decision of Law J. is not correct and the learned

Judge has given no reason and has merely followed the English decisions although the provision in the English statute is difFcrent from the provision

in the Indian Act.

184. It is to be noted that no such case of retirement of S.S. Jalan by rotation has been made in the plaint and the case made in the plaint proceeds

entirely on a different footing. The question of S.S. Jalan''s retirement by rotation is a mixed question of law and fact and, in the absence of any

specific plea or issue, I am of the opinion that the Defendants rightly contend that the Plaintiffs should not be allowed to make any such case at the

trial. If any such case had been made, it might have been possible for the Defendants to meet the same.

185. The position as it emerges from evidence brought on record, obviously for various other purposes, appears to be that S.S. Jalan was longest

in office and should have retired at the annual general meeting on September 27, 1962. Through inadvertence and some silly mistake on the part of

the company or its officers, H.L. Dey who was not to have retired at that meeting was made to retire on the footing that he was due to retire by

rotation, and H.L. Dey who was made to retire by rotation through mistake was re-elected. It is not in dispute and it cannot be disputed that if S.S.

Jalan had in fact retired he would, undoubtedly, fyave been re-elected as the company was completely under the control of S.B. Jalan. Through

inadvertence and foolish mistake, the fact that S.S. Jalan should have retired by rotation and not H. L. Dey, escaped the attention of the company.

It is indeed very unfortunate that this kind of mistake should at all occur and it only goes to show that the affairs of the company were not being

managed with that much of care and caution as should be expected of any company. There can, however, be no doubt that the whole thing was

through mistake and lack of due care and there can be no question of any motives or mala fides and no motives or mala fides were even suggested

or could be suggested, as S.S. Jalan could easily have been re-elected in the event of his retiring. I may only add that S. S- Jalan had in fact been

subsequently re-elected on occasions after his retirement by rotation.

186. Even if I had held that it was open to the Plaintiffs to raise this contention that S.S. Jalan had retired by rotation, I would certainly have held in

the facts of the instant case, that all acts done by S.S. Jalan were valid and protected by Section 290 of the Companies Act.

187. Section 290 of the Companies Act is in the following terms:

290. Validity of acts of Directors Acts done by a person as a Director shall be valid notwithstanding that it may afterwards be discovered that his

appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the

Articles:

Provided that nothing in this section shall be deemed to give validity to acts done by a Directof, after his appointment has been shown to the

company to be invalid or to have terminated.

188. This section has been enacted in the larger interests of company administration. In the interest of the company and also of persons dealing

with the company, the Legislature in its wisdom has enacted this section with the object that acts done by a company and transactions entered into

by or with the company, may not be vitiated, if it happens to transpire subsequently for some reason that any Director of the company who has

acted as such in any of such acts and transactions, has not been validly appointed because of some defect or disqualification or has ceased to be a

Director at the material time by virtue of any provision contained in the Act or in the Articles of the company. The basic purpose of this provision is

to preserve acts and transactions of the company done bona fide and in good faith and the object is to ensure the smooth working and

administration of a company and to protect the interests of persons dealing with the company. The section, irt view of the object intended to be

achieved, is naturally wide in its scope with this limitation that this protection will not be available after any such appointment of a Director has been

shown to the company to be invalid or to have terminated, as provided in the proviso to the said section. Naturally, any act or transaction done,

after it has been shown to the company that the appointment of a Director is invalid or has terminated, cannot be said to be an act done bona fide

and in good faith. The section in its express terms covers the acts done by a person as a Director whose appointment has terminated by virtue of

any provision contained in the Act or in the Articles unless hit by the proviso. To my mind, the case of a Director due to retire by rotation comes

within the purview of this section. The case of a Director retiring by rotation is not a case of no appointment at all as a Director. A Director, who is

to retire by rotation, must have been validly appointed as Director and by virtue of the provisions contained in the Act or in the Articles, he is to

retire by rotation in his turn and his appointment as Director is terminated by virtue of the provisions contained in the Act or in the Articles of the

company. Sections 255 and 256 of the Companies Act make provisions for retirement of Directors by rotation and Articles 123 and 124 of the

company in the instant case also provide for retirement of Director by rotation. The question of any Director retiring by rotation is essentially a

question of fact and, although normally and usually the company should know and the Director concerned may also know the time for such

retirement, it cannot be contended that as a matter of law such knowledge must necessarily be presumed in every case to take the case of a retiring

Director out of the purview of the protection afforded by Section 290 on the footing that such termination had been shown to the company which

must be presumed to have such knowledge. The company acts and has to act through human agencies and to err is human nature. Normally and

usually the company knows and should know which particular Director is to retire by rotation at any annual general meeting and any mistake on the

part of the company in this regard is not generally to be expected and, in any event, not to be appreciated and encouraged. Even though any such

mistake is not to be normally expected and does not usually occur in a company whose affairs arc properly managed, such a possibility cannot be

completely ruled out and, through inadvertence or otherwise, the fact may escape the attention of the company and may not be in the mind of the

company at the relevant time. If any such mistake is in fact made and a Director, who should have retired by rotation, continues to act without

retiring because of the mistake, his act will be covered by Section 290 and will be entitled to protection thereof. If, however, it is established as a

matter of fact that the termination has been shown to the company at the relevant time or at any time thereafter, the protection will be withheld as

soon as it is so shown. Whether it is a case of genuine mistake in the sense that the fact of such retire merit by rotation has escaped'' the attention

of the company or'' it is a case whether the fact ofsuqh retirement by rotation has been shown to the company in the sense that the company has

actual knowledge thereof, is essentially a questions of fact and must necessarily depend on the facts and circumstances of each particular case.

There is no question of any presumption.

189. The contention of Mr. Gupta that Section 290 applies to cases of termination of the appointment of a Director under Sections 280, 281 and

282 and has no application to the case of a Director retiring by rotation u/s 256 is, in my opinion, riot sound. Mri Gupta has raised this contention

relying on the expression ''appointment...had terminated by virtue of any provision contained in this Act'' used in the said Section 290. Mr. Gupta

has argued that the expression appointment had terminated'' has been used in Sections 280, 281 and 282 and not in Section 256, and as the same

expression has been used in Section 290, Section 290 should be construed to cover cases of termination under Sections 280, 281 and 282 and

not to cover a case of retirement by rotation u/s 256. This argument is, in my opinion, fallacious, and it may be noted that even in Section 280 the

word "vacate" has been used. In the Act, the Legislature has used various expressions, namely, "vacating",, "termination", "retirement", "cease"

etc. in relation to determination of office of a Director. The effect, to my mind, of whatever expression may have been used in this connection, is

the same and the effect is that the office of the Director stands determined or terminated. The word "terminate", according to the Shorter Oxford

English Dictioriary (3rd. ed.) means, amongst other things-- ""To determine; to bring to an end, put an end to, cause to cease ; to end (an action,

condition, etc.)."" The said expression is wide enough to cover a case of retirement by rotation which has the effect of terminating the office of the

Director. In my opinion, the Legislature never intended to narrow down the scope of Section 290 to cases of termination under Sections 280, 281

and 282 as contended by Mr. Gupta; and if the Legislature had so intended the Legislature could have easily said so. As I have already observed,

the Legislature, in my opinion, intended the scope of Section 290 to be sufficiently wide. It may be noted that under the provisions of the previous

Act, which corresponded to the English After the scope was indeed narrower, and under the present Act the Legislature must have altered the

provisions with the object of enlarging the scope. There is, no provision in the earlier Act protecting the acts done by a person as a Director after

termination of the, appointment as such. The provisions in the earlier Act contained in Section 86 of the Act of 1913 is in the following terms:

The acts of a Director shall be valid notwithstanding any defect that may afterwards be discovered in his appointriient 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.

190. The provisions contained in Section 86 are substantially the same as contained in the English Act. In view of the language used in Section 290

of the present Act widening the scope of the section to cover expressly acts done by persons as Directors after termination of the appointment as

such by virtue of any provision contained in the present Act or in the Articles, the English decisions are not of any material assistance in construing

the present section. The decision of Law J. in the case In re Hindusthan Co-operative Insurance Society Ltd. (Supra (79)), which was decided on

the peculiar facts of the case, is also of no great assistance to the Plaintiffs. The learned Judge observed:

The Respondents" case is that they are validly appointed Directors and not they are protected u/s 290 of the Companies Act. Yet at the hearing

the Learned Counsel for the Respondents sought protection u/s 290 of the Companies Act. In my opinion, on the facts and circumstances of this

case the acts of the Directors cannot be validated u/s 290 of the Companies Act. This is not a case where there was a defective appointment but

one where there was no appointment as Directors at all.

The Directors were fully aware of their position and there is ample evidence on record for that also. Section 290 is not applicable to the facts and

circumstances of this case.

191. It appears, therefore, that the learned Judge came to the conclusion in the peculiar facts of the case that the acts were hit by the proviso and

were, therefore, not protected. The learned Judge does not appear to have considered the question of the validity of acts of persons done as

Directors after the termination of appointment, as such, by retirement by rotation u/s 256 of the Act and does not appear to have construed the

said provision in the section. The observation of the learned Judge that

this is not a case where there was a defective appointment but one where there was no appointment of them as Directors at all appears to be

based on the decision of the English Court in the case of Morris v. Kanssen and Ors. (1946) A.C. 459 and not on any interpretation of the

provisions contained in Section 290 of the present Act as to validity of acts of persons as Directors after termination of the appointment. The

conclusion of the learned Judge that

the Directors were fully aware of their position and there is ample evidence on record for that also

and Section 290 is not applicable to the facts and circumstances of this case

suggests that Section 290 could otherwise apply, had the facts been different, and does not lay down that Section 290 has no application to the

case of a Director retiring by rotation. The decision in the case of Morris v. Kanssen and Ors. (Supra) was concerned with the provision of the

English Statute. The provisions of the English Statute are materially different and there is no provision in the English Act, according protection to the

acts of persons as Directors after termination of the appointment as such under provisions of the Act. The facts of the case of Morris v. Kanssen

were briefly as follows: Kanssen and Cromie were the two first Directors of the company and held all the shares. Cromie alleged that at a Board

meeting Strelitz was appointed a Director. This meeting never took place and the minute recording it was a forgery. At another meeting Cromie

and Strelitz, without Kanssen''s knowledge, purported to appoint Morris a Director and allotted share to Morris. Morris knew that Kanssen was

contending that Strelitz was not a Director and that the issue of shares was invalid, but he made no enquiries. The Court of Appeal held that Morris

was put on enquiry and could not rely on the section. Lord Green M.R. in the Court of Appeal (which decision is reported in (1944) Ch. 346) laid

down the following proposition as having been established by the authorities:

(1) A party to the transaction may be able to rely on the section, if he does not know of an irregularity, even though other parties know that the

appointment was irregular.

(2) The section may apply, though the parties concerned know the facts, if the defect is not present to their minds at the time.

(3) Where a person is put on enquiry and makes no enquiries, it is no answer for him to contend that, if he had made enquiries, he would have had

false statements made to him.

(4) A person who takes an interest as transferee from one of the parties to the transaction is not protected by the section; and if the transferor

could not rely on the section, the transferee is in no better position.

192. When this case (Supra) came before the House of Lords these propositions were neither affirmed nor rejected. The House of Lords held

that the appointment of Strelitz and Morris and the allotment of shares to Morris were completely bad and were not validated by the section. The

relevant section before the Court was Section 143 of the Companies Act, 1929, which read:

The acts of a Director or Manager shall be valid notwithstanding any delect that may afterwards be discovered in his appointment or qualification.

Lord Simonds dealing with the section observed (Supra (471)):

There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment,

and (b) no appointment at all.

193. This case was not concerned with any acts done by a person as a Director who has retired by rotation and is of no assistance in the instant

case. To my mind, in view of the fact that the English Act contains no provision protecting the acts of persons as Directors after termination of the

appointment as Director as provided in Section 290 of the present Indian Act, the English decisions are not really of any assistance in construing

this particular provision in Section 290 of the present Indian Act. I do not, therefore, consider it necessary to discuss the case reported in (1914) 1

Ch. 883, referred to in the judgment of Law J., as the said case has no bearing on the question. The other case reported in (1959) Comp Cases

273, referred to in the judgment of Law J., does not deal with Section 290 of the Companies Act and is not concerned with the question of. acts

done by a Director after termination of his appointment and is, therefore, not of any assistance in the instant case.

194. In the instant case, the facts and circumstances clearly establish that the question of retirement of S.S.Jalan by rotation had escaped the

attention of the company through inadvertence or mistake for ""some reason or other and the fact of such retirement of S.S. Jalan was not present in

the mind of the company and was never shown to the company at the material time or at any time thereafter. If this fact had been present in the

mind of the company or of S.S. Jalan at the relevant time or had been shown to the company at the material time or at any time thereafter, there

would have been no difficulty in getting S.S. Jalan re-elected on such retirement by rotation. The company at the material time and at all times

thereafter had been under the control of S.B. Jalan and there was in fact no rival group in the company and S.S. Jalan could easily have been re-

elected on retirement by rotation. The fact that S.S.Jalan could easily have been re-elected at the meeting at which through mistake H.L. Dey was

made to retire by rotation and was re-elected, is not and could not be seriously disputed. No valid reason except negligence and mistake on the

part of the company,, for retirement of H.L. Dey by rotation and his re-election in place of S.S.Jalan, has been or can be suggested. However

unfortunate and undesirable the mistake might have been, it is clear that because of the mistake made, S.S. Jalan instead of retiring and getting re-

elected had continued to function as Director bona fide in the belief that he continued to be a Director although his appointment as Director had to

terminate by rotation. If this case had been made in the plaint, the company and S.S. Jalan could, undoubtedly, have led evidence to explain the

situation. As no such case has been made in the plaint or in course of the evidence led on behalf of the Plaintiffs, the company naturally was not

prepared to meet such a case. In any event, the facts and circumstances of the case and the evidence on record establish, to my mind, beyond

doubt that it was a case of genuine mistake, however unfortunate and undesirable, and that the fact was not present in the mind of the company at

the relevant time or at any time thereafter and was never shown to the company at any material point of time. There is no evidence to show that the

fact had been shown to the company at any material time or that the fact was present in the mind of the company at any relevant time. If the fact

had been present in the mind of the company at the relevant time and had not escaped the attention of the company, the company instead of

retiring H.L. Dey by rotation would have retired " S.S. Jalan by rotation and would have him re-elected on such retirement. It is important to note

that S.S. Jalan had in fact on subsequent occasions retired by rotation and had been re-elected. In the facts of the instant case, I am, therefore, of

the opinion that all acts done, by S.S. Jalan after September 27, 1962, till his re-election, if" they could be challenged by the Plaintiffs, are valid

and protected u/s 290 of the Companies Act.

195. I have to observe that the further argument oi Mr. Mitter that S.S. Jalan must be considered to have been statutorily re-elected under the

provision of Section 256(4) in the event of his statutory retirement u/s 256(1) & (2), does not appeal to me. The said Section 256(4) which

provides for such statutory re-election reads:

Section 256(4) (a) If the place of the retiring Director is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the

meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a public holiday, till the next

succeeding day which is not a public holiday at the same time and place.

(b) If at the adjourned meeting also, the place of the retiring Director is not filled up and the meeting also has not expressly resolved not to fill the

vacancy, the retiring Director shall be deemed to have been re-appointed at the adjourned meeting, unless

(i) at the meeting or at the previous meeting a resolution for the re-appointment of such Director has been put to the meeting and lost;

(ii) the retiring Director has, by a notice in writing addressed to the company or its Board of Directors, expressed his unwillingness to be so re-

appointed;

(iii) he is not qualified or disqualified for appointment;

(iv) a resolution, whether special or ordinary, is required for his appointment or reappointment by virtue of any provision of this Act; or

(v) the provisos to Sub-section (2) of section 263 or Sub-section (3) of section 280 is applicable to the case.

196. The aforesaid provisions, in my opinion, do not cover a case of a Director, say X, who is due to retire by rotation, but another Director, say

Y, is made to retire by rotation in place of X through mistake or otherwise and the said Director Y who is so made to retire by rotation gets re-

elected. These provisions, to my mind, are intended to apply to a case where the Director X, due to retire by rotation, retires in fact to the

knowledge of the company and the members thereof at the meeting, and the members of the company deliberately choose not to fill up the

vacancy and further Choose not to expressly resolve not to fill the vacancy, and the Director X in such case will be deemed to be re-elected after

the necessary requirements of the statute have been complied with. In the case of any automatic re-election u/s 256(4), exercise of deliberation and

volition on the part of the members of the company as to what should be done with regard to the vacancy caused by such retirement by rotation

with full knowledge of the fact of. such retirement, is necessarily implied, although the result of such deliberation and volition is not any positive act

of doing something and is aa act in the negative of not doing anything in the matter of filling up the vacancy caused by such retirement. To my mind,

for attracting the provisions of Section 256(4) the company and the members thereof must know that the Director X is retiring by rotation and a

vacancy is being caused in consequence thereof and with the knowledge of that fact the members must proceed to act at the meeting; and if with

the knowledge of the fact that the members choose not to fill up the vacancy and further choose not to resolve expressly not to fill up the vacancy,

the vacancy will be deemed to be filled up by the automatic re election of the retiring Director, provided the other conditions laid down in the

section are satisfied. If the company and its members do not happen to know that the Director X is retiring by rotation and a vacancy is being

caused thereby, there cannot be any question of filling up such vacancy far less to speak of expressly resolving not to fill the vacancy. The question

of filling up the vacancy and of further resolving expressly as to whether the vacancy is to be filled up or not, must necessarily depend on the fact of

knowledge of such vacancy at the meeting. There cannot be any question of filling up any vacancy and of forming and resolution, either in favour of

filling up or against filling up the vacancy, which must necessarily be a deliberate act unless attention of the company and the members thereof has

been drawn to the fact of vacancy at the meeting. The further condition as to statutory adjournment of the meeting, as provided u/s 256(4)(a),

indicates, to my mind, that the Legislature has intended that automatic re-election should only become effective after the share-holders have had

sufficient opportunity to consider as to what is to be done as to the vacancy caused. These provisions are not intended to get a snap re-

appointment by keeping the company and its members in the dark and lulling them into a kind of sleep over the question. To put any such

construction, in my opinion, will possibly throw open the gates of nepotism and corruption in company administration, and the company may be in

a position, by suppressing the fact of retirement by rotation at the meeting of any Director whose re-election may be doubtful at the said meeting,

to. have the said Director automatically re-elected.

197. The case of Great Northern Salt Chemical Works (1890) 44 Ch.D. 472 and the case of Grundt v. Great Bouldes Proprietary Mines Ltd.

(1948) 1 Ch.D. 145, referred to and relied on by Mr. Mitter, are of no assistance in the facts of the instant case. These cases do not lay down that

if the company and its Directors are kept in the dark as to the fact of retirement by rotation of any particular Director and the fact of such

retirement is not even mentioned in the meeting, the Director concerned will still be deemed to be automatically re-elected in the event of his

enforced statutory retirement by rotation. The view expressed in the case of Mica Export Promotion Council and Others Vs. G.C.L. Joneja and

Others, , referred to by Mr. Mitter, has no bearing on this question.

198. In the instant case, the company and the members were not only not informed of the fact of any retirement by rotation of S.S. jalan and kept

in the dark about the same, the company and its members had in fact been told that another Director H.L. Dey would be retiring by rotation and

H.L. Dey had been re-elected on the footing that he had retired by rotation. The members, therefore, resolved in fact to fill up the vacancy by re-

electing H. L.Dey. There was, ""therefore, no question of not filling up the vacancy or of any express resolution not to fill up the vacancy and

naturally there could be no question of any compliance with the other requirements of the section arising in consequence thereof.

199. Even if there had been a force in the contentions of Mr. Gupta and even if he had been in a position to urge them in the absence of any

pleading or issue, the contentions cannot be entertained and are bound to fail for a very fundamental reason. Before I deal with this aspect, it will

be convenient to dispose of another contention of Mr. Gupta. He has contended that the appointment of Mr. H.L. Dey as Director is" illegal and

invalid as H.L. Dcy happens to be an employee of Surajmull Nagarmull. It is the contention of Mr. Gupta that at all material times H.L. Dey was an

employee of Surajmull Nagarmull which was the Managing Agent of the company and, in the absence of compliance of the necessary requirements

and formalities, the appointment of H.L. Dey is invalid and illegal and H.L. Dey was not and could not be a Director of the company. No such

case has been made in the plaint. On the otner hand, the plaint clearly proceeds on the basis that H.L. Dey was a Director of the company.. In

para 16 of the plaint the Plaintiff has stated:

The Plaintiffs further state that thus the only Director of the Defendant No. 13 between the middle of 1961 and the middle of 1962 was the

Defendant No. 3 who alone could not validly act as a Director nor transact any business of the Defendant No. 13. Furthermore, the Defendants

Nos. 1, 2 and 3 having in the circumstances hereinbefore stated ceased to hold the qualification share, they and each of them ceased to be the

Directors of the Defendant No. 13 with effect from the day of their ceasing to hold such qualification shares.

The Defendant No. 3 referred to is H.L. Dey. There is, and naturally could be, no issue on this question. This contention has been put forward

relying on some stray answers of Mr. Kar. The evidence of Mr. Kar on this question is not very reliable and his answers to Qs. 379-380, 3690,

3992-3999 are very unsatisfactory, and it is not possible to come to any conclusion only on the basis of Mr. "Kar"s oral testimony.- In any event,

in view of the nature of the case made in the plaint and in the absence of any pleading or issue, the Plaintiffs arc not entitled to raise this contention.

This contention of Mr. Gupta must, therefore, be rejected.

200. Even assuming that there were any valid grounds which could be successfully urged for challenging the meetings of the company and the

proceedings thereof, including the appointment of S.B. Jalan and S.S. Jalan as Directors and the special resolution giving the consent of the

company to the holding of the office of profit by G.K. Jalan, the Plaintiffs in the facts of the instant case are not competent to challenge the validity

of the said meetings and the proceedings thereof and. are riot entitled to raise any objection with regard to the same.

201. In the case of Towers v. African Tug Company (1904) 1 Ch. 558 it was held that if a share-holder in a limited company, who had the notice

or knowledge of the facts, received part of the proceeds of an ultra vires act committed by the Directors--such as payment of a dividend out of

capital and who still retained the money, could not, either individually or as suing on behalf of the general body of share-holders, maintain an action

against those Directors.

202. The facts of this case may be briefly noted. The accounts of the African Tug Company Ltd. at the commencement of its financial year, in

1900, showed a considerable debit balance on the previous year''s trading, but the Directors illegally, though honestly, applied a profit made in the

earlier part of 1900 in payment of an interim dividend instead of in reduction of the debit balance, thus in effect paying a dividend out of capital.

The balance-sheet for 1900 showing the debit balance and also the payment of the dividend was submitted to and approved by the share-holders

in the general meeting. Subsequently, the Directors, recognising their mistake, proposed to apply any future profits in wiping out the debit balance,

and this was almost entirely accomplished out of profits in 1901 and 1902, as appeared from the balance-sheets for those years submitted to and

approved by the share-holders in the general meeting. In 1903, two of the share-holdersy who had themselves received their portions of the

dividend and concurred in passing the balance-sheets, commenced an action on behalf of themselves and all the share-holders of the company

against the company and the Directors to compel the Directors to repay to the company the amount of the dividend. Afterwards, the other share-

holders were at their own request joined as Defendants. All the Defendants counter-claimed, in the event of the Court holding that the dividend had

been illegally paid, for repayment by the Plaintiffs of the portions received by them. Byrne J. in the trial Court held that the payment of the dividend

out of capital being an act ultra vires, the Directors were liable to replace the amount, and judgment was given in the action accordingly in favour of

the Plaintiffs, the Plaintiffs submitting to judgment against themselves on the counter-claim. On appeal by the Defendants against the judgment of

the) learned trial Judge, the Court of Appeal set aside the decree in favour of the Plaintiffs and held that the Plaintiffs in the circumstances were not

entitled to maintain the action but the judgment on the counter-claim against the Plaintiffs stood. Vaughan Williams L.J. observed (Supra (567)) ;

I think that an action cannot be brought by an individual shareholder complaining of an act which is ultra vires if he himself has in his pocket at the

time he brings the action some of the proceeds of that very ultra vires act. Nor, in my opinion, does it alter matters that he represents himself as

suing on behalf of himself and others. I think that the reason which require us to say he ought not to bring such an action equally requires us to say

that he ought not to be the peg upon which such an action is to be hung for the benefit of others.

203. Cozens-Hardy L.J. observes (Supra (572)):

Now, can a share-holder who has, with full notice of all the material facts, received part of the capital by way of dividend, and who still retains that

money in his pocket, maintain an action against the Directors who have paid the dividend ? I think the true answer"" to this question is he cannot.

204. The following observations of Cozens Hardy L.J. (Supra (571)) may also be usefully quoted:

An action in respect of or arising out of an ultra vires transaction ought properly to be brought by the company; but it has long been well

established that there are cases in which such an action may be maintained by a share-holder suing on behalf of himself and all other share-holders

against the company as Defendants. I will not pause to consider under what particular circumstances such ari action maybe maintained, but I

assume that this is one of those cases in which such an action may be maintained.--I mean in point of form. But I think it is equally clear that the

action cannot be maintained by a common informer. The Plaintiff in an action in this form must be a person who is really interested.

205. In the case of In Re: James Burton and Son Ltd. (1927) 2 Ch. 132 it was held that a share-holder of the company, whose name appeared on

the register in respect of the shares allotted to him and who acted as a share-holder of the company and received a bonus on his shares, was

estopped from denying that he was a share-holder of the company and that the allotment of the shares to him was illegal and void. In January

1920, Kenworthy applied, on a form supplied to him by Young, for 100 shares in a company about to be formed. On April 14, 1920, Young

purported to transfer to Kenworthy 100 shares, but the transfer did not specify denoting number of the shares comprised therein. At a meeting of

the Directors held on April 16, 1920, a resolution was passed purporting to allot all the -shares of the company. At that date the company had not

issued a prospectus or filed a statement in lieu thereof. On April 20, 1920, the statement in lieu of prospectus was filed. At a meeting of the

Directors held on April 30, 1920, the transfer from Young to Kenworthy came before the Board, and a resolution was passed approving the

transfer and directing that a share certificate should be forwarded to Kenworthy. Subsequently, Kenworthy was registered as a member of the

company. The certificate dated May 26, 1920, was sent to and was accepted by Kenworthy. At the Board meeting held on April 30, 1920, in

which the transfer of shares from Young to Kenworthy was approved, a bonus of 6 d. per share had also been declared and on June 8 the said

bonus was paid to and was accepted by Kenworthy. Kenworthy, as purporting to be the owner of the 100 shares, attended a meeting of the.

share-holders on March 24, 1921. The company subsequently went into liquidation. Kenworthy, on whose shares there was a liability of 10 s. per

share, then denied being a share-holder, contending that the allotment of shares to Young was void, as the same was in violation of Section 82,

Sub-section (1) of the Companies (Consolidation) Act, 1908, which provides that a company which does not issue a prospectus shall not allot any

of its shares or debentures, unless before the first allotment there has been filed a statement in lieu of prospectus. It was held that although the

allotment to Young was void, Kenworthy was a member of the company at the commencement of the winding up, there having been no agreement

between him and the company until April 30, when the company was legally in a position to allot shares and that, in any event, in view of the

subsequent conduct Kenworthy was estopped from denying that he was a member of the company. Romer J. observes (Supra (141)):

for these reasons it appears to me that section 82 does not in any way enable Kenworthy to relieve himself of this liability which he always intended

to undertake.

Further than that, supposing that so far I have been wrong and that in fact and in law there was no agreement come to between the company and

Kenworthy constituting Kenworthy a member, then Kenworthy appears to me to be estopped, by what he has been doing, from denying that any

such agreement had been come to. It is true that Kenworthy may not be estopped from alleging that the allotment to Young was illegal and void. I

will assume that; but that is no reason why he should not be estopped from denying that a valid agreement was come to between him and the

company for the allotment to him of these 100 shares. He was placed on the register in respect of these shares, and he received a certificate. He

did not get a certificate from Young as a matter of fact, but he received the certificate from the company. He acted as a share-holder of the

company and he received bonus on his shares. In these circumstances, I should have thought that he was clearly estopped from denying that an

agreement was come to between him and the company under which he agreed to take those shares at a time when the company was in the

position legally to enter into such an agreement.

206. In the case of British Sugar Refining Company 26 L.J. Ch. 369 it has been observed that it may not be open to a share-holder who attends

and participates at a meeting, without any protest or objection, to complain later on that the meeting was not duly convened and was invalid for any

non-compliance. and by reason of any irregularity.

207. In the case of Narayandas Sreeram Sornani v. Sanghi Bank Limited (Supra (174)) the Supreme Court held that the validity of allotment of

shares could not be challenged by a Director, who was a party to the resolution allotting the shares and who dealt with the shares on the footing

that the allottees were the holders of the shares with a clear knowledge of the circumstances, and it was not open to the Director to say that the

allotment was void as he being interested in the resolution allotting the shares could not vote. Narayandas was at all material times a Director of the

company, He was a Director of the company when a Board meeting of the company was held on May 25, 1916, and at this meeting the Directors

resolved to allot 2000 shares to the nominees of Narayandas. This Board meeting of May 25, 1946, was attended by only three Directors of

which Narayandas was one. Narayandas was clearly interested in allotment of the shares and notwithstanding the provisions contained in Section

91B of the Companies Act, 1913, Narayandas had voted on the said resolution. The validity of the said allotment was challenged and it was

contened that the allotment of the 2000 shares to the nominees of Narayandas was void. The Supreme Court held:

We think that the allotment of the 2000 shares to the nominees of Narayandas in the meeting of the Directors of the company held on May 25,

1946, was not void. In view of the fact that. Narayandas was not entitled to vote on the allotment and after exclusion of his vote there was no

quorum, the allotment was irregular and the company was entitled to avoid the allotment. Instead of avoiding the allotment the company has chosen

to affirm it. The allotment is, therefore, valid and binding on the allotees.

Moreover, Narayandas cannot be heard to say that there was no valid allotment of the shares. For the purpose of specifying the requirement of

Section 277(1) it was necessary to allot the shares, and he allowed the company to commence business on the footing that the shares had been

subscribed. He was a Director of the company and a party to the resolution alloting the shares. He dealt with the shares on the footing that the

allottees were the holders of the shares with a clear knowledge of the circumstances on which he might have founded his present objection. He

cannot now be heard to say that he was interested in the allotment and could not vote. Like the Director in York Tramways Company v. Willows

(1882) 8 Q.B.D. 685, he is now estopped from contending that the allotment is invalid.

208. Some other decisions on this aspect have been cited by Mr. Mitter. I, however, do not consider it necessary to refer to the same as the

question whether any particular party is debarred and estopped from denying or disputing any particular act or transaction or raising any objection

must necessarily depend on the facts and circumstances of each particular case. Mr. Gupta has referred to the decisions in the case of Neal v.

Quin (1916) W.N. 223 and also to the decision in the case of North Eastern Insurance Company case (1919) 1 Ch. 198. These decisions are of

no material assistance in the facts of the instant case and I, therefore, do not consider it necessary to deal with these cases.

209. In the instant case, Surajmull Nagarmull and Howrah Trading received, with full knowledge of all facts, the dividends declared at the annual

general meetings which they seek to challenge now in this suit, and they were present and had participated at the extra-ordinary general meeting

held on July 18, 1962, in which the special resolution amending the Articles of the company and deleting the share qualification clause was

unanimously adopted. Surajmull Nagarmull and Howrah Trading were also present at the meeting of August 20, 1956, in which the special

resolution according the consent of the company to the holding of the office of profit by G.K. Jalan was unanimously passed. Surajmull Nagarmull

had filed necessary returns with the Registrar of Companies, and it may also be noted that at the said meetings various other resolutions, benefits of

which have been enjoyed by the members of the company including Surajmull Nagarmull and Howrah Trading, had also been passed. In these

circumstances, Surajmull Nagarmull and Howrah Trading having obtained and enjoyed the dividends declared at the annual general meetings and

having participated at the other two meetings and having, been'' parties to the resolutions which were passed at the said two meetings, are

precluded and estopped from challenging the validity of the said meetings and the proceedings thereof. D.N. Jalan is not a member of the company

and he cannot be heard to make any grievance about the said meetings. He has no right and locus standi. I am, therefore, of the opinion that it is

rightly contended on behalf of the Defendants that the Plaintiffs are not entitled to challenge the said meetings and the proceedings thereof including

the resolutions about which the Plaintiffs seek to make a grievance.

210. In view of the special resolution passed at the extra-ordinary general meeting held on July 18, 1962, (Ex. 001(h)), amending the articles of

association of the company and in view of my findings on issue No. 4, issue No. 3 which reads--""Were 500 equity shares, the qualifying shares of

the Directors of the Defendant No. 13 after 18th July, 1962 ?"" must necessarily be answered in the negative.

211. In view of my answer to issue No. 3, issue No. 5, which is --""Did the Defendant Nos. 1, 2 and 3 or any of them cease to hold any equity

shares in the Defendant No. 13 as alleged in para 13(f) of the plaint or at all ?"" loses its importance and is of no consequence. The factual position

which does not appear to be in any serious dispute, however, is that S.S. Jalan and H.L. Dey had transferred their holding of 500 shares each in

favour of the Defendant No. 13 and had each acquired on the same day one share which they still hold, and S.B. Jalan never ceased to hold his

shares in the company.

212. In view of my finding on issue No. 1 that D.N. Jalan is not. a member of the conpany, issue No. 6 which reads--""Has the Plaintiff No. 3 no

right or authority or locus standi to dispute the validity of the notices and resolutions referred to in paras. 13 and 14 of the plaint for reasons stated

in para 15 of the written statement of the Defendant No. 13 ?"" must be answered in the affirmative and it must be held that D.N. Jalan has no such

right.

213. Issue No. 7 is--""Did the Defendant Nos. 1, 2 and 3 cease to be the Directors of the Defendant No. 13 as alleged in paras. 15 and 16 of the

plaint ?"" So far as this issue is concerned, in view of my findings on issues Nos. 3 and 4, this issue has to be answered against the Plaintiffs and it

must, in any event, be held that the Plaintiffs are not entitled to challenge the validity of the appointment of the said Directors. "

214. I now take up issue No. 8 which is--""Was the arrangement as to exchange of shares invalid or illegal or fraudulent, as alleged in the plaint ?

215. No evidence has been adduced on behalf of the Plaintiffs to show the invalidity or illegality of the arrangement as to exchange of shares or to

establish that the said arrangement is fraudulent. To my mind, there is even no proper averment of fraud. The issue as framed raises the question of

the validity of the arrangement and not the factum thereof. The issue as raised proceeds on the basis that there was the arrangement in fact, but the

said arrangement is invalid and illegal. Although in the issue, as framed, the factum of the arrangement does not appear to be in dispute and the

validity of the arrangement is only in question. Mr. Gupta has sought to argue that in fact there was no such arrangement at all. Mr. Gupta has

contended that the letters of offer and acceptance evidencing the arrangement of exchange of shares are fabricated documents. He has made this

statement on the basis of certain mistakes and discrepancies in the letters and some infirmities in evidence relying particularly on the unsatisfactory

nature of Mr. Kar''s evidence. I have no hesitation in rejecting this contention of Mr. Gupta. Apart from the question that it may not be open to the

Plaintiffs to seek to challenge the factum of the arrangement, the facts and circumstances of the case and the evidence on record clearly establish

the arrangement. This arrangement has been referred to in the announcement published in Hindusthan Standard on May 22, 1962, a copy whereof

has been exhibited by the Plaintiffs themselves in this suit (Ex. A). This arrangement is also mentioned in the prospectus of the company, which

again has been exhibited by the Plaintiffs in this suit (Ex. C). In spite of the fact that this arrangement had been mentioned in the announcement in

the newspaper and in the prospectus of the company, not any of the Plaintiffs, nor any other share-holder for that matter ever recorded any protest

or objection. The share-holders, including the Plaintiffs Surajmull Nagarmull and Howrah Trading Company Pvt. Ltd., have given effect to the

arrangement and have in fact exchanged shares. The other share-holders, who have given effect to the arrangement and acted on the same and

have exchanged their shares on the basis thereof, do not complain and they all accept the arrangement and the exchange. It is not for the Plaintiffs

to make any grievance as to the exchange of shares by the other members. The other members raised no dispute as to the genuineness of the

letters of offer and acceptance which passed between them and the company and they accepted the exchange of their shares. In these

circumstances, I do not see any reason as to why these letters of offer and acceptance should be fabricated. Surajmull Nagarmull was the

Managing Agent of the company. Surajmull Nagarmull and Howrah Trading must have been aware of the announcement of the arrangement in the

newspaper and also in the prospectus. There was no protest from any of them. Surajmull Nagarmull and Howrah Trading acted on the

arrangement and still hold the shares obtained by way of exchange. It can never be suggested that the announcement of the arrangement in the

prospectus (Ex. C) and in the newspaper (Ex. A) could be fabricated and these documents could be manufactured documents. The said

documents, which have been exhibited by the Plaintiffs, record the fact of the arrangement and no objection is taken by any of the members. The

subsequent conduct of the members in acting on and in implementing the arrangement clearly falsifies the case sought to be made on behalf of the

Plaintiffs. The announcement in the newspaper and in the prospectus and the conduct of the members of the company clearly establish the

arrangement and, in spite of mistakes and discrepancies in the letters of offer and acceptance, there could be no question of their genuineness. The

validity of the arrangement has been challenged mainly on the ground of the exchange ratio and it has been contended that the ratio of exchange is

unjust and unfavourable to the members of the company. In support of this contention, Mr. Gupta has relied on the testimony of Chamaria which,

as I have already noted, is wholy unsatisfactory. Mr. M.K. Roy in course of his evidence has explained to my satisfaction how the said ratio came

to be fixed. I have no hesitation in accepting the testimony of Mr. Roy on this question. The facts and circumstances of this case and the sanction of

the Government corroborate the testimony of Mr. Roy. In any event, the question of the ratio, to my mind, is of no consequence and does not in

any way affect the validity of the arrangement. If the members of the company had felt that the ratio of exchange was unfavourable to them, it was

open to them not to agree to exchange their shares at that rate. It was essentially a matter for the members to decide and there was no compulsion

or obligation on their part to exchange their shares. The members, including Surajmull N agar mull and Howrah Trading, have chosen to exchange

their shares and they even now hold the shares of the Defendant No. 4, obtained in exchange of their shares. in the company. No other members

than Surajmull Nagarmull and Howrah Trading make any grievance as to the exchange and the other members are perfectly satisfied with their

holdings in the Defendant No. 4 obtained in exchange of their shares in the company. Surajmull Nagarmull and H(\wrah Trading have no right to

complain about the shares held by other members. Surajmull TSfagarmull and Howrah Trading had themselves obtained the benefit of the

exchange and still hold the shares in the Defendant No. 4 obtained on such exchange of their shares. They have never raised any objection and

have never protested. Surajmull Nagarmull was further the Managing Agent of the company and had been responsible for various acts in

connection with the exchange. In any event, it is not open to Surajmull Nagarmull and Howrah Trading to dispute the validity of the said

arrangement while they continue to retain the benefits of the said arrangement by holding the shares obtained on the basis of the said arrangement.

This issue No. 8 is, therefore, answered against the Plaintiffs in the negative.

216. Issue No. 9 is as follows ;

9. (a) Did the Plaintiff No. 3 prohibit the transfer of shares in the share capital of the Defendant No. 13 as alleged in para 24 of the plaint ?

(b) If so, was such prohibition valid or legal or binding on the Plaintiff No. 1 or its partners or any of the Defendants?

(c) Were the transfers, allotments and exchange of shares invalid or illegal or made in collusion and conspiracy or without the knowledge or

consent or approval of the partners of the Plaintiff No. 1, as alleged in paras. 24 and 25 of the plaint?,

(d) Are the Plaintiffs entitled to dispute the validity or legality of such transfers, allotments and exchange of shares ?

217. I first take up issue No. 9(a). The only evidence in support of this issue consists of the oral testimony of Chamaria, the letter, dated May 25,

1962, written by D.N. Jalan to B. L. Jalan, S.B. Jalan, N.K. Jalan and K.L. Jalan (Ex. B), and the letters exchanged between khaitan &

Company, Solicitors for D.N. Jalan, and L. P. Agarwalla, Solicitor of IK.L. Jalan (Ex. J). I have earlier discussed the oral testimony of Chamaria

and I have also dealt .with these letters. The oral testimony of Chamaria, I have already observed, is worthless and cannot be relied upon. Exhibit

B, which I have analysed earlier, contains no prohibition. The letter of Khaitan & Company dated May 8, 1959, (part of Ex. J) mentions--

In any event and without prejudice to what is stated above, our client hereby revokes the authority, if any, of the other partners of the firm,

including yourself to deal with the shares standing in the name of the firm.

No attempt was made to prove the truth of the contents of this letter which was addressed in 1959, long before the institution of the suit. Exhibit B,

which was addressed by D.N. Jalan in May 1962, makes no reference to the revocation of authority and speaks of violation of oath. On this state

of evidence, I am unable to come to the conclusion that there was any prohibition by the Plaintiff No. 3. In any event, the purported revocation of

authority by D.N. Jalan is of no consequence and I shall deal with this aspect while I consider issue No. 9(b).

218. The letter of Khaitan & Company dated May 8, 1959, purports to revoke the authority of the four partners named in the letter in the matter

of dealing with the shares standing in the name of the firm of Surajmull Nagarmull. The said letter was addressed on behalf of D.N. Jalan, also a

partner of Surajmull Nagarmull, to the said four partners and was not addressed to the other partners of the firm. By the said letter of iKhaitan &

Company dated May 8, 1959, D.N. Jalan, a partner of Surajmull Nagarmull, seeks to revoke the authority of four other partners named in the said

letter. In my view, it is not open to any partner to revoke the authority of any other partner of the firm while the firm subsists. To allow any partner

to take away from any other partner the authority, which such partner lawfully enjoys, will result in utter chaos and confusion in any partnership

business and create a situation wholly in consistent with the concept of partnership. A partner is an agent of the firm and acts on behalf of the firm

and binds the firm in all matters in which the partner is lawfully entitled to act on behalf of the firm. No partner has any authority to prohibit any

other partner from doing on behalf of the firm anything which such partner as partner is lawfully authorised to do, as no partner can arrogate to

himself alone the entire authority of the firm to the exclusion of other partners. I need not consider as to what will be the position in a case, if there

be any specific provisions in this regard in the partnership agreement, as it is nobody''s case that the agreement of partnership gave any such

authority or power to D.N. Jalan or any other partner. Section 18 of the Indian Partnership Act provides:

Subject to the provisions of this Act a partner is the agent of the firm for the purpose of the business of the firm.

Section 4 of the said Act provides:

''Partnership'' is the relation between partners who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually ''partners'' and collectively ''firm'', and the name under which

their business is carried on is called the ''firm name''.

No individual partner constitutes the firm and the partners collectively constitute the firm. It must necessarily follow that no individual partner can

revoke the authority of any partner as, the agent of the firm which happens to be the principal. Section 18 of the Indian Partnership Act expressly

provides that a partner is the agent of the firm for the purpose of the business of the firm, and in view of the said express provision this agency

necessarily continues so long as the firm is in existence, and it is not open to any partner to terminate the said agency created by the statute for

smooth functioning and working of partnership business. If any partner is dissatisfied with the conduct of any other partner and has lost confidence

in any other partner and does not want any other partner to deal with the business of the firm, the remedy open to such an aggrieved partner is to

dissolve the firm. An argument was sought to be advanced on behalf of the Plaintiffs that other partners of Surajmull Nagarmull did not have any

such authority as the said firm of Surajmull Nagarmull has been dissolved and a suit is now pending in this Court. No such case has been made in

the plaint and, on the other hand, the plaint proceeds only on the basis that in view of the prohibition by D.N. Jalan the other partners did not have

any authority. In the absence of any pleading it is not open to the Plaintiffs to raise this contention. There is also no proper material before me to

come to any conclusion that the said firm of Surajmull Nagarmull stands dissolved and, if so, at what point of time. The plaint proceeds on the

.basis that Surajmull Nagarmull continues to be in existence and Surajmull Nagarmull figures as one of the Plaintiffs in this suit. The further argument

of Mr. Gupta that the partners of the firm did not have any authority to transfer the said shares and such authority is also not implied u/s 19 of the

Partnership Act is of no avail. .Section 19 of the Indian Partnership Act speaks of implied authority of partner as agent of the firm and the relevant

portion of Section 19 reads as follows:

19(1) Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by

the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

Section 19 speaks of implied authority of a partner of a firm. In tne absence of any evidence before me as to what were the terms of the

partnership agreement, it does not appear to my mind to be necessary to invoke the said provision as to implied authority of a partner in the instant

case. The fact that the partners did enjoy necessary, authority is clearly established by the letter of D.N. Jalan. Unless the partners of the firm

enjoyed necessary authority to the knowledge of D.N. Jalan, D.N. Jalan would not consider it necessary to revoke the authority of the partners, as

no question of such revocation would then arise. In any event, the facts of the case clearly suggest, to my mind, that the partners did enjoy such

authority, whether express or implied,. It is clearly in evidence that one of the important items of business of Surajmull Nagarmull was to invest in

shares in diverse joint stock companies and the power and authority to buy and sell shares or to change the nature of investments must necessarily

be there with the partners of the firm. In the view that I take, I do not consider it necessary to refer to the decisions cited by Mr. Mitter on the

question of partner"s authority. I, therefore, hold that the purported prohibition, which in my view has not been properly established, is in any event

not valid or legal or binding on the Plaintiff No. 1 or its pertners or any of the Defendants, and I answer the issue No. 9(b) accordingly.

219. Issue No. 9(c) is concerned with the legality and validity of transfers, allotments and exchange of shares. The legality or validity is challenged

on the grounds stated in paras. 24 and 25 of the plaint and the said grounds taken in the plaint are--

(i) Transactions effected in spite of prohibition by D.N. Jalan as partner of Surajmull Nagarmull and as Director of Howrah Trading.

(ii) Transactions by the other members, who are only benamdars, effected in spite of prohibition by D.N. Jalan.

(iii) Transactions effected in collusion and conspirary.

220. So far as ground No. 1, that is, prohibition by D.N. Jalan is concerned, I have already held that I am not satisiied that there was in fact any

such prohibition. None of the letters (Exs. B and J) make any mention or any prohibition by D.N. Jalan as Director of Howrah Trading and the

letter of Khaitan &.Company dated May 8, 1959, addressed on behalf of D.N.Jalan, as partner of Surajmull Nagarmull, speaks of revocation of

authority of the partners in the matter of dealing with the shares of the firm. The evidence as to prohibition by D.N. Jalan as Director of Howrah

Trading was sought to be introduced through Chamaria, and I have already observed that I am unable to place any reliance on his testimony. I

have further held that the purported revocation of authority by D.N. Jalan as partner of Surajmull Nagarmull is, in any event, of no effect and

validity. In view of these findings, the ground No. 1 taken on the basis of such prohibition fails.

221. With regard to the ground No. 2 taken on the basis of benami, I have already held, while discussing issue No. 2, that the other share-holders

were not and are not benamdars ; and in view of my said findings the ground No. 2 has to be rejected. In view of the finding that there was no

benami transaction in the matter of the holding of the shares of the company by the respective share-holders, I do not need to consider the further

question of the power and authority of a benamdar to deal with any benami property and the effect of any such dealing.

222. So far as the third and the last ground taken in the plaint on the basis of collusion and conspiracy, I am of tile opinion that there is no proper

pleading of collusion and conspiracy. In any event, there is no evidence or material to justify this allegation. This ground No. 3 cannot, therefore, be

entertained.

223. Issue No. 9(c) must, therefore, be answered against the Plaintiffs in the negative and the transfers, allotments and exchange must be held to

be valid.

224. I have to observe that Mr. Gupta has further argued that the transfers should be held to be bad as the registration of the transfers by the

company is illegal being in violation of the statutory provisions contained in Section 108 of the Companies Act of 1956. It is the argument of Mr.

Gupta that the instruments of transfers are not duly stamped and, as the instruments are not properly stamped, the said transfers could not be

registered under the law, and the registration is, therefore, illegal and consequently the transfers must by held to be bad.

225. In the absence of any such, case being made in the plaint, I am of the opinion that this objection sought to be raised at the, hearing cannot be

entertained. This is undoubtedly a mixed question of law and fact, and in the absence of any specific plea that question cannot be gone into, as laid

down by the Supreme Court in the case of Ram Prasad v. The State of Madhya Pradesh and Anr. (Supra) to which I have earlier referred.

226. In any event, Section 108 of the Companies Act deals with the question of registration of transfer of shares in a company in the books of the

company by the company and does not affect the question of the validity of any transfer effected. There may be a lawful and valid transfer of

shares even if the transfer is not registered in the books of the company. The transferee becomes the owner of any shares as soon as the title to

share passes to him by necessary transfer thereof by the transferor and the passing of title in a share from the transferor to the transferee is not

dependent on the registration of the transfer by the company. In view, however, of the peculiar nature of property a share in a limited company

represents, and the provisions of the Companies Act, a transferee though the lawful owner of the share transferred may not enjoy the benefits of

the transfer, as the share-holder or member of the company, so long as the transfer is not registered in the books of the company. Registration of

transfer of any share by the company makes the transferee, who has already become the owner o(the share, a member of the company and is

really in the nature of recognition by the company of the transfer already effected. There must necessarily be a valid transfer before there can be

any question oi recognition or such transfer by the company by registering the same in the books of the company.

227. It is also to be noted that it is not open to the Plaintiffs to question the transfer of shares by other members and the registration thereof by the

company. They do not have any right. As far as transfers of shares effected by Surajtnull Nagarmull and Howrah Trading, Surajmull Nagarmull and

Howrali Trading are not entitled to challenge the same, as Surajtnull Nagarmull and Howrah Trading have obtained and enjoyed the benefits of

such transfers. On the basis of the aforesaid transfers of their own shares, they have obtained shares in the Defendant No. 4 in exchange. They

continue to retain the said benefit and still hold in their possession the shares in the Defendant No. 4 obtained on such exchange. They cannot,

therefore, be heard to make any complaint about any irregularity or non-compliance of any formality in the matter of the transfer, allotment and

exchange. D.N. Jalan, who is not even a member of the company, has no locus standi. As, in my opinion, it is not open to the Plaintiffs to raise this

question of invalidity on the ground of sufficiency of stamp in the absence of necessary pleading and as I am further of the opinion that the Plaintiffs

Nos. 1 and 2 are estopped from challenging the legality and validity of the transactions in question and the Plaintiff No. 3 has no right to raise any

objection with regard to the said transactions, I have not considered it necessary to adjudicate upon the question whether the instruments of

transfer had been duly stamped or not. It, however, appears that the company did proceed to act in a manner of care free laxity, not at all

desirable in the administration of the affairs in a limited company. I have earlier observed with regard and have expressed my dissatisfaction as to

lack of proper care and due diligence exhibited in the various affairs of the company. It may be true that there was this degree of informality in the

administration of the affairs of the company and lack of that much of care and attention because of the peculiar composition of the members of the

company and as all members happen to be under the control of Surajmull Nagarmull. It may be true that any of these irregularities would never

have seen the light of the day but for the internal disputes now going on amongst; the partners of Surajmull Nagarmull. Whatever may be the

reasons, I need hardly add that this state of affairs must necessarily be deprecated.

228. While considering the issue No. 9(c), I have held that it is not open to the Plaintiffs to dispute the validity and legality of the transfers,

allotments and exchange of shares; and in view of my aforesaid finding for reasons already given, the issue No. 9(d) must be answered in the

negative.

229. I may further note that after the transfer and exchange of shares, Howrah Trading in its balance-sheet for the year ending on April 30, 1963,

(Ex. 0056) has clearly indicated the position and the balance-sheet has been duly approved in the annual general meeting of Howrah Trading

Company Pvt. Ltd. The act of transfer and exchange appears to have been ratified by the share-holders of Howrah Trading, and in my view, Mr.

Mittcr has rightly contended that the necessary materials which enable a company to avoid a transaction of this nature effected by the Directors of

the company on behalf of the company have neither been pleaded nor in any event established.

230. So far as Surajmull Nagarmull is concerned, admittedly a partner with proper authority had lawfully entered into the transaction on behalf of

the firm and the transaction is binding on the firm; and it is not open to the firm or some other partners to dispute the transaction lawfully entered

into on behalf of the firm. Surajmull Nagarmull was also .the Managing Agent of the company at the material time and for a few years thereafter. In

the returns filed by Surajmull Nagarmull as Managing Agent with the Registrar showing the list of share-holders, Surajmull Nagarmull has clearly

indicated the changed position. Surajmull Nagarmull and Howrah Trading are not entitled to raise any objection with regard to the holdings of the

other members. The other members have not raised any objection and in fact accepted the position and they continue to do so. D.N. Jalan has no

say in the matter.

231. I have, therefore, no hesitation in holding that the Plaintiffs are not entitled to dispute the validity and legality of the transfers, allotments and

exchange of shares.

232. I now take up the issue No. 10(a) which reads:

Was the agreement between the Defendant No. 13 and the Industrial Finance Corporation of India to secure loans to the Defendant No. 4 invalid

or void or illegal or ineffective or without the sanction of the Board of Directors of the Defendant No. 13, as alleged in para 29 of the plaint ?

233. That in fact there was a Board resolution is not seriously disputed. In any event, the Board resolution dated July 13, 1963, (Ex. 0016(b))

approving the agreement and according the necessary sanction has been proved. What has been contended on behalf of the Plaintiffs is that the

purported Board resolution is in law no resolution of the Board of Directors of the company, as there were no validly elected Directors of the

company and there was, therefore, no valid Board of Directors of the company. The contention is that the persons acting as Directors of the

company were not the valid Directors of the company and acts done by them as such Directors are wrongful and illegal and not binding on the

company. This contention of the Plaintiffs has been dealt with by me at length earlier, particularly while considering the issues Nos. 4(a), 4(b) and

7, and has been rejected by rac. In view of my earlier observations and my findings, particularly on the jssues Nos. 4(a), 4(b) and 7, this issue No.

10(a) is answered against the Plaintiffs in the negative.

234. I now take up the issue No. 10(b) which is--

Has the agreement been approved and ratified by the members of the Defendant No. 13, as alleged in para 31 of the written statement of the

Defendant No. 13 ?

235. The minutes of the extraordinary general meeting of the company held on June 14,1963, (Ex. 001 (m)) clearly establish this issue. The said

general meeting of the company had been attended by all the existing share-holders of the company excepting the deceased member Baijnath

Jalan, and the short notice in respect, of this meeting was also consented to by all the living members. The printed report and balance-sheet of the

company for the year ending on March 31,1964, (Ex. 0031) specifically refers to the agreement of mortgage, under the heading "Notes" (item No.

5), appended to the sch. A of Fixed Assets annexed to the said balance-sheet. The said report and balance-sheet had been considered at the

annual general meeting of the company held on September 30, 1964, (Ex. 001(f)) and had been adopted unanimously. Surajmull Nagarmull

attended the meeting and was necessarily a party to the resolution. At that time Howrah Trading had ceased to be a member of the company and

If.: N. Jalan was never a member of the company. Issue No. 10(b) is, therefore, answered in the affirmative in favour of the Defendant No. 13.

236. In the light of my decision of the issue No. 10(b), issue No. 10(c) which reads--

Are the Plaintiffs estopped from challenging the legality and validity of the said agreement as alleged in the written statement of the Defendant No.

13 ?

has necessarily to be answered against the Plaintiffs in the affirmative as Surajmull Nagarmull by its conduct as aforesaid is estopped from

challenging the legality .and validity and Howrah Trading and D.N. Jalan, who were not members of the company, have no right to challenge the

same.

237. It will be convenient to take up the issues Nos. 11 and 12 together. Issue No. 11 relates to the question of transfer of the manufacturing

licence by the company to the Defendant No. 4 and the issue No. 12 which comprises of three several issues, is in relation to the question of sale

of cylinders by the company to the Defendant No. 4.

238. Issue No. 11 is--

Was the manufacturing licence transferred to the Defendant No. 4 wrongfully or illegally or in collusion and conspiracy or without any knowledge

or benefit to the Plaintiffs or"" the Defendant No. 13 ?

239. There is really no evidence on the side of the Plaintiffs on this aspect. To my mind, there is not even proper pleading of collusion and

conspiracy. In any event, there is no proper material before the Court on the basis of which any such conclusion is permissible. On the other hand,

the evidence of Rajmal Patni clearly explains the position and the circumstances under which the licence came to be transferred. The evidence of

Patni, which I am inclined to accept, establishes, to my mind, that the transaction was a perfectly bona fide and proper one. It is to be noted that

the said transfer had been duly sanctioned by the Government and there cannot be any question of illegality about the said transfer. This issue is,

therefore, answered in the negative against the Plaintiffs.

240. Issue No. 12(a) is--

Did the Defendants Nos. 1, 2 and 3 act in collusion and conspiracy with the Defendants Nos. 4 and 5 in selling or agreeing to sell the cylinders at

cost price as alleged in para 31 of the plaint ?

241. An analysis of the allegation''s made in para 31 of the plaint shows that the charges levelled are--

(i) Collusion and conspiracy,,

(ii) Requirements of the cylinders by the company for its own uses,

(iii) Cylinders not easily available in the market,

(iv) Sale at cost price, illegal and wrongful,

(v) Market price was higher.

242. Not any of the aforesaid charges has been established. The Plaintiffs did not in fact make any serious attempt to prove any of the charges

preferred. The allegation of collusion and conspiracy is also without any particulars and there is no evidence or material which justifies the

allegation. The evidence of Patni, on the other hand, establishes that the transaction was not only bona fide but in the circumstances also in the best

interest of the company. The transfer of cylinders at cost was sanctioned by the Government. The fact of the transfer of the cylinders at cost is

specifically mentioned in the balance-sheet of the company for the year ending on March 31, 1963 (Ex. 0030) in Note 5 appended to sch. A of

the Fixed Assets, annexed to and forming a part of the balance-sheet. This balance-sheet on behalf of the company is signed by Surajmull

Nagarmull as Managing Agent of the company. This balance-sheet (Ex. 0030) was approved and passed unanimously at the annual general

meeting held on January 10, 1964 (Ex. 001(k)). Surajmull Nagarmull was present at the meeting and a party to the resolution. Of the three

Plaintiffs, Surajmull Nagarmull only was a member of the company, Howrah Trading had ceased to be a member, having transferred the shares to

the Defendant No. 4 and D.N. Jalan did never become a member of the company. Issue No. 12(a) is, therefore, answered in the negative against

the Plaintiffs. Issue No. 12(b) which is--

Was the sale or the agreement for sale of the cylinders approved and ratified by members of the Defendant No. 13 in general meeting?

has to be answered in the affirmative, as the members of the company must be held to have ratified the transaction at the annual general meeting

held on January 10, 19C4. Issue No. 12(c) is--

Are the Plaintiffs estopped from challenging the legality or validity of the sale and/or the agreement for sale as alleged in the written statement of the

Defendant No. 13 ?

243. Surajmull Nagarmull having signed the balance-sheet (Ex. 0030) as Managing Agent of the company and being a party to the resolution

adopting the said balance-sheet at the annual general meeting held on January 10, 1964, is not entitled to challenge the legality or validity of the sale

or the agreement for sale. Howrah Trading and D.N.Jalan not being members of the company at the time are also not competent to challenge the

said transaction. Issue No. 12(c) is, therefore, answered in the affirmative.-

244. In the facts of the instant case, I am further of the opinion that the transfer of the licence and the sale of cylinders by the company do not

furnish for the Plaintiffs any cause of action on the basis of which they can maintain an action. It is to be noted that there is no allegation of fraud or

ullra vires in the plaint regarding these transactions. The allegation of collusion and conspiracy is without any particulars and, in any event, the said

allegation is not established. It. is beyond dispute that S.B. Jalan and his group are in clear "majority in the company. The said position was made

abundantly clear even at the trial at which most of the members supported S.B. Jalan. Even an officer of Howrah Trading deposed on behalf of the

Defendants and nobody on behalf of Howrah Trading came to support the case. To my mind, it appears that there was in fact no rival group in the

company; and--but for certain unfortunate disputes which have arisen amongst the partners of Surajmull Nagarmull and between D.N. Jalan and

S.B. Jalan and the other brothers who arc also partners--there would be no occasion for this litigation. The company has been completely under

the control of S.B. Jalan. Surajmull Nagarmull as Managing Agent and shareholder of the company has been represented mainly by S.B. Jalan and

has been under the control of S.B. Jalan and has always supported S.B. Jalan in the company. Even if I have to consider Surajmull Nagarmull to

be -opposed to S.B. Jalan simply because Surajmull Nagarmull happens to figure as one of the Plaintiffs in the suit, Surajmull Nagarmull, as a

share-holder of the company, was"" in a hopeless minority at the relevant period. Howrah Trading and D.N. Jalan were not members of the

company at the time of transfer of the licence and the sale of the cylinders. In the case of Pavlides v. Jonson and Ors. (1956). 2 All E.R. 518 it

was held that a minority share-holder was not entitled to maintain an action challenging the validity of a sale which is within the powers of the

company in the absence of any allegation of fraud.

245. Tunnel Asbestos Cement Go. Ltd. had effected the sale of its asbestos mine in Cyprus. The Plaintiff brought an action on behalf of himself

and all other share-holders of Tunnel Asbestos Cement Company Ltd., excepting the Defendant Directors, against the company and the Directors

who had been responsible for the said sale and the Plaintiffs claimed a declaration that the Defendant Directors were guilty of a breach of duty, an

enquiry as to damages and payment of the amount found due on such enquiry. The Plaintiff did not allege any fraud or ultra, vires. A preliminary

objection had been raised as to the maintainability of the action. Danckwerts J. upheld the preliminary objection and dismissed the action. The

learned Judge referred to various decisions and held that the action was not maintainable by the Plaintiff, because the sale of the mine being within

the powers of the company and no acts of a fraudulent character being alleged by the Plaintiff, the sale could be approved or confirmed by the

majority of the share-holders. The learned Judge observed (35):

On the facts of the present case, the sale of the company''s mine was not beyond the powers of the company, and it is not alleged to be ultra vires.

There is no allegation of fraud on the part of the Directors or appropriation of assets of the company by the majority of the share-holders in fraud

of the minority. It was open to the company, on the resolution of a majority of the share-holders, to sell the mine at a price decided by the

company in that manner, and it was open to the company by a vote of the majority to decide that, if the Directors by their negligence or error of

judgment had sold the company''s mine at an under value, proceeding should not be taken by the company against the Directors. Applying,

therefore, the principles as stated by Lord Davcy, it is impossible to see how the present action can be maintained.

I have examined again all of the large number of authorities which were cited to me in the course of the argument. Though there are to be found, in

one or two instances, observations which at first sight might justify a more liberal view of the extent of the minority share-holders'' rights when

taken out of their context, I do not think any of the authorities justify any conclusion other than that which I have reached.

246. This decision in the case of Pavlides v. Jenson (Supra. (523)) was quoted with approval by Harman L.J. in the case of Heyting v. Dupont

and Anr. (1964).2 All ER 273 (281) In the case of Heyting v. Dupont the Court of Appeal in England took a similar view in an action by a

minority share-holder who also happened to be a Director of the company against the majority share-holder, who was the other Director of the

company, for payment of damages by the majority share-holders to the company for misfeasance as a Director by withholding an asset of the

company; and the Court held that the action would, not lie in the absence of any allegation of ultra vires or fraud on the part, of the majority share-

holder. On the facts of the case, the Court of Appeal held that the cause of justice did not require any departure from the rule in Foss v. Harbottle

(1843) 2 Hare 461 that in general an action to remedy a wrong done to a company lie only at the suit of the company.

247. In the facts of the instant case, I am of the opinion that justice does not require any departure from the said rule in Foss v. Harbottle (1843) 2

Hare 461 and the Plaintiffs are not entitled to make any grievance with regard to the transfer of licence and tne cylinders by the company and to

prefer any claim for any damages in respect thereof:

248. In view of my finding on the issues Nos. 11 and 12 issue No. 13(a), namely,

has the Defendant No. 13 suffered any loss or damage and, if so, to what extent ? ''

and the issue No. 13(b), are the Plaintiffs or any of them entitled to any damages and, if so, what ft the amount thereof ?

have both to be answered in the negative against the Plaintiffs.

249. 1 have to note that no evidence has been led on the question of damage and no attempt had in fact been made to prove any loss or damage.

On the authority of the decisions in the case of Pavlides v. Jenson (Supra) and in the case of Hevting v. Dupont (1964) 2 All E.R. 273 (281), I

further hold that in the fact of the instant case the Plaintiffs are not entitled to make any claim for any alleged loss or "damage to the company and

are not entitled to maintain an action in respect thereof.

250. I propose to take up the issues Nos. 14 and 15 together. Issue No. 14 is--

Is the suit not maintainable on the ground stated in Para 40 of the written statement of the Defendant No. 13 ?

and the issue No. 15 is--

Is the question of the suit being not maintainable barred by res judicata for reasons stated in paras 38 to 42 of the plaint ?

Relying on the rule in Foss v. Harbottle (1843) 2 Hare 461 Mr. Mitter appearing on behalf of the Defendant No. 13 has argued that this suit by

minority share-holders is not maintainable and should not be entertained. Mr. Mitter has argued that D.N. Jalan is the real Plaintiff in the suit and he

is not a share-holder of the company. He has submitted that at the time of the institution of the suit Howrah Trading had ceased to be a member of

the company and Surajmull Nagarmull, the only other Plaintiff, is not the real Plaintiff and some of other partners of Surajmull Nagarmull, who have

been made Defendants in this suit, are contesting this suit. Mr. Mitter contends that in any event there can be no dispute to the fact that S.B. Jalan,

who controls the company, has undoubtedly a clear support of the majority share-holders, if not of all the share-holders of the company. It is the

contention of Mr. Mitter that the relevant allegations which may confer right in appropriate cases on minority share-holders to bring an action in

respect of wrong done to company are not even there in the plaint. Mr. Mitter has argued that the facts of the case do not justify any departure

from the principle laid down in the case of Foss v. Harbottle (Supra). Mr. Mitter has also referred to a large number of other decisions in which the

said principles have been followed. Mr. Mitter has relied on the following decisions: Foss v. Harbottle (1843) 2 Hare 461, Mozley v. Alston

(1847) 1 Ph. 790, Macdougall v. Gardiner (1875-6) 1 Ch. 13, Normandy v. Incoope Company Ltd. (1908) 1 Ch.D. 84, Pavlides v. Jenson and

Ors. (Supra), Heyting v. Dupont and Anr. (Supra) and Satya Gharan Law v. Rameswar Prasad AIR 1950 F.C. 133.

251. Mr. Tibrewal, the Learned Counsel for. the Defendants Nos. 1 to 10, has contended that this suit is not maintainable as the Plaintiffs and the

Defendants happen to be the same. It is the contention of Mr. Tibrewal that the firm of Surajmull Nagarmull happens to '' be a Plaintiff in the suit

and that necessarily implies that all the named partners of Surajmull Nagarmull are the Plaintiffs in this suit and some of the said partners of

Surajmull Nagarmull are also the Defendants in this action.

252. Mr. Gupta, the Learned Counsel appearing on behalf of the Plaintiffs, has submitted that the rule in Foss v. Harbottle (1843) 2 Hare 461 has

no application to the facts of the present case and he submits that in the facts of the instant case the suit by the Plaintiffs is maintainable. Mr. Gupta

has drawn my attention that the company was also originally one of the Plaintiffs, but because of changed circumstances the company had since

been transposed to the category of the Defendant. Mr. Gupta contends that in any event the rule laid down in Foss v. Harbottle (1843) 2 Hare

461 is not of universal application, and exception to this rule has been made in many cases in the interest of justice. It is the contention of Mr.

Gupta that exception to the rule laid down in Foss v. Harbottle in the interest of justice is well recognised and Mr. Gupta has also referred to a

large number of authorities in support of his contention. Mr. Gupta has drawn my attention to the relevant passages appearing in Buckley (13th ch.,

pp. 169-71), to Palmer (21st ed., pp. 498-509) and also to the following decisions: Rameswara Prosad Bajoria and others Vs. Satya Charan

Law and others , Dr. Satya Charan Law and Ors. v. Rameswar Prasad Bajoria and Ors. (Supra), Edwards and Anr. v. Halliwell and Ors. (1950)

2 All E.R. 1064, Baillie v. Oriental Telephone and Electric Company Ltd. (1915) L.R. Ch.D. 503, Ramkrishandas Dhanuka and Ors. v. Satya

Charan Law and Ors. AIR 1950 F.C. 81 and N.V.R. Nagappa Chettiar and Anr. v. The Madras Race Club by its Secretary H.L. Raja Urs and

Ors. (Supra).

253. Mr. Gupta has argued that the contention of Mr. Tibrewal is barred by res judicata or principles analogous thereto as on the same ground an

application had been earlier made for the dismissal. of the suit and the said prayer has been rejected.

254. In view of my findings on the other issued. I do not consider it necessary to deal with the respective contentions on these two issues and to

decide the same as these two issues cease to be of any material consequence.

255. Issues Nos. 16 and 17 have not been pressed.

256. I have only to note that Mr. Mitter has argued that in any event the Plaintiffs are not entitled to any declaratory decree in this action as the

necessary conditions, which entitle a Plaintiff to a declaratory decree of the nature asked for, are not satisfied in the instant case. As, in view of my

findings on the issues raised herein, the Plaintiffs are not entitled to any relief, it is not necessary to consider the argument of Mr. Mitter.

257. In view of my above findings, I must hold that the Plaintiffs are not entitled to any relief in this suit and the issue No. 18 is answered

accordingly;

258. In the result the suit fails. The suit is, therefore, dismissed. It is quite clear that D.N. Jalan, the Plaintiff No. 3, is the real Plaintiff in the suit.

Taking advantage of his position as partner of Surajmull Nagarmull and as Director of Ilowrah Trading Company Pvt. Ltd. he has joined the said

two parties as Plaintiffs in this suit and the plaint on behalf of the said parties has been signed by D.N. Jalan himself.. Some of the partners of

Surajmull Nagarmull have been made parties as the Defendants to this suit and they have contested the suit. An officer of Howrah Trading has

given evidence on behalf of the Defendants against the Plaintiffs. There is nothing to indicate that Surajmull Nagarmull and Howrah Trading really

intended to institute the suit or were interested in any of the reliefs claimed. The facts and circumstances of the case, on the other hand, suggest to

the contrary. There is no doubt in my mind that this entire litigation has been at the instance of D.N. Jalan who may have his own grievance against

some of the other partners of the firm in respect of the affairs of the partnership, and this suit is the result of some personal grievance of D.N. Jalan

and is an off-shoot of the partnership dispute. The manner of conducting the suit and particularly the nature of cross-examination clearly indicated

that the fight was on behalf of D.N. Jalan. In the facts of this particular case, I think it will not be proper to saddle the other Plaintiffs, namely,

Surajmull Nagarmull and Howrah Trading, with the costs of this litigation and D.N. Jalan who is the real Plaintiff and at whose instance the suit has

been prosecuted should be made liable for the costs. I have to observe that the unsatisfactory nature of Mr. Kar''s evidence has been responsible

to an extent for the prolongation of the trial. I have also to bear in mind that the other appearing Defendants have made common cause with the

Defendant No. 13 and have not called any witness of their own. I'' am, therefore, of the opinion that in the facts and circumstances of this particular

case D.N. Jalan should pay half of the costs of the appearing parties. I, therefore, direct and order that the Plaintiff No; 3 D.N. Jalan do pay to the

appearing Defendants half of the taxed costs. The appearing Defendants will be entitled to one set of costs.

259. Certified for two counsel.