



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 924 OF 2001

NEETA
SHAILESH
SAWANT

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1. Dharmil A. Bodani
of Mumbai, Adult Indian Inhabitant,
residing at 152, 15th Floor,
N.C.P.A. Apartments,
N.C.P.A. Complex, 1-92,
D. Tata Road, Nariman Point,
Mumbai – 400 021.
2. Shyamal A. Bodani
of Mumbai, Adult Indian Inhabitant,
residing at 51, El-Cid, B.G.Kher Marg,
Mumbai – 400 006.

} ...Plaintiffs

: Versus :

1. Manju Meadows Pvt. Ltd.
A Company registered under the
Provisions of the Companies Act 1956
And having its registered office at
Metro House, 2nd Floor,
Mahatma Gandhi Road,
Mumbai – 400 020.
2. Govind Gupta
3. Manju Gupta
4. Radhika Gupta
5. Meera Gupta
6. Akshat Gupta
Defendant Nos. 2 to 6, having their
address at Metro House, 2nd Floor,
Mahatma Gandhi Road,
Mumbai – 400 020.
7. Vikram Gupta having his address at Metro
House, 2nd Floor, Mahatma Gandhi Road,
Mumbai – 400 020 (and if a minor Through
his father and natural guardian Mr. Govind
Gupta)



8. Mr. Ashwin B. Mehta
residing at 27/A, Shangnla,
Charmichael Road,
Mumbai – 400 020.
9. Mr. Rajesh R. Khandelwal
Residing at B-1201,
Bhawani Complex,
62, Bhawani Shankar Road,
Dadar (West), Mumbai – 400 028.
10. Ajit Investments
a partnership firm having its
registered office at Metro House,
2nd Floor, M.G. Road,
Mumbai – 400 020.
11. Somerville Farms Pvt. Ltd.
a company registered under the
provisions of the Companies Act, 1956
and having its registered office at
Metro House, 2nd Floor, M.G.Road,
Mumbai – 400 020.
12. Vinod Haritwal
having its address at Nandanam,
A-2, Tilak Marg, C-Scheme, Jaipur.
13. Nestor D'Souza
having his address at 11,
Tulip, 3rd Pasta Lane, Colaba,
Mumbai – 400 050.
14. Ravikumar D. Naicker
having his address at Room No.17,
Atlas House, Dr. E.Moses Road,
Jacob Circle, Mumbai – 400 001.
15. M.S.M. Shrirangam
residing at 5-B/1, New Sion
Co-operative Housing Society,
Scheme-6, Sion (West),
Mumbai – 400 022.



17. Ashwin J. Ahya, having his address at F/44,
Maitri Park, Sion Trombay Road, Chembur,
Mumbai – 400 075.
18. Bharat J. Ahya having his address at 4/16,
Borla Co-operative Housing
Society, Dr. Gidwani Road,
Chembur, Mumbai – 400 075.
19. Bhaven H. Soonderji
having his address at 1502,
Ben Hur, 15th Floor, 32,
Narayan Dhabolkar Road,
Mumbai – 400 006.
21. The Stud Book Authority of India
having its address at 6, Arjun Marg,
Pune – 411 001.
22. The Registrar of Companies,
Maharashtra having its address
at 2nd Floor, Hakoba Mills
Compound, Dattaram Ld Marg,
Kala Chowkie, Mumbai.

} ...Defendants

Appearances

Mr. Venkatesh R. Dhond, Senior Advocate and ***Mr. Snehal Shah***, Senior Advocate with Mr. Kunal Mehta, Ms. Akanksha Saxena and Ms. Jigisha Vadodaria and Mr. Darshan Upadhyay i/b M/s Negandhi Shah & Himayatullah *for the Plaintiffs*.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Darshit Jain i/b Juris Consillis, *for Defendant No.2*.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Vikram Trivedi, Mr. Yashesh Kamdar, Mr. Anant Mallya, Mr. Mayur Bhojwani & Ms. Dhamini Nagpal i/b Manilal Kher Ambalal & Co., *for Defendant No. 11*.

Ms. Forum Prajapati i/b Mr. Jayesh Vyas, *for Defendant No.1*.

Mr. Y.K. Tiwari with Mr. Ankit Tiwari, Mr. Pulkit Tyagi & Mr. Manee Vishwakarma i/b Mr. K.A. Patel, *for Respondent No. 1 to 7 in IAL/2525/2024*.



CORAM : SANDEEP V. MARNE, J.

Reserved On : 10 April 2024.

Pronounced On : 11 June 2024.

JUDGMENT:-

1. The suit involves the issue of ownership of shares as well as control and management of the Company 'Manju Meadows Private Limited', which owns 101.7 Acre Stud Farm on old Mumbai-Pune Road.

2. Plaintiffs have filed this Suit aggrieved by actions of the contesting Defendants in decreasing the stake of original Plaintiffs in the first Defendant Company from 99.96% to 24.99% by increasing the authorised share capital of the first Defendant Company from Rs. 25 Lakhs to Rs. 150 Lakhs and by allotting 75000 shares to Defendant No. 11. Plaintiffs have accordingly sought various declaratory reliefs in the Suit *inter alia* including a declaration that the authorised share capital of the first Defendant Company is Rs. 25 Lakh comprising of 25000 shares of Rs. 100 each and that original Plaintiffs own 24,990 shares i.e. 99.96% stake in it. Plaintiffs have also sought declaration that 24th Annual General Meeting shown to be held on 30 September 2000 and resolutions passed therein increasing the authorised share capital of the first Defendant Company is illegal, null and void. Plaintiffs have also challenged meeting of the Board of Directors of the first Defendant Company shown to have been held on 18 October 2000 and resolutions adopted therein allotting 75000 shares to Defendant No. 11 and appointing Defendant No. 12 (director of Defendant No. 11) as director of the first Defendant company. Plaintiffs also seek declaration that Defendant No.11 is not a shareholder of Defendant No.1-Company. Plaintiffs are also aggrieved by defeat of resolutions proposed by them in the Extraordinary General Meeting of the first Defendant Company held on 9th January 2001 by which Defendant Nos.



2, 8 and 9 were proposed to be removed as Directors and original Defendant Nos. 16 to 20 were proposed to be appointed as Directors of the first Defendant Company. Plaintiffs have sought declaration that resolutions for appointment of original Plaintiff No. 2, original Defendant Nos. 16 and 20 (later transposed as Plaintiffs) and Defendant Nos. 17 to 19 be treated as adopted in the said meeting dated 9th January 2001. They have also challenged holding of Board meeting of 10 January 2001 and resolution adopted therein for appointment of Defendant Nos. 13 to 15 as Directors. Plaintiffs have sought specific performance of Share Purchase Agreement (SPA) dated 27 October 1998 and in the alternative, they have prayed for damages of Rs.10 crores. Plaintiffs have also sought consequential permanent and mandatory injunctions against Defendants Nos. 2 to 15.

3. The suit was originally filed by Mr. Anil K. Bodani and Mrs. Chandrika A. Bodani. During the course of trial, both Plaintiffs have passed away and the Suit is now being prosecuted by their legal representatives, who were originally impleaded as Defendant Nos. 16 and 20 and who are now transposed as Plaintiffs. For the sake of brevity, late Anil K. Bodani and late Chandrika A. Bodani are referred as 'original Plaintiffs' and Late Anil K. Bodani is referred to as 'original Plaintiff No.1' and Late Chandrika A. Bodani is referred as 'original Plaintiff No.2'. Defendant Nos. 2 to 15 are collectively referred to as 'contesting Defendants'.

4. Before stating facts of the case, a quick reference to description of the parties would be necessary. Original Plaintiffs were husband and wife and original Defendant Nos. 16 and 20 are their children. Manju Meadows Pvt Ltd. (Defendant No.1) is a private limited company registered under the provisions of Companies Act, 1956 and is *inter alia* engaged in the business of livestock farming and breeding. Defendant No. 2 (Mr. Govind Gupta) and Defendant No. 3 (Mrs. Manju Gupta) are husband and wife. Defendants No. 3 to 7 are members of



family of Defendant Nos. 2 and 3, who were the erstwhile owners of shares of first Defendant company. Defendant Nos. 8 and 9 are Directors of the first Defendant Company. Defendant Nos. 10 and 11 are group concerns of Defendant No. 2. Defendant No. 10 is partnership firm, in which Defendant No.2 is a partner. Defendant No. 11 is a private limited company and Defendant No.12 is its director. Plaintiffs believe that Defendant No. 10 held one share of first Defendant Company, whereas it is the case of contesting Defendants that Defendant No. 11 held that particular one share. Defendant Nos. 13 to 15 are shown to have been appointed as directors of the first Defendant company on 10 January 2001. Defendant Nos. 17 to 19 were nominees of original Plaintiffs for being appointed as directors of first Defendant company. Defendant No. 21 is the Stud Book Authority of India, who is responsible *inter alia* for registration of horses as well as their transfers. Defendant No. 22 is the Registrar of Companies, Maharashtra.

A. FACTS

5. Briefly stated, facts of the case, as pleaded by Plaintiffs, are as follows :
- a. Defendant No.1-Company, incorporated on 16 July 1977 formerly under the name 'Clover Agricultural and Farming Company Pvt. Ltd.' was owned and controlled by erstwhile owners-Tapia Family. After taking over of the entire shareholding of the Company by Defendant Nos. 2 to 7, its name was changed to 'Manju Meadows Pvt. Ltd.' on 12 October 1993. The first Defendant Company had total issued subscribed share capital of Rs. 25 Lakhs comprising of 25,000 shares of Rs. 100/- each. The main asset of Defendant No.1 is a Stud Farm admeasuring 101.7 acres situated at Village Shirgaon, Taluka Maval, District Pune.



- b. Original Plaintiffs and Defendant Nos. 2 and 3 were friends since 1988 and according to Plaintiffs, akin to family. According to Plaintiffs, Defendant No. 3-Manju Gupta was treated as *Rakhi* sister of original Plaintiff No. 1. Original Plaintiff No. 1 and Defendant No. 2 were interested in horse racing and were part of racing circuit. In the year 1998, Defendant No.2 approached Original Plaintiff No.1 requesting for help in selling second Defendant's family's share in the first Defendant Company due to financial constraints. Original Plaintiff No.1 offered to purchase the stake of Defendant No.2 and his family in the first Defendant Company. Accordingly, negotiations ensued between original Plaintiff No.1 and Defendant No.2. Independently, negotiations were also transpired between Defendant No.2 and Original Plaintiff No.1 in relation to separate arrangements for borrowing substantial amounts from original Plaintiff No.1.
- c. In consonance with the ongoing negotiations, Board of Directors of the first Defendant Company held meeting on 23 October 1998 wherein a resolution was adopted for proposed sale of 24,990 shares by all shareholders in favour of original Plaintiffs and for issuance of Share Certificates to them. Accordingly, a Share Purchase Agreement dated 27 October 1998 was executed between Defendant Nos. 2 to 7 and original Plaintiffs, wherein the original Plaintiffs purchased 24,990 shares amounting to 99.96% of paid-up equity share capital of Defendant No.1-Company for consideration of Rs. 29,98,000/- on the terms and conditions set out in the agreement. Defendant Nos. 2, 8 and 9 were Confirming Parties to the Agreement. Accordingly, Defendant No.1-Company transferred 17,990 shares in the name of original Plaintiff No. 1 and 7,000 shares in the name of original Plaintiff No.2. Independent of the Share Purchase Agreement, an Agreement of Debt was also executed between Defendant No.1-Company and Original Plaintiffs on 27 October 1998, whereby the original Plaintiffs loaned and advanced amounts of Rs. 12 Lakhs and Rs. 13 Lakhs to the Defendant No.1-Company,



receipt of which was acknowledged by Defendant No.2 on behalf of Defendant No.1-Company. The said amounts were secured by Deed of Simple Mortgage dated 27 October 1998, two Promissory Notes dated 27 October 1998 payable on demand for amounts of Rs. 12 Lakhs and Rs.13 Lakhs and Specific Power of Attorney dated 27 October 1998 by Defendant No.1-Company to original Plaintiffs to sell the mortgaged lands. By way of Agreement of Debt dated 27 October 1998, original Plaintiffs also loaned sum of Rs. 16 Lakhs in favour of Defendant No.3 which was secured by Memorandum of Agreement of Equitable Mortgage dated 27 October 1998. Over and above the sums aforesaid, original Plaintiffs also advanced short term loan of Rs. 45 Lakhs to Defendant No.3-Manju Gupta, which was repaid in April 1999 and another short term loan of Rs. 4 Lakhs to Gupta Livestock Breeding and Research Farm (D2's Group Concern) which was repaid in April 1999. By two letters dated 23 November 1998, Defendant No.10-M/s. Ajit Investment and Defendant No.11-Somerville Farms Pvt. Ltd. absolved Defendant No.1-Company from repaying amounts of Rs. 1,27,08,069/- and Rs. 67,97,470/- respectively and stated in the letters that Defendant Nos.2 and 3 would be personally liable to repay the said amounts. In the Board Meeting held on 1 December 1998, the Directors of Defendant No.1-Company approved transfer of shares in favour of original Plaintiffs.

- d. On 30 March 1999, original Plaintiff No.1 was appointed as Director of Defendant No.1-Company. Accordingly, Defendant No.1-Company filed Form No.32 with Defendant No.22-Registrar of Companies giving particulars of appointment of original Plaintiff No.1 on the Board of Directors. By letter dated 2 April 1999, Defendant No.1-Company forwarded photocopies of extracts of various documents and registers including register of members, the register of share transfers, etc. to original Plaintiff No.1. Defendant No.1-Company filed Annual Return dated 30 September 1999



with Defendant No.22-Registrar of Companies which reflected shareholding of original Plaintiffs.

- e. On 4 September 2000, a notice of Annual General Meeting to be held on 30 September 2000 was purportedly sent to all shareholders of the Company. By special resolution passed in Annual General Meeting of Defendant No.1-Company held on 30 September 2000, the authorised share capital of the Defendant No.1-Company was shown to be increased from Rs. 25 Lakhs to Rs. 1,50,00,000/- (divided into 1,50,000 equity share of Rs. 100/- each) for conversion of part of Eleventh Defendant's outstanding loan of Rs. 2,02,63,302/- into equity shares of the Defendant No.1-Company. The Minutes of the AGM allegedly held on 30 September 2000 recorded presence of only two members- Defendant No.2 and Defendant No.11 (represented through Defendant No.12) who unanimously passed resolution for proposed increase in the Authorized Share Capital. In September 2000, original Plaintiff No.1 requested for balance sheet of Defendant No.1-Company and accordingly Defendant No.2 furnished unaudited Balance Sheet for the period 1st April 2000 to 31st August 2000. From the accounts furnished, original Plaintiff No.1 noticed precarious financial condition of Defendant No.1-Company and upon enquiry, Defendant No.2 assured that they were his personal liabilities and nothing was due and payable from Defendant No.1-Company. Purportedly, a meeting of Directors was held on 4 October 2000 for discussing dire financial condition and financial restructuring of the Defendant No.1-Company. On 7 October 2000, Board passed Resolution approving increase in equity share capital of Defendant No.1-Company and authorising Defendant No.12 (on behalf of Defendant No.11) to sign Share Application Form. In the meeting of Board held on 8 October 2000, financial restructuring scheme was set in motion to convert debts of certain alleged creditors (Defendant No.11) into equity. Defendant No.11 addressed letter dated 9 October 2000 to Defendant No.1-Company



allegedly enclosing Share Application Form for 75,000 equity shares of Rs. 100/- at premium of Rs.50/- per share. On 10 October 2000, three letters were addressed by Defendant No.2 to Defendant No.1-Company confirming personal liability of Defendant No.2 to repay debts of Rs. 1,02,61,000/- to M/s. Gupta Livestock Breeding and Research Farm, Rs. 89,54,126/- to Gupta Emerald Mines Pvt. Ltd. and Rs. 2,02,63,302/- to Defendant No.11. In the purported Meeting held on 18 October 2000, the Board resolved allotment and issuance of Share Certificate No. 94 consisting of 75,000 shares to Defendant No.11 and appointment of Defendant No.12 as Additional Director. On 14 November 2000, Defendant No.1-Company filed Form No.5 (intimating increase in the share capital) and Form No.23 (registering resolution in respect of increase in the Authorized Share Capital) with Defendant No.22-Registrar of Companies.

- f. In the first week of November 2000, Original Plaintiff No.1 owing to his ill-health requested Defendant No.2 to meet Plaintiff No.1 (his son) and in the said meeting, Plaintiff No.1 on behalf of Original Plaintiffs requested Defendant No. 2 and his nominees (Defendant No.8 and Defendant No.9) to resign from the post of Director of the Company. Defendant No.2 apparently agreed and assured to tender resignation letters within 2 days. By letter dated 16 November 2000, Original Plaintiffs called upon Defendant Nos. 2, 8 and 9 to submit their resignation letters and relinquish their management control and hand over all documents in their possession. Defendant Nos.2, 8 and 9 replied by letter dated 17 November 2000 refusing to handover resignation letters alleging that original Plaintiffs were not 100% shareholders and were 'party to the re-organisation of Manju Meadows Pvt. Ltd. and its working'. By separate letters dated 16 November 2000, the original Plaintiffs wrote to Manager, Shamrao Vithal Co-operative Bank Ltd. and Managing Committee, Royal Western Turf Club Ltd. stating that First Defendant's management was under their control and Defendant Nos.2, 8 and 9 did not



have authority to represent Defendant No.1-Company and no cheques shall be honoured unless signed by original Plaintiffs. By letter dated 20 November 2000, Defendant No.2 purportedly on behalf of Defendant No.1-Company replied to Shamrao Vithal Co-operative Bank Ltd. disputing the authority of original Plaintiff No.1. On 20 November 2000, in purported meeting it was resolved that all documents, letters, POAs executed in favour of original Plaintiff No.1 shall stand revoked. Original Plaintiffs asked the Company Secretary-Mr. Bharat V. Pathak to conduct a search of documents and records with Defendant No.22 in respect of Defendant No.1-Company. Accordingly, he submitted report dated 21 November 2000 containing particulars about directors and share holding pattern of the Defendant No.1-Company, change of auditors, etc.

- g. Defendant Nos.1 to 3 wrote letter dated 21 November 2000 making several allegations against the original Plaintiffs about sending of 'undesirous persons' at First Defendant Company's Stud Farm, original Plaintiffs agreeing to lend amount of Rs. 1.2 crores and loan being structured as Share Purchase Agreement, obtaining signature of Defendant Nos.2 and 3 on blank papers, transfer of shares as 'merely security for due repayment' towards loan advanced, premature recalling of loan amount of Rs. 45 Lakhs in April, 1999, cancelling and revoking documents executed by them and offering to deposit balance loan amount alongwith interest. Original Plaintiffs replied by letter dated 28 November 2000 denying the contents of letter dated 21 November 2000 stating Defendant Nos.2 and 3 to set out correct facts which led to execution of Share Purchase Agreement and other subsequent documents. By letter dated 30 November 2000 and 1 December 2000, the Defendant No.2 reiterated the contents of the earlier letter dated 21 November 2000 and invoked the arbitration clause and appointed arbitrator. The Original Plaintiffs replied to letter dated 1 December 2000 reiterating



the contents of letter dated 28 November 2000, not acceding to arbitration and not concurring with appointment of the said Arbitrator.

- h. By notice dated 7 December 2000, original Plaintiffs through their constituted attorney requested meeting under Section 169 of the Companies Act for removing Defendant Nos.2, 8 and 9 as Directors and instead appointing Plaintiff No. 1, Defendant No.17 and Original Plaintiff No.2. Accordingly, a Meeting of Board was held on 8 December 2000 resolving to take proper legal advice on original Plaintiff No.1's requisition.
- i. Original Plaintiffs also issued public notices in Times of India (17 December 2000) and Mumbai Samachar (18 December 2000) stating that they have 99.96% stakeholding in Defendant No.1-Company and requesting of Extra-Ordinary General Meeting (EOGM) for removal of Defendant Nos.2, 8 and 9 as Directors. Defendant No.2 also issued public notice in Times of India (24 December 2000) contending that Original Plaintiffs' Notices were misleading. On 26 December 2000 an intimation was sent by Defendant No.1-Company to Defendant No.22-Registrar of Companies about cessation of original Plaintiff No.1 as Director of the Company. Also, a Notice dated 26 December 2000 convening the requisitioned meeting on 9 January 2001 by Defendant No.1-Company was received by Original Plaintiffs on 27 December 2000. By letter dated 4 January 2001, original Plaintiffs forwarded proxy forms appointing Plaintiff No.1 and Defendant No.17 as their proxies to vote in the AGM.
- j. On 9 January 2001, EOGM as requisitioned by original Plaintiffs was convened which was attended by Plaintiff No.1 and Defendant No.17 (as proxies) alongwith their Advocate and Company Secretary, Mr. Pathak, Defendant No.2, Defendant No.8, Defendant No.9 and Defendant No.12 alongwith Mr. K. C. Tadarwal (C.A.) and a Partner of M/s. Kanga & Co.,



Advocates. Defendant No.8 claiming himself as the Chairman did not permit Plaintiff's Advocate and Company Secretary to attend the meeting. Requests were made by original Plaintiffs' proxy holders to appoint Plaintiff No.1 as Chairman, conduct of poll for appointing Chairman, furnishing of details of all share-holders of Company and allowing appointment of Scrutineer, which were turned down by Defendant No.8. Separate ballots were given to each of the proxy-holders for voting on each of the 9 resolutions on Agenda. All 9 resolutions were defeated with 75.01% votes cast against each resolution and 24.99% votes were cast in favour of each resolution. By letter dated 10 January 2001, the original Plaintiffs called upon Defendant No.1-Company explain how the resolutions were defeated despite original Plaintiffs holding 99.96% stake and about any purported increase in share capital. Original Plaintiffs addressed letter dated 11 January 2001 calling upon Defendant No.22-Registrar of Companies not to register any application or return of allotment showing enhancement of capital and allotment of additional shares, without their consent or approval and stating facts pertaining to manipulation of records and illegal action to purportedly enhancing share capital of Defendant No.1-Company. The original Plaintiffs have pleaded in their plaint that from 10 January 2001 till the filing of the suit (20 February 2001) they have made further enquiries with Defendant No.22-Registrar of Companies and had also inspected certain documents on 5 February 2001 provided by M/s. Kanga & Co., Advocates. On the basis of these enquiries and documents, original Plaintiffs claim that fraud was perpetrated by the concerned Defendants and that Defendant No.2 and his nominees had taken series of steps clandestinely and behind the original Plaintiffs' back to reduce them to minority shareholders. The original Plaintiffs plead that they neither received any Notice of any Board Meeting nor had any knowledge of the purported increase in the authorised share capital of the Defendant No.1-Company until after Extra-Ordinary General Meeting held on 9 January 2001 and subsequent inquiries conducted thereafter.



- k. Subsequently, after noticing that contesting Defendants had put 11 horses for auction sale held by Defendant No.21-RWITC on 9 February 2001 and other 21 horses were taken to Pune for private sale, Original Plaintiffs addressed letter dated 8 February 2001 calling upon RWITC not to permit auction, private sale and/or transfer of horses of Defendant No.1-Company.

In the above factual background, the Original Plaintiffs have filed the present suit.

6. The Suit is contested essentially by Defendant Nos. 1, 2, 3, 10 and 11 who have filed their written statements disputing the pleadings in the plaint. Defendant No.1 has filed Written Statement disputing Plaintiff's claim of ownership of 99.96% stake in the company and stating that the shareholding of Plaintiffs is only 24.99%. The first Defendant has justified the resolutions adopted for increasing its authorised share capital and allotting 75000 shares to Defendant No. 11. Defendant No.2 has filed Written Statement contesting the claim of Plaintiffs and stating that SPA dated 27 October 1998 was executed merely as security/comfort document and was not meant to be acted upon. However second Defendant has also pleaded that as on the date of filing of the Suit, Plaintiffs held only 24.99% shares of the first Defendant Company. He has contended that Plaintiffs merely advanced loan of Rs. 1.20 crores to Defendant Nos, 1 to 7 and towards security for that loan, various documents including the SPA was executed on 27 October 1998. That the SPA was never intended to be acted upon nor was acted upon as original Plaintiff No. 1 did not participate in management of the first Defendant company or its stud farm after execution of SPA and particularly after his appointment as Director on 30 March 1999. That he did not attend even a single meeting of the Board nor enquired about affairs of the company. That despite service of notice, original Plaintiffs did not attend AGM of 30 September 2000 in which decision was taken for increasing the authorised share capital of the first Defendant Company for conversion of debt of



Defendant No. 11 into equity. He has justified the decision taken in the Board meeting for allotting 75000 shares to Defendant No. 11. He has also contended that he is in control and management of Defendant No.1-Company without any interference from Plaintiff.

7. Defendant No.3 has also filed Written Statement denying 99.96% shareholding of Plaintiffs and justifying the other documents of Debt executed in her favour. In her Written Statement, she has stated that she has adopted contents of Written Statement of Defendant No.2.

8. Defendant No.10 has also filed Written Statement contending that it has 9 shares in Defendant No.1-Company and that the said 9 shares are held by Defendant No.2 on behalf of Defendant No.10.

9. Defendant No.11 has filed Written Statement *inter alia* stating that it owned 1 share of the first Defendant Company since 15 June 1992. That Defendant No. 11 started investing in Defendant No. 1 company since 1996-97 and that as on 31 March 2000, an amount of Rs. 2,02,63,302 was owed by Defendant No. 1 company to Eleventh Defendant. That in July 2000, a proposal was made for converting part of debt of Eleventh Defendant into equity as Defendant No. 1 was not in position to repay the debt. That to facilitate the decision, authorised share capital of first Defendant was increased from Rs. 25,00,000 to Rs. 1,50,00,000 in the AGM held on 30 September 2000. That accordingly Defendant No. 11 made application for allotment of 75000 shares by paying premium of Rs. 37,50,000/- and 75,000 shares were allotted to Defendant No. 11 in the Board Meeting dated 18 October 2000. That Defendant No. 12 was appointed as Additional Director of first Defendant Company. That Defendant No. 11 received Share Certificate No. 94 consisting of 75000 shares. That Defendant No. 11, through Defendant No. 12, exercised voting rights in capacity



as owner of 75,001 shares in the EOGM dated 9 January 2001. That after converting debt of Rs. 1,12,50,000 by allotting 75000 shares, debt of Rs. 90,13,202 is still due and payable by Defendant No. 1 to it.

10. Defendant No.21 has also filed Written Statement stating that it is only added as formal party as plaint does not disclose any cause of action against them except relief of permanent injunction from selling, transferring and alienating or creating third party interest in respect of horses registered with Defendant No.1-Company.

B. EVENTS DURING PENDENCY OF SUIT

11. The Original Plaintiffs had filed Notice of Motion No. 683 of 2001 for interim relief in the form of appointment of Court Receiver and for their appointment as Agents of Court Receiver for running the Stud Farm. By order dated 5 March 2004, this Court granted Notice of Motion No. 683 of 2001 in terms of prayer clause (a), Court Receiver was appointed and Plaintiffs were appointed as the agent of Court Receiver on usual terms and conditions, except the condition for payment of royalty and furnishing security. Appointment of Original Plaintiffs (as Agents) was subject to condition of Plaintiffs immediately negotiating with the Shamrao Vitthal Bank to settle its dues, making payment to the Bank and producing documents showing payment to the Court Receiver, who was directed to proceed to take possession of the Stud Farm. Further Plaintiffs were directed to settle the dues of M.S.E.B and Village Panchayat within 6 weeks. The Order dated 6 March 2004 passed in Notice of Motion No. 683 of 2001 was challenged before Division Bench of this Court in Appeal (LD) No. 168 of 2004. This Court passed Order dated 15 April 2004 modifying the Order dated 6 March 2001 only to the extent that royalty charges will be paid by the Original Plaintiffs. In pursuance of the Order passed by Division Bench, the Court Receiver fixed royalty at Rs. 20,000/- per month.



12. Defendant No.1 had taken out Notice of Motion No. 1334 of 2006 seeking termination of agency of Plaintiffs on account of breach of agreement of agency. The Court Receiver also filed Court Receiver's Report No. 44 of 2006 seeking directions to Plaintiffs to submit detailed accounts of Stud Farm. This Court passed Order dated 21 December 2006 issuing directions (i) to Court Receiver to refix the royalty to be paid by Plaintiffs which was to take effect from the date on which the Plaintiffs assumed charge as agents of the Court Receiver, (ii) to Plaintiffs to file accounts quarterly with the Receiver since the date on which they took over possession (iii) Court Receiver to cause the stud farm to be inspected periodically once in every four months alongwith Registrar of the Stud Book Authority of India, (iv) for undertakings on behalf of Original Plaintiffs that they shall discontinue the arrangement with Five Star Shipping Company Pvt. Ltd. by giving three months' notice of termination under Clause 5 of the licence agreement dated 15 March 2005 and amount of Rs. 5,20,000/- that was realized on account of the sale of horses which belonged to the Stud farm prior to the date on which the Plaintiffs acquired agency as reflected in the accounts and the amount shall be deposited with the Receiver within two weeks without prejudice to the rights and contentions of the Plaintiffs in the suit and (v) Plaintiffs to manage the property of which they have acquired agency as a Stud farm.

13. The Original Plaintiffs filed Chamber Summons No. 168 of 2008 for setting aside the Order dated 6 October 2007 passed by First Assistant to the Court Receiver, High Court, Bombay fixing royalty at Rs. 3,85,000/-. By Order dated 29 April 2008, this Court appointed M/s. AT & TS Associates as Valuer for fixing royalty, deposit of Rs. 1,25,000/- by Plaintiffs towards fees of Valuer with the Court Receiver and paying royalty of Rs. 1,80,000/- per month from April 2004 till disposal of the Chamber Summons. By consent of the parties, Order was passed in Chamber Summons Nos. 168 and 228 of 2008 wherein royalty to be paid by Plaintiffs was fixed at Rs. 6,81,600/- per month starting from



January 2012, arrears of royalty to be paid calculated at rate of Rs. 6,81,600/- per month for period from 21 December 2006 to December 2011. Royalty for the period 15 April 2004 to 21 December 2006 was also fixed at Rs.6,81,600/- in view of dismissal of SLP(C) No. 30403 of 2008.

14. Defendant No.11 filed Notice of Motion No. 2959 of 2008 seeking termination of agency of Plaintiffs on account of contravention of agreement of agency and Orders passed by this Court. The Court Receiver also filed Court Receiver's Report No. 171 of 2009 seeking directions as to what action be taken against Original Plaintiffs for violating clause 11 (not allowing entry to representative of Court Receiver on 12 January 2009) of agency agreement dated 1 September 2004. Both the Notice of Motion and Court Receiver's Report were taken for hearing together. The Notice of Motion No. 2959 of 2008 was dismissed by this Court holding that no case was made out by Defendant No.11 for termination of agency of Plaintiffs. The Court Receiver's Report was disposed of accepting apology tendered by Plaintiffs and directing Plaintiffs not to prevent the entry of Court Receiver in the Stud Farm at any time in future.

15. Original Plaintiff No. 1 Anil K. Bodani passed away on 20 December 2014, leaving behind original Plaintiff No. 2 (wife), Dharmil Bodani (original Defendant No. 16), Shri. Shyamal Bodani (Original Defendant No. 20) and Smt. Kinnari Arun Punjabi as his legal heirs. According to Plaintiffs, original Plaintiff No. 1 left behind his late will bequeathing all his properties in favour of his wife (original Plaintiff No. 2). Smt. Chandrika Anil Bodani (original Plaintiff No.2) passed away on 14 July 2017. According to Plaintiffs 24,900 shares have been bequeathed to them by original Plaintiff No. 2 under the Will. This is how two sons of original Plaintiffs, who were original Defendant Nos. 16 and 20 filed Chamber Summons No. 794 of 2017 seeking their transposition as Plaintiffs [prayer clause (a)] and



their appointment as Agents of Court Receiver [prayer clause (b)]. By Order dated 11 August 2017, this Court recorded no objection on part of Defendant No.2 in allowing prayer clause (a). This Court continued the arrangement i.e. same staff of deceased Plaintiff be allowed to take care of the interest of property. By Order dated 13 February 2018, this Court made absolute prayer clause (a). Further, Order dated 20 June 2018 was passed with the consent of Defendant No.2 and the Plaintiffs in continuing the arrangement contemplated in Order dated 11 August 2017 till the disposal of the suit.

16. This is how Plaintiffs continue to be in possession of the Stud Farm. By conclusion of hearing of Suit, Plaintiffs have deposited in this Court Royalty of Rs. 14,85,02,106/-. Additionally, according to Plaintiffs an amount of Rs. 29,03,17,667/- is spent towards costs of running the Stud Farm, quarterly accounts whereof are filed by Plaintiffs with the Court Receiver.

C. ISSUES

17. By Order dated 12 September 2011, this Court has framed the following issues:

(1) Whether the Plaintiffs prove that the Plaintiffs acquired 24,999 shares, i.e. a 99.96% equity stake in the Defendant No.1 company under the Share Purchase Agreement dated 27.10.1998 ?

(2) Whether the 2nd and 3rd Defendants prove that the said Share Purchase Agreement was only by way of security for an underlying loan transaction as alleged in parara 4.7, 4.8, 4.9, 29 and 32 of the 3rd Defendant's Written Statement and in para 11 of the 2nd Defendant's Written Statement ?

(3) Whether the Plaintiffs prove that Defendant Nos. 2, 8 and 9 ceased to be Directors of Defendant No.1 Company with effect from 9th January 2011 as alleged in para 2(b) of the Plaint ?



(4) Whether the 1st Plaintiffs ceased to be a Director of the 1st Defendant Company in September 1999 ?

(5) Whether the Plaintiffs prove that the 2nd Defendant agreed in the meeting alleged by the Plaintiffs to have been held in November 2000 that the 2nd Defendant and his nominees would resign as Directors of the 1st Defendant ?

(6) Whether the 2nd Defendant proves that the Share Purchase Agreement and other documents dated 27th October 1998 were validly cancelled/terminated on 21st November 2000 as alleged in para 34 of the 2nd Defendant's Written Statement ?

(7) Whether the Plaintiffs prove that the resolutions passed at the 24th Annual General Meeting of the 1st Defendant Company held on 30th September 2000 are illegal, null and void ?

(8) Whether the Plaintiffs prove that Defendant Nos. 16 to 20 are validly appointed Directors of Defendant No.1 Company as alleged in para 2(h) of the Plaint ?

(9) Whether the Defendant Nos. 2 and 12 prove that the 12th Defendant was entitled to attend, participate in or vote at the Annual General Meeting of the 1st Defendant held on 30th September 2000 either on his own, or on behalf of the 11th Defendant ?

(10) Whether the Plaintiffs prove that the Minutes of the 24th Annual General Meeting of the 1st Defendant Company held on 30.09.2000 are fabricated and got up documents and are illegal, null and void ?

(11) Whether the Plaintiffs prove that resolutions were validly passed/carried at the Extraordinary General Meeting of the 1st Defendant held on 9th January 2001 removing Defendant Nos. 2, 8 and 9 as Directors of the 1st Defendant Company and whether the said Directors thereupon ceased to be Directors of the 1st Defendant Company and, if so, from what date ?

(12) Whether the Plaintiffs prove that the meetings of the Board of Directors of the 1st Defendant Company purportedly held on 18th October 2000 and 10th January 2001 were illegally/invalidly convened and that the resolutions passed at the said meetings are illegal, null and void and of no legal effect ?



(13) Whether the Plaintiffs prove that the Board Resolution dated 18th October 2000 to allot, and the allotment of 75,000 equity shares of Rs. 100/ each of the 1st Defendant Company to the 11th Defendant are illegal, null and void and of no legal effect ?

(14) Whether the 2nd Defendant proves the allotment of 75,000 equity shares of the 1st Defendant Company to the 11th Defendant was with the knowledge and consent of the Plaintiffs as alleged in para 45 to 47, 58 and 106 of its Written Statement ?

(15) Whether the Defendants prove that on equity share of the 1st Defendant Company was legally and lawfully transferred from the 10th Defendant to the 11th Defendant on 15th June 1992 as alleged in para 9 of the Written Statement of the 10th Defendant and para 2 of the Written Statement of the 11th Defendant ?

(16) Whether the Plaintiffs prove that they are entitled to a decree of specific performance of the Share Purchase Agreement dated 27th October 1998 against Defendant Nos. 2 to 9 ?

(17) If the answer to Issue 16 above is in the negative, whether the Plaintiffs prove that they are, in the alternative, entitled to a decree in damages jointly and/or severally against Defendant Nos. 2 to 15 and if so, in what amount ?

(18) Whether the Plaintiffs prove that the following documents are liable to be delivered up for cancellation and cancelled

(a) The minutes of the 24th Annual General Meeting of the 1st Defendant Company held on 30th September 2000 ?

(b) The minutes of the Extraordinary General Meeting of the 1st Defendant Company held on 9th January 2001 ?

(c) The minutes of the meetings of the Board of Directors of the 1st Defendant Company held on 18th October 2000 and 10th January 2001 ?

(19) What reliefs ?

D. EVIDENCE LED BY PARTIES

18. Original Plaintiff No.1-Mr. Anil K. Bodani has examined himself as witness (PW1). Original Plaintiff No. 1 passed away on 20 December 2014 before his cross-examination could be completed. Plaintiffs have also examined Kamlesh



S. Shah as PW2, Doctor who was attending Original Plaintiff No.1. Defendant No.2 has examined himself as DW1. Order dated 7 January 2016 records statement of Advocate for Defendant No.1 that Defendant No.2 is Director of Defendant No.1 and Defendant No.1 shall not lead any separate evidence. The Order also records and accepts statement of Advocates for Defendant Nos. 3, 10 and 12 that they are not desirous of leading any evidence in the suit. The Order also records that Defendant Nos. 13 and 15 neither appeared in the Court nor represented by any Advocate/s and that though Defendant Nos. 6 and 7 appeared in the Suit but they no longer were appearing in person nor represented by an Advocates. Order dated 11 January 2016, this Court has recorded and accepted statement of Defendant No.8 who was personally present in the Court that he is not desirous of leading any evidence in the suit.

E. SUBMISSIONS

19. Extensive submissions have been canvassed by the learned counsel appearing for rival parties. Mr. Venkatesh Dhond and Mr. Snehal Shah, the learned senior advocates have canvassed submissions on behalf of Plaintiffs. Mr. Pradeep Sancheti and Mr. Janak Dwarakadas have canvassed submissions on behalf of the contesting Defendants. The learned counsel have also filed written notes of arguments on several topics argued as well as final abridged version of written submissions. It would be necessary to briefly record their submissions.

E.1 SUBMISSIONS ON BEHALF OF PLAINTIFFS:

20. Mr. Dhond, the learned Senior Advocate appearing for Plaintiffs would submit that the contesting Defendants have fraudulently decreased Plaintiffs' stake in the first Defendant company from 99.96% to 24. 99% by unauthorisedly showing increase of its share capital from Rs. 25,00,000 to Rs. 1,50,00,000 and by allotting 75,000 shares to Defendant No. 11. That the series



of steps shown to have been taken by the contesting Defendants are not only bogus and fraudulent but are aimed at reducing Plaintiffs' stake from majority to minority. That there is apparent contradictions in the defences taken by contesting Defendants where in one breath they contend that SPA was executed only as a comfort document as security for loan advanced and that the same was never meant to be acted upon, whereas in another breath they contend that the stake of Plaintiffs in the first Defendant Company is only 24.99% and not 99.96%. That assertion about 24.99% stake of Plaintiffs contains an implied admission that SPA effected sale of 24,900 share of first Defendant Company in original Plaintiffs' favour.

21. Mr. Dhond would further submit that original Plaintiffs and Defendant Nos. 2 and 3 had friendly family relations where Defendant No.3 was the *Rakhi* sister of Original Plaintiff No. 1. That Defendant No.2 who was facing financial constraints and at his request, original Plaintiffs agreed to purchase 99.96% stake in the first Defendant company. That in addition to Rs. 29,98,800 paid for purchase of 24900 shares, original Plaintiffs also lent various other sums to Defendant Nos. 1 to 3. That distinct documents were executed for sale of shares and as debt agreement. That though during negotiations it was agreed between the parties owing to ill-health of Original Plaintiff No.1 and his trust and confidence in Defendant No.2 that Defendant No.2 and his nominees would continue on the Board of Directors of Defendant No.1-Company, a separate mechanism was to be created by which Original Plaintiff No.1 was to retain management control, in tune with his rights as 99.96% shareholder.

22. Mr. Dhond would submit that SPA was not a loan transaction and was subsequently acted upon, which is established by Share Certificates, extract of Register of Members, Transfer Forms, Form 32, Annual Return for the year 1999, etc. That contesting Defendants have, at all material times, including after



alleged letter dated 21 November 2000 admitted original Plaintiffs as shareholders of Defendant No.1-Company. That the act of Defendant No.1-Company convening EOGM requisitioned by original Plaintiffs, acknowledging their proxies to attend and vote at the EOGM would further buttress the case that SPA was acted upon. That Resolutions in the EOGM have been defeated by 75,010 votes cast by contesting Defendants as against 24,990 votes of Plaintiffs. Plaintiffs have thus established that they hold 24,990 shares pursuant to the SPA. Relying on *Mathrubhumi Printing & Publishing Co Vs. Vardhaman Publishers Ltd. & Ors.*¹, he would submit that once names of original Plaintiffs were recorded in register of members, they can no longer be treated as 'namesake shareholders', which concept is otherwise unknown to law. Mr. Dhond would take me through Resolution dated 23 October 1998 passed in Board Meeting and various articles of SPA to demonstrate that SPA was not a loan transaction and that the same has to be read in its plain language. Mr. Dhond would submit that the terms of SPA are reduced to the form of written agreement. That as per the provisions of Section 91 of the Indian Evidence Act, 1882 (**Evidence Act**) the SPA can be proved only by document itself or by secondary evidence of its contents where it is admissible. That the terms of SPA stands proved as per Section 91 of the Evidence Act as there is no dispute as to its execution. That law in this regard is well settled that if the oral agreement is inconsistent with the terms of the written agreement, then law favours exclusion of evidence of oral agreement which is contrary to the terms of the written agreement. That it applies with even greater vigour where the parties have included 'Entire Agreement Clause' in the SPA. The law is well settled that when entire agreement clause is found in the contract, parole evidence stands excluded and reliance in this regard is placed on judgment of this Court in *BVM Finance Private Limited Vs. Vistra ITCL (India) Ltd. Ors.*², of Delhi High Court in *Thyssen Krupp Materials AG Vs. The Steel Authority of India*³ and of the Court

¹ 1991 SCCOnLine Kerala 453.

² MANU/MH/1720/2020.

³ 2017 SCC OnLine Del 7977.



of Appeal in *North Eastern Properties Ltd Vs. Coleman and another*⁴. That once the terms of SPA are proved, any assertion as to its nature is squarely contrary to the provisions to the plain terms of SPA and barred by Section 92 of the Evidence Act. That Section 92 of the Evidence Act excludes evidence of oral agreement where the terms of the agreement are reduced in form of Agreement. Reliance in this regard is placed on judgment of Apex Court in *Vimal Chand Ghevarchand Jain Vs. Ramkant Eknath Jadoo*⁵, of the Calcutta High Court in *Halima Khatun Vs. Shashi Kumar Banik*⁶ and of this Court in *Keshavrao Bhagvant Vs. Raya Pandu*⁷. Mr. Dhond has placed reliance on the judgment of this Court in *Jry Investments Private Limited Vs. Deccan Leafine Services Ltd.*⁸ to draw a distinction between transfer of share and pledge of share. Mr. Dhond has invited my attention to para 11(4) of Written Statement of Defendant No. 2 and Clause 10.9 of SPA to illustrate that the SPA has to be read in its plain language and not as a document of loan.

23. Mr. Dhond would further submit that on the very same day, separate and distinct documents were executed for different amounts and different purposes. That documents themselves speak about the nature and intention of the parties. That if the intention of the parties was to treat entire amount of Rs.1.20 crores as advanced towards loan, the SPA would not be executed and acted upon. That if shares of Defendant No.1-Company were to be given as security, simple document of Pledge would have been executed. Without prejudice, the amount of Rs.25 Lakhs was advanced to meet working capital requirements of Defendant No.1-Company. The other amounts of Rs. 16 Lakhs and Rs. 45 Lakhs were loaned to Defendant No.3 and evidence of PW-1 is relied for highlighting the gambling habit of Defendant No.2. There is no dispute about

⁴ [2010] 1 WLR 2715.

⁵ (2009) 5 SCC 713.

⁶ AIR (34) 1947 Cal 453.

⁷ MANU/MH/0042/1906.

⁸ MANU/MH/1427/2003.



the SPA and Loan Agreements being prepared by the same Solicitor. That what would be abnormal and incongruous is that if the sum of Rs. 29,98,000/- is treated as loan portion of transaction or that it was secured by transfer of ownership of shares, which would confer upon original Plaintiffs the status of owners of Defendant No.1-Company.

24. Mr. Dhond would further submit that as shareholders of Defendant No.1-Company, original Plaintiffs are in no manner precluded from infusing capital into the Company or from accepting security to secure that finance. That apart from making bald averments that Plaintiffs only invested Rs. 26 Lakhs post SPA and that Defendant No.2 and/or his companies have invested approximately Rs. 5,25,00,000/-, Defendants have not produced any documentary evidence in tune with the averments. Mr. Dhond has highlighted the stark difference between infusing funds and lending stating that infusing funds into Company by subscribing to equity is irreversible akin to ownership but lending is temporary measure in contemplation of it being repaid. Thus, what is allegedly injected by Defendant No.2 is lending. That factum of lending has not been proved and it is settled law that where factum of loan is disputed, the same must be established by primary evidence such as Bank Statement, which has not been done. As per Section 34 of the Evidence Act, entries made by party in his books of account though relevant are not evidence of the fact of a loan actually have been advanced or received by the party and further fortified by Section 3 of the Commercial Documents Evidence Act, 1939 read with Item 21 of Part 2 of the Schedule. That case of lending is belied by accounts of Defendant No.1-Company. In the Balance Sheet for the period ending on 31 August 2000 reflect a loan amount of Rs. 1.74 crore to Gyan Impex. That Defendant No.1 who was in need of funds and borrowed Rs. 60 Lakhs from Shamrao Vithal Bank by mortgaging its property would lend Rs. 1.74 crores to Gyan Impex speaks volume for itself. That if the Balance Sheets are examined it would show that Defendant No. 2 was using



Defendant No.1-Company to route funds for its own use. That debts reflected in Balance Sheets are personal liability of Defendant No.2.

25. Mr. Dhond would further submit that the terms of SPA itself reflect transfer of shares/ownership of Defendant No.1-Company and management control of Defendant Nos.2, 8 and 9 subject to creation of safeguards in Original Plaintiffs' favour and thus the Defendants are barred by Section 92 of the Evidence Act to raise defence of Defendant Nos.2, 8 and 9 remaining in management subsequent to purchase by original Plaintiffs. That it proved that Original Plaintiff No.1 was appointed as Director of Defendant No.1-Company with effect from 30 March 1999 and Defendants have failed to prove that he ceased to be Director from 30 September 1999. That Defendants have not placed on record any evidence that Original Plaintiff No.1 received Notice of any Board Meetings after he was appointed as Director. That letter dated 17 November 2000 addressed by Defendant Nos.2, 8 and 9 to original Plaintiffs contains a categorical admission that Original Plaintiff No.1 remained as a Director till that date. That Plaintiffs' relationship with Defendant Nos.2 and 3 has to be considered while analysing conduct of original Plaintiffs post execution of SPA. Mr. Dhond has relied on Affidavit of Evidence of PW-1, Affidavit of Evidence of PW-2 and cross examination of PW-1 to establish that original Plaintiff No.1 had more successful business and because of his ill-health and his trust and confidence in Defendant No.2 as his family friend, he allowed Defendant No. 2 to run and manage Defendant No.1-Company and Stud Farm subject to SPA. That the Companies Act recognises bifurcation of ownership and management in a Company and the same is reiterated in SPA by way of safeguards. That Defendant No. 2 was allowed to be in management of the Company as he wanted to avoid social stigma of selling the stud farm and also because his daughter was getting married.



26. Mr. Dhond would submit that Defendants, to establish their case of dilution, which they failed to establish, had to prove (i) an existing and established debt in favour of Defendant No.11, (ii) need of improving debt to equity ratio and (iii) process leading to ultimate dilution. For this process, Defendants held purported Board Meetings dated 10 August 2000 and 4 September 2000. That Notice of the Board Meetings was not given to Original Plaintiffs and there is not even an attempt to show that Notice was sent to Original Plaintiffs. Neither notice was sent by Defendants even by UCP nor received by Original Plaintiffs. Although, Defendants have changed their stance that Notice dated 4 September 2000 of purported Annual General Meeting (AGM) dated 30 September 2000 was issued by Under Certificate of Posting (UCP), the Original Certificate of Posting is not produced. What has been produced is purported photocopy and Defendants have not led secondary evidence thereof. That the theory of original UCP with the Economic Offences Wing is discredited by Defendant's own Affidavit of Evidence. That Defendants have led evidence of only Defendant No. 2, who admitted in his cross-examination that he did not carry out the process of dispatching UCP. He also admitted that this process was allegedly carried out by Defendant No. 9, who is not examined as witness. That Defendants have miserably failed to discharge the burden by not examining concerned Chief Post Master. That observations made in Judgment passed by this Court in Dharmil Anil Bodani V/s. State of Maharashtra and others⁹ while setting aside the Magistrate Order accepting 'C' Summary report are to be taken into consideration. The law regarding probative value of UCP is settled by Apex Court in its judgments in Shiv Kumar and others V/s. State of Haryana and others¹⁰ and M.S.Madhusoodhanan and another V/s. Kerala Kaunudi (P) Ltd. and others¹¹. That the decisions relied upon by Defendants are distinguishable and reliance therefore is misplaced. Presumption of service under Section 53(2)(a) of the Companies Act is

⁹ Writ Petition No. 1491 of 2009 decided on 27 October 2016.

¹⁰ (1994) 4 SCC 445.

¹¹ (2004) 9 SCC 204.



rebuttable presumption. Also, the Minutes of the Board Meeting dated 4 September 2000 are not placed on record. That the AGM dated 30 September 2000 was purportedly attended by Defendant No.2 (in his individual name) and Defendant No. 12 (Director of Defendant No.11). That evidence on record clearly establishes that Defendant No.11 was never a shareholder before 30 September 2000 and therefore there was no valid quorum to convene the AGM. Original Plaintiffs were once again not informed/ given notice of Board Meeting held on 18 October 2000 purportedly allotting 75,000 shares to Defendant No.11. Thus, the entire case of debt to equity conversion is sham as within few days of the purported AGM, Defendant No.2 addressed letter to Plaintiffs declaring that loan of Rs. 2,02,63,202/- payable to Defendant No.11 was personal liability of Defendant No.2. Further, purported copy of Annual Returns forwarded by Defendants' Advocates during pre-suit inspection clearly records that as on 30 September 2000, 75,001 shares stood allotted to Defendant No.11 whereas it is Defendants' case that purported allotment was made on 18 October 2000. When Defendants realised that the cat is out of the bag, subsequently by letter dated 7 January 2001 they claimed that the said document was on an 'unsigned draft format'. It is thus established that documents relating to purported meetings were ante-dated and are not credible and thus the argument of decision to increase shares to be in interest of the Company and incidental reduction of majority to minority shareholding does not hold ground.

27. Mr. Dhond would submit that the Original Plaintiffs have pleaded a specific case that 'very recently' i.e. before filing of the suit, Defendant No.10 had illegally transferred its 1 share in favour of Defendant No.11. That a lot hinges on the issue whether Defendant No.11 was shareholder prior to 30 September 2000 and thus status of Defendant No.11 during the period 1992-1998 is thus very relevant. Mr. Dhond has placed reliance on cover letter dated 2 April 1999 (Exhibit P-25), Annual Returns of Defendant No.1 for the year ending 31



March 1999 (Exhibit P-14), Balance Sheet of Defendant No.1 for the year ending 31 March 1999 (Exhibit D-46 and D-46: subject to proof documents), Balance Sheet of Defendant No.1-Company for the year ending 31 March 2000 (Exhibit D-38: subject to proof documents), Balance Sheet of Defendant No.11 for the year ending 31 March 1995 and Balance Sheet of Defendant No.11 for the year ending 31 March 1998 and Company Secretary Mr. Pathak's letter dated 21 November 2000 (Exhibit P-36) to demonstrate that name of Defendant No.11 is not reflected as shareholder in official records. Mr. Dhond has also taken me through various others documents on which reliance is placed by Defendants to demonstrate failure on part of Defendants to lead primary/best evidence, fabrication and forgery of documents to corroborate their defence of Defendant No.11 being shareholder prior 30 September 2000. Mr. Dhond, by relying on Sections 76 and 77 of the Evidence Act, has strongly objected to copies of Annual Returns of Defendant No.1-Company for the years 1994 to 1998 being read in evidence by contending that Defendants have not produced the ROC certified copies on record. He would rely on judgment of this Court in **Om Prakash Berlia Vs. Unit Trust of India¹²**. That it should also be appreciated that Defendant No.2 has deliberately not produced Annual Returns and Balance Sheet for the years 1992 to 1999. That Defendants cannot be permitted to rely upon admissions made by Plaintiffs, when they themselves have failed to discharge their burden by leading positive evidence. That Plaintiffs have maintained consistent stance in the plaint that according to them, Defendant No.2 and Defendant No.10 held remaining 10 shares of the Company. That Defendant No.2 cannot be allowed to rely upon Balance Sheet of Defendant No.11 for year ending 31 March 2001 as for the first time it notes that 1 share was purchased by Defendant No.11 from Defendant No.3 on 11 August 1992 and the consideration was paid by Tapia Livestock Breeding and Research Farm, where Defendant No.11 is a partner. Thus, it can be established that no consideration flowed from Defendant No.11 to Defendant No.1 and in light of this, Defendant No.11 cannot assert its title to that

¹² AIR 1983 Bom 1.



1 share as it is directly hit by Section 4 of the Benami Transactions (Prohibition Act), 1988. That belated entry has only been recorded to correct previous years' records. That even if the defence raised by Defendants is to be believed, the 1 share shall form part of asset of Tapia Livestock as per Section 14 of the Indian Partnership Act. That according to Defendants, AGM was attended by only two shareholders Defendant No.2 and Defendant No.11 and since Defendants have failed to prove that Defendant No.11 was shareholder prior to 30 September 2000 there was no valid quorum for convening AGM as per Section 174 (1) of the Companies Act, 1956 (**Companies Act**). On these counts, Resolution passed in AGM dated 30 September 2000 and all consequential actions of Defendants to portray Defendant No.11 as shareholder of Defendant No.1-Company be set aside. Defendants contention that Plaintiffs were aware on the date of execution of SPA that Defendant No.11 was shareholder, although reference thereto has been removed by white ink, are only surmises and conjectures and this does not prove factum of shareholding of Defendant No.11. Even if any surmise is to be drawn, the plausible one would be that reference to Defendant No.11 was effaced by white ink because Defendant No.11 was not shareholder and could not have sold any shares. Mr. Dhond would rely on judgment in Dale & Carrington Investment (P) Ltd. Vs. P. K. Prathapan¹³ in support of his contention that directors of even a private limited company are expected to make disclosure to the shareholders of the Company when further shares are being issued.

28. Mr. Dhond relying on Affidavit of Evidence of PW-1 would submit that PW-1 has led sufficient evidence. That he was cross-examined extensively on crucial points in various sessions. That the law is well settled in regards where the witness dies before his cross-examination and what weightage should be attached to such witness's statement. In support of his contentions, Mr. Dhond would rely upon the judgments of Delhi High Court in Krishan Dayal Vs.

¹³ (2005) 1 SCC 212



Chandu Ram¹⁴, of this Court in Banganga Co-operative Housing Society Ltd. Vs. Vasanti Gajanan Nerukar¹⁵ and of the Kerela High Court in Food Inspector Vs. James¹⁶. Alternatively, he would submit that Plaintiffs' entire case is based on documentary evidence, existence of which is also admitted by Defendants.

29. Mr. Dhond would submit that the argument of alleged undervaluation does not stand in view of Explanation 2 to Section 25 of the Indian Contract Act. Relying on the judgments of Madras High Court in Santhappa Rai Vs. Santhiraju alias Kanchu Shetty¹⁷, P Saraswathi Ammal Vs. Lakshmi Ammal¹⁸ and Delhi High Court in Trilok Nath Vs. Khem Chand¹⁹ law in this regard is well settled that inadequacy of consideration can only be looked at for determining whether party's consent was freely given. That Explanation I to Section 20 (prior to 2018 amendment) of the Specific Relief Act that mere undervaluation or inadequacy of consideration for transaction shall not deem to constitute an unfair advantage or hardship. In support of his contention, Mr. Dhond has relied upon the judgment of Apex Court in Jai Narain Parasrampuriah Vs. Puspa Devi Saraf²⁰, and Calcutta High Court in Vijaya Minerals Pvt. Ltd. Vs. Bikash Chandra Deb²¹. That Defendants have sought to raise defence of alleged of consideration/undervaluation, neither Defendants have sought to establish alleged "true value" of shares independently nor any positive evidence is led as to correct valuation.

30. Mr. Dhond would submit that present case warrants grant of relief of specific performance of SPA and granting damages, as sought to be suggested by

¹⁴ ILR 1969 Del 1090.

¹⁵ 2015(5) Bom. C.R. 813.

¹⁶ 1997 SCCOnLine Ker 255.

¹⁷ (1938) 47 LW 714.

¹⁸ 1997 SCC OnLine Mad 33.

¹⁹ 2017 SCC OnLine Del 8958.

²⁰ (2006) 7 SCC 756.

²¹ AIR 1996 Cal 67.



Defendants,, would not be appropriate relief, which would cause serious injustice to the Plaintiffs. That the shares in Defendant No.1-Company and Stud Farm are not ordinary articles of commerce but hold substantial value and monetary compensation will nowhere be adequate. That almost entirety of suit transaction has been performed and the specific performance is sought only against direction to Defendant Nos.2, 8, 9, 12 and 15 to resign as Directors and before doing so, appoint Original Plaintiffs' nominees as Directors. That Plaintiffs conduct throughout, including post-filing of the suit, demonstrate readiness and willingness as well as bonafides.

31. Mr. Dhond would submit contenting Defendants have failed to produce original documents and that merely because they are marked, the same did not absolve them of their responsibility of producing the originals. That Defendants had four opportunities to mention existence of and/ or produce, originals and/or ROC certified copies but they consciously and advisedly did not do so. The first opportunity was at the time of filing of Affidavit of Documents(AOD). That AOD is not merely for the purpose of identifying the documents a party is relying upon but for "Discovery". That it is obligatory for a party to disclose all the documents (originals or photocopy) in their possession so as to enable the other party to decide its action, including Production of such documents. That party is required to set out in the Second Schedule, original documents which are not in their possession or power stating when they were in last possession or power of the party and name of present possessor or power. That in the AOD filed by Defendant No.1 and Defendant No.2 both dated 7 October 2011 they have only mentioned copies and not original documents. That the Defendant Nos. 1 and 2 are now precluded from relying on documents other than those disclosed in their respective AOD and manner in which they were disclosed as they did not file any supplementary Affidavit of Documents as provided in Rule 172 of the High Court (Original Side) Rules prior to or



alongwith the Affidavits in lieu of Examination in Chief of Defendant No.2. That if Defendants submission that AOD can be substituted by an averment made in Affidavit in lieu of Examination in Chief, then the provisions of Rule 172 of the High Court (Original Side) Rules will be rendered otiose and meaningless. The second opportunity was at the time of giving inspection. That letter dated 1 November 2022 from M/s. Kanga & Co., Advocates clearly records inspection of copies/ true copies/ notarized copies. That at no time, Defendant Nos. 1 and 2 called upon Plaintiffs to take inspection of any alleged original documents. Third opportunity was when Defendants filed their Affidavit in lieu of Examination in Chief. The AOE affirmed by Defendant No.1 on 7 October 2011 does not tender the originals. Every single paragraph of AOE which introduces or produces documents expressly state that “*I am producing a certified/true copy.*” Defendants filed second AOE on 22 April 2016 and in paras 11 and 12 it is stated that original documents are received from EOW in November 2015. Relying on the cross-examination of Defendant No.2, Mr. Dhond would submit that original documents were in his custody on the date on which AOE was affirmed, thus, belying the theory that Defendants were handicapped as the original documents were with EOW. That despite having custody of the original documents, Defendants for the reason best known to them did not produce it at this stage. The fourth opportunity was at the stage of marking of documents by this Court. Even at this stage, the original documents were not shown to the Court and Plaintiffs. Defendants have undertaken in paragraph 63 of AOE to produce original documents at the stage of cross examination, without prejudice, even this requirement is not complied with. Paragraph 63 of AOE is cleverly drafted as it uses two distinct expressions “produced at the time of examination” and “as and when called upon”. That merely stating that original documents were always kept available in the Court does not meet the rule of fair play and it was Defendants burden to produce and inform Plaintiffs. Relying on judgments of Apex Court in *Bipin Shantilal Panchal V/s. State of Gujarat and another*²² and

²² (2001) 3 SCC 1.



Full Bench of this Court *Hemendra Rasiklal Ghia V/s. Subodh Mody*²³, Mr. Dhond would submit that objections to documents which are so marked (tentatively), must be raised at or before the stage of marking of documents to enable that party to argue its objection at the stage of final hearing. It is settled law that mere marking of documents does not indicate that it stands proved. He would also rely on Apex Court judgment in *Vijay Vs. Union of India*²⁴ and *Shalimar Chemical Works Pvt. Ltd. Vs. Surendra Oil and Dal Mills (Refiners) and Ors*²⁵ and of this Court in *Rohit Vanmalidas Mehta Vs. Smt. Vimla H. Mehta*²⁶. The effect of procedure adopted by Defendants is to deprive Plaintiffs the benefit of examining the documents. Relying on *M/s. Micromeritics Engineers Pvt. Ltd. Vs. S. Munusamy*²⁷ and *Ashish S. Shah Vs. Seth Developers Pct Ltd. & Ors*²⁸, Mr. Dhond would contend that presumption under Section 195 of the Companies Act would not apply to photocopies of Minutes Book, Resolutions, Returns, Forms, etc produced by contesting Defendants.

E.2 SUBMISSIONS ON BEHALF OF DEFENDANT NO.2:

32. Mr. Sancheti, the learned senior advocate appearing on behalf of Defendant No.2 would submit that SPA was a sham document executed only for security. That Plaintiff No.1, who allegedly intended to acquire the entire shareholding of Defendant No.1-Company including movable and immovable assets, did not undertake valuation exercise at all. That Original Plaintiff No.1 is his cross-examination admitted he had not undertaken any exercise to value the land independently. That consideration mentioned in SPA, if it were to be acted upon, is clearly illusory and unconscionable and thereby shows that SPA was a sham document executed only for security. Inviting my attention to Affidavit of

²³ (2008) SCC OnLine Bom 1017.

²⁴ 2023 SCCOnline SC 1585

²⁵ (2010) 8 SCC 423

²⁶ 2018 SCC Online Bom 4765

²⁷ 2002(3) CTC 661

²⁸ 2011 (4) MhLJ 288



Examination in Chief and cross-examination of Original Plaintiff No.1 (P.W.1), Mr. Sancheti would submit that Original Plaintiff No.1 sought to justify consideration of Rs. 29,98,800/- by referring to two factors i.e. (i) operational expenses of Rs. 4.5 crores and (ii) liability of Rs. 3 crores which stand is clearly disproved by his own admissions in his cross-examination. Further, Plaintiff in his evidence has indicated that in 1993, the value of his half share of 6 mares imported jointly with Defendant No. 1 was about Rs. 25 Lakh. That the audited balance sheet as on 31 March 1998, annexed to SPA, reflected the value of Defendant No.1-Company at Rs. 2.16 crores. On the other hand, Defendant No.2 has positively stated in his Written Statement as reaffirmed in his evidence that assets of Defendant No.1-Company were worth Rs. 8 to 10 crores. That Plaintiffs' prayer for damages of Rs. 10 Crores in lieu of specific performance itself is indicative of value of the company/stud farm in Plaintiff's own perception. In his rejoinder, Mr. Sancheti has further submitted that Plaintiffs are trying to mislead this Court as if the value of Stud Farm is Rs. 29.9 Lakhs, which is contrary to the table of assets set out in the Balance Sheet. That the contention of Plaintiffs that value of shares allotted in 2000 is not much different compared to value of shares sold in 1998 is totally baseless. Mr. Sancheti would submit that Plaintiffs' attempt to justify sale consideration of Rs. 29,98,000/- has not only been disproved but based on Plaintiffs' own evidence, it is positively shown that value of Defendant No.1-Company ran in excess of Rs. 8 to 10 crores as on the date of execution of SPA .

33. Mr. Sancheti would further submit that admittedly there is sheer absence of possession, control and management by the Original Plaintiffs of the Defendant No.1-Company from October 1998 to November 2000. This position is tacitly confirmed in the Plaint and further by ad interim order passed by this Court on 30 March 2001, which clearly records that Defendant No.2 was in control and management of the Stud Farm. That DW1, in his evidence, has listed



30 distinct items depicting custody, control, possession and management of Stud Farm/Company on which aspect there is no cross-examination. That the position thus remains undisputed and runs contrary to the common course of business conduct wherein owner of the Company does not take charge and control. To buttress the case of Defendants that SPA was a security document and not be acted upon, Mr. Sancheti has relied upon Examination in Chief of DW1 and Cross examination of PW-1 to show Original Plaintiffs' conduct contrary to being shareholders of the Company. That the DW-1 has specifically deposed in his Examination in Chief that stud farm was the sole business of Defendant No.1- Company and Original Plaintiffs did not visit the same over the entire period of 2 years since the execution of SPA. Mr. Sancheti has invited my attention to Examination in Chief of PW1 to show admissions on Original Plaintiff No.1's part. To belie the theory of ill health of Original Plaintiff No.1, Mr. Sancheti has relied upon examination-in-chief of DW-1, wherein he has deposed that Original Plaintiff No.1 personally managed his Company-Oriental Aromatics Ltd., visited his Chembur office everyday, periodically attended Mahalaxmi Race Course and that during the Pune racing season, he attended live race meetings but did not visit the stud farm which was on the way and touching the Mumbai-Pune highway. That Plaintiffs have not cross examined the DW1 on these aspects and it is settled law when no cross examination is conducted on certain facts, that part of the testimony is deemed to be admitted. To further solidify that Original Plaintiff No.1 was mobile, active and looking after his affairs routinely, Mr. Sancheti has taken me through various admissions by PW1 in his Examination in Chief. Another excuse set up Plaintiff about on account of impending marriage of second Defendant's daughter, he was allowed to retain directorship in the Company is half-baked as the marriage took place in January 1999 and admittedly thereafter, no steps were taken by the Plaintiffs to exert control and management of the Company. Curiously, after being appointed as Director in March 1999, Plaintiff did not even attend a single board meeting. In rejoinder, Mr. Sancheti would submit that Plaintiff's contention that every step contemplated and which



the Companies Act mandated to give effect to SPA as sale and purchase agreement was carried out is misconceived in light of prayer clause (b) seeking specific performance of SPA. That right to possess and actual possession is an important facet of ownership of property and in support he would rely on Judgment of Calcutta High Court in Jiban Roy Choudhary Vs. Sm. Taramoyee Debi²⁹.

34. Mr. Sancheti would further submit that it is Defendants' case that SPA was merely executed as comfort/security. That the security was in the form of registration of shares in the name of Plaintiffs and that such registration was only to facilitate the security. According to him, a security in a private limited company can only be effected by transfer of shares. That mere execution of SPA is meaningless, without transfer of shares. Mr. Sancheti would rely upon the judgment of the Apex Court in Vistra ITCL (India) Limited and others V/s. Dinkar Venkata Subramanian and another³⁰ in support of his contention that it is settled law that between the persons creating the security interest, beneficial ownership continues to remain with the pawnor and the pawnee only holds the shares as security.

35. Mr. Sancheti would further contend that it is admitted position that Plaintiffs did not infuse any funds from October 1998 till the filing of the suit. That contrary to original Plaintiffs' conduct, Defendant No.2 actually acted as owner of Defendant No.1-Company and was actually in its control and management. In support, he has relied upon Examination in Chief of DW1. That the Original Plaintiff No.1 also admitted during the course of evidence that need for infusion of capital in Defendant No.1-Company, but Original Plaintiff No.1

²⁹ 1979 SCCOnline Cal 83

³⁰ (2023) 7 SCC 324.



neither introduced any funds nor enquired about working capital requirements. That Defendant No.2 has infused Rs. 2,71,00,000/- during the years 1998 to 2000 to meet the working capital requirement of Defendant No.1-Company. That the Original Plaintiffs instead of questioning Defendant No.2 as to why he was investing funds in the Company, they happily accepted comfort letters dated 10 October 2000 for the funds introduced. In the above background, Mr. Sancheti would submit that on 27 October 1998, series of documents were executed which clearly indicate that it was a composite loan transaction. That if Original Plaintiffs were owners of the Company, they never called for any documents. That Plaintiffs' case as pleaded in the plaint does not stand scrutiny.

36. Mr. Sancheti would further submit that on 27 October 1998 alongwith the SPA, series of other loan documents were also executed. Since, the documents were executed on the same day, they form part of the same transaction. That the said loans were advanced by executing various documents by Original Plaintiffs in favour of Defendant No.1. That the Plaintiffs obtained various documents such as Promissory Note, Mortgage Deed etc. as security/collateral for the loans advanced. That it is inconceivable that, to recover loan advanced by Plaintiffs to Defendant No.1, Plaintiffs would sell their own wholly owned company. To buttress the case, Mr. Sancheti would submit that it is admitted in the plaint that registration of shares in the name of Plaintiff took place on 27 October 1998. Thus, it is rather perplexing and not in consonance with normal business conduct that person owing entire shareholding of Company would insist or require execution of such documents. That Plaintiffs have not assigned any reason in plaint or in evidence for exclusion of 10 shares whereas on the other hand Defendant No.2 has given positive explanation that the 10 shares were retained by him to retain control and management of the Company. It is thus evident that SPA was merely a part of series of documents intended for comfort and security and thus was not to be acted upon. Further,



Mr. Sancheti would contend that there is no bar under Sections 91 and 92 of the Evidence Act to show that a document which was never intended to operate as an agreement but bought into existence solely for the purpose of creating evidence, then oral evidence is permissible in law. Reliance is placed on the judgment in *Tyagaraja Mudaliyar and another V/s. Vedathanni*³¹ and of the Apex Court in *Gangabai w/o Rambilas Gilda V/s. Chhabubai w/o Pukharajji Gandhi*³² and *V. Anantha Raju Vs. T. M. Narasimhan & Ors*³³ to contend that oral evidence is admissible when there is different document altogether and what is recorded in the document was intended to be of no consequence thereof. That the ratio of the abovementioned judgments apply equally applies to entire agreement clause in SPA. Mr. Sancheti as also relied upon the judgement of this Court in *Lonkaran Kishorilal Paliwal V/s. Bhaskar Rambhau Ghive and others*³⁴ wherein evidence contrary to document was read and considered by the Court.

37. Mr. Sancheti would further submit that without prejudice, if the SPA was to be treated as an agreement for sale and transfer of ownership, management and control of Defendant No.1-Company, then the decree of specific performance as sought by Plaintiffs is a discretionary relief as mandated under Section 20 of the Specific Relief Act. In support of his contentions, he has relied upon the judgments of this Court in *Lonkaran Kishorilal Paliwal* (*supra*) and of the Calcutta High Court in *Sen Mukherjee and Co. V/s. Smt. Chhaya Banerjee*³⁵.

38. Mr. Sancheti would further submit that issue whether Defendant No. 11 is shareholder of Defendant No.1-Company is desperate attempt to somehow

³¹ 1935 Indian Appeals L.R. 126.

³² (1982) 1 SCC 4.

³³ (2021) 17 SCC 165

³⁴ 1992 Mh.L.J. 1365.

³⁵ AIR 1998 Cal 252.



dispute the AGM held on 30 September 2000. The allegation of forgery and fabrication raised by Plaintiffs is of serious nature in light of deposition of Defendant No.2, who was personally present and participated in the AGM and copy of the resolution being filed with the ROC alongwith Form No. 5 on 14 November 2000. That it is not disputed that 10 shares were not part of the SPA and were retained by Defendant No.2 and/or associated entities, thus there is no reason to indulge in any forgery or fabrication as the shareholders could always attend the meetings. Without prejudice, Mr. Sancheti would submit that there is overwhelming evidence to show shareholding of Defendant No.11. In the plaint, the Original Plaintiffs have pleaded that Defendant No.10 holds 1 share and Defendant No.11 holds 9 shares in the Defendant No.1-Company. Whether Defendant No.11 holds 1 share or 9 shares does not make any difference. That bare reading of Clause 1.1 (c) alongwith first recital of SPA, would further buttress the fact that Defendant No.11 was always the shareholder in Defendant No.1-Company. That the SPA was drafted by M/s. Hariyani & Co. and they had knowledge about Defendant No.11 being shareholder of the Company. That Defendant No.11 had attended AGM/EGM's from the year 1992 to 2000 and that name of Defendant No.11 is reflected in the Annual Returns from 1992 to 2000. Further, the principle of *caveat emptor* is clearly applicable and Plaintiffs cannot feign ignorance of this fact.

39. Mr. Sancheti would further submit that plea of fraud or forgery or fabrication has to be specifically raised and that too with requisite particulars. In support, he has relied upon judgment of Constitution Bench of the Apex Court in *Bishundeo Narain and Another V/s. Seogeni Rai and another*³⁶. Without prejudice, Mr. Sancheti would submit that Defendant No.2 admittedly being Director and in control of Defendant No.1-Company, his capacity to prove existence and contents of the documents cannot be doubted. That Defendant

³⁶ 1951 SCC 447.



No.2 had taken all requisite steps to retrieve original documents from EOW before evidence was received and documents were marked. That the same were made available in the Court on 25 July 2016 when evidence was received and documents were marked. That this Court passed an Order in terms of Minutes of the Order prepared and signed by the parties, which in turn was based on Affidavit of Evidence filed by Defendant No.2 wherein handwritten paragraph 63 states that originals are available and request is made to take on record documents truly certified by the Advocate and thus true copies of the same were taken on record. At this stage, the only objection raised by the Plaintiffs to the Minutes of the Order was related to the proof of the document and hence they were not exhibited and were merely identified. The contention of the Plaintiff that the Defendants are holding back the Original records is not correct in light of requisite steps to retake possession as well as Orders passed by this Court and Magistrate's Court and documents were returned by EOW is also proved by Additional Affidavit filed by Defendant No.2. Reliance is placed on the judgment of the Full Bench of this Court in Hamendra Rasiklal Ghia V/s. Subodh Mody³⁷ in support of his contention that objection as to existence or proof of documents must be raised at appropriate stage to enable the party tendering evidence to cure the defect and tender the documents accordingly. That the objection at this stage is raised in an attempt to prejudice Defendant No. 2 and gain an unfair advantage. He would rely on judgment of Supreme Court in Union of India Vs. Imbrahim Uddin & Anr³⁸ in support of his contention that mere withholding of document is not sufficient for drawl of adverse inference and that it is necessary that the opposite party must ask for its production. That the Plaintiff is trying to mislead this Hon'ble Court by mixing up two different aspect of proof of existence of documents versus proof of correctness of content. That under Sections 159 and 164 of the Companies Act a deeming rebuttable presumption is created to prove the truth of the contents of original records of the Company.

³⁷ (2008) 6 Mh.L.J. 886.

³⁸ (2012) 8 SCC 148



Mr. Sancheti would further submit that the contention of Plaintiffs that only original documents can be tendered in evidence is a misnomer. Section 61 of the Evidence Act permits evidence being tendered in the form of either primary or secondary evidence. Photocopies as well as copies certified as true clearly fall in the category of secondary evidence and thus can be received as secondary evidence under Section 63 of the Evidence Act. That Plaintiffs' submissions proceed on an erroneous footing that public documents can be proved only through certified copies. However in the present case, these documents are filed by Defendant No.1-Company with ROC and there are various modes prescribed under Section 63 of the Evidence Act, one of them being by way of certified copies under Section 74. That Section 74 does not override Section 63 and does not facilitate other forms of secondary evidence but facilitates the process of secondary evidence. The aforementioned circumstances is indicative of Plaintiff's attempt to render judgment with considering/glossing over the relevant documents and evidence.

40. Mr. Sancheti would further submit that Plaintiffs had no beneficial interest in the shares and therefore there is no question of dilution of their shareholding. Without prejudice, he would submit that it is admitted position that Defendant No.1-Company was in need of funds and that Defendant No.2 infused further funds. It was therefore necessary to improve debt to equity ratio of Defendant No.1-Company in order to facilitate further funding. That Plaintiffs have admittedly neither exercised any ownership rights nor offered to infuse any funds in the Defendant No.1-Company.

41. Mr. Sancheti has placed reliance on admission given by Original Plaintiffs that they did not attend any Board Meetings held after execution of SPA till the filing of the suit, albeit that he was not given any notice. PW-1 in his



cross examination has admitted that he did not write any letter to Defendant No.1-Company lamenting not receiving of any notice of board meetings or suggesting/objecting any course of action of Board of Directors. That Original Plaintiff No.1 had knowledge about all meetings including notice for AGM in the year 1999 and 2000, which is clear from his own admissions in Affidavit in examination in chief. That Defendant No.2 in his Affidavit of examination in chief has given positive evidence that Notice dated 4 September 2000 about AGM on 30 September 2000 alongwith relevant enclosures was sent by UCP dated 5 September 2000. That UCP is a mode of service recognised under Section 53(2) of the Companies Act. Relying on judgment of Supreme Court in Mohd. Asif Naseer Vs. West Watch Company³⁹ and V. S. Krishnan Vs. Westfront HiTech Hospital Ltd⁴⁰ Mr Sancheti would submit that UCP has been recognised as proper mode of service.

42. Mr. Sancheti would further submit that Plaintiff No.1 (Original Defendant No. 16) and Plaintiff No. 20 (Original Defendant No. 20) have not come forward and led evidence despite being arrayed as parties to the suit since the institution of the suit. That Plaintiff No.1 despite claiming personal knowledge of various events narrated in the plaint did not step in the witness box. That Section 114(g) of the Indian Evidence Act requires the Court to draw adverse inference against party who does not enter witness box. In support, he has relied on the judgment of the Apex Court in Iswar Bhai C. Patel alias Bachu Bhai Patel V/s. Harihar Behera and another⁴¹.

43. Mr. Sancheti would further submit that cross-examination of PW1 (Original Plaintiff No. 1) could not be completed due to his demise. Cross-

³⁹ (2020) 17 SCC 136

⁴⁰ (2008) 3 SCC 363

⁴¹ (1999) 3 SCC 457.



examination of PW1 is therefore incomplete on vital aspects. In support of his contention on Court ascertaining the probative or evidentiary value of incomplete testimony of witness by reason of death or incapacity, Mr. Sancheti has relied upon the judgments of Full Bench of Allahabad High Court in Narsingh Das V/s. Gokul Prasad⁴² which is followed by Single Judge of Allahabad High Court in Varun Agrawal V/s. Jamuna Devi and others⁴³. Thus, PW1's evidence should wholly and totally be disregarded and cannot be relied for any purpose whatsoever.

44. Mr. Sancheti would submit that the observations made by this Court while deciding Criminal Writ Petition No. 1491 of 2009 are wholly irrelevant and cannot be considered by Civil Court while deciding the suit. That it is settled law that even a judgment rendered in criminal case cannot be relied upon in civil cases and in support he would rely on Apex Court judgment in Seth Ramdayal Jat Vs. Laxmi Prasad⁴⁴.

E.3 SUBMISSIONS ON BEHALF OF DEFENDANT NO.11

45. Mr. Dwarkadas, the learned senior advocate appearing on behalf of Defendant No.11-Sommerville would adopt the submissions of Mr. Sancheti. Additionally, he would submit that Plaintiffs have filed the present suit seeking specific performance of SPA and particularly covenants contained in Article V thereof. That Plaintiffs could have enforced their rights under SPA subsequent to its execution. Admittedly, the Original Plaintiffs have not exercised their rights under SPA till the filing of the present suit. That it is pleaded case of the Original Plaintiffs that Defendant No.2 held 9 shares and Defendant No. 10 held 1 share in the Defendant No.1-Company. That "very recently" before filing of the suit,

⁴² AIR 1928 All 140.

⁴³ 2016 SCC OnLine All 4039.

⁴⁴ (2009) 11 SCC 545



Defendant No.10 illegally transferred its 1 share to Defendant No.11. Contrary to this pleaded case, Mr. Dwarkadas would submit that there are various admissions in the plaint that Defendant No.11 was shareholder prior to execution of SPA. Mr. Dwarkadas would contend that neither it is the case of Original Plaintiffs that they were receiving any notices for holding either Board of Directors meeting or the General Body Meeting between 1998 to August 2000 nor that they attended any of the Board Meetings or General Body Meetings. Relying on Answers to Questions 218 and 237 put forth to Original Plaintiff No.1 in his cross-examination, Mr. Dwarkadas would contend that any person having 99.96% shareholding in the Company would not blindly trust friends (Defendant No.2- Govind Gupta) and family. This conduct of the Original Plaintiffs is contrary to the common course of human conduct.

46. Mr. Dwarkadas would further counter the case of the Original Plaintiffs that allotment of 75,000 shares to Defendant No.11 was to allow Defendant No.2 to reduce them to minority shareholders by submitting that neither Original Plaintiffs conducted themselves as owners of 99.96% shareholding of Defendant No.1-Company nor asserted any rights in accordance with Articles 5.1 to 5.4 of SPA. That the said conduct of the Original Plaintiffs itself speaks volumes that SPA was not intended to be an agreement for sale of shares and any in any event, Original Plaintiffs have not shown readiness or willingness to assert their rights under SPA.

47. Mr. Dwarkadas would submit that Original Plaintiffs have neither sought any relief seeking cancellation of allotment of 75,000 shares to Defendant No.11 nor rectification of the Register of Members as per Section 111(4) of the Companies Act. That under Order II Rule 2 of the Code of Civil Procedure, 1908, Plaintiff is obliged to include whole claim in respect of the cause of action



but in the present case, the Original Plaintiffs have not sought all the reliefs they are entitled to claim.

48. Reliance is placed on the judgment of the Apex Court in *Nagindas Ramdas V/s. Dalpatram Ichharam alias Brijram and others*⁴⁵ in support of his contention that admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act, if true and clear, stand on a higher footing than evidentiary admissions. Such admissions are binding on a party making them and constitute waiver of proof. Mr. Dwarkadas has taken me through relevant admissions in plaint, more particularly in paragraphs 2(j), 9(a), 19 and 54(a) that the Original Plaintiffs had knowledge that Defendant No.11 was already shareholder of Defendant No.1-Company prior to entering into the SPA. Mr. Dwarkadas has further invited my attention to relevant clauses in the SPA and cross-examination of PW-1 to show the Defendant No.11 was party to the SPA. That, it is admitted that some portions of the SPA were blanked out using white ink, the Original Plaintiffs who were signatories to the same have not offered any explanation for the same. That this is not a case of bonafide purchase but gross abuse of process of law. That, relying on Answer to Question No. 1092, Mr. Dwarkadas would submit that the Original Plaintiffs have admitted that name of Defendant No.11 appears in records of Defendant No.1-Company. That, the admission on part of Original Plaintiffs is all that matters and not the capacity or purpose for which the admission is made. That once there is an admission, burden shifted on the Original Plaintiffs to disprove the same. Reliance is also placed on Section 3(iii) of the Companies Act which defines the term “private company” and clauses (a), (b), (c) and (d) which provides for restriction on transfer of shares of private limited company. In support of his contention that a closely held company or private limited company is in nature of glorified partnership, Mr. Dwarkadas has relied upon judgment of this Court in

⁴⁵ (1974) 1 SCC 242.



Re : Severn Trent Water Purification⁴⁶. That it is impossible to believe that Original Plaintiffs would not have satisfied themselves as to who are the other shareholders of the Defendant No.1-Company. That this conduct on part of Original Plaintiffs is contrary to presumption that is to be drawn under Section 114 of the Evidence Act. Mr. Dwarkadas has further relied upon Section 153 of the Companies Act which provides for keeping of one or more books a register of its members and penalty for non-maintenance of Register of Members and Section 163 which provides that registers, indexes, returns, copies of certificates and other documents are open during business hours for inspection by any member, debenture holder or any other person. That “member” is defined under Section 41 of the Companies Act. Thus, Register of Members being a public document available for inspection for every member of public, it is difficult to believe that Original Plaintiffs did not carry out due diligence to know who were the existing shareholders of Defendant No.1-Company prior to execution of SPA. That the Original Plaintiffs cannot challenge veracity of Register of Members. Relying on definition of the term “proved” in Section 3 of the Evidence Act, to contend that the test is to cross the line of probability and therefore the question whether Register of Members of Defendant No.1-Company or its contents to establish Defendant No.11 was shareholder of Defendant No.1-Company becomes wholly irrelevant.

49. Mr. Dwarkadas would further submit that allotment of 75,000 shares to Defendant No.11 was towards financial restructuring of Defendant No.1-Company to enable the Company to raise funds from banks and financial institutions. In support, he has placed reliance on relevant pleadings in the Second Defendant’s Written Statement, Affidavit of Evidence and the documents produced therewith (subject to proof documents). That, the Original Plaintiffs have placed reliance on letters dated 23 November 1998 and 10 October

⁴⁶ 2005 SCC OnLine Bom 1766.



2000, addressed by Defendant No. 11 to Defendant No.1-Company confirming personal liability of Defendant Nos.2 and 3 to repay loan amount of Rs. 67,97,470/-. The said letter was handed over to Original Plaintiffs. Perusal of the cross examination of PW-1 emanates that original letter dated 23 November 1998 was in custody of Original Plaintiffs and is subsequently produced in the present proceedings, Defendant No.1 was never forwarded the letter and thus not acted upon and liability of Defendant No.11 continued to reflect till October 2000, in fact progressively increased over the years. That letter dated 10 October 2000 was also handed over to Original Plaintiffs wherein Defendant No.2 confirmed that as on 31 August 2001, the outstanding loan amount due to Defendant No.11 was Rs. 2,02,63,302/- which will be repaid by Defendant No.2. It has come in cross examination of Defendant No.2 that the said letters were given to Plaintiff for his comfort and security and never to be acted upon as liability of Defendant No.11 continued to reflect in the books of Defendant No.1-Company. That such conduct on part of Original Plaintiffs, who claim to be 99.96% shareholder of the Company about non inquiry or not concerning about rising liability of Defendant No.11 in books of Defendant No.1-Company, gives impression that SPA was loan document.

50. Mr. Dwarkadas has relied upon Constitution Bench Judgment of Apex Court in Nanlal Zaver and another V/s. Bombay Life Assurance Company Limited and others⁴⁷, 3 Judge Bench decision of Apex Court in Needle Industries (India) Ltd. and others V/s. Needle Industries Newey (India) Holding Ltd. and others⁴⁸ and judgment of Apex Court in Hasmukhlal Madhavlal Patel and another V/s. Ambika Food Products Private Limited and others⁴⁹ in support of his contention that if shares are issued in larger interest of the Company, the

⁴⁷ AIR 1950 SC 172.

⁴⁸ (1981) 3 SCC 333.

⁴⁹ (2023) 7 SCC 580.



decision to issue the shares cannot be struck down on the ground that it has incidentally reduced majority shareholder to a minority shareholder.

51. To counter Original Plaintiffs' case that allotment of 75,000 shares to Defendant No.11 was in contravention of Section 81(1)(a) of the Companies Act, Mr. Dwarkadas has submitted that once Defendant No.11 is held to be shareholder of the Defendant No.1-Company, the only question that arises is whether allotment of 75,000 shares fulfilled requirement of further issue of capital. The judgment of Apex Court in *Dale & Carrington Investment Pvt. Ltd.* relied upon by Plaintiffs is sought to be distinguished by Mr. Dwarkadas by submitting that principle laid down is subject to exception recognised in para 11 (d) of the judgment viz. if issue of further capital is construed to be bonafide act in the interest of the Company, then in such case neither provisions of Section 81 apply nor the higher standard set in the judgment restrict or prohibit the board of directors from issuing further capital.

52. Alternatively and without prejudice, Mr. Dwarkadas would contend that if Plaintiffs' prayer of allotment of 75,000 shares to Defendant No.11 as illegal, null and void is upheld, Plaintiffs' cannot invalidate such transfer as title of movable property i.e. 75,000 shares nevertheless stands transferred to the purchaser (Defendant No.11) as the transaction is completed. In support, he has relied upon 3 Judge Bench decision of the Apex Court in *B.O.I Finance Ltd. V/s. Custodian and others*⁵⁰. Mr. Dwarkadas would further submit that since allotment of 75,000 shares cannot be invalidated, the only relief which Plaintiff can seek is claim for damages subject to satisfying conditions of Section 21(2) of the Specific Relief Act.

⁵⁰ (1997) 10 SCC 488.

**F. REASONING, ANALYSIS AND FINDINGS**

53. The suit involves the issue of the ownership of shares and control and management of Defendant No.1 Company-Manju Meadows Pvt. Ltd. While Plaintiffs claim that they hold 99.96% stake in the equity share capital of the first Defendant Company, Defendants claim that either Plaintiffs do not hold any shares or, at the highest, hold 24.99 % stake in the Company. The first defence of the Defendants about Plaintiffs not owning any shares of the Company is premised on the assertion that the Share Purchase Agreement dated 27 October 1998 did not effect sale of 24,990 shares in favour of original Plaintiffs and that it was executed merely as a comfort document and as security for loan advanced by original Plaintiffs to Defendant Nos. 1 to 3. As against this, the second and the alternative defence of the Defendants about Plaintiffs owning only 24.99% stake in the Company is premised on an assertion that in the Annual General Body Meeting of Defendant No.1 held on 30 September 2000, read with meeting of Board of Directors held on 18 October 2000, the share capital of the First Defendant Company was increased from Rs. 25,00,000/- to Rs.1,50,00,000/- and that 75,000 shares of the First Defendant company have been allotted to Defendant No.11-Somerville. According to the contesting Defendants, though the authorized share capital of the first Defendant Company is Rs. 1,50,00,000/-, the subscribed and paid-up share capital at the moment is Rs. 1,00,00,000 divided into 1,00,000 shares of Rs. 100 each, out of which 75,010 shares are owned by the contesting Defendants whereas only 24,990 shares are owned by original Plaintiffs. This is how original Plaintiffs' stake in the company is alleged to be only 24.99% by the contesting Defendants.

54. Plaintiffs have accordingly filed the present suit essentially for a declaration that they own 24,990 equity shares of the first Defendant Company and that its share capital is Rs.25,00,000/- comprising of 25,000 equity shares of Rs.100/-. By seeking these declarations, Plaintiffs seek to control the first



Defendant Company by owning 99.96% of its equity shares with only 10 shares being left for Defendant No.2 (9 shares) and either Defendant No.10 or Defendant No.11 (1 share). With a view to defeat the actions of defendants in increasing the authorised share capital of the first Defendant Company from Rs.25,00,000/- to Rs.1,50,00,000/- and allotment of 75,000 shares in favour of Defendant No.11, Plaintiffs have sought declarations that the Annual General Meeting of the first Defendant Company shown to have been held on 30 September 2000, as well as the meeting of the Board of Directors shown to have been held on 18 October 2000 together with Minutes of both the meetings are illegal and void. On the strength of their assertion that Plaintiffs own 99.96% stake in the First Defendant Company, Plaintiffs had proposed various Resolutions in the Extra-Ordinary General Meeting of the first Defendant Company held on 9 January 2001 for removal of Defendant Nos.2, 8 and 9 as Directors and for appointment of original Plaintiff No. 2 and original Defendant Nos. 16 to 20 as Directors, which Resolutions were defeated by Defendant Nos.1 to 11 on account of purported owning of 75,000 shares by Defendant No.11. Plaintiffs therefore seek a declaration that the said Resolutions of EOGM held on 9 January 2001 are validly adopted. Additionally, Plaintiffs have also sought specific performance of Share Purchase Agreement dated 27 October 1998.

55. The prayers sought in the plaint are rather lengthy. For the sake of brevity, only substantive prayers of the Plaint in prayer clauses (a) to (g) are reproduced below:

The Plaintiffs, pray:

(a) This Hon'ble Court be pleased to declare :

(i) That the Original 1st Plaintiff owned 17,990 equity shares of face value of Rs.100/- each of the 1st Defendant company and that the Original 2nd Plaintiff owned 7,000 shares of the face value of Rs.100/- each of the 1st Defendant company, as per the particulars set out at Exhibit "A" to the plaint.



(ii) That the Authorised Share Capital of the 1st Defendant company is Rs.25,00,000/- comprised of 25,000 equity shares of Rs. 100/- each.

(iii) That the 24th Annual General Meeting of the 1st Defendant company purportedly held on 30.9.2000 was illegally / invalidly convened and that the alleged resolutions passed thereat are illegal, null and void and of no legal effect.

(iv) That the special resolution purporting to increase the Authorised Share Capital of the 1st Defendant from Rs.25,00,000/- to Rs. 1,50,00,000/- allegedly passed at the Annual General Meeting held on 30.9.2000 is illegal, null and void and of no legal effect.

(v) That the 12th Defendant had no authority to attend, participate in or vote at the Annual General Meeting of the 1st Defendant held on 30.9.2000 either on his own behalf or on behalf of the 11th Defendant and that neither the 11th nor the 12th Defendant were shareholders of the 1st Defendant company on 30.9.2000.

(vi) That the Minutes of the 24th Annual General Meeting of the 1st Defendant company held on 30.9.2000 (Exhibit 'VV') are fabricated or got up documents and are illegal, null and void.

(vii) That the following resolutions were carried at the Extra Ordinary General Meeting of the 1st Defendant held on 9.1.2001:

(A) 'RESOLVED Mr. Govind Gupta, Director of the company, be and is hereby removed from the office of the director of the company.'

(B) 'RESOLVED Mr. Ashwin Mehta, Director of the company, be and is hereby removed from the office of the director of the company.'

(C) 'RESOLVED Mr. Rajesh Khandelwal, Director of the company, be and is hereby removed from the office of the director of the company.'

(D) 'RESOLVED that Mr. Dharmil A. Bodani be and is hereby appointed as a director of the company.'

(E) 'RESOLVED that Mrs. Chandrika A. Bodani be and is hereby appointed as a director of the company.'

(F) 'RESOLVED that Mr Ashwin J. Ahya be and is hereby appointed as a director of the company.'

(G) 'RESOLVED that Mr. Bharat J. Ahya be and is hereby appointed as a director of the company.'

(H) 'RESOLVED that Mr. Bhaven H. Soonderji be and is hereby appointed as a director of the company.'

(I) 'RESOLVED that Mr. Shyamal A. Bodas be and is hereby appointed as a director of the company.'



(viii) That the 2nd Defendant, the 8th Defendant and the 9th Defendant ceased to be directors of the 1st Defendant company with effect from 9.1 2001 or such other date as this Hon'ble Court may be pleased to hold, and that they are not directors of the 1st Defendant company.

(ix) That the appointment of Defendant Nos. 12 to 15 as directors of the 1st Defendant is illegal, null and void and that the said Defendants are not directors of the 1st Defendant company.

(x) That the purported transfer of one share of the 1st Defendant company from the 10th Defendant to the 11th Defendant is illegal, null and void.

(xi) That the purported allotment of 75,000 equity shares of Rs.100/- each of the 1st Defendant company to the 11th Defendant is illegal, null and void.

(xii) That the Board of Directors Meeting purportedly held on 18.10.2000 was illegally/ invalidly convened and the alleged resolutions passed thereat are illegal, null and void and of no legal effect.

(xiii) That the resolution purporting to allot 75,000 equity shares to the 11th Defendant allegedly passed at the Board of Directors Meeting of the 11th Defendant held on 18.10.2000 is illegal, null and void and of no legal effect.

(xiv) That the resolution purportedly passed at the Board of Directors Meeting of the 1st Defendant held on 18.10.2000 appointing the 12th Defendant as a director of the 1st Defendant company is illegal, null and void.

(xv) That the Board of Directors Meeting purportedly held on 10.1.2001 was illegally / invalidly convened and that the resolutions passed thereat are illegal, null and void and of no legal effect.

(xvi) That the resolutions purporting to appoint Defendant Nos. 13 to 15 as directors of the 1st Defendant passed at the Board of Directors Meeting of the 1st Defendant held on 10.1.2001 are illegal, null and void.

(b) That Defendant Nos. 2 to 9 be ordered and decreed to specifically perform their obligations under the said share purchase agreement dated 27. 10. 1998 (Exhibit "C" hereto);

(c) In the alternative to prayer (b) hereinabove, Defendant Nos. 2 to 15 be ordered and decreed, jointly and severally, to pay to the Plaintiffs a sum of Rs.10 crores as and by way of damages together with interest on the said amount at the rate of 18% per annum from the date of the filing of the suit until payment and/ or realisation;

(d) That this Hon'ble Court be pleased to order and decree the 1st, 2nd, 8th and 9th Defendants to deliver up for cancellation the following documents and be pleased to cancel the same:

(i) The Minutes of the 24th Annual General Meeting of the 1st Defendant held on 30.9.2000, a copy whereof is hereto annexed and marked as Exhibit "VV".



(ii) The Minutes of the Extra-Ordinary General Meeting of the 1st Defendant held on 9.1.2001, a copy whereof is hereto annexed and marked as Exhibit "UU".

(iii) The minutes of the Meetings of the Board of Directors of the 1st Defendant company held on 18.10.2000 and 10.1.2001.

(e) That the Defendant No.22 be ordered and decreed by a permanent injunction not to act upon Form No. 5 (intimating increase in the share capital) filed by the 1st Defendant company on or about 14.11.2000 with the Defendant no 22, a copy whereof is hereto annexed and marked as Exhibit "LL", Form No. 23 (registering the resolution in respect of the increase in Authorised Share Capital) filed by the 1st Defendant company on or about 14.11.2000 with the Defendant No 22, a copy whereof is hereto annexed and marked as Exhibit "MM", Form No. 2 being a return of allotment filed by the 1st Defendant company on or about 14.11.2000 with the Defendant No.22, a copy whereof is hereto annexed and marked as Exhibit 00, Form No. 32 (furnishing the particulars of new directors) filed by the 1st Defendant company on or about 11.1 2001 with the Defendant No.22, a copy whereof is hereto annexed and marked as Exhibit "PP", Form No. 32 (furnishing the particulars of appointment of Defendant No. 12 a director) filed by the 1st Defendant company on or about 14.11.2000 with the Defendant No.22, a copy whereof is hereto annexed and marked as Exhibit "PP-1" respectively and if acted upon be ordered and decreed by a mandatory injunction to cancel entries passed in his records and registers on the basis of the forms;

(f) That this Hon'ble Court may be pleased to order and decree a permanent injunction restraining:

(i) The 2nd, 8th, 9th and 12th to 15th Defendants from holding themselves out as directors of the 1st Defendant or from acting as directors of the 1st Defendant;

(ii) The 2nd, 8th, 9th and 12th to 15th Defendants, their officers, agents and employees from in any manner dealing with or disposing off any of the immovable or movable properties of the 1st Defendant company (including livestock and horses);

(iii) The 2nd, 8th, 9th and 12th to 15th Defendants, their officers, agents and employees from in any manner acting on behalf of or making representations on behalf of the 1st Defendant company;

(iv) The 11th Defendant from exercising any rights as a shareholder or member of the 1st Defendant company in respect of said 75,001 shares (or any part thereof) of the 1st Defendant;

(v) The Defendant No 21 from transferring or acting upon any request relating to the sale, transfer, alienation, or creation of any third party rights whatsoever in respect of the horses registered in the name of the 1st Defendant company without the express sanction and consent of the Plaintiffs.

(vi) The 1st, 2nd, 8th, 9th, 11th to 15th Defendants from acting pursuant to or in implementation of:



(A) The resolution dated 30.9.2000 purporting to increase the share capital of the 1st Defendant from Rs.25,00,000/- to Rs 1,50,00,000/-.

(B) The allotment/transfer of 75,001 shares to the 11th Defendant;

(C) The decisions/resolutions appointing Defendant Nos. 12 to 15 as directors of the 1st Defendant.

(vii) The 2nd to the 15th Defendants, their employees, officers or agents from entering upon the property of 1st Defendant company including but not limited to the 1st Defendant's Stud Farm situate at village Shirgaon, near Somatne Phata, Mumbai Pune Highway, Maval, District Pune and from in any manner intermeddling or interfering in the affairs of the 1st Defendant company.

(g) That this Hon'ble Court may be pleased to order and decree a mandatory injunction requiring:

(i) The 2nd to 15th Defendants to hand over all documents, papers, registers, records and property of the 1st Defendant in their possession or control to the Plaintiffs or their nominees,

(ii) The 2nd, 8th, 9th, 12th to 15th Defendants to disclose on affidavit the full particulars of each and every transaction relating to the livestock / horses of the 1st Defendant entered into on or after 1.9.2000 with details in respect of the dates of the transaction, the names and addresses of the counter party, the consideration received and / or receivable, or the supporting documents executed, the particulars in of possession, etc. and to disclose all the related documents in the affidavit.

52) The learned senior advocates appearing for Plaintiffs on one side and for Defendant Nos. 2 and 11 on the other, have canvassed extensive submissions on various issues framed. In my view, though there are as many as 19 issues framed by Order dated 12 September 2011, answering the following three broad questions will provide answer to most of the issues framed by this Court:

(I) What is the exact nature of Share Purchase Agreement dated 27 October 1998? - Does it amount to sale of 24,990 shares of first Defendant Company in favour of Original Plaintiffs or was it executed only as comfort document and/or as a security for the securing loan extended by Original Plaintiffs to the some of the contesting Defendants and that it was never meant to be acted upon?



(II) Whether Defendant No.11 owned one share of the first Defendant Company as on 30 September 2000 when Annual General Meeting of the Company was held increasing the authorised share capital of the Company from Rs.25,00,000/- to Rs.1,50,00,000/-, and as on 18 October 2000 when decision was taken to convert part of the alleged debt of Defendant No.11 to Defendant No.1 into equity by allotting 75,000 shares of the First Defendant Company to Defendant No.11 ?

(III) Whether the Annual General Meeting of 30 September 2000 and the meeting of Board of Directors dated 18 October 2000 are validly held and whether the Resolutions adopted therein for increase of authorized share capital of the first Defendant Company and for allotment of 75,000 shares to Defendant No. 11, are valid?

53) In my view, either during the process of answering the above three broad questions or once they are answered, various related and consequential questions such as validity of transfer of shares in favour of Defendant No. 11, validity of EOGM dated 9 January 2001, validity of Board Meeting dated 10 January 2001 etc also get answered.

54) Before proceeding to answer the issues framed in the Suit, it would be necessary to first deal with three points raised by contesting parties about (i) non-production of original documents by contesting Defendants, (ii) incomplete evidence of PW-1 due to his death during currency of his cross-examination and (iii) failure to lead evidence of Mr. Dharmil Bodani, who was original Defendant No. 16 and is now transposed as Plaintiff No.1.

**F.1 NON-PRODUCTION OF ORIGINAL DOCUMENTS**

55) In the present case, Plaintiffs tendered either original documents or, ROC certified copies, which have been marked in evidence and there is no dispute about Plaintiffs' marked documents. However Defendant Nos. 1, 2 and 11, who filed separate Affidavits of Documents have tendered copies of various documents about which Plaintiffs have serious dispute about their admissibility in evidence. Most of the documents relied upon by the contesting Defendants are vital for the purpose of deciding the issues involved in the present case. One of the main issues involved in the present case is about correctness of defence of contesting Defendants about holding Board Meetings dated 10 August 2000, 4 September 2000 and 18 October 2000 and AGM of 30 September 2000. The authenticity of the Minutes of the said Meetings is also doubted by Plaintiffs. Notice dated 4 September 2000 about AGM of 30 September 2000 as well as the purported UCP, by which notice of the meeting was purportedly dispatched, is also doubted by Plaintiffs. Furthermore contesting Defendants have claimed filing of various documents and forms with the ROC and according to Plaintiffs, only certified copies of such documents and forms, which are certified by ROC, could be read in evidence. According to Plaintiffs, contesting Defendants could have either produced originals or at least ROC certified copies of those documents, forms etc. However, what is produced alongwith the Affidavits of Documents by the contesting Defendants are the photocopies of various documents. As observed above, in the Evidence Affidavit dated 7 December 2015, DW1 has stated in paragraph 63 as under :

“I say and submit and undertake that all the original documents shall be produced at the time of examination and as and when called by the Hon'ble Court. In the list of documents the xerox copy duly certified by the Advocate be taken on record.”



56) Relying on the above statement in the Affidavit, Mr. Sancheti has submitted that Defendant No.2 did not produce voluminous original documents alongwith the Affidavit of Evidence as well as Affidavit of Documents and made it clear that the originals were available with the witness, which were to be produced at the time of examination or as and when called by the Court. According to Mr. Sancheti, most of the disputed documents are already marked in evidence by this Court. He has relied upon judgment of the Full Bench of this Court in *Hemendra Rasiklal Ghia* (supra) in which this Court has held that party objecting to marking of documents must raise the objection at the relevant time, which enables the other side to produce original documents. According to Mr. Sancheti, once a document is marked without raising any objection, the opposite party cannot be permitted to subsequently raise any objection about non-production of original documents. In *Hemendra Rasiklal Ghia*, Full Bench of this Court held in paragraphs 74 and 77 as under :

74. In the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.

77. Thus, we hold and rule that ordinarily an objection to the admissibility of the document in first and second categories of cases (excluding third type of case) has to be taken before the document is exhibited which, necessarily,



postulates decision on the objection then and there. In other words, whether document is admissible or inadmissible is matter which should always be ruled upon at the time when the document is being proved or put in or the question asked to the witness. Such practice and procedure is fair to both parties.

57) On the contrary, Mr. Dhond has submitted that mere marking of documents as Exhibit does not mean that the document is admissible in evidence. Referring to paragraph 87 of the judgment in *Hemendra Rasiklal Ghia*, Mr. Dhond has contended that Full Bench of this Court had made it clear as under:

“We may make it clear that omission to object a document, which in itself is inadmissible in evidence, would not constitute such document in evidence. It is also duty of the Court to exclude all irrelevant evidence even if no objection is taken to its admissibility by the parties. The question of relevancy of the document being a question of law can be raised and decided at any stage of the proceedings.”

58) In *Bipin Shantilal Panchal*, the Apex Court has held in paras- 13 and 14 as under:

13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: **Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively**



as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

(emphasis supplied)

59) In *Rohit Vanmalidas Mehta* (supra), single Judge of this Court has made following observations:

Marking of a document does not imply that its authenticity or genuineness is proved. It is merely a piece of evidence, the assessment of which is to be considered in the course of the trial.

60) In recent decision of the Apex Court in *Vijay* (supra), following principles are deduced about admissibility of secondary evidence:

33. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

33.1 Law requires the best evidence to be given first, that is, primary evidence.

33.2 Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.

33.3 If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.

33.4 A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party.

33.5 When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.

33.6 Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.

33.7 When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational



evidence that the alleged copy is a true copy of the original.

33.8 Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.

33.9 Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. It has to be proved in accordance with the law.

(emphasis and underlining supplied)

61) In my view, mere marking of exhibit numbers to the documents in question by Order of this Court dated 25 July 2016 on photocopies of some of the documents produced by the contesting Defendants would not make the said documents *ipso facto* admissible in evidence. This particularly applies to crucial documents such as original Register of Members of Defendant No.1, the entire Minutes Book of the Board and General Body Meetings of the Defendant No.1, audited Balance Sheets of Defendant No.1 certified to be true by ROC, UCP dated 4 September 2000 etc. Mr. Dhond has relied upon judgment of Single Judge of this Court in *Om Prakash Berlia* (supra), in which this Court has referred to the provisions of sections 65, 74, 75, 76 and 77 of the Evidence Act and has held as under:

“Under S. 65(e), secondary evidence may be given when original is a public document within the meaning of section 74 and only a certified copy of the public document is admissible.”

62) In the present case, wherever ROC filed documents are relied upon by contesting Defendants, it was incumbent for them to produce ROC certified copies. However what is filed are only copies certified by the Advocate.

63) When it comes to original documents such as the entire Minute Book, UCP, etc., Plaintiffs raised serious doubts of their authenticity. It was



therefore incumbent for the contesting Defendants to produce originals of those documents. Mr. Sancheti has strenuously submitted that Defendants kept on carrying the originals of voluminous documents with them and were always ready and willing to offer them for inspection to Plaintiffs. In fact, Mr. Sancheti showed some of the original documents such as Minutes Book, UCP etc. to me during the course of his submissions. However, showing those original documents directly to the Court at the time of final arguments becomes irrelevant as the originals ought to have been shown to Plaintiffs during the course of evidence, so that Plaintiffs could have effectively cross-examined Defendants' witnesses relating to their doubts about authenticity of those documents. Once a party relies on a particular document and produces only photocopy thereof alongwith Affidavit of Evidence, it is a duty cast on its part to produce original of that document during the course of Trial. Such party cannot take a chance by expecting the other side to call upon the witness to produce original document. The other side, who is not relying on that document, would obviously never call upon the witness to produce the original and in the event of failure on the part of the witness to produce original, the opposite party would urge the Court not to take cognisance of photocopy while deciding the suit. Thus the party who takes the risk of filing photocopy (by submitting an undertaking to produce original), must accept the consequences of non-production of original document during the course of trial. Such party cannot later contend that the other side never called for production of original, which was always kept in pocket by the party relying on. In the present case, DW1 ought to have produced originals of all documents which are relied upon by him in his evidence. Plaintiffs are not relying on those documents such as original Minute Book, UCP, etc. and they would obviously not call for production of originals. DW1 has taken the risk of filing only photocopies alongwith Affidavit of Evidence. It was his duty to produce originals during the course of his examination. His statement in Affidavit of Evidence that originals would be produced either during examination or as and when called for by the Court is not sufficient. Inspection of original is not only for the Court but



is also for the opposite party for conduct of effective cross-examination. Also the Court may not always require production of any particular document. It is for party concerned, who relies upon a particular document, to produce original of that document. Therefore failure by opposite party to call for original or by Court to direct production of original document, would not mean that photocopy would substitute original.

64) Mr. Sancheti has relied upon Section 63 of the Evidence Act, which according to him, permits leading of secondary evidence to prove contents of a document. According to him, Section 74 does not override provisions of Section 63. However under Section 65 if the original is a public document, a certified copy of the document alone is admissible and no other secondary evidence is admissible. Section 65 provides thus:

65. Cases in which secondary evidence relating to documents may be given:
Secondary evidence may be given of the existence, condition, or contents of a document in the following cases—

- a) **When the original is shown or appears to be in the possession or power—**
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- b) **when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;**
- c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- d) when the original is of such a nature as not to be easily movable;
- e) **when the original is a public document within the meaning of section 74;**
- f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;
- g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.



In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

(emphasis supplied)

65) Thus when it comes to ROC filed documents, only its certified copies become admissible in evidence. So far as entire minute book, UCP, etc are concerned, the originals are in custody of contesting Defendants and therefore secondary evidence thereof could not have been led.

66) Mr. Sancheti has relied on Supreme Court judgment in *Union of India Vs. Imbrahim Uddin* (supra) in support of his contention that mere withholding of a document is not sufficient to draw adverse inference and that the other party must ask the party in possession of document to produce the same and its only after such demand, if the party refuses to produce the document, adverse inference can be drawn. In para 15 to 17 of the Judgment, it is held as under:

15. In *Municipal Corpn., Faridabad v. Siri Niwas* [(2004) 8 SCC 195 : 2004 SCC (L&S) 1062] this Court has taken the view that the law laid down by this Court in *Gopal Krishnaji Ketkar* [AIR 1968 SC 1413] did not lay down any law, that in all situations the presumption in terms of Illustration (g) to Section 114 of the Evidence Act must be drawn.

16. In *Srinivas Ramanuj Das v. Surjanarayan Das* [AIR 1967 SC 256] this Court held **that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn** : (AIR p. 263, para 28)

“28. ... It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that, therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list



of documents. The court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent's case.”

(emphasis supplied)

17. In *Ramrati Kuer v. Dwarika Prasad Singh* [AIR 1967 SC 1134] this Court held : (AIR p. 1137, para 9)

“9. ... It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. **An adverse inference could only have been drawn against the plaintiff-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts.**”

(emphasis supplied)

67) The judgment in *Union of India Vs. Imbrahim Uddin* would not assist the case of contesting Defendants as Plaintiffs are not suggesting that adverse inference should be drawn against them for failure to produce the original documents. In fact, Plaintiffs do not desire to rely on the documents of which photocopies are produced by the contesting Defendants. It is contesting Defendants who are relying on those documents in support of their defence. Therefore it was incumbent for them to produce originals of those documents. Since Plaintiffs do not want this Court to draw any adverse inference against contesting Defendants, failure by Plaintiffs to ask Defendants’ witness to produce originals would not mean that photocopies of those documents, in absence of production of originals, would be admissible in evidence.

68) In my view therefore, even though photocopies of various documents are marked by this Court as exhibits, the same cannot be relied upon



or treated as admissible in evidence in the light of failure on the part of the contesting Defendants to produce either originals or certified ROC copies.

69) One thing however must be clarified here. Though I have held that various documents marked as exhibits cannot be read in evidence on account of failure to produce original or ROC certified copies, it must also be clarified here that even if those documents are to be read in evidence, the same would not have any effect on the ultimate decision of the suit. It must also be clarified here that this Court has taken note of contents of some of those documents such as Minutes of the Meetings, resolution passed therein, etc. Therefore, it is not that the result of the suit is dependent only on admissibility of those documents in evidence. Even if those documents are read in evidence, the ultimate conclusions reached on various issues by this Court would still remain unaffected.

F.2 INCOMPLETE EVIDENCE OF PW1

70) Original Plaintiff No.1-Mr. Anil K. Bodani filed his Affidavit of Evidence dated 15 November 2011. His cross-examination commenced on 22 April 2014. By 30 October 2014, 10 sessions of cross-examination of PW1 were conducted on 22nd, 23rd, 28th April, 7th May, 19th June, 8th, 25th July, 22nd September, 7th October and 30th October 2014. In those 10 sessions of cross examination, he was put to as many as 478 questions. According to the contesting Defendants, the cross-examination of PW1 remained incomplete. On 20 December 2014, PW1 passed away. According to contesting Defendants, since cross-examination of PW1 was not complete as on 20 December 2014, his evidence is required to be discarded on account of non-grant of full and complete opportunity to them to cross-examine PW1. On the other hand, it is the contention of Plaintiffs that PW1 has been extensively cross-examined on all crucial points of dispute and that therefore the evidence led by PW1 is entirely



admissible. Both sides have relied upon various judgments on this issue. Plaintiffs have relied upon judgment of the Delhi High Court in *Krishan Dayal* (supra) in which DW2 therein died before he could be subjected to cross-examination. The issue before Delhi High Court was whether the statement of DW2 therein was admissible and if so, what weight could be attached to a statement in case the witness dies before cross-examination. After considering various decisions on the subject, Single Judge of the Delhi High Court held as under :

I have given the matter my consideration and am of the view that the statement of a witness in examination-in-chief, which was admissible at the time it was recorded, cannot become inadmissible by reason of the subsequent death of the witness before cross-examination. The absence of cross-examination would undoubtedly affect the value and weight to be attached to the statement of the witness, but it would not render the statement inadmissible, or result in its effacement. So far as the question is concerned as to what weight should be attached to such statement made in examination-in-chief the Court has to keep in view the facts and circumstances of each individual case. Some of the factors, which may be borne in mind are the nature of the testimony, its probative value, the status of the witness, his relationship or connection with the parties to the case, a likely animus which may colour his statement and any other factor touching the credibility of the witness which may emerge on the record. Regard must also be had to the fact that the witness has not been subjected to cross-examination. The Court should see whether there are indications on the record that as a result of cross-examination his testimony was likely to be seriously shaken or his good faith or credit to be successfully impeached. The Court may also adopt a rule not to act upon such testimony unless it is materially corroborated or is supported by the surrounding circumstances. If after applying that rule of caution, the Court decides to rely upon the statement of a witness who was examined in chief, but who died before cross-examination, the decision of the Court in this respect would not suffer from any infirmity.

71) Mr. Sancheti is quick enough to highlight the observation of Delhi High Court in *Krishan Dayal* that absence of cross-examination affects value and weight to the statement of the witnesses. He has further submitted that in the present case, testimony of PW1 is not corroborated, which could have been done by Plaintiff No.1-Dharmil Bodani (son of PW1) who failed to step into witness box despite being aware of facts of the present case.



72) Mr. Dhond has also relied upon judgment of the Single Judge of this Court in *Banganga Co-operative Housing Society Ltd.* (supra) in which this Court has held that mere incomplete testimony by reason of death or incapacity of the witness before cross-examination does not render the evidence inadmissible. This Court has further held that what probative or evidentiary value is to be attached to such evidence would depend on facts of each case.

73) Mr. Dhond has also relied upon judgment of Single Judge of Kerala High Court in *Food Inspector* (supra) where PW1 had expired before he could be cross-examined. It is held in paragraph 12 of the judgment as under :

12. The general proposition that the evidence of a witness who is not subjected to cross-examination cannot be looked into, cannot be disputed. But the question to be considered in this case is whether the evidence of PW 1 who was examined in chief and was not available for cross-examination due to his death in the meanwhile, is admissible in evidence or not. The principles laid down in the decisions relied upon by the counsel for the appellant referred to above clearly establish that the evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of the case. Therefore, the lower court is not at all justified in discarding the evidence of PW 1 on the ground that he was not available for cross-examination and therefore, great prejudice will be caused to the respondents if his evidence is accepted.

74) On the other hand Mr. Sancheti has relied upon judgment of Allahabad High Court in *Narsingh Das* (supra), in which it is held as under :

In that state of affairs Musammat Chandrawal died on the 19th of February, 1922- it is said she died of plague. The plaintiff naturally wished that evidence to be used in the lower court and here. It was excluded in the lower court and we have been obliged to exclude it here, being guided by the decision which is reported in *Boisagomoff v. The Nahapiet Jute Company* and on a consideration of the terms of section 33 of the Evidence Act, and we have had to decide that the evidence cannot be received because the evidence was not concluded. That is to say, although her examination-in-chief was concluded, it was open to the defendants to argue that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence-in-chief, and therefore one could not take an incomplete deposition of the lady and pay any attention to it. We have no doubt that the argument put forward by the defendants was a good argument, and we did decide to exclude her incomplete statement, and it has not been presented to us.



75) The judgment in *Narsingh Das* (supra) has been followed by Single Judge of Allahabad High Court in *Varun Agarwal* (supra). To distinguish the judgment in *Narsingh Das*, Mr. Dhond in Rejoinder has relied upon judgment in *Ahmad Ali and others V/s. Joti Prasad and another*⁵¹ wherein the judgment of *Narsingh Das* has been noted and it is held that there is a difference between rejecting evidence on the ground of inadmissibility and ignoring it on the ground of it being not believable. Mr. Dhond has also relied upon judgment of Calcutta High Court in *Dever Park Builders Pvt. Ltd. and others V/s. Smt. Madhuri Jalan and others*⁵² which has taken note of both the judgments in *Narsingh Das* (supra) and *Ahmad Ali* (supra) and has followed the latter. According to Mr. Dhond the view in *Ahmad Ali* (supra) is further followed by Andhra Pradesh High Court in *Somagutta Erapa Reddy and another V/s. Palapandla Chinna Gangappa and others*⁵³. Mr. Dhond has also relied upon judgment of the Apex Court in *Satnam Singh V/s. Sadhu Singh*⁵⁴ in which it is held in paragraph 6 as under :

"6. So far as the question whether the plaintiffs failed to prove the agreement for sale is concerned, the first appellate court as well as the High Court rejected the evidence of the plaintiffs on irrelevant ground. It has come on evidence on record that Teja Singh, one of the attesting witnesses, after his examination-in-chief died and, therefore, he could not put up for cross-examination. Under such circumstances, the evidence of Teja Singh could not have been excluded. Similarly, the evidence of Jagdish Singh Uppal, the scribe, ought not to have been rejected on the ground that he did not know the parties personally. We are, therefore, of the opinion that the view taken by the High Court in rejecting the plaintiffs' evidence was erroneous.

76) After taking stock of various decisions cited by both the sides, it is seen that there is no hard and fast rule that in every case wherever witnesses dies

⁵¹ AIR 1944 ALL 188.

⁵² AIR 2002 Cal 281.

⁵³ 2001 SCC OnLine AP 1322.

⁵⁴ (2010) 15 SCC 335.



before completion of cross-examination, his evidence is required to be discarded altogether. It is for the Court to decide what weight and value is to be attached to the statements made in the evidence. In the present case, as observed above, PW1 has been extensively cross-examined on behalf of Defendant No.2 in 10 sessions held during 22 April 2014 to 30 October 2014 by asking him as many as 478 questions. His cross-examination runs into 118 pages. In my view therefore, PW1 has been substantially cross-examined at the behest of the contesting Defendants. Though it is sought to be urged that Defendant No.11 could not cross-examine PW1, considering the main issue involved in the present suit about validity of conduct of three Board Meetings and one AGM (in which Defendant No.11 did not have much role to play), denial of opportunity of cross-examination to Defendant No.11 would not render the testimony of PW1 inadmissible in evidence. It is also required to be noted that most of the case of the Plaintiffs is based on documentary evidence particularly the SPA dated 27 October 1998. The nature of SPA is disputed by contesting Defendants and they sought to lead evidence to prove that the same does not amount to sale of shares and was executed merely as security for loan. Similarly it is the case of the contesting Defendants that authorised share capital of the First Defendant Company was increased to Rs.1.50 crores and that 75,000 shares were allotted to Defendant No.11 towards conversion of debt into equity. All the documents in this regard are relied upon by Defendants. In that view of the matter, even if cross-examination of PW1 is treated as incomplete, the same would not be a ground for discarding his evidence altogether.

77) It must also be noted that in the present case, both the parties seem to have adopted the course of subjecting witnesses to unending cross-examinations. While PW1 was subjected to 478 questions before his death, Plaintiffs can also be accused of similar conduct as they subjected DW1 to long and unending cross-examination running into 1153 questions, running into 206



pages. Such practice of subjecting witnesses to unending cross-examination is required to be deprecated, as the same results in wastage of Court's valuable judicial time as well as delay in decision of proceedings. Though in the present case, most of the cross-examinations are conducted before a Court Commissioner, mere appointment of Court Commissioner for conduct of cross-examination does not mean that parties can go on asking unending questions to witnesses making the task of Court difficult to locate the relevant portion in the evidence. In the present case, the incomplete cross-examination of PW1 runs into 118 pages, whereas the cross-examination of DW1 has been extended to as many as 206 pages. Both the parties have thus expected this Court to run through hundreds of pages of cross-examination to locate the relevant part thereof. This is the reason why this Court is of the view that the course of action adopted by the parties to the present suit in conducting unduly long cross-examination of witnesses is required to be deprecated.

78) Be that as it may. After having considered the cross-examination of PW1, I am not inclined to discard his testimony altogether.

F.3 FAILURE TO EXAMINE MR. DHARMIL BODANI AS WITNESS

79) Mr. Sancheti has contended that after evidence of PW1 remained incomplete due to his demise, it was possible for Mr. Dharmil Bodani, his son and who got himself transposed as Plaintiff No.1, to enter the witness box to fill up the gap in evidence. However Mr. Dharmil Bodani did not come forward as witness despite he claiming to have personal knowledge of various events narrated in the Plaint as well as in the evidence of PW1. According to Mr. Sancheti, Mr. Dharmil Bodani was always a party to the suit (earlier as Defendant No.16 and now as Plaintiff No.1). It is contended that in the Plaint, it is averred that (i) Mr. Dharmil Bodani held alleged meeting in November 2000 with Defendant No.2 and a specific Issue No.6 has been framed in this regard, (ii)



that Original Plaintiff No.1 had given Power of Attorney to Mr. Dharmil Bodani to take various steps on his behalf, (iii) that Mr. Dharmil Bodani signed notice dated 7 December 2000 requisitioning EOGM, (iv) that he gave public notices on 17 and 18 December 2000, (v) that report of 21 November 2000 was sent by Mr. Bharat Pathak to Mr. Dharmil Bodani, (vi) that he lodged police complaints etc. According to Mr. Sancheti, adverse inference needs to be drawn against Plaintiffs for having withheld evidence of Mr. Dharmil Bodani. Reliance in this regard is placed on judgment of the Apex Court in *Iswar Bhai C. Patel* (supra), in which the Apex Court has held in paragraphs 22 to 28 as under :

22. This decision has since been relied upon practically by all the High Courts. The Lahore High Court in *Kirpa Singh v. Ajaipal Singh* observed as under:-

"It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into the witness-box. Plaintiffs were the best persons to give evidence as to the "interest" possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."

23. This decision was also relied upon by the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh* which observed as under:-

"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

24. The Lahore High Court in two other cases in 1934, namely, *Bishan Das v. Gurbakhsh Singh* and *Puran Das Chela v. Kartar Singh* took the same view.

25. A Division Bench of the Patna High Court in *Devji Shivji v. Karsandas Ramji* relying upon the decision of the Privy Council in *Sardar Gurbakhsh Singh v. Gurdial Singh* and the Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat* have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in *Pranballav Saha v. Tulsibala Dassi* :

"The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny.

26. The Allahabad High Court in *Arjun Singh v. Virendra Nath* held that :



"The explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court would not imagine an explanation which a party himself has not chosen to give."

27. It was further observed that:

"If such a party abstains from entering the witness-box it must give rise to an inference adverse against him."

28. A Division Bench of the Punjab & Haryana High Court also in *Bhagwan Dass v. Bhishan Chand* drew a presumption under Section 114 of the Evidence Act that if a party does not enter into the witness box, an adverse presumption has to be drawn against that party.

80) On the contrary, Mr. Dhond has contended that the entire case of the Plaintiffs is based on the nature of transaction in the SPA and the validity of Board and AGM meetings of Defendant No.1-Company to which Mr. Dharmil Bodani was not a party. Perusal of various findings recorded above would indicate that the whole controversy between the parties revolve around two important aspects viz. (i) the nature of the transaction that took place between the parties on 27 October 1998, and (ii) validity of meetings conducted on 10 August 2000, 4 September 2000, 30 September 2000 and 18 October 2000. It is not the case of the Defendants that Mr. Dharmil Bodani had any role to play with regard to either of the two controversies. He is not party to the SPA nor he had any capacity to attend any of the four Board Meetings. Merely because Original Plaintiff No.1 executed Power of Attorney in favour of Mr. Dharmil Bodani, the same did not mean that it was incumbent for him to depose before this Court with regard to above two controversies. The subsequent actions taken by Mr. Dharmil Bodani after discovery of the actions taken by the contesting Defendants of unauthorizedly increasing share capital of First Defendant Company, allotment of 75,000 shares to Defendant No.11, reduction of stake of Original Plaintiffs from 99.96% to 24.99%, etc does not mean that evidence of Mr. Dharmil Bodani was either relevant or vital for deciding the issue of validity of the aforesaid actions. Reliance of Mr. Sancheti on illustration in clause (g) of Section



114 of Evidence Act is misplaced as presumption of evidence of Mr. Dharmil Bodani being unfavourable to Plaintiffs cannot be drawn in the facts and circumstances of the present case. In my view therefore, failure on the part of the Plaintiffs to lead evidence of Mr. Dharmil Bodani is inconsequential.

F.4 NATURE OF THE SHARE PURCHASE AGREEMENT DATED 27 OCTOBER 1998.

(ISSUE NOS. 1 & 2)

81) As observed above, the first Defendant Company was originally incorporated in the name of '*Clover Agricultural and Farming Company Pvt. Ltd.*', whose name was changed on 12 October 1993 to '*Manju Meadows Pvt. Ltd.*'. It is common ground that the main, and possibly the only, asset of the first Defendant Company is '*Manju Meadows Stud Farm*' spread over 101.07 acres at Village-Shirgaon, Taluka-Maval, District-Pune. At the relevant time, shares of first Defendant Company were owned by Gupta Family comprising Defendant Nos.2 to 7. Mr. Ashwin Mehta-(Defendant No.8) and Rajesh Khandelwal (Defendant No.9), in addition to Defendant No. 2, were directors of the Company. It is also common ground that Defendant No.10-Ajit Investments (partnership firm), as well as Defendant No.11-Somerville Farm Pvt. Ltd. (private limited company) are also group concerns of Gupta Family. There is a dispute about ownership of shares by Defendant No.11-Somerville, which is being dealt with separately.

82) Family friendship between original Plaintiffs and Defendant Nos. 2 and 3 as well as common horse racing interests of original Plaintiff No. 1 and Defendant No. 2 appear to be the main reason why the transaction in question has taken place. According to Plaintiffs, third Defendant-Manju Gupta was considered as *Rakhi* sister of original Plaintiff No.1-Anil Bodani. It is Plaintiff's case that Mr. Govind Gupta had approached Mr. Anil Bodani seeking his help to



sell his and his family's stake in the first Defendant Company in order to take care of financial constraints and at that stage, Mr. Anil Bodani suggested that he himself would purchase the stake of Gupta Family in the first Defendant Company. Accordingly, a resolution was adopted by the Board of Directors of the first Defendant Company on 23 October 1998 resolving to sell 24,990 shares by all shareholders of the Company in favour of the original Plaintiffs.

83) There is great deal of debate between the parties about the assets of the first Defendant Company as on the date of execution of the Share Purchase Agreement. While Plaintiffs contend that the land admeasuring 101.07 acres at Village-Shirgaon, Taluka-Maval, District-Pune was the only asset of the Company, Defendant Nos.1 to 11 contend that what the first Defendant Company owned was a well-developed and landscaped stud farm comprising of thousands of trees, various kind of horses, equipment etc. This factual controversy is being dealt with in latter portion of the judgment while dealing with the issue of undervaluation of sale. There is no dispute to the position that by Resolution dated 23 October 1998 (Exhibit P-6), the first Defendant Company resolved to sell 24,990 shares to the Original Plaintiffs.

F.4.1 COVENANTS OF SPA

84) On 27 October 1998, Share Purchase Agreement was executed which was signed by Defendant Nos. 2 to 7 in their capacity as shareholders of the first Defendant Company in favour of the Original Plaintiffs (Anil K. Bodani and Chandrika A. Bodani). Defendant Nos. 2, 8 and 9 are confirming parties to the SPA, in their capacity as directors. By SPA executed on 27 October 1998, the 'First Party' sold in favour of the 'Second Party', equity stake representing 99.96% of paid-up equity share capital of the first Defendant Company for sum of Rs.29,98,800/-. Clause-2.5 of the SPA gives the details of 24,990 shares owned



by the First Party which are shown to have been sold in favour of the Second Party. It would be relevant to reproduce some of the important clauses of the SPA.

THIS SHARE PURCHASE AGREEMENT (hereinafter referred to as the "SPA" of the "Agreement") is made on this 27th day of October 1998.

BY AND BETWEEN:

Mr. Govind Gupta, Mrs. Manju Gupta, Miss Radhika Gupta, Miss Meera Gupta, Mr. Akshat Gupta, Mr. Vikram Gupta, all existing Shareholders of Manju Meadows Pvt. Ltd. a company incorporated under the Companies Act, 1956 having its registered office at Metro House, 2nd floor, Mahatma Gandhi Road, Bombay 400 020 hereinafter collectively referred to as "the First Party" (which expression shall, unless repugnant to the context or meaning hereof, be deemed to include their respective heirs, legal representatives, executors and administrators) of the One Part.

AND

Mr. Anil K. Bodani & Mrs. Chandrika A. Bodani both of Mumbai Indian Inhabitant, residing at 51 Elcid, B.G.Kher Marg, Bombay 400 006 hereinafter referred to as "the Second Party" (which expression shall unless repugnant to the context or meaning hereof, be deemed to include their respective legal representatives, executors, administrators and permitted assigns) of the Other Part.

AND

Mr. Anil K. Bodani, residing at 51 Elcid, B.G.Kher Marg, Bombay 400 006, hereinafter referred to as "the Third Party" (which expression shall, unless repugnant to the context or meaning hereof, be deemed to include his legal representatives, executors, administrators and assigns) of the Third Part.

AND

Mr. Govind Gupta, residing at 11/2, Mont Blanc Apts., Dadyseth Hill, August Kranti Marg, Bombay 400 036, Mr. Ashwin B. Mehta, residing at 27/A, Shangrila, Carmichael Road, Bombay 400 026, Mr. Rajesh R. Khandelwal residing at B-1201, Bhavani Complex, 62 Bhavani Shankar Road, Dadar (W), Bombay 400 028 all Directors of Manju Meadows Pvt. Ltd. having its Registered office at Metro House, 2nd floor, Mahatma Gandhi Road, Bombay 400 020 hereinafter collectively referred to as "Confirming Parties" (which expression shall, unless repugnant to the context or meaning hereof, be deemed to include their heirs, legal representatives, executors, administrators and permitted assigns);

WHEREAS, the First Party are holding 100% equity share in Manju Meadows Pvt. Ltd. a company incorporated under the Companies Act, 1956, having Registered office Metro House, 2nd floor, Mahatma Gandhi Road, Bombay 400 020 (hereinafter referred to as "MMPL");



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WHEREAS, MMPL is engaged in business of farming and breeding of live stock;

WHEREAS, the Second Party is desirous to purchase the paid up and subscribed capital of MMPL owned by the First Party and the First Party herein has agreed to sell the said shares being the paid up capital and subscribed capital of MMPL owned by the First Party.

WHEREAS, the Second Party is desirous of appointing the Third Party as a Director of MMPL after the said purchase of shares with the Confirming Parties to continue as Directors of MMPL for the time being.

WHEREAS, the parties hereto, upon the basis of the representations and warranties, in consideration of the mutual covenants set forth herein and subject to the terms and conditions set forth in this Agreement agree as follows:

NOW THIS AGREEMENT WITNESSETH AS UNDER:

ARTICLE I

DEFINITIONS AND INTERPRETATION

1.1 Definitions.

In this Agreement, unless the context otherwise requires, the following expressions enumerated herein shall have the following meaning:

- a) "Agreement" or "SPA" means this Share Purchase Agreement entered into between the parties hereto on this 27th day of October 1998:
- b) "Equity Stake" shall mean the entire share holding of the First Party i.e.99.96% of the existing paid up and subscribed share capital of MMPL;
- c) "First Party" shall mean Mr. Govind Gupta, Mrs. Manju Gupta, Miss. Radhika Gupta, Miss. Meera Gupta, Mr. Akshat Gupta and Mr. Vikram Gupta and Ajit Investments, a Partnership firm under the Indian Partnership Act, 1932, and Somerville Farms Pvt. Ltd, a company incorporated under the Companies Act, 1956, both having their registered office address at Metro House, 2nd Floor, M.G.Road, Bombay - 400 020.

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ARTICLE II

PURCHASE AND SALE OF EQUITY STAKE

2.1 The First Party hereby sell and the Second Party hereby purchases the equity stake representing 99.96% of the paid up equity share capital of MMPL in the manner and on such terms and conditions as hereinafter contained.

2.2 In consideration of sale of the entire equity stake by the First Party a sum of Rs.29,99,800/- (Rupees Twenty Nine Lakhs Ninety Eight Thousand Eight Hundred only) has been paid by the Second Party to the First Party (receipt whereof the First Party doth hereby admit and acknowledge).

2.3 After the acquisition of the Equity Stake, the Second Party shall be entitled to and shall receive all rights and privileges, of any nature whatsoever, declared, issued or delivered in respect of the Equity Stake and any and all other rights attaching thereto.



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2.4 After the acquisition of the Equity Stake, the Second Party shall, as incidental to the ownership of the shares, be entitled to full use, right, title and interest in 101.7 acres of land situate at Village Shirgaon, Taluka Maval, District Pune more particularly described in Schedule "A" hereunder written (hereinafter referred to as "the said lands"), approximately 55.975 acres of which are mortgaged with the Shamrao Vithal Co-operative Bank Ltd.

2.5 The First Party have represented that the Equity Stake is currently held jointly by them in MMPL as follows :

S.No.	Name of Shareholder	Share Certificate No.	Distinctive Nos.	No. of Shares
1.	Mr. Govind Gupta	54 to 69	15001-19000	4000
2.	Mrs. Manju Gupta	1	1	13490
		2	2	
		3	3-152	
		4	153-252	
		5	253-377	
		6	378-502	
		19	1003-1500	
		20	1501-2990	
		23	3251-4750	
		26	5001-6000	
		27	6001-7000	
		28	7001-8000	
		29	8001-9000	
		34 to 43	10001-12500	
		70 to 81	19001-22000	
3.	Miss Radhika Gupta	12	3241-3250	1250
		22	3111-3230	
		25	4871-4990	
		30	9001-9250	
		44	12501-12750	
		82 & 83	22001-22500	
4.	Miss Meera Gupta	14	4991-5000	1250
		21	2991-3110	
		24	4751-4870	
		31	9251-9500	
		44	12751-13000	
		84 & 85	22501-23000	
5.	Mr. Akshat Gupta	18	753-1002	2500
		33	9751-10000	
		46 to 49	13001-14000	
		86 to 89	23001-24000	
6.	Mr. Vikram Gupta	17	503-752	2500
		32	9501-9750	
		50 to 53	14001-15000	
		90 to 93	24001-25000	
				24990



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2.7 Annexed hereto as Annexure "1" is a copy of the audited Balance Sheet of MMPL dated 31st March, 1998. The First Party doth hereby confirm that the said audited Balance Sheet of MMPL dated 31st March 1998 gives a true and fair view of the state of affairs of MMPL as at 31st March, 1998 and the results of MMPL for the financial year ended on 31st March, 1998.

ARTICLE III

PAYMENT FOR EQUITY STAKE

3.1 The First Party hereby admits and acknowledges payment for the shares being transferred by the First Party to the Second Party in full and final settlement of the account under which a sum of Rs 29,98,800/- (Rupees Twenty Nine Lakhs Ninety Eight Thousand and Eight Hundred only) has been paid by the First Party to the Second Party.

ARTICLE V

MANAGEMENT OF MMPL-BOARD OF DIRECTORS

5.1 On the date of execution and delivery hereof, the boards of MMPL shall be reconstituted as follows:

- 1) The board of directors of MMPL shall meet and approve the following items:
 - a) Re-confirm the transfer of Equity Stake;
 - b) Appoint the Third Party, Mr. Anil K. Bodani as Director of MMPL;

5.2 All decisions in respect of the management and running of MMPL shall be taken by the Board of Directors of MMPL with the concurrence of the Third Party.

5.3 The Confirming Parties shall appoint such further persons as Directors of MMPL as the Second Party shall so direct.

5.4 The Confirming Parties shall forthwith submit their resignation from the Board of Directors of MMPL as and when the Second Party shall so direct.

10.9 Entire Agreement.

This Agreement and the agreements expressly contemplated hereby constitute the entire agreement and understanding between the parties, and supersede all prior agreements, whether oral or written, between the parties with respect to the subject matter hereof and thereof. No rights are created by this Agreement and any of the documents contemplated hereby that are not expressly set forth herein or therein.

85) Bare perusal of the SPA dated 27 October 1998 shows that what it effected was 'sale' of 99.96% of paid-up equity share capital of the first Defendant Company representing 24,990 shares with distinctive numbers indicated in the SPA by the 'First Party' in favour of the 'Second Party'. However, the



contesting Defendants have raised a defence that the SPA was executed only by way of security and that the same was never meant to be acted upon. It is the case of the contesting Defendants that the loan of Rs.1.20 crores was advanced by the original Plaintiffs to Defendant Nos. 1 to 3 and the SPA was therefore executed only for the purpose of comfort and security for such loan. This defence was raised by contesting Defendant Nos.1 to 3 in letter dated 21 November 2000 in which details of alleged loan of Rs.1.20 crores, split into various parts, were given contending that various documents executed on 27 October 1998 including SPA were handed over to Original Plaintiffs for the limited purpose of giving them a sense of security and to satisfy their advisors that they were fully secured about repayment of such loan. It is on account of this defence taken by the contesting Defendants that the whole dispute about the nature of transaction effected by SPA dated 27 October 1998 has erupted.

86) If contesting Defendants succeed in proving that SPA was never meant to be for sale of any shares of the first Defendant Company to the Original Plaintiffs, Plaintiffs would have no shareholding in the first Defendant Company and the entire suit will have to be dismissed. On the contrary, if the said defence of the contesting Defendants gets demolished, SPA will have to be read to mean what it records viz. 'sale' of 24,990 shares of the first Defendant Company in favour of the original Plaintiffs. In that event, Plaintiffs would become owners of the first Defendant Company leaving only 10 shares as on 27 October 1998 to be owned by Defendant Nos. 2 and 10/11. Therefore, Plaintiffs' case of gaining virtually total control over the first Defendant Company on the strength of ownership of 99.96% stake in its equity share capital hinges on demolition of defence of the contesting Defendants about SPA being a mere document executed towards security.



87) As observed above, various covenants of Share Purchase Agreement undoubtedly show the nature of transaction to be 'sale' of 24,990 shares, which is sought to be disproved by contesting Defendants by leading parole evidence. The issue is therefore whether such parole evidence can be led to disprove what is stated in a written contract.

88) It would be first necessary to refer to pleadings of contesting Defendants about the nature of SPA. Contesting Defendants have claimed that SPA was executed only as security for repayment of loan and was never intended to mean actual sale of shares to original Plaintiffs. In paragraph 44 of his Written Statement Defendant No.2 has averred that '*the Share Purchase Agreement dated 27 October 1998 was entered into only as and by way of comfort and as one of the various security document for the repayment of amounts loaned by Plaintiffs to Defendant Nos.1 to 7*'. However this defence goes completely against admission given by Defendant No.2 in paragraph 10 of the Written Statement wherein it is averred that "*the Defendants says that the aforesaid is totally erroneous inasmuch on the date of filing of the suit Plaintiffs hold only 24.99% shares of the 1st Defendant Company*'. Similar admission is given by Defendant No.1 in its Written Statement wherein it is averred in paragraph 1 that "*This Defendant says that the current shareholding of the Plaintiffs in this Defendant is 24.99% and not 99.96% as alleged*". The admission given by Defendant Nos.1 and 2 about Plaintiffs owning 24.99% shares of the first Defendant Company clearly belies their contention that SPA was executed only as a comfort document and towards security for repayment of loan.

89) Plaintiffs have relied upon Section 92 of the Evidence Act and '*Entire Agreement Clause*' of SPA in support of their contention that no extrinsic evidence can be led to disprove what is documented in the form of the SPA. It would therefore be necessary to consider effect of Section 92 of Evidence Act and



of '*Entire Agreement Clause*' for deciding the issue of nature of transaction effected between the parties on 27 October 1998.

F.4.2 PERMISSIBILITY TO LEAD PAROLE EVIDENCE INCONSISTENT WITH WRITTEN CONTRACT

90) It is Mr. Dhond's contention that since the transaction of sale of shares is reduced in the form of writing, contesting Defendants are precluded from leading oral or parole evidence which is inconsistent with SPA. He has relied on provisions of Sections 91 and 92 of the Indian Evidence Act, 1872, which provide thus:

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.- When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.- Wills admitted to probate in India may be proved by the probate.

Explanation 1.- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.- Where there are more originals than one, one original only need be proved.

Explanation 3.- The statement, in any document whatever, or a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or



their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms :

Proviso (1). - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). - Any fact may be proved which shows in what manner the language of a document is related to existing facts.

91) Thus, under Section 91, if terms of a contract are reduced to a form of a document, no evidence can be given in proof of the terms of such contract, except the document itself. Section 92 provides that once the terms of contract are proved by proving the document under Section 91, no evidence of any oral agreement or statement is admissible with regard to such document for the purpose of contradicting, varying, adding or subtracting from its terms.

92) In the present case, execution of SPA dated 27 October 1998 has been proved. Contesting Defendants do not dispute execution of SPA. Thus, on plain reading of provisions of Sections 91 and 92 of the Evidence Act, upon execution of SPA being proved, no oral evidence can be led for the purpose of contradicting the covenants of the said SPA. As against this, it is the contention



of the contesting Defendants that law permits leading of oral evidence to prove that executed documents were not for the purpose of which it is shown to have been effected, as well as for the purpose of proving that the exact nature of transaction executed between the parties. Both the sides have relied upon various judgments in support of their respective contentions.

93) In *Vimal Chand Ghevarchand Jain* (supra), the Apex Court has held in paras-22, 31, 32, 33, 36 and 37 as under:

22. The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him by the learned Trial Court. (See *Kamakshi Builders v. Ambedkar Educational Society*.)

31. **Indisputably when a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible.** (See *R. Janakiraman v. State*, SCC para 24; *Roop Kumar v. Mohan Thedani*, SCC para 19; and *SBI v. Mula Sahakari Sakhar Karkhana Ltd.*, SCC paras 23 to 32.) We would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document. But, in our opinion, he did not discharge the burden of proof in respect thereof which was on him. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent.

32. The Respondent paid certain amount by cheque towards the licence fee. It was for him to show on what account the money was paid. Only because the parties had other transactions by itself was not sufficient to hold that the defendant has discharged his onus. If the sum of Rs.50,000/- was the amount of loan wherefor the deed of sale was executed by way of security, having regard to his admission that the firm is an income-tax payee and maintains books of account in regular course of business, failure on his part to produce any documentary evidence merited drawing of an adverse inference. Why he did not examine himself before the trial court or before the appellate court? He should have furnished an explanation in this regard to prove his plea. Why he failed to produce documentary evidence had also not been explained.



33. The approach of the first appellate court in relying upon certain circumstantial evidence was also of no use. Why the plaintiffs have purchased the properties at Village Saikheda or why they had allowed another tenant to continue were not decisive far less relevant for construction of a document. The first appellate court had arrived at a conclusion first and then started to assign reasons in support thereof. It, as indicated hereinbefore, did not pose unto itself the correct questions. Apart from wrongly placing the burden of proof on the plaintiff, even adverse inference against the defendant had not been drawn. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security.

36. If the appellants were able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that apparent state of affairs was not the real state of affairs. It was for the defendant in a case of this nature to prove his defence. The first appellate court, therefore, in our opinion, misdirected itself in passing the impugned judgment insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration.

37. **A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance.** The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. The judgment of the first appellate court was, therefore, perverse. The High Court, thus, failed to consider the real dispute between the parties.

(emphasis and underlining supplied)

94) Thus, in *Vimal Chand Ghevarchand Jain*, the Apex Court has held that if the Defendant asserts that the document is not for sale and that the true nature of transaction was that of loan, the onus of proof to prove such defence is on Defendant and that the burden of proof on Defendant was heavy. Mr. Sancheti has sought to rely upon observations of the Apex Court in para-31 of the judgment in support of his contention that when the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. Though the Apex Court has held so in para-31, in latter portion of the judgment



in para-37, the Apex Court has held that the case did not involve a situation where parties did not intend to enter into any transaction at all and the dispute was about its nature. The Apex Court has further held that a distinction must be borne in mind in regard to nominal nature of transaction which is not a transaction in the eyes of law at all and the nature and character of transaction as reflected in the Deed of Conveyance. The Apex Court therefore held that the construction of the Deed clearly showed that it was a deed of sale and not a transaction of loan. Thus, in my view, extrinsic evidence in the form of oral evidence is admissible essentially to prove the factum of parties entering into the transaction or not. This aspect is more particularly discussed by the Apex Court in its judgment in *Gangabai* (supra), wherein the Apex Court, by referring to the judgment of Court of Appeals in *Thagaraja Mudaliyar* (supra), has held in para-11 as under :

11. The next contention on behalf of the appellant is that sub-section (1) of Section 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parole evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-section (1) of Section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to Section 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party, want or failure of consideration, or mistake in fact or law. **It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction**



recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties (*Tyagaraja Mudaliyar V. Vedathanni*). The Trial Court was right in permitting the respondent to lead parole evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the parole evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail.

(emphasis supplied)

95) In *Thagaraja Mudaliyar*, which is referred to in *Gangabai*, Privy Council has dealt with case of a Hindu widow who, after death of her husband, signed a document evidencing the undivided status of her husband and his brother and making provision for her maintenance. She later alleged that she was induced to sign the document on verbal assurance by the brother that the document was only intended to create evidence of undivided status of family and that provision for maintenance was not part of the contract. After having received nothing in maintenance, she brought action for arrears of maintenance. The factual background is set out in the judgment as follows:

On his death in December, 1912, his elder brother, Somasundara, took control, had the body removed to his own house for funeral rites, and locked up the other house in which there was a box containing jewels of which the widow had the key. The widow, who went to live with him, disclaimed any intention of setting up a case of separation; but there was always the possibility that her relations might persuade her to change her mind; and at his request she agreed to sign a document evidencing the undivided status of the family. He proceeded at once to have a deed of settlement drawn up by which, from that day onwards, she was to have the jewels in her possession, as set out in the schedule A, with full powers of alienation; and as soon as she decided to live apart from him, she was to enjoy for her life the income of the lands and to live in the house mentioned in schedule B. In consideration of this provision she relinquished her claims for maintenance. The annual income of the lands set apart for her was between Rs. 2000 and Rs. 2500, only Rs 200 a month; and, as regards the house in Bazaar Street, Tiruvarur, the plaintiff stated in her evidence that people of her status and condition of life could not live there at all.



There are concurrent findings of the Courts below that, when this document was presented to her three days after her husband's death, she refused to sign it, and was only induced to do so two days later by representations that it would not be acted on, and was only intended to provide evidence of the undivided status of the family. It was held by both Courts on these facts that there was no agreement and therefore no contract.

96) The main question before the Privy Council in *Thagaraja Mudaliyar* was whether oral evidence was admissible in view of Section 92 of Evidence Act to prove facts inconsistent with the terms of the document in question. The Privy Council held as under:

When a contract has been reduced to the form of a document, s. 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself, unless otherwise expressly provided in the Act, and s. 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Sect. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on s. 91, which only excludes oral evidence as to the terms of a written contract. **Clearly, under that section, a defendant sued, as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery.** In their Lordships' opinion oral evidence in disproof of the agreement (1.) that, as in *Pym v. Campbell*, the signed document was not to operate as an agreement until a specified condition was fulfilled, or (2.) that as in the present case, the document was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence of some other matter, stands exactly on the same footing as evidence that the defendant's signature was forged.

In *Pym v. Campbell* the defendants were sued upon a written contract to purchase an invention, and Lord Campbell had ruled at the trial that on the plea denying the agreement oral evidence was admissible that it had been agreed between the parties before they signed that there was to be no agreement until the invention was approved by A. In his judgment discharging the rule nisi for a new trial, Lord Campbell said (1): "It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement." Erle J. who gave judgment first had dealt more fully with this question (1): "the point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional : and if that had been so it would have been wrong. **But**



I am of the opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence: but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

(emphasis supplied)

97) Both, *Gangabai* and *Thagaraja Mudaliyar* are relied upon by Mr. Sancheti. On careful reading of the judgments in *Vimal Chand Ghevarchand Jain*, *Thagaraja Mudaliyar* and *Gangabai*, what emerges is that the bar under sub-section (1) of Section 92 of the Evidence Act is not attracted when the case of a party is that transaction recorded in the document was never intended to be acted upon at all between the parties and that the document itself is a sham. However, any evidence to vary the terms of agreement in writing is not admissible. What is admissible is only the evidence to show that there was no agreement at all between the parties. In *Thagaraja Mudaliyar*, the Privy Council has held that the document therein was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence of some other matter, stands exactly on the same footing as evidence that the Defendant's signature was forged. In case before Privy Council, it is held that the document in question was executed essentially to record joint status of the family and this was the main and actual purpose for which the same was executed. The Widow was never made aware that provision for maintenance was also being incorporated therein. The Widow was not willing to sign the document, which was presented before her 3 days' after her husband's death and the evidence proved that she was induced to sign the same 2 days' of her initial refusal, under an express representation that the same was only for recording joint status of the family. The findings of Privy Council for permitting leading of



oral evidence inconsistent with the document are required to be read in the above peculiar factual background.

98) In the present case, it is not the case of the contesting Defendants that there was no agreement at all between the parties, as execution of agreement is not disputed. In my view, following the law expounded in *Vimal Chand Ghevarchand Jain, Thagaraja Mudaliyar* and *Gangabai* once the transaction is not disputed, the contesting Defendants cannot be permitted to lead evidence to vary the covenants of the SPA to prove that though the transfer of shares was effected by SPA, the same was only for the purpose of security for loan. It is not even the case of contesting Defendants that they were induced by original Plaintiffs in signing the SPA or that there was any misrepresentation or suppression by them while executing the same as was the case in *Thagaraja Mudaliyar*. In my view therefore, reliance by Mr. Sancheti on judgments in *Thagaraja Mudaliyar* and *Gangabai* does not assist his case.

99) Mr. Dhond has relied upon judgment of Division Bench of Calcutta High Court in *Halima Khatun (supra)* in which it has held in paras-13, 14 and 15 as under :

13. In these circumstances we asked the learned Advocate to state clearly on behalf of his client, what was the exact agreement between the parties, i.e., to say, definitely whether any money was advanced under the mortgage by conditional sale, whether that money was to be repaid, and what was the exact agreement for sale. The learned Advocate thereupon (after taking some time for consideration) gave us the following statement:

“The plaintiff’s case, in brief, is that there was a contract for sale of the property for Rs. 1800. The execution of the conveyance was deferred to a certain date. The mortgage bond in question was taken in substance as security for the performance of the contract, though in form it was a security for the payment of money, which could be enforced as such only in the event of the contract failing.”



14. It seems to us that the Courts below were clearly wrong in holding that proviso 2 to Section 92, Evidence Act applied. This proviso refers to a separate oral agreement not inconsistent with the terms of the written agreement.

15. In the present case, the written agreement recites that Rs. 1800 is advanced as a loan to be repaid within 15 years and that on that sum being paid, the land is to be returned to the transferor; the alleged oral agreement is to the effect that Rs. 1800 is paid not as a loan, but as the purchase price of the property that it is not be repaid, and that the property is not to be returned to the original owner. **In other words the alleged oral agreement is entirely inconsistent with the terms of the written agreement. In fact the learned Advocate was constrained to admit that the written agreement did not represent the real agreement between the parties at all.**

(emphasis supplied)

100) Thus, in *Halima Khatun*, Calcutta High Court has held that the alleged oral agreement which is entirely inconsistent with the terms of the written agreement, cannot be proved by leading oral evidence.

101) In *Keshavrao Bhagvant* (supra), the Division Bench of this Court has held in para-8 as under:

8. Then with regard to want or failure of consideration under Proviso 1 of Section 92, it is also to be noted that no consequence invalidating the document could follow save from a complete want or failure of consideration. For Section 25 of the Contract Act renders an agreement void in respect of consideration only when it is made without consideration, which necessarily means the entire absence of all consideration. The only other proviso that was mentioned in argument was Proviso 6 and it was suggested that the facts to which the lower Courts have referred as showing the document now in question to have meant something different to what it purports to be, are facts shopping in what manner the language of the document is related to the existing facts. **It would be a manifest strain of language to contend that facts intended to show that the language of the document meant the exact opposite of what it purports to mean, could be brought within the category of facts showing how the language related to existing facts.** There is no necessity for the explanation of the language used in relation to existing facts. The only object or use of such evidence, if admitted, would be to show that the language was intended to mean something which is utterly incapable of being expressed by that language.

(emphasis supplied)



102) Thus, an attempt to contend that facts intended to show that the language of the document mean the exact opposite of what it purported to mean was not countenanced by Division Bench of this Court in *Keshavrao Bhagvant*.

103) In addition to *Thagaraja Mudaliyar* and *Gangabai*, Mr. Sancheti has relied upon judgment of this Court in *Lonkaran Kishorilal Paliwal*, in which this Court held in para-18 as under :

18. Considering the evidence on record together with the other circumstances discussed in the preceding paras, I am of the opinion that the findings of the learned lower Court are unsound and unreasonable as he has not considered the evidence and specific admissions in true and correct perspective. There is specific admissions of Dinkar that the appellant was not in need to dispose of his property as well as he had no other land than the land in suit. The appellant has admitted that he was in need of money because of loss of crops and, therefore, he approached the plaintiff No. 1 who took him to Mahadeo, a money lender. From the facts it is crystal clear that the appellant was in need of money to the tune of Rs. 5,000/- and he executed a deed of agreement as a security for the loan amount. He being in need of money, he had to succumb to the desire of the respondents and Mahadeo, to execute a deed of a agreement for Rs. 10,000/-. It is also in the evidence that the appellant had been to the plaintiff No. 1 with an amount of Rs. 7,500/- i.e. Rs. 5,000/- as the principal amount and Rs. 2,500/- as an interest as agreed upon, but the plaintiff refused to accept the amount and demanded Rs. 10,000/-. To this also the appellant agreed and sought time. But, the respondents issued notice directing him to attend the office of the Sub-Registrar to execute the sale deed in respect of the suit filed. As the appellant was and is ready to pay Rs. 10,000/- to the respondents, he is directed to pay Rs. 10,000/- to the respondents alongwith interest @ 9% p.a. from the date of the judgement and order of the lower Court dated 31st July, 1982 till its realisation. In the result the appeal is allowed and the judgement and order passed by the learned lower Court on 31-7-1982 is set aside. No order as to costs.

104) In *Lonkaran Kishorilal Paliwal*, this Court has not discussed provisions of Sections 91 and 92 of the Evidence Act, but in facts of that case, it is held that the nature of transaction was of loan though the same was shown to be an agreement for sale. The unique and distinct feature of that case was that the Defendant therein had approached Plaintiff for repayment of principal amount



with some interest, but Plaintiff had refused to accept the said amount and had demanded higher amount. The demand of Plaintiff therein for higher amount towards repayment clearly proved that it was a transaction of loan. In the present case, there is nothing on record that Plaintiffs ever agreed to accept the repayment of any amount. Thus, *Lonkaran Kishorilal Pailwal* is decided in the light of facts of that case and does not throw any light on the issue involved in the present case.

105) Mr. Sancheti has also relied upon judgment of the Apex Court in *V. Anantha Raju* (supra), which has followed the judgment in *Gangabai* in para-35 of its judgment and has held in para-36 as under :

36. It could thus be seen that once the plaintiffs had specifically contended that the terms of the 1992 Deed were amended/modified by the 1995 Deed, and the defendants admitted about the execution of the said document, i.e., the 1995 Deed, if it was the case of the defendants that the terms mentioned in the 1995 Deed were inadvertent or a mistake in fact, then the burden to prove the same shifted upon the defendants. **In view of Section 92 of the Evidence Act, any evidence with regard to oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract, would be excluded unless the case falls within any of the provisos provided in Section 92.** The defendants have attempted to bring their case within the first proviso to Section 92 of the Evidence Act, by contending that mentioning of 25% share to each of the plaintiffs in the profits and losses of the partnership firm was a mistake in fact.

(emphasis supplied)

106) In fact, the ratio of the judgment in *V. Anantha Raju* can be quoted against the contesting Defendants as the Apex Court in para-36 has specifically held that in view of Section 92 of the Evidence Act, any evidence with regard to oral agreement for the purpose of contradicting, varying, adding to or subtracting from the terms of written contract would be excluded unless the case falls within any of the provisos of Section 92.



F.4.3 ENTIRE AGREEMENT CLAUSE

107) In addition to provisions of Section 92 of the Evidence Act, there is yet another reason why the Defendants cannot be permitted to lead evidence to prove existence of different agreement than the one recorded in the SPA. SPA contains 'Entire Agreement' clause quoted above. The same is reproduced once again at the cost of repetition:

10.9 Entire Agreement.

This Agreement and the agreements expressly contemplated hereby constitute the entire agreement and understanding between the parties, and supersede all prior agreements, whether oral or written, between the parties with respect to the subject matter hereof and thereof. No rights are created by this Agreement and any of the documents contemplated hereby that are not expressly set forth herein or therein.

108) The parties have thus specifically agreed that the agreement expressly contemplated in the SPA constitutes the entire agreement and understanding between the parties and that no different or separate rights were created except the one which are expressly set forth in the SPA. The 'Entire Agreement' clause is inserted with a view to quell any attempt on the part of the parties to prove any collateral agreement different than the one set forth in the SPA. In the light of the Entire Agreement clause, the contesting Defendants cannot be permitted to contend that what is set forth in the SPA was actually agreed upon by the parties.

109) Mr. Dhond has relied upon few judgments in support of his contention with regard to the effect of 'Entire Agreement' clause. It would be necessary to make a quick reference to the said judgments. In *Thyssen Krrup Materials AG* (supra), the Division Bench of Calcutta High Court has held in paras- 70, 71 and 72 as under :



70. In relation to the second lot, the question that arises is whether there was an existing contract enforceable between the parties. In this context, Clause 9 of the main agreement (Agreement for Sale and Purchase of Prime Cold Rolled Mild Steel Sheets in Coils) between the parties is relevant. Clause 9 is reproduced below:

“Clause 9: Modification of the Contract

This Agreement cancels all previous negotiations/agreements between the parties hereto. There are no understandings or agreement between the Buyer and the Seller which are not fully expressed herein and no statement or agreement, oral or written, made prior to or at the signing hereof shall effect or modify the terms hereof or otherwise be binding on the parties hereto. No change in respect of the contract covered by this Agreement shall be valid unless the same is agreed to in writing by both the parties hereto specifically stating the same to be an amendment to this Agreement.”

71. With respect to the second lot, admittedly, no such formal modification or amendment to the agreement was made by the parties. The learned arbitrator found that Clause 9 of the agreement had been waived by conduct of the parties and in any event, it would not have any impact on the existence of a concluded contract between the parties in relation to the second lot. He relied on the negotiations between the parties and exchange of letters to find that there was in existence a concluded contract between the parties in relation to the second lot. Such kind of clauses in commercial contracts are known as “entire agreement” clauses, the intention of which is to preclude parties from adducing evidence of a collateral contract or agreement between the parties governing the same issue. The English law in relation to such kind of clauses has been aptly laid down in the case of *Inntrepreneur Pub Co. Ltd. v. East Crown Ltd.* [2000] 2 Lloyd’s Rep. 611:

“The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.

Entire agreement clauses come in different forms. In the leading case of Deepak v. ICI [1998] 2 Lloyds Rep 140, 138, affirmed [1999] 1 Lloyds Rep 387 the clause read as follows:

“10.16 Entirety of Agreement

This contract comprises the entire agreement between the PARTIES ... and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this CONTRACT and superseded thereby ...”



*Rix J and the Court of Appeal held in that case (in particular focusing on the words “promises or conditions”) that this language was apt to exclude all liability for a collateral warranty. In *Alman & Benson v. Associated Newspapers Group Ltd* 20 June 1980 (cited by Rix J at p.168), *Browne-Wilkinson J* reached the same conclusion where the clause provided that the written contract “constituted the entire agreement and understanding between the parties with respect to all matters therein referred to” focusing on the word “understanding”. In neither case was it necessary to decide whether the clause would have been sufficient if it had been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties. That is the question raised in this case, where the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the Agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect.”*

72. While there is hardly any case law or jurisprudence by Indian courts on such concepts, this court is of the opinion that the above ruling in the context of English law, would apply with equal force to the Indian context. **The object of insertion of such a clause is the parties’ resolve to prevent either of them from raising any claim based on a collateral contract, entered into by the parties during negotiations or after conclusion of the contract. The very purpose of such a stipulation would be defeated in case parties were allowed to raise a claim based on a collateral agreement, entered between them during negotiations.** In the present case, Clause 9 of the agreement between the parties is of such nature; it would necessarily preclude the parties from raising any claims based on collateral agreements that are not encompassed within the present contract or are not expressly stated as being amendments to the main agreement. That being the case, we are of the view that the learned arbitrator fell into error by not giving Clause 9 its full intended effect. Indeed by finding that the parties through their conduct had impliedly waived Clause 9, the arbitrator in effect defeated the very purpose of inserting Clause 9- that to prevent parties from raising such claims based on collateral agreements entered into between the parties, not specifically encompassed by the contract nor specifically stated to be amendments to the agreement. Therefore, we set aside the arbitrator’s award in relation to the second lot of CRC and find that there was no concluded contract entered into between the parties in relation to the second lot.

(emphasis supplied)

110) In *B.V.M. Finance* (supra) the Division Bench of this Court has held in para-41 to 45 as under:

41. Thus, the core issue is whether the Debenture Trust Deed should be treated as a final document governing the rights of the parties.



42. The agreements executed between the parties can be placed in two categories. One, the documents executed between BVM Finance and its group with Aditya Birla Finance. Second, the documents to which Vistra is party. These are: Share Pledge Agreement, Guarantee documents, Debenture Trustee Appointment Agreement and Debenture Trust Deed. There is a reference to arbitration law in CAL and Information Memorandum executed between BVM Finance and Aditya Birla Finance. There is no reference to Arbitration Act in the agreements to which Vistra is a party. Reference is only to governing laws in India.

43. Vistra has placed heavy reliance on clause 59.1 of the Debenture Trust Deed named: Entire Agreement. The Clause states that the Trust Deed constitutes the entire understanding amongst the Parties as to the subject matter thereof and notwithstanding anything to the contrary in any prior arrangements, agreements, representations or undertakings between the Parties regarding the subject matter of Trust Deed, Trust Deed shall prevail. Entire Agreement clause is a commonly used clause in commercial agreements where there are multiple agreements between the parties. This clause is used with different nomenclatures and different combinations of phrases. The object of the Entire Agreement clause is to ensure that all the terms and conditions are incorporated one document. The intention is to prevent confusion by refereeing to other instruments and correspondence.

44. The effect of Entire Agreement has come up for consideration of the before the Supreme Court in the case of Joshi Technologies, the Ministry of Petroleum had issued a notice inviting tenders. The appellant before the Supreme Court had entered into product sharing contracts. The Income Tax Department had allowed the special deductions for first three production years, but declined the same for fourth year and thereafter reopened the assessment for all years and issued notices. Out of various issues raised before the Supreme Court, one was the interpretation of a clause in the agreement under the heading "Entire Agreement". **After analysis, the Supreme Court held that intention behind such clauses is not to look into any other document or correspondence which takes place between the parties before signing the agreement.**

45. The ambit of Entire Agreement clause is considered in the case of *Entrepreneur Pub Co. Ltd. v. East Crown Ltd.* (2000) 2 Lloyd's Rep. 611 (Chancery Division) which decision has been relied upon by the Delhi High Court in the case of Thyssen Krupp Materials AG v. Steel Authority of India. The observations in the case of Interpreter Club are reproduced in the case of Thyssen Krupp Materials AG. **The Court held that the purpose of an entire agreement clause constitutes a binding agreement between the parties that the full contractual terms are in the document containing the clause and not elsewhere.** It observed that the Entire agreement clauses come in different forms. Once the formula used is sufficient and constitutes an agreement that the parties agree to bind themselves are in the Agreement and nowhere else. This concept is applied to the Indian context. **The purpose of final agreement will be defeated if parties keep arguing referring to other documents.**

(emphasis supplied)



111) In *North Eastern Properties Ltd.* (supra) the Court of Appeal has held in paras-55 and 57 as under:

55 An obvious way of providing expressly that performance of the terms of a separate contract are not to operate as condition for the performance of the land contract where they form parts of a composite transaction, is for the parties to insert an appropriately worded entire agreement clause in the land contract. In *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611, para 7, Lightman J said:

57 While I agree with Lightman J that the normal reason for the inclusion of an entire agreement clause is to dispose of the risk that some collateral contract or additional terms may be discovered in the undergrowth of the parties' negotiations, I see no reason why such a clause should not also serve the valuable purpose (in a composite transaction which includes, but does not entirely consist of, a land contract) of ensuring that the land contract will not accidentally be construed as conditional upon the other expressly agreed terms, so as to render the land contract void under section 2. In the context of a case such as the present, where it was acknowledged on all sides that the 2% finder's fee was intended to be contractually binding, the entire agreement clauses in each of the I I land contracts cannot be construed so as to produce the contrary result. It must yield, like any written provision in a contract, to the dictates of commercial common sense. But there is nothing contrary to common sense in construing such a clause as having the alternative meaning that the parties have agreed that the terms of some other part of the composite transaction are not to be conditions for the performance of the land contract.

(emphasis supplied)

112) Thus, the objective of inserting the 'Entire Agreement' clause in a contract is to ensure that full contractual terms are incorporated in the document and not elsewhere. The entire purpose of incorporation of 'Entire Agreement' clause would be defeated if the parties are permitted to contend that there was a separate oral agreement between the parties, which is different than the one incorporated in the written contract.



113) In my view, after considering the combined effect of provisions of Section 92 of the Evidence Act read with the effect of the 'Entire Agreement' clause, the contesting Defendants cannot be permitted to contend that the transaction intended between the parties was not for sale of any equity in the first Defendant Company in favour of the Original Plaintiffs and that the same was merely for the purpose of security for loan. If the contention of the contesting Defendants is accepted, the same would amount to violation of the express terms of the SPA, which are reproduced above.

114) The express terms of SPA specifically provide for sale of 99.96% equity stake upon acceptance of consideration of Rs.29,98,800/-. If the contention of the contesting Defendants is accepted, the same will have to be interpreted to mean that Rs.29,98,800/- was a loan advanced by original Plaintiffs to the first Defendant Company and that the shares were transferred only for the purpose of Plaintiffs' comfort and for creation of security. In view of provisions of Section 92 of the Evidence Act read with effect of 'Entire Agreement' clause, it is impermissible for this Court to vary the terms of SPA as sought to be canvassed by the contesting Defendants.

115) It is also relevant to note that once execution of SPA is admitted, its contents get proved in view of provisions of Sections 61, 62 and 64 of the Evidence Act. Therefore, upon plain reading of the terms of contract embodied in the SPA, sale and purchase of 24,990 shares of the first Defendant Company from Defendant Nos. 2 to 7 to the Original Plaintiffs is clearly proved.

F.4.4 SPA ACTED UPON AND SUBSEQUENTLY GIVEN EFFECT TO

116) Apart from bar under Section 92 of the Evidence Act to lead oral evidence contrary to the terms of SPA, coupled with the effect of the 'Entire Agreement' clause, what is relevant to note in the present case is the fact that the



SPA has been acted upon and is fully given effect to. This is clear from two things viz. actual transfer of 24,990 shares from Defendant Nos.2 to 7 to original Plaintiffs and appointment of original Plaintiff No.1 on the Board of Directors of the first Defendant Company.

117) So far as the aspect of actual transfer of shares is concerned, it is seen that Share Transfer Forms and Share Certificates are proved, marked in evidence and admitted by Defendants. Under Section 108 of the Companies Act, 1956 registration and transfer of shares require production of instrument of transfer and an application in writing made to the Company by the transferee (Share Transfer Form). The Share Certificate issued under the provisions of Section 82 of the Companies Act constitute *prima-facie* evidence of title of the member of such shares. Thus Share Transfer Forms (Exhibit P-46) alongwith endorsement made on the Share Certificates in the name of the original Plaintiffs evidencing such transfer clearly proves that the SPA was indeed acted upon by the parties.

118) Apart from Share Transfer Forms and Share Certificates, the extract of Register of Members has been marked in evidence at Exhibit P-25 which appears to have been issued to the original Plaintiffs by the letter of Defendant No.1 dated 22 April 1999. The said extract of Register of Members reflected shareholding of Original Plaintiffs of 24,990 shares.

119) Plaintiffs have also produced Annual Return of the first Defendant Company for the year 1999, which is marked in evidence at Exhibit P-14. Perusal of the said Annual Return dated 30 September 1999 would indicate the Original Plaintiffs as shareholders of the First Defendant Company together holding 24,990 shares.



120) In my view, the aforesaid four documents in the form of Share Transfer Forms, Share Certificates, Extract of Register of Members and Annual Return for the year 1999 prove beyond any doubt that the SPA was acted upon by the parties and 24,990 shares were actually transferred in the name of the original Plaintiffs.

121) Another factor to infer the real nature of SPA, is appointment of original Plaintiff No.1-Anil K. Bodani as the Director of the first Defendant Company. His appointment is proved by the letter of Defendant No.1 dated 2 April 1999 (Exhibit P-25) by which Form No.32 dated 30 March 1999 was forwarded reflecting appointment of Original Plaintiff No.1 as Director of Defendant No.1 from 30 March 1999. This position is borne out by the Annual Return of Defendant No.1 for the year 1999 (Exhibit P-14).

122) Furthermore, the Annual Return for financial year ending on 31 March 2000 shows that purported AGM of 30 September 2000 was conducted on the footing that original Plaintiffs owned 24,990 shares of the first Defendant Company. This completely falsifies the defence taken by the contesting Defendants that SPA was merely a comfort document and that the same was executed only for security towards loan.

123) Considering the conduct of the contesting Defendants, in actually transferring the shares in the names of original Plaintiffs and in appointing the original Plaintiff No.1 as the Director of the first Defendant Company, it is difficult to infer that SPA was intended merely as a security for loan transaction and the same was never intended to effect actual sale of shares in favour of the original Plaintiffs. It is well settled position of law that when a person voluntarily acts on a contract which he claims is not to be acted upon, his conduct would clearly disentitle him from raising a plea that the contract was never meant to be acted upon. Having clearly acted upon the SPA by actually transferring the shares



in the names of the Original Plaintiffs and by appointing Original Plaintiff No.1 as Director, it does not lie in the mouth of the contesting Defendants that the SPA was never meant to be acted upon.

124) The contesting Defendants have raised a defence that Plaintiffs were only ‘*namesake shareholders*’ and that the transfer of shares was only towards security for transaction of loan and that the transaction was never intended to be acted upon and reversed upon repayment of loan. It becomes difficult to accept this defence of the contesting Defendants for variety of reasons. Firstly, there is no concept of ‘*namesake shareholder*’ under the provisions of the Companies Act, the concept being alien to law. Secondly, the names of the original Plaintiffs were entered into the Register of Members and the combined effect of provision of Sections 150 and 164 of the Companies Act is that the Register of Members constitute *prima-facie* evidence of owning of shares by the persons concerned. Sections 150 and 164 of the Companies Act read thus :

150. Register of members.-

(1) Every company shall keep in one or more books a register of its members, and enter therein following particulars:-

- (a) the name and address and the occupation, if any, of each member;
- (b) in the case of the company having a share capital, the shares held by each member, distinguishing each share by its number except where such shares are held with a depository and the amount paid or agreed to be considered as paid on those shares;
- (c) the date at which each person was entered in the register as a member; and
- (d) the date at which any person ceased to be a member.

Provided that where the company has converted any of its shares into stock and given notice of conversion to the Registrar, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.

(2) If default is made in complying with sub-section (1), the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

**164. Registers, etc., to be evidence.-**

The register of members, the register of debenture-holders, and the annual returns, certificates and statements referred to in sections 159, 160 and 161 shall be *prima facie* evidence of any matters directed or authorised to be inserted therein by this Act.

125) In *Mathrubhumi Printing & Publishing Co.* (supra), the Kerala High Court has decided the effect of entry into register of members and has held in para-36 as under :

36. It, therefore, follows that the equitable right of the transferee gets metamorphosed into the absolute right of a shareholder only when the names of the transferees after the recognition of the transfer, are entered on the register. This can be viewed from another angle and it is this : **when once the transferee does everything that he is required to do under law, to get his name entered on the register by proper lodgment of the instruments of transfer and no other obstacles remain in enforcement of the said right, the transfer becomes effective as against the company also. Thereafter, the company cannot unilaterally alter its articles affecting the aforesaid right of the transferee. Mere delay in the actual registration of the name of the transferee on the register provided there is a proper lodgment of the instrument of transfer cannot affect the above right of the transferee. If that be the position, the right of the transferee to get his name entered on the register gets crystallised when proper lodgment is effected and the transfer from the date of the proper lodgment becomes effective as against the company also, and such rights cannot be affected by subsequent actions of the company like amendment of articles, etc.** Subject to what is stated above, the transfer, once the company after recognising the transfer enters the name on the register, relates back to the time when the transfer was first made (see *Howrah Trading Co.Ltd. v. CIT*, [1959] 29 Comp Cas 282 ; AIR 1959 SC 775).

(emphasis supplied)

126) Thus once the name of the transferee is entered on the Register of Members, the transfer becomes effective as against the Company. The effect of provisions of Sections 150 and 164 coupled with absence of any concept of ‘*namesake shareholder*’ makes it abundantly clear that original Plaintiffs became full and absolute shareholders of the first Defendant Company upon entry of their names in the Register of Members.



127) In *J.R.Y. Investment Pvt. Ltd.* (supra), the Plaintiff therein had entered into Agreement for Sale with Defendants and transferred shares in favour of the Defendant as security for loan to be advanced. Plaintiff apparently failed to receive the loan or seek its disbursal and challenged transfer of shares. This Court held that transfer of shares was absolute and did not suffer from any irregularity on account of Plaintiff's failure to create a pledge. *Justice S. A. Bobade* (as he then was) held in para-23 as under:

23. It is, therefore, evident that the plaintiffs conveyed their property in the shares to defendant No. 1 and defendant No. 1 has been shown as a beneficial owner in the depository participant account. If the plaintiffs intended to transfer the shares in favour of defendant No. 1 on account of the pledge they could have done so in the manner provided by regulation 58, i.e., by making an application to the depository through defendant No. 2 depository participant, whereupon the depository participant would have made a note that the securities are available in the pledge in accordance with Section 58(2). The important thing is that the security would have been accepted by the depository as a pledger and the record would have shown the plaintiffs as the pledger, and defendant No. 1 as pledgee. **This has an important bearing on the question whether the plaintiffs intended to convey title in the shares in favour of defendant No. 1, or merely intended to create a pledge, In view of the fact that the plaintiffs did not follow the procedure provided by regulations for creating pledge, I am of the view, prima facie, that the plaintiffs had not intended to create a pledge but intended to transfer and that in any case has been the effect. In any case, in fact they did not create a pledge, but transferred the shares.**

(emphasis supplied)

128) Mr. Sancheti has relied on Apex Court judgment in *Vistra ITCL (India) Ltd. & Ors.* (supra) in support of his contention of transaction being akin to a pledge. The Apex Court has discussed the concept of Pledge in para 29, 30 and 31 of the Judgment as under:

29. It is accepted and admitted that Appellant 1-Vistra has security interest in the pledged shares. In order to examine the nature of the said interest, we must first understand what constitutes “pledge” in law.

30. The concept of “pledge” has been elucidated by this Bench in *PTC (India) Financial Services Ltd. v. Venkateswarlu Kari* [PTC (India) Financial Services Ltd. v. Venkateswarlu Kari, (2022) 9 SCC 704 : (2023) 1 SCC (Civ) 490] , with



reference to the provisions of contract of bailment and specific provisions concerning the pledge, a subset of bailments, in the following manner : (SCC pp. 724-26, paras 18-20 & 22-23)

“18. As per Section 151, a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his goods of the same bulk, quality and value as the goods bailed. Section 152 states that a bailee, in the absence of a special contract, will not be liable for any loss, destruction, or deterioration of the bailed goods if he acts in conformity with Section 151. As per Section 153, a contract for bailment is voidable at the option of the bailor if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. Section 154 lays down that the bailee shall be liable for damage arising from unauthorised use of the bailed goods. The bailee, with the consent of the bailor, can mix the goods bailed with his own goods, in which event, the bailor and the bailee will have interest in proportion to their respective shares in the mixture. [Section 155 of the Contract Act, 1872.] However, if the bailee, without the bailor's consent, mixes the bailed goods with his own, and the goods can be separated or divided, the property in the goods remain with the parties respectively. [Section 156 of the Contract Act, 1872.] Further, the bailee is bound to bear the expense of separation or division of the goods, as well as any damage arising from the mixture. Section 157 provides that when the goods are so mixed without the bailor's consent and cannot be separated, the bailor is liable to be compensated, and the bailee is liable for the loss.

19. Under Section 160, the bailee has to return or deliver, as per the bailor's directions, the goods, without demand, as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished. Section 161 states that if there is a default by the bailee and the goods are not returned, delivered, or tendered at the proper time, the bailee is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time. As per Section 163, in the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or in accordance with his directions, any increase or profit that may accrue from the goods bailed.

20. Section 172 of the Contract Act is reproduced as under:

‘172. “Pledge”, “pawnor” and “pawnee” defined.—The bailment of goods as security for payment of a debt or the performance of the promise, is called a “pledge”. The bailor is in this case called the “pawnor”. The bailee is called the “pawnee”.’

As per Section 172, creating a valid pledge requires delivery of the possession of goods by the pawnor to the pawnee by way of security upon the promise of repayment of a debt or the performance of a promise, thereby, creating an estate that vests with the pawnee.

22. As per Section 176, when a pawnor makes a default in payment of debt or performance of a promise, the pawnee may bring a suit against the pawnor upon such debt or promise and retain the goods pledged as collateral security, or he may sell the goods pledged upon giving the pawnor reasonable notice of the sale. If the pledged goods are sold, and the proceeds of such sale are less than the amount due in respect of the debt or



promise, the pawnor is still liable to pay the balance amount to the pawnee. If the proceeds of such sale exceed the amount due, the pawnee will be liable to pay the surplus to the pawnor.

23. Section 177 gives statutory right to the pawnor, who is at default in payment of the debt or performance of the promise, to redeem the pledged goods at any time before “actual sale” by the pawnee. However, in such cases, the pawnor must pay in addition the expenses that have arisen from his default. Section 179 states that the limited interest that a pawnor has in the goods can be validly pledged.”

31. The law of pledge contemplates special rights for the pawnee in the goods pledged i.e. the right to possession of the security, and in case of default, the right to bring a suit against the pawnor, as well as the right to sell the goods after giving reasonable notice to the pawnor. The general rights or ownership rights in the property remain with the pawnor, and wholly reverts to him on discharge of the debt or performance of the promise. In other words, the right to property vests in the pawnee only as far as it is necessary to secure the debt. We need not refer to other portions of the said judgment which relate to right of redemption till “actual sale”, etc.

(emphasis supplied)

129) The judgment in *Vistra ITCL (India) Ltd. & Ors* appears to have been relied upon to deal with the factum of actual transfer of shares in the name of original Plaintiffs. Relying on para-31 of the Judgment, it is sought to be contended that a pledge contemplates physical transfer of property and that mere registration of shares in the name of original Plaintiffs does not *ipso facto* make SPA as ‘sale’ of shares. I do not see how the judgment of the Apex Court assist the case of contesting Defendants. Firstly, SPA is not a document of ‘Pledge’, but the same is one of absolute sale. Secondly, transfer of shares is not the only factor on which the transaction is inferred as that of sale. There are several other factors such as express covenants of SPA, Board Resolution for sale of shares of 23 October 1998, appointment of original Plaintiff No. 1 as director, admission of ownership of shares in various board meetings, AGM and EOGM, etc. The judgment in *Vistra ITCL (India) Ltd. & Ors* therefore is not useful for deciding the question of nature of transaction between the parties.



130) Contesting Defendants have also taken a defence that Notice dated 4 September 2000 in respect of AGM of 30 September 2000 was dispatched to original Plaintiffs under certificate of posting. If Plaintiffs were only namesake shareholders as sought to be contended by them, no explanation is forthcoming as to why contesting Defendants considered it necessary to invite original Plaintiffs for AGM of the first Defendant Company.

131) There is yet another factor which completely demolishes the defence of contesting Defendants of original Plaintiffs being only '*namesake shareholders*'. Original Plaintiffs called EOGM of the first Defendant Company by letter dated 7 December 2000. The requisition was acted upon by the contesting Defendants and an EOGM was held on 9 January 2001. If original Plaintiffs were actually '*namesake shareholders*', there was no necessity for the contesting Defendants to act upon the requisition made by so called '*namesake shareholders*' and hold EOGM on 9 January 2001. More pertinently, in the EOGM dated 9 January 2001, the said '*namesake shareholders*' were permitted to propose Resolutions and vote in support thereof. I am therefore unable to agree with the baseless defence sought to be raised by the contesting Defendants that Original Plaintiffs became only '*namesake shareholders*' of the first Defendant Company.

132) Also of relevance is the fact that the contradiction in the defence of the contesting Defendants about lack of ownership of shares on one hand and ownership of 24.99% shares (which has been dealt with more elaborately in latter portion of the judgment) once again make the theory of '*namesake shareholders*' unbelievable. In different paras of the Written Statement (quoted above), Defendant Nos.1 and 2 have repeatedly admitted that shareholding of the Plaintiffs is 24.99%. Therefore, on this count again, it is difficult to hold that original Plaintiffs did not become full or absolute shareholders of the first



Defendant Company in pursuance of actions taken by the contesting Defendants pursuant to execution of the SPA.

133) More pertinently, the contesting Defendants have not even filed a counterclaim challenging the SPA. In action initiated by Plaintiffs, they seek to raise a defence that SPA did not effect transfer of shares. However independent of that defence, contesting Defendants did not file any independent action or filed a counterclaim to seek a declaration that SPA is void and did not have the effect of sale of shares. Though 24,900 shares are actually transferred in original Plaintiffs' names, no counterclaim is filed to negate the effect of such transfer or for seeking any declaration that original Plaintiffs do not own any shares in the first Defendant Company. This once again shows that even if Plaintiffs suit is to be dismissed, their ownership of 24.99% shares would still remain valid.

134) I am therefore of the view that the SPA has been fully acted upon by the contesting Defendants demolishing their defence that the same was not meant to be acted upon.

F.4.5 EMERGENCE OF DEFENCE OF 'NO REAL SALE OF SHARES' FOR THE FIRST TIME

135) The defence of SPA being executed only for the purpose of security for loan was raised by Defendant Nos. 2 and 3 by letter dated 21 November 2000. Between execution of the SPA on 27 October 1998 till addressing of letter dated 21 November 2000, it appears that the contesting Defendants never really questioned the nature of SPA. In fact, three meetings (Board of Directors dated 10 August 2000, Annual General Meeting dated 30 September 2000 and Board of Directors dated 18 October 2000) proceeded on a footing that Plaintiffs owned



shares in the Company and that after allotment of 75,000 shares to Defendant No.11, Plaintiff remained minority stakeholders to the extent of 24.99%. For the first time on 21 November 2000, Defendant Nos.2 and 3 raised a defence that the SPA was executed for the limited purpose of giving sense of security to the Original Plaintiffs and to satisfy their advisors that they were fully secured about repayment of loan to them. Letter dated 21 November 2000 makes an interesting reading and it is this letter, which later became the base for raising of defence by the contesting Defendants that SPA was executed only to comfort Original Plaintiffs for repayment of loan. The letter dated 21 November 2000 reads thus:

November 21, 2000.

To:

1. Anil K. Bodani
2. Mrs. Chandrika A. Bodani
51, El-Cid, 5th floor, Ridge Road,
Malabar Hill,
Mumbai 400 006.

Sir/Madam,

We are shocked and pained to see your conduct and behaviour starting with your letter of 16th November to Govind Gupta and others, making false and bogus allegations, thereafter your sending undesirable persons disguised as Singh Security to our Stud Farm at village Shirgaon on 18th November, 2000 to dispossess Manju Meadows Pvt. Ltd./us and which attempt was foiled by our staff and thereafter your addressing malicious and mischievous letters making false and bogus and defamatory allegations against us to Shamrao Vithal Co-operative Bank Ltd. and also to RWITC Ltd.

You are aware that in or about October, 1998 you agreed to lend and advance upto Rs.1.20 crores to us and proposed that we must secure your loan to your satisfaction and to the satisfaction of your legal advisor Mr. Amit Hariani and that your legal advisor had proposed that the loan be structured as follows:

- (i) Rs.12 lacs plus Rs.13 lacs totaling to Rs.25 lacs will be advanced by you, Mr. A.K. Bodani/Mrs. Chandrika A. Bodani, to Manju Meadows Pvt. Ltd. (MMPL) against second charge on 55.975 acres and first charge on 45.730 acres of land of MMPL situate at Village Shirgaon, Taluka Maval, Dist. Pune.
- (ii) Rs.16 lacs will be advanced by Mrs. Chandrika A. Bodani to Mrs. Manju Gupta, against first charge on her 17.775 acres of land situate at Village Shirgaon, Taluka Maval, Dist. Pune.



(iii) Rs.25 lacs plus Rs.20 lacs totaling to Rs.45 lacs will be advanced by Miss Kinnari Bodani to Mrs. Manju Gupta against blank promissory notes and some other blank papers signed by Mrs. Manju Gupta/Mr. Govind Gupta.

(iv) Rs.29,98,800 will be advanced by you, Mr. Anil K. Bodani and Mrs. Chandrika A. Bodani to Govind Gupta/Mrs. Manju Gupta/Radhika Gupta/Meera Gupta/Akshat Vikram Gupta against security of 24.990 shares of face value of Rs.100 each of MMPL held by them constituting 99.96% shares of MMPL to be transferred in your name as merely security for due repayment of amount by us.

(v) Rs.4 lacs to be advanced to Gupta Livestock Breeding and Research Farm.

As part of the above arrangement, you got documents prepared by M/s. Hariani & Co. your advocates and solicitors and which comprised of purported share transfer Agreement, Agreement of debt, declarations, Powers of Attorney, charge documents, promissory notes, several blank papers, etc. The documents were executed on 27th October 1998 by us and handed over to you expressly on the basis that the same was for the limited purpose of giving you sense of security and satisfy your advisor that you were fully secured about repayment of the loan to you. The duration of loan was 2 years and extendable by further six months at our option with interest at the rate of 18% per annum.

You insisted that document/s will provide period of loan of only one year though it was in fact two years and extendable for six months at our option and you also insisted that you should be inducted as co-director in addition to the three other existing directors and assured us that you will not enforce any of the terms of the purported document/s and they were to give comfort to your advisors. You also assured us that you will not interfere with management, control, working and operations of MMPL which will continue with us as usual. You also insisted that none of you will give any personal guarantee to the bankers for loan advanced by Shamrao Vithal Bank to MMPL. We relied upon your assurances and executed the documents and handed over the same to you along with original document/s and you did not furnish us copies of some of the documents executed by us.

You acted upon your assurances for some time, however in or about April 1999 you suddenly, contrary to the understanding between us, you demanded refund of Rs.45 lacs though not due to be repaid by us. Much to our dislike we refunded Rs. 45 lacs to Miss Kinnari Bodani (Rs.25 lacs on 24.4.1999 and Rs.20 lacs on 28.4.1999). You agreed that in view of the said unauthorised and premature recall of loan, the balance principal amount of Rs.70,98,800 and interest accruing at the rate of 18% per annum will be paid by us to you at the end of 30 months, i.e. March/April 2001. You again assured us that you will not do any act which may interfere with our management, control, working and operation of MMPL.

In or about January, 2000, again contrary to the understanding between us, you demanded the refund of Rs.4 lacs that was advanced to Gupta Livestock Breeding and Research Farm. This amount, again to our dislike, was refunded by us on 1.2.2000.



You are aware about the restructuring of MMPL in Sept/Oct 2000 and the various decisions taken by MMPL to revamp its affairs including appointing additional directors.

It is disturbing and distressing now to see your defamatory conduct and the sudden spate of nasty actions started by you. You are aware that there was no real sale of shares of MMPL to you and the second charge by MMPL and first charge by Mrs. Manju Gupta of their lands was as desired by you for the sake of "giving comfort to your legal advisor" and that too advance of total Rs.1.20 crores from which Rs.49 lacs was prematurely recalled by you and repaid to you.

Your acts are amounting to breach of trust and playing fraud upon us and cheating us and we are constrained to seek legal advice in that behalf. We reserve our rights to take appropriate steps against you at your costs, risks and consequences, as we may be advised.

However, in view of your dishonest behaviour we do not intend to avail of the loan facility upto March/April 2001 and hereby inform you that we desire to return the balance amount of Rs.70,98,800 together with interest forthwith to you against your returning our original document/s, share certificates and all writings taken by you from us in good faith and held by you in trust. You are requested to immediately appoint time for the aforesaid purpose and we are willing to deposit in advance the loan amount with interest with our legal advisors to show our bonafides, if you so desire.

In the meantime, we hereby cancel and revoke all the documents executed by us and particularly the powers of attorney in your favour and you are hereby called upon not to abuse the said documents, make any representations on the basis of the said documents to any person or party, failing which we shall be constrained to adopt appropriate proceedings and/or criminal against you at your entire risk as to costs and consequences as we may be advised.

Yours truly,

Sd/-

1. Govind Gupta

Sd/-

2. Mrs. Manju Gupta

3. For Manju Meadows Pvt. Ltd.

Sd/-

Govind Gupta

Director

136) Thus, by letter dated 21 November 2000, Second and Third Defendants contended that there was no '*real sale of shares*' to the Original



Plaintiffs and that SPA was executed for '*giving comfort to your legal advisor*' against the advance of total amount of Rs.1.20 crores lent by the Original Plaintiffs. Defendant Nos.2 and 3 offered to repay the balance amount of Rs.70,98,800/- to the Original Plaintiffs by letter dated 21 November 2000 and cancelled and revoked all documents executed by them. The letter dated 21 November 2000 was sent in response to Original Plaintiffs' letter dated 16 November 2000, by which Original Plaintiffs sought resignation of Defendant Nos.2, 8 and 9 as per the covenants of the SPA. In my view, the defence taken by Defendant Nos.2 and 3 in the letter dated 21 November 2009 about '*no real sale of shares*' and execution of SPA for '*giving comfort to legal advisor*' cannot be accepted in view of the contradictory conduct of the contesting Defendants in recognising Plaintiffs' stake of 24.99% in the first Defendant Company. It is this apparent that Defendant Nos.2 and 3 adopted false defence in letter dated 21 November 2000.

F.4.6 EFFECT OF SIMULTANEOUS EXECUTION OF DOCUMENTS OF DEBT/MORTGAGE AND SPA

137) The contesting Defendants have relied upon two Agreements of Debt dated 27 October 1998 in support of their claim that SPA was executed only as a security for loan. The first Agreement for Debt is between Defendant No. 1 and original Plaintiffs and the same in respect of lending two loans of Rs.12,00,000/- and Rs.13,00,000/- to the first Defendant for its business, which was repayable alongwith interest @ 18% per annum as agreed in the Agreement. Further documents of (i) Deed of Simple Mortgage dated 27 October 1998, by which the First Defendant created second mortgage of land admeasuring 55.975 acres of the stud farm towards security for repayment of loan of Rs.25,00,000/- and (ii) two Promissory Notes for Rs.12,00,000/- and Rs.13,00,000/- are also executed on 27 October 1998. Another Agreement of Debt dated 27 October 1998 was executed by Defendant No.3 (Manju Gupta) in respect of the term loan



of Rs.16,00,000/- advanced by Original Plaintiffs which was secured by Deed of Equitable Mortgage in respect of land admeasuring 17.775 acres of the stud farm and Special Power of Attorney. It appears that another short-term loan of Rs.45,00,000/- was advanced by Plaintiffs family to Defendant No.3 and to the group concern of the contesting Defendants, M/s. Gupta Livestock Breeding and Research Farm of Rs.4,00,000/-. Thus, in addition to the SPA executed on 27 October 1998, the above documents were executed by the contesting Defendants on the same day.

138) The contesting Defendants are not illiterate persons. They are seasoned players in the business. They knew exactly what they were executing. It has come on record that all the documents are drafted by the same Advocate. Thus, a conscious distinction is made between instruments relating to debt and the instrument relating to sale of shares. The contesting Defendants thus knew very well that instruments of debt were separately and distinctly executed for a different purpose than execution of SPA for transfer of shares. If SPA was to be executed only for comforting original Plaintiffs in respect of the loans advanced by them, the said documents should also have been termed as '*Agreement for Debt*' or in any case, a pledge of shares for loans advanced. However, all the instruments are drafted by a reputed Solicitor firm in Mumbai with the consent of both the parties. This is not a case where an agriculturist is cheated by a purchaser by misleading him that agreement for loan was being executed under the guise of execution of sale-deed. Conscious execution of Share Purchase Agreement as contra-distinct from execution of various sale documents/instruments relating to debt, leaves no manner of doubt that contesting Defendants always intended to sell their stake in the first Defendant Company to the original Plaintiffs. The sale of stake is also backed by resolution adopted in the meeting of Board of Directors of first Defendant Company of 23 October 1998. In my view, therefore, reliance of the contesting Defendants on



various instruments of debt, far from assisting their case, actually militates against them.

139) Mr. Sancheti has sought to contend that the nature of SPA as being security for loan is required to be inferred from mortgages created in respect of stud farm land in favour of the original Plaintiffs. It is sought to be contended that if original Plaintiffs were to become 99.96% stakeholders in the first Defendant Company, there was no question of Defendant Nos.2 and 3 mortgaging any portion of the farm land in favour of the original Plaintiffs, after being divested of their ownership rights. I do not see any difficulty if a shareholder of a company lends funds for operation of business of the company. Also, what is sought to be contended by Mr. Sancheti might have been true in a case involving transfer of only land from one individual to another. If Defendant Nos.2 and 3 were sole owners of the land in question and had executed a Sale-Deed in favour of the original Plaintiffs on the same day of execution of Mortgage Deeds, what Mr. Sancheti contends could have been correct. However, in the present case, the ownership of the farm land is with the first Defendant Company and on the day of execution of various instruments dated 27 October 1998, Gupta Family controlled the entire stake in the first Defendant Company. Though SPA was executed on 27 October 1999, further actions in the form of transfer of shares and entry in the Register of Members relating to names of Original Plaintiffs was yet to occur. It was only after occurrence of those actions, original Plaintiffs were to become shareholders of the First Defendant Company and to take decisions relating to its management. As on 27 October 1999, the parties felt that Defendant Nos.2 and 3 were still the decision makers in respect of assets of the first Defendant Company and this is possibly why the mortgages were created by them in favour of the original Plaintiffs. Whether such mortgages were legally enforceable or not in the light of execution of SPA on the same day is an altogether different aspect. What is material in the present case is the fact that the contesting Defendants knew very well that they were executing distinct



nature of documents drafted by the same Solicitor on same day. If parties intended that SPA was to be used only as a comforting document, the contesting Defendants could have insisted on the amount of Rs.29,98,800/- be also treated as loan by executing of Debt Agreement and a Mortgage/Pledge to be created in respect of 24,900 shares. As observed above, apart from specific covenants of the SPA, the actions of the contesting Defendants in acting upon the same, leaves no manner of doubt that the transaction was always meant to be the one of transfer and not of security for loan. In my view, therefore execution of instruments of debt and mortgage on 27 October 1998 by contesting Defendants in favour of the original Plaintiffs do not assist the case of the contesting Defendants to prove that SPA was executed as security for loan.

F.4.7 ORIGINAL PLAINTIFFS NOT TAKING OVER MANAGEMENT AND CONTROL OF FIRST DEFENDANT COMPANY

140) The contesting Defendants have contended that the factum of original Plaintiffs not taking over management and control of the first Defendant Company is yet another indicator of the true nature of the transaction in question. The contesting Defendants have contended that after execution of the SPA, original Plaintiffs did not take even a single action, which a true and absolute owner would take in ordinary course of business after acquiring 99.96% of stake in a company. According to the contesting Defendants, original Plaintiffs did not appoint their nominal Directors, did not attend any AGMs, did not infuse funds, did not issue intimation to the bankers of the Company regarding change of signatures, did not change of name of authorised persons with Stud Authority of India, did not intimate the racing clubs in India about change of ownership, did not change registered address of the Company, did not take possession or control of statutory records of the Company, did not appoint any personnel to oversee the stud farm operations, did not attend their appoint their own auditors or Company Secretaries etc. According to the contesting Defendants, for the entire



period of two years after execution of SPA, original Plaintiffs did not bother to visit either the registered office of the Company or the Stud farm, which is an unnatural action for an owner holding 99.96% stake in a Company. These factual assertions of the contesting Defendants are not really disputed by Plaintiffs and therefore the original Plaintiffs not taking active part in management of the first Defendant Company after execution of SPA is more or less proved.

141) Having not disputed that original Plaintiffs did not take active part in management and control of the first Defendant Company, in response the Plaintiffs have given reasons why the original Plaintiffs could not participate in active management of the Company and have contended that law does not require active participation by owner in the management of a company and that non-participation in management does not divest owner of ownership rights.

142) So far as Defendant Nos.2, 8 and 9 remaining as Directors of the first Defendant Company post execution of SPA is concerned, the answer is to be found in the relevant covenants of the SPA itself. The fourth recital to the SPA provided that the Confirming Parties were to continue as Directors of the Company for time being. Furthermore, under Article V of the SPA, the Board of the first Defendant Company was to be reconstituted, under which original Plaintiff No.1 was to be appointed as Director and all decisions in respect of the management and control of the Company was to be taken by the Directors of the Company with '*concurrence of the third party*' i.e. original Plaintiff No.1. The existing Directors were to appoint such persons as Directors as directed by the original Plaintiffs. The existing Directors were to tender their resignations from the Board of Directors '*as and when the second party shall so direct*'. Thus, the SPA itself contemplated that '*for time being*' Defendant Nos. 2, 8 and 9 were to continue as Directors of the Company. Thus, continuation of Defendant Nos.2, 8 and 9 as Directors, despite sale of 99.96% stake, is in tune with the covenants of



the SPA and this factor cannot be considered for the purpose of inferring that the nature of transaction was that of security for loan.

143) It is undisputed position that in pursuance of the SPA, original Plaintiff No.1 was appointed as Director of the Company on 30 March 1999. He continued to remain as such even after the AGM dated 30 September 1999 (contesting Defendants contend that he ceased to be a director after 30 September 2000 on account of non-confirmation of his appointment by the AGM, which aspect is being dealt with separately). It is Plaintiffs' contention that original Plaintiff No.1 was never given a single notice for attending any of the Board Meetings or AGMs and that therefore absence of Original Plaintiff No.1 in such meetings cannot be cited as reason by the contesting Defendants for the purpose of taking benefit of their own wrong. Furthermore, according to the Plaintiffs, the relationship between the parties at the relevant time is required to be taken into consideration where Defendant No.3 was being considered as *Rakhi* sister of original Plaintiff No.1. It is undisputed position that original Plaintiff No.1 attended the wedding of daughter of Defendant Nos.2 and 3 at Jaipur for 5 days in January 1999. Original Plaintiff No.1 has given evidence that in his capacity as maternal uncle, he gave '*Mameru*' to Defendant No.4 during her wedding. It is Plaintiffs' contention that since the daughter of Defendant Nos. 2 and 3 was getting married, they did not want a social stigma of loss of ownership of stud farm being made known to public. Apart from specific covenants of the SPA, these are some of the other reasons cited by the Plaintiffs to suggest as to why Defendant No.2 continued to manage and control the affairs of the stud farm even after execution of the SPA.

144) Additionally, it is contended by Plaintiffs that original Plaintiff No.1 had other successful businesses to look after and that he was not keeping good health, which prevented him from taking active participation in the management and control of the Stud Farm of the first Defendant Company. The contesting



Defendants have not only disputed the claim of ill-health of original Plaintiff No.1, but have attempted to use his 'more successful business' as a factor against original Plaintiff No.1. According to the contesting Defendants, original Plaintiff No.1 continued to be in-charge of his company named, 'Oriental Aromatics Ltd.' with a factory at Daman and office premises at Govandi to demonstrate his ability to actively look after business. They contend that original Plaintiff No.1 was incharge of Finance and Marketing of Oriental Aromatics Ltd. till the year 2014 and was its Managing Director till 1 April 2004. That he acquired shares of Camphor Allied Products Limited in 2008. According to the contesting Defendants, if original Plaintiff No.1 was able to actively participate in the affairs of his companies, it is difficult to believe that his alleged ill-health came in his way of not participating in the management and control of the first Defendant Company after execution of the SPA. The contesting Defendants have also seriously contested the claim of ill-health of original Plaintiff No.1 by contending that he was fully mobile and active and used to participate in the racing circuits by attending not just races but also live racecourse meetings at Mahalaxmi Race Course, as well as at Pune Race Course. That he was regularly attending Willingdon Sports Club and Breach Candy Swimming Sports Club. That he attended wedding of daughter of Defendant Nos.2 and 3 for five days in January 1999.

145) Plaintiffs examined P.W.2, who was Doctor of original Plaintiff No.1, to prove various ailments suffered by him. P.W.2 has given evidence about the status of health of original Plaintiff No.1 during 1995 to 2014. It is not necessary to discuss each and every medical treatment availed by original Plaintiff No.1 during this long period of time. Suffice it to note that during 11 July 1999 to 27 July 1999, he was hospitalised for infection of heart valve. He was once again hospitalised in October 2000. He underwent three angiographies, one angioplasty and heart replacement after undergoing open heart surgery in December in USA. Thus hospitalization and medical treatment for heart value



infection during July 1999 is proved. Also, it appears that both pre and post hospitalization for treatment in July 1999, original Plaintiff No. 1 was required to undergo various diagnostic procedures. He was appointed as Director on 30 March 1999 and the medical treatment underwent by him after his appointment as director does indicate that such medical treatment could be one of the reasons, why original Plaintiff No. 1 did not show interest in active management of the Company and its stud farm. After discovering series of actions taken by the contesting Defendants, most of the correspondence towards the end of the year 2000 was made by his son (original Defendant No. 16). Even the EOGM of 9 January 2001 was attended by proxies of original Plaintiff No. 1.

146) After considering the evidence led by both the sides on the issue of ill-health of original Plaintiff No.1, it is difficult to draw a definitive conclusion whether his ill-health prevented him from participating in the day-to-day activities of the Stud Farm of the first Defendant Company. Some evidence is led to show that during 1999 and 2000, original Plaintiff No.1 did suffer ailments and underwent open heart surgery at USA. It is possible that he may have been slightly incapacitated from during the years 1999 to 2000, but whether his health condition was such that he was prevented from visiting the stud farm is something which is difficult to infer on the basis of evidence produced by both the sides. Be that as it may. In my view, it is not necessary to delve deeper into this aspect. As observed above, Defendant Nos.2, 8 and 9 were expressly permitted under SPA to continue to act as a Directors and look after the affairs of the Stud farm.

147) The SPA was executed on 27 October 1998 and original Plaintiff No. 1 was appointed as Director on 30 March 1999. SPA permitted Defendant Nos. 2, 8 and 9 to remain as directors until replaced by original Plaintiff No. 1.



Even at the time of his appointment as Additional Director on 30 March 1999, Defendant Nos. 2, 8 and 9 were again permitted to remain as directors by original Plaintiff No. 1 as per the covenants of SPA. On 16 November 2000, original Plaintiff No. 1 called upon Defendant Nos. 2, 8 and 9 to resign as directors and not to take any decision about the first Defendant Company. Thus, continuation of Defendant Nos. 2, 8 and 9 in management of the company was with express consent of original Plaintiff No. 1 and not as owners of entire share capital by treating the SPA as loan transaction.

148) Even otherwise, there is nothing in law which divests an owner of ownership of property on account of his failure to exercise full rights relating to such ownership. In the present case, we are concerned with the issue of ownership of shares in a company by one person vis-à-vis management thereof by another person. Ownership and management of the Company are two different things, and it cannot be stated that if an owner fails to take part in management of the Company, he gets divested of his ownership rights. Therefore, reliance by Mr. Sancheti on judgment of Calcutta High Court in *Jiban Roy Choudahry* (supra) in support of contention that right to possess property is an important facet of ownership right, is misplaced. The Calcutta High Court has dealt with the issue of ownership of immovable tenanted property in the context of tenancy dispute. In the present case, there was conscious continuation of Defendant Nos. 2, 8 and 9 to remain as directors coupled with reasons why original Plaintiff No. 1 could not participate in management of the company for about one and half years after his appointment as director.

149) It is also required to be noted that the Second Defendant was apparently deeply involved in horse racing and horse breeding activities. It is possible that on account of his interest in those activities, the Second Defendant possibly retained 10 shares of the company with a view to remain in management



of the stud farm for some more time despite the original Plaintiffs purchasing 99.96% stake in the first Defendant Company. Mr. Dhond has repeatedly highlighted the aspect of Defendant No. 2 not wanting a social stigma of losing stud farm to be made known to public in view of his daughter's impending wedding and therefore requesting original Plaintiff No. 1 to permit him to remain in charge of activities of the stud farm for some time. Whatever might be the actual reason, the said arrangement was recognised in the SPA and therefore Defendant No. 2 remaining in management or original Plaintiff No. 1 not taking part in management of the company or its stud farm cannot be a ground for divesting original Plaintiffs of their ownership rights in 24,900 shares by treating the transaction as security for loan.

**F.4.8 NON-INFUSION OF FUNDS BY ORIGINAL PLAINTIFFS AND
INFUSION OF FUNDS BY SECOND DEFENDANT**

150) Another factor strenuously highlighted by the contesting Defendants is failure on the part of the original Plaintiffs to infuse funds into the first Defendant Company for managing day-to-day expenses of the stud farm after execution of SPA and corresponding infusion of funds by the Second Defendant for the same purpose. Non-infusion of funds by the original Plaintiffs into the First Defendant Company after 27 October 1998 (except lending of funds on 17 October 1998) is not disputed and therefore evidence in this regard need not be discussed. However, what is contended by Plaintiffs is that funds were already lent by them to first Defendant Company for managing its affairs. Defendant No. 2 on the other hand has contended that he infused Rs. 2,71,00,000 in the first Defendant Company for managing the expenditure of the Stud Farm. No doubt, running of the stud farm would obviously require some expenditure to take care of horses, equipment, plantation, personnel employed



etc. As on the date of execution of the SPA on 27 October 1998, Rs. 25 Lakh were lent by original Plaintiffs to the first Defendant Company. Admittedly the outstanding loan of Shamrao Vithal Bank on first Defendant Company was not repaid after receipt of funds of Rs. 25 lakh on 27 October 1998. Thus Rs. 25 Lakh remained available with Defendant Nos. 2, 8 and 9 for incurring of expenditure on management of the stud farm and this funding came from original Plaintiffs. Whether expenditure in excess of Rs. 25,00,000/- was incurred till September 2000 when steps were taken for dilution of stake of original Plaintiffs? Though figure of Rs. 2,71,00,000/- is quoted by the Second Defendant, no concrete evidence of incurring of such expenditure is produced. In my view, primary evidence to show infusion of external funds into Defendant No.1 would be production of bank statements after execution of SPA. However, the Second Defendant has failed to produce even a single bank entry to show any funds were actually infused by Defendant No.2 into accounts of Defendant No.1. In absence of any bank entries, it is difficult to infer infusion of funds only on the basis of Balance Sheets relied upon by Defendant No.2. It is also of relevance that original Plaintiffs repaid the entire outstanding loan of Shamrao Vithal Co-operative Bank of Rs. 66,88,116/- to save the Stud Farm being attached and sold in pursuance of notice issued under Section 13(2) of the SARFAESI Act. Plaintiffs have also relied upon the report of the Court Receiver dated 2 April 2004 which does not indicate healthy state of affairs at the Stud Farm. It is therefore difficult to believe that after execution of the SPA, Second Defendant continued to maintain the Stud Farm in the same condition as it stood earlier. If Defendant No.2 indeed spent any money from his own pockets for running day-to-day affairs of the Stud Farm, it was for him to file a counterclaim against the Plaintiffs to seek recovery of the said amount. However, Defendant No. 2 has neither filed any counterclaim nor has produced details of expenditure incurred and amount has been spent by him for managing the day-to-day affairs of the Stud Farm. In my view, therefore failure on the part of original Plaintiffs to infuse funds or contesting Defendants incurring any expenditure towards management of the Stud Farm again cannot



be a factor for inferring that the true nature of SPA was that of security for loan and not transfer or sale.

151) The theory of the contesting Defendants about infusion of funds of Rs. 2,71,00,000/- in the first Defendant Company after execution of SPA appears to be doubtful on account of yet another factor. According to contesting Defendants, SPA was executed only as a security for loan and if this defence is to be accepted, the amount of Rs.29,98,800/- would also become loan advanced by original Plaintiffs to the contesting Defendants. In fact, this is the stand taken by the contesting Defendants in correspondence as well as in the Written Statement that total amount of Rs.1.20 crores was lent by original Plaintiffs, which included Rs.29,98,800/-lent to Defendant Nos. 2 to 7. As contended in the letter dated 21 November 2000, the contesting Defendants had refunded loan of Rs.45,00,000/- by 28 April 1999 and only Rs.70,98,800/- remained to be repaid to original Plaintiffs. If Defendant Nos. 2 to 7 indeed had Rs. 2,71,00,000/- to be infused for operation of the stud farm after execution of SPA, any prudent person would have first repaid much lesser amount of Rs. 29,98,800/- to the original Plaintiffs and got the SPA cancelled. It is impossible to believe that the contesting Defendants took the risk of keeping the SPA subsisting by not repaying the alleged loan of Rs.29,98,800/- and kept on investing the money which they allegedly possessed, allegedly for maintenance of the stud farm.

152) The theory of infusion of funds in excess of Rs. 2 crores by contesting Defendants is also belied by the condition of the stud farm at the time of appointment of Court Receiver. At that time, the electricity connection of the farm was disconnected owing to non-payment of electricity charges. Shamrao Vithal Bank had issued Notice for attachment and sale of the mortgaged land due to non-payment of its dues. Plaint alleges attempts on the part of the contesting Defendants in selling several horses when suit was filed. What was left at the stud



farm as on 1 April 2004 were only 8 mares, 1 stallion, 1 four year old, 3 two year old and four yearlings and none of them were in healthy condition.

153) All the above aspects clearly make the defence of contesting Defendants of having invested amount of Rs. 2,71,00,000/- for operation of the stud farm post execution of the SPA unbelievable.

F.4.9 INADEQUACY OF CONSIDERATION

154) One of the defences raised by the contesting Defendants is that the consideration amount of Rs.29,98,800/- for purchase of 99.96% stake in first Defendant Company is grossly inadequate and unconscionable. Contesting Defendants' defence is premised on the assertion that as on the date of execution of the SPA, the Stud Farm owned by the first Defendant Company had a valuation in excess of Rs. 8 to 10 Crores as against the paltry sum of Rs.29,98,800/- paid by original Plaintiffs for acquisition of almost the entire stake in the Company. According to contesting Defendants, at the relevant time, the Company owned a well-developed farm spreading over 101.7 acres on land situated at Mumbai-Pune highway. That it was not merely a barren piece of land but was fully developed stud farm with extensive facilities and amenities with thousands of trees and landscaping. That there were around 40 well maintained paddocks for horses for grazing and well maintained race course for training of horses. The farm had barns for stock of hay. There were 150 thoroughbred horses at the farm at the relevant time consisting of (i) two imported stallions (championed male horses) (ii) 60 mares (female horses) (iii) 42 foals (young horses) (iv) 40 yearlings (one year old horses) (v) 40 foals at foot (new borns). Contesting Defendants claim that 140 well developed stables were provided at the farm. There was imported exercise machine, one trade mill for the horses costing Rs.12 lakhs. That there were state of the art diagnostic and pathological



laboratory for the horses, equipment for sonography, breeding, etc. That there was large residential villa for directors /owners. That there were staff quarters for about 60 persons. That there was well developed internal network of roads with overhead lighting. That the farm had its own electricity generating set, borewells, tractors, sprinkler system, etc. Based on the above, the contesting Defendants have valued the farm at Rs. 8 to 10 crores at the time when the SPA was executed.

155) As against the above contentions of the contesting Defendants, Plaintiffs have contended that contesting Defendants have not placed any valuation report on record to suggest valuation of the farm at Rs. 10 crores as alleged. Plaintiffs have also relied upon Balance Sheet of Defendant No. 1 in which the book value of the Stud Farm and stables was indicated at Rs. 29.9 lakhs. Additionally, Plaintiffs have relied upon outstanding loan liability of Defendant No. 1 towards Shamrao Vithal Co-operative Bank of Rs. 67,88,116/-.

156) Before discussing whether the consideration of Rs. 29,98,800/- paid by original Plaintiffs for purchase of 99.96% stake in the first Defendant-Company is adequate or not, it would be first necessary to consider whether inadequacy of consideration, by itself, would vitiate a contract. Mr. Dhond has placed reliance on provisions of Sections 15, 16, 17 and 18 of the Indian Contract Act, under which a contract can be set aside only when it is executed under coercion and /or undue influence and/or fraud and /or misrepresentation. On the issue of adequacy of consideration, reliance is placed on Section 25 of the Contract Act, which reads thus:-

25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. —

An agreement made without consideration is void, unless —



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(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

***Explanation 2.*—An Agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.**

(emphasis supplied)

157) Mr. Dhond has particularly relied upon Explanation 2 to Section 25, under which an agreement to which consent of promisor is freely given, is not void merely because the consideration is inadequate. At the same time, Explanation 2 to Section 25 further provides that the inadequacy of consideration can be taken into consideration by Court in determining the question whether the consent of the promisor was freely given or not. Thus, under provisions of Section 25 of the Contract Act, mere inadequacy of consideration *ipso facto* is not a factor for declaring a validly executed contract, out of free consent of the promisor, to be void. Thus, what is important is “free consent by promisor” and not “inadequacy of consideration”. Inadequacy of consideration is a factor only for determining whether the contract is an outcome of free consent of the promisor or not. So what is required to be pleaded and proved is that the contract was not executed out of free consent of the promisor.



158) Reliance is also placed by Mr. Dhond on Section 20 of the Specific Relief Act, 1963, as it read prior to its amendment in the year 2018, and which provided thus:-

20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance :-

- (a) where the terms of contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
- (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or
- (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.- The question whether the performance of contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

(emphasis supplied)

159) Reliance is particularly placed on Explanation 1 to Section 20 of Specific Relief Act, under which mere inadequacy of consideration shall not be



deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Under sub-section 2 of Section 20, Court can refuse to grant specific performance by exercising its discretion where the promise of contract gave Plaintiff an unfair advantage over the Defendant or where performance of contract involves hardship on the Defendant. What Explanation 1 to Section 20(2) provides is that mere inadequacy of consideration is not a factor for inferring unfair advantage or hardship.

160) On the contrary, it is Mr. Sancheti's contention that inadequacy of consideration is a factor recognised under Explanation 2 to Section 25 of the Contract Act as a relevant factor in the context of specific performance especially while exercising discretion under Section 20 of the Specific Relief Act. According to him, the relationship between the parties and the circumstances were such that an inference needs to be drawn that Plaintiffs had an unfair advantage over the contesting Defendants. It is further submitted that circumstances of the case are such that it is inequitable to enforce specific performance of the contract on contesting Defendants.

161) Mr. Dhond has relied upon judgment of the Apex Court in *Jai Naraian Parasrampur* (supra) in paragraph 63 of which, the Apex Court has held as under:-

63. In any view of the matter inadequate consideration by itself would not lead to the conclusion that the same was an agreement of loan. Inadequate consideration, it is trite, is also not a ground for refusing to grant a decree for specific performance of contract.

162) The judgment is sought to be distinguished by Mr. Sancheti submitting that the defence of the contesting Defendants is not based only on the



ground of inadequate consideration. He has also sought to distinguish the facts of the case in *Jai Naraian Parasrampuriah* (supra). The facts in *Jai Naraian Parasrampuriah* involved execution of Agreement for Sale of the property by the Company in favour of the Appellant for consideration of Rs.11 lakhs, out of which 10 lakhs was paid by the Appellant and the remaining amount of Rs.1 lakh was to be paid at the time of execution and registration of the Sale Deed. One of the defences raised by the Defendant in the suit for specific performance was that the valuation of the property was Rs. 25 lakhs on the basis of a property agreement executed by the Defendants Company in favour of their son-in-law. It is in the light of these facts that the Apex Court has held in paragraph 63 of the judgment that inadequate consideration by itself does not lead to a conclusion that the transaction was that of a loan nor inadequate consideration is a ground for refusal to grant a decree for specific performance of contract.

163) Mr. Dhond, has also relied upon judgment of the Madras High Court in *Santhappa Rai* (supra) in which the Madras High Court has held as under:-

.... It seems to me that that is directly in conflict with the warning given by Lord Jessel, M. R. in *Wallis v. Smith* which is that where contracts are clearly expressed, **the Judges should resist the temptation of interfering with them on the ground that they know the business of the people making the contract better than the people know it themselves. It has been held with utmost clearness that inadequacy of consideration alone is not a ground for holding that a contract was induced by fraud or undue influence.** In *Tennant v. Tennant* Lord Westbury stated the law as follows:

"The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. **My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.**"

That dictum of Lord Westbury's was approved and applied by the Judicial Committee in *Administrator General of Bengal v. Juggeswar Roy*. In this case it cannot be said that the considerations for Exs. E and F were themselves so



grossly inadequate as to raise a presumption that the first plaintiff did not know what he was doing or that he was the victim of some imposition.

.....

Lord Shaw goes on to state that it had got to be shown that the influence was undue. I mention this to show the very high degree of evidence that is required because in the case now under appeal there is no evidence of any relationship at all between the parties except the slight relationship by marriage. **There is no evidence that the one was able to dominate the will of the other.**

(emphasis supplied)

164) Mr. Sancheti has sought to distinguish the judgment in *Santhappa Rai* by contending that the judgment itself indicates that in certain circumstances, inadequacy of consideration can be a ground for setting aside sale where the party either did not understand what the transaction was about or that the party was a victim of some imposition. He has further contended that judgment required pleading and evidence, which has not been done in the present case.

165) In my view the judgment in *Shantappa Rai* fully applies to the present case. In the case before Madras High Court, there was no allegation of undue influence, the document was read over and thereafter signed. In such circumstances, the Madras High Court did not accept the finding of the lower Court that the transaction was entered into in a hurry and for inadequate consideration. The High Court also did not accept the theory of stupidity of Plaintiff in entering into the transaction in question. In the present case as well, contesting Defendants are seasoned players in the business, they knew what they were transacting. They are not illiterate persons or novices, incapable of comprehending the nature of transaction that was being executed. There is nothing on record to indicate any undue influence by original Plaintiffs on the contesting Defendants for execute the transaction in question. The transaction, to my mind, stems out of free will of the contesting Defendants. It therefore has



to be held that the transaction was executed out of the free will of the contesting Defendants. In such circumstances, it is not for this Court to determine as to what would have been the adequate consideration for sale of 24,990 shares of the first Defendant Company.

166) On the issue of undue influence, Mr. Dhond has relied upon judgment of the Madras High Court in *P. Saraswathi Ammal* (supra) in which it is held that the allegation of undue influence must be well supported by pleadings and evidence. In the present case, there are no supportive pleadings, much less evidence, to infer that Plaintiffs were in position of exercising or that they indeed exercised any undue influence on the contesting Defendants for execution of SPA. Sale of stake by family of Defendant No. 2 is a well a considered decision, backed by Board resolution dated 23 October 1998. As on 23 October 1998, none of the contesting Defendants owned any sum to original Plaintiffs. SPA has been drafted by a well known solicitor firm in Mumbai along with various other documents of debt and mortgage. Contesting Defendants were able to deduct 10 shares from the previously drafted SPA by putting white ink on some portions of the draft. In his written statement, Defendant No. 2 has denied that he was under any financial constraints. It therefore cannot be stated that original Plaintiffs were either in a position to exercise any undue influence on contesting Defendants or that the contesting Defendants were hoodwinked into execution of the SPA.

167) Plaintiffs have also relied upon judgment in *Vijaya Minerals Pvt. Ltd.* (supra) and *Triloknath* (supra) which also seem to suggest that inadequacy of consideration by itself does not lead to an inference that the contract was not executed out of free consent by the promisor.



168) Mr. Sancheti, on the other hand has relied upon the judgment of this Court in *Lonkaran Kishorilal Paliwal* (supra) to which reference has already been made hereinabove. The case before this Court involved a pure case of loan transaction where the Defendants therein had approached Plaintiff for repayment of loan amount with interest and the Plaintiff had demanded higher amount of interest. It is in the light of these peculiar facts that this Court inferred that the transaction in question was of loan.

169) After considering the conspectus of provisions of the Indian Contract Act and Specific Relief Act as well as various decisions relied upon by the parties, I am of the view that inadequacy of consideration, by itself, is neither a ground for declaring a contract to be void nor a reason for denying the relief of specific performance of an agreement. It is necessary for parties to prove that the consent was obtained either on account of undue influence or was not given freely, for declaration of contract as void or to prove that party seeking specific performance had an unfair advantage or that specific performance involves hardship for the purpose of avoiding a decree of specific performance. In the present case, the contesting Defendants have failed to prove that their consent for execution of SPA was not freely obtained. They have further failed to prove that the Plaintiffs were in a position to secure unfair advantage over them or that purpose of the contract involves any hardship for the Defendants which they did not foresee or that non-performance of SPA would involve any hardship on Defendants. In my view therefore, even if it was to be assumed that the consideration of SPA is inadequate, the same cannot be a ground *ipso facto* for holding SPA to be void or to deny the decree of specific performance to Plaintiffs. It must also be borne in mind herein that decree for specific performance in the present case is restricted only to performance of few acts in pursuance of the SPA. It however does not mean that the SPA had not fructified. SPA in the present case has fructified into complete transaction by transfer of shares and by



entry of names of original Plaintiffs in the Register of Members. So this is not a usual case of specific performance of a contract of sale for the purpose of attracting provisions of Sections 20 of the Specific Relief Act.

170) Having held that inadequacy of consideration by itself is not a ground for holding SPA to be a sham or for denial of decree of specific performance, it is not really necessary to go into the next issue as to whether the consideration for the transaction in question was really adequate or not. However, since both the parties have led evidence and canvassed submission, in this regard it would be necessary to decide this issue in paragraphs to follow.

171) As observed above, there was outstanding loan liability of Rs.67,88,116/- of Shamrao Vithal Co-operative Bank on Defendant No.1. First charge of land admeasuring 55.975 acres of Stud Farm land was already created by Defendant No.1 in favour of Shamrao Vithal Co-operative Bank on 10 February 1994. Thus, more than half of the land of the Stud Farm was already mortgaged with Shamrao Vithal Co-operative Bank and there was substantial outstanding of loan of the said Bank from Defendant No.1. It appears that even after receiving various loans from Plaintiffs as well as sale consideration of Rs.29,98,800/- in pursuance of SPA, contesting Defendants did not clear the said loan liability and the same was ultimately cleared by Plaintiffs when the Bank initiated proceedings under Section 13 (2) of the SARFAESI Act. Thus, the amount of consideration of Rs.29,98,800/- is required to be considered alongwith the outstanding loan liability of Shamrao Vithal Bank.

172) Though contesting Defendants have painted a rosy picture of livestock as well as the facilities at the Stud Farm, there is no denial to the fact



that at the time when SPA was executed, contesting Defendants needed funds. The contesting Defendants have repeatedly highlighted purchase transaction of acquisition of 50% stake in six mares for Rs. 25 lakhs in the year 1993 with a view to present the predicted valuation of the stud farm with 150 odd horses at the farm, including 60 mares. However, when a veterinary doctor paid visit at the stud farm alongwith Receiver of this Court on 1st April 2004, he took notice of following livestock at the stud farm:-

- (i) 8 mares,
- (ii) 1 stallion,
- (iii) 1 four year old,
- (iv) 3 two year old and
- (v) four yearlings.

173) This was the only livestock left at the farm when the veterinary doctor paid a visit on 1 April 2004. The condition of most of the horses was found to "poor". Of course this was the situation five and half years after the SPA was executed. None of the parties undertook the exercise of valuation at the time of execution of the SPA. Therefore there is no documentation of the exact number of horses at the stud farm at the time of execution of SPA.

174) While Mr. Dhond has relied on the report of the veterinarian of 1 April 2004, Plaintiffs seem to have admitted in the Plaint that the livestock at the farm was 'valuable' as on the date of filing of the suit. In paragraph 52D(b), Plaintiffs have averred that the contesting Defendants were attempting to dispose of "valuable livestock" of the first Defendant Company and were seeking to generate monies with a view to siphon off the funds. In paragraph 52D(a) Plaintiffs have averred that the contesting Defendants had put 11 horses for being auctioned at the auction sale held by RWITC on 9 February 2001 and another 21



horses were taken to Pune by the second Defendant and his nominee Director for the purpose of private sale. These averments in the Plaint do indicate that the livestock present at the farm at the time of execution of SPA was not totally without any value. Plaintiffs themselves have described the same as "valuable livestock".

175) Though it is difficult for this Court at this juncture to arrive at the exact valuation of the Stud Farm at the relevant time, at the same time, it is not possible to accept the tall claims made by the contesting Defendants about presence of well-groomed 150 horses at the farm at the time of execution of the SPA. If contesting Defendants desired to prove that the actual valuation of the Stud Farm was way higher than Rs.29,98,800/- they ought to have produced the valuation report and led evidence of such valuer. They could have examined an employee of the farm or witness from Defendant No. 11 to prove the exact number of horses present at the farm on the date of execution of SPA. However this is not done. Therefore in absence of any concrete evidence before this Court, valuation sought to be suggested by contesting Defendants of Rs.10 Crores cannot be accepted on the basis of mere surmises and conjectures.

176) A great deal of debate has taken place between the parties on the issue of valuation on the basis of acquisition of 75,000 shares of Defendant No.11 for conversion of alleged debt of Rs.1,12,50,000/- into equity. According to Plaintiffs, the value of each share for consideration of Rs. 29,98,800/- comes to Rs.120 per share. This is compared by Plaintiffs with the amount of Rs.1,12,50,000/- for purchase of 75,000 shares by Defendant No.11, which comes to Rs.150/- per share. On this basis it is sought to be inferred that the alleged undervaluation is only to the extent of Rs. 30 per share (difference between Rs. 150 and Rs. 120), which comes to paltry sum of Rs.7,49,700/-. This is countered



by Mr. Sancheti by submitting that if the value per share is taken at Rs.150/- (on the basis of conversion of 75,000 shares for Rs.1,12,50,000/-) the value of the Company becomes Rs. 1.50 crores for 1,50,000 shares and the value of Rs.24,990 shares purchased by Plaintiffs would be Rs.600/- per share. Mr. Sancheti's contention that purchase of company worth Rs. 1.50 crores (as per Plaintiffs' calculations) at Rs. 29,98,800/- is clearly unconscionable.

177) I do not wish to delve deeper into the calculations presented by the parties before me. What is relevant to be noted is that allotment of 75,000 shares to Defendant No. 11 for consideration of Rs. 1,12,50,000/- in October 2000, completely demolishes the theory of contenting Defendants that the first Defendant Company was valued at Rs. 10 crores, as falsely contended by them.

178) As observed above, contesting Defendants are seasoned players in the field and they knew exactly as to what was the correct valuation at which the stake in the first Defendant Company could be sold at the relevant time. As observed earlier, the SPA has been fully acted upon by transferring the shares in the name of Original Plaintiffs and by entering their names in the Register of Members and by appointing Original Plaintiff No.1 as Director. Nature of SPA as a transaction of sale is further acknowledged by contesting Defendants by admitting Plaintiffs' stake of 24.99% in the company while holding EOGM dated 9 January 2001. Thus this is not a case of contesting Defendants being hoodwinked by original Plaintiffs into a transaction, which no sound person could ever enter into. Why the contesting Defendants agreed to sell 99.96% stake in the first Defendant Company for consideration of Rs.29,98,800/- is something which is in the knowledge of the Defendants themselves.



179) As observed above, the only asset of the First Defendant is the Stud Farm. It measures 101.7 acres. Plaintiffs have placed on record all the Sale Deeds, by which the land of the Stud Farm was purchased from time to time. While it is not necessary to make reference to all the said Sale Deeds, in absence of any dispute about purchase of lands, for the purpose of getting some idea about the possible value of the land at the relevant time, it would be necessary to make reference to Sale Deed dated 26 March 1998 executed between Defendant No.1-Company and Shri Bandu H. Gopale and Shri Popat B. Gopale, by which land admeasuring 14.2 Ares in Gat No.71, Village-Shirgaon, Taluka -Maval, District -Pune, is shown to have been purchased for consideration of Rs. 26,000/-. Similarly, by a Sale Deed executed on 17 October 1997 executed between Defendant No.1-Company and Dhanaji Namdeo Gopale, land admeasuring 64 Ares in Gat No.75 Village-Shirgaon, Taluka-Maval, District -Pune is shown to have been purchased for Rs.88,000/-. In the Sale Deed dated 17 October 1997 the Ready Reckoner value is shown at Rs.1,14,000/-. If the Ready Reckoner value of Rs.1,14,000/- for land admeasuring 64 Ares is taken into consideration, the approximate rate per acre would be Rs. 71,250/- in the year 1997. If price at which the land is sold at Rs.88,000/- is taken into consideration the rate would be Rs.55,000/- per acre. If the above rates of the land are taken into consideration, the value of the land of Stud Farm of 101.7 Acres would Rs.76,73,625/- going by Ready Reckoner value and Rs.55,93,500/- going by value at which the land is actually purchased. While it is not for this Court to enter into guess work for finding out the true value of the land at the relevant time, the purchase transactions placed on record give some idea about the actual value of the land at the relevant time. Thus, after taking into consideration the amount of Rs.29,98,800/- paid under SPA coupled with the outstanding loan liability of Shamrao Vithal Co-operative Bank, it is otherwise difficult to hold that the consideration is so inadequate or is unconscionable that the entire contract must be treated as void. It must also be borne in mind that contesting Defendants did not sell the entire stake in the Company and for the some reason decided to keep



10 shares of the Company with themselves, possibly to assert their rights in respect of management of the first Defendant Company. They also got included covenant in the SPA which permitted them to remain in management even after sale of 99.96% stake in the first Defendant Company. They were also possibly aware of the disinterest of the original Plaintiffs in taking part in the management of the Stud Farm. Thus, this is not a case of absolute sale of the Stud Farm and contesting Defendants continued to be in possession and management of the farm after execution of the SPA at least for some time. Considering all these circumstances, it is difficult to hold that the consideration paid for execution of the SPA is grossly inadequate that this Court must draw an adverse inference that the SPA is not executed by contesting Defendants out of their free consent.

180) It may be that the price of Rs.29,98,800/- paid by original Plaintiffs for purchase of 99.96% stake in the first Defendant Company may not exactly match the value of the stud farm as on 27 October 1998. However the issue is whether such under valuation alone can be a ground for the purpose of holding that SPA did not effect sale of shares and that the same was merely a document executed towards security for loan? The answer to the question, to my mind, appears to be in the negative. It must also be borne in mind that contesting Defendants, on their own, did not file any proceedings for declaring the SPA to be void or not binding on them. They have failed to file any counterclaim in the present suit. Therefore on this count as well, the defence of inadequacy of consideration raised by the Defendants deserves to be repelled.

F.4.10 ANSWER TO ISSUE NOS. 1 & 2

181) On the basis of the findings recorded above, I am unable to hold that SPA was executed merely as a comfort document or towards security for loan.



SPA has effected transfer of 24,990 shares in favour of original Plaintiffs. Issue

Nos. 1 and 2 are accordingly answered as follows:

No.	Issue	Answer
1	Whether the Plaintiffs prove that the Plaintiffs acquired 24,999 shares, i.e. a 99.96% equity stake in the Defendant No.1 company under the Share Purchase Agreement dated 27.10.1998 ?	Yes
2	Whether the 2 nd and 3 rd Defendants prove that the said Share Purchase Agreement was only by way of security for an underlying loan transaction as alleged in para 4.7, 4.8, 4.9, 29 and 32 of the 3rd Defendant's Written Statement and in para 11 of the 2nd Defendant's Written Statement ?	No

F.5 WHETHER ELEVENTH DEFENDANT WAS A SHAREHOLDER AS ON THE DATE OF EXECUTION THE SPA.
(ISSUE NOS. 9 & 15)

182) The Plaintiffs have alleged that Defendant No.11-Somerville was not a shareholder of the first Defendant Company as on 30 September 2000 when resolution was allegedly adopted for increase of share capital of the Company from Rs.25 lakhs to Rs.1.50 crores and also as on 18 October 2000 when decision was taken for allotment of 75,000 shares of the Company to Defendant No.11.

Plaintiffs have averred in paragraph 2(e) of the plaint as under :-

(e) The 10th Defendant is a partnership firm and holds one share in the 1st Defendant company. The 10th Defendant is owned and controlled by the 2nd Defendant and members of his family. It appears that as part of the series of illegal and fraudulent steps taken by the 2nd Defendant and his co-defendants, **the 10th Defendant has very recently transferred its share to the 11th Defendant, without the knowledge or concurrence of the Original Plaintiffs.** The transfer is illegal, null and void as stated more particularly hereinafter.

(emphasis supplied)



183) Plaintiffs further contend that under Articles of Association, there was a right of pre-emption for Plaintiffs to purchase the share allegedly sold by Defendant No.10 to Defendant No.11.

184) It is Plaintiffs' case that "very recently" before filing of the suit, Defendant No.10-Ajit Investments clandestinely transferred 1 share of the first Defendant Company to Defendant No.11 and that the same was done not only to prove valid conduct of AGM dated 30 September 2000 but also to prove valid allotment of 75,000 shares to Defendant No.11. Plaintiffs' case is thus that when Defendant No.11 did not own even a single share in the first Defendant Company, it could have neither remained present for AGM conducted on 30 September 2000 nor any shares could have been allotted in its favour. Thus, absence of ownership of 1 share by Defendant No.11 is essentially raised by Plaintiffs to demolish the entire theory of Defendant No.11 owing any debt to Defendant No.1 or increasing the share capital of Defendant No.1-Company to reduce such alleged debt or entitlement of Defendant No.11 towards allotment of any shares by converting debt into equity.

185) Before proceeding to decide the issue of ownership of 1 share by Defendant No.11 in the First Defendant Company, it must be observed at the very outset that the entire case of the Plaintiffs in this regard is based on surmises and conjectures. Plaintiffs have not produced any primary evidence to show that the one share, in respect of which ownership is claimed by Defendant No.11, is/was actually and factually owned by some other person or entity. Though it is vaguely contended that 'very recently' Defendant No. 10 transferred the share to Defendant No. 11, no evidence is produced to show that Defendant 10 owned that particular share before alleged transfer. Secondly, Plaintiffs themselves do not appear to be very sure about the exact date on which the alleged transfer of



one share took place between Defendant No.10 and 11. In fact no document of transfer in this regard is placed on record by Plaintiffs. Thus, Plaintiffs' averments in the plaint about Defendant No. 10 'very recently' transferring 1 share of first Defendant Company to Defendant No.11 is purely based on surmises in absence of any specific knowledge about the alleged transaction.

186) This Court while framing Issue No. 15 has cast burden on Defendants to prove that one equity share of the first Defendant Company was legally and lawfully transferred from the Third Defendant to Eleventh Defendant on 15 June 1992. This issue is framed on account of following averments in paragraph 2(i) of the written statement filed by Defendant No.11 :

2. Without prejudice to the aforesaid, this Defendant further states as follows:

(i) On 15th June 1992, this Defendant became the holder of One Equity Share of Rs. 100/- in the 1st Defendant Company. The said share bearing distinctive No.3240 was transferred to this Defendant by Mrs. Manju Gupta (Defendant No.3) and a Share Certificate No.16 was received by this Defendant from the 1st Defendant Company after duly recording the transfer therein. Hereto annexed and marked **Exhibit '1'** is a copy of the said Share Certificate No.16. The said Share transfer was duly entered in the Register of share Transfers of the 1st Defendant company under Serial No.7 on 15th June 1992. Hereto annexed and marked **Exhibit '2'** is a copy of the extract from the said Register of Share Transfers.

187) As a matter of fact, it is the assertion of Plaintiffs that Defendant No.11 was never a shareholder of the first Defendant Company and in that sense, this assertion is required to be proved by Plaintiffs. However, on account of the averment raised by Eleventh Defendant in the Written Statement about transfer of share by Third Defendant to it on 15 June 1992, the burden appears to be cast on the Defendants. Be that as it may. I proceed to examine whether Defendant was a shareholder at the relevant time. In this regard the primary assistance is to



be found in the averments made by Plaintiffs in their plaint itself. The following relevant averments are made by the Plaintiffs in paragraph 2(j), 9(a), 19 and 54(a) of the plaint, which read thus:-

2.(j) Defendant Nos. 2 to 11 (either by themselves or through 2nd Defendant) are all parties to the share purchase agreement dated 27.10.1998 ...

9.(a) ... Article 1.1(c) denies the expression 'First party' to mean members of the Defendant No.2's family (Defendant Nos 2-7) and the 2nd Defendant's family concerns, namely, the 10th Defendant and the 11th Defendant.

19. The 10th Defendant firm and 11th Defendant company are entities owned and controlled by the 2nd Defendant. As stated above, they fall within the ambit of the expression 'First party' used in the share purchase agreement dated 27.10.1998, Certain amounts were shown as being due from the 1st Defendant to the 10th and the 11th Defendant in the books of account of the 1st Defendant company.

54.(a) ... the Original Plaintiffs were shareholders and members of the 1st Defendant company and 24,990 shares constituting 99.96% of the total issued, subscribed and paid up share capital of the 1st Defendant company. These shares were purchased by the Original Plaintiffs under a share purchase agreement dated 27.10.1998 to which Defendant Nos. 2 to 11 were parties either as 'First party' or 'the Confirming Parties' ...

188) Thus, in their Plaint itself, Plaintiffs have averred that Defendant No.11 was party to the SPA. The above admissions given by Plaintiffs are not stray and stem out of the covenants of the SPA. In the SPA, "First Party" is defined to include "Mr. Govind Gupta, Manju Gupta, Radhika Gupta, Meera Gupta, Akshat Gupta, Vikram Gupta and M/s. Ajit investments, a partnership firm under the Indian Partnership Act, 1932 and Somerville Farms Pvt. Ltd., a company incorporated under the Companies Act, 1956 having their registered office address at Metro House, 2nd floor, M.G. Road, Mumbai 400 020".



189) After inclusion of Defendant No.11-Somerville within the definition of the term “*First Party*”, the first recital to the SPA provides that “*the first party are holding 100% equity share in Manju Meadows Pvt. Ltd.*” Thus, the SPA proceeds on an assumption that Defendant No.11-Somerville, together with other persons and entities included in the definition of the term “*First Party*”, held 100% equity shares in the first Defendant Company. The original Plaintiffs were thus given a clear idea at the time of execution of the SPA that Defendant No.11-Somerville was also equity shareholder in the first Defendant Company. This is the reason why Plaintiffs appear to have given admissions in the plaint that even Defendant No.11, in its capacity as entity forming part of the First Party, executed the SPA.

190) Mr. Dwarkadas, appearing for Defendant No.11 has relied upon judgment of *Nagin Das* (supra) in which it is held that admissions, if true and clear, are by far the best proof of the facts admitted and stand on a higher footing than evidentiary admissions. That such admissions are binding on a party that makes them and constitute a waiver of proof. The Apex Court has held in paragraph 27 of the judgment as under :

27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. **Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof.** They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as



evidence, are by themselves, not conclusive. They can be shown to be wrong.

(emphasis supplied)

191) In my view, once Plaintiffs have given admissions in the plaint about Defendant No.11 forming part of “*First Party*” coupled with specific covenants in the SPA that ‘First Party’ held 100% equity shares in the first Defendant Company, it was not even required to be proved by any of the contesting Defendants that Defendant No.11-Somerville was actually a shareholder of the first Defendant Company as on the date of holding the AGM of 30 September 2000.

192) During the course of submissions, I was shown original SPA by Mr. Dhond. Some of the portions of the SPA have been blanked out by use of white ink. However, after holding the said blanked out portion by white ink against the light, it is clear that serial Nos.7 and 8 of the table, showing shares held by Defendant Nos.10 and 11, are covered in white ink. It appears that initially entire 25,000 shares were incorporated for sale in the typed SPA. However, at the time of execution of the SPA, parties apparently agreed to sell only 24,990 shares, which appears to be the reason why one share owned by Defendant No.11 was covered by white ink in the original SPA. Furthermore, the SPA was apparently supposed to be signed by Defendant No.11 (when all 25,000 shares were agreed to be transferred). However, since share of Somerville was apparently deleted from the scope of transfer, name and place for signature of Defendant No.11 appears to have been covered in white ink on the last page of the SPA. It is Plaintiffs’ own case that the SPA was drafted by their Solicitor. The same must have been drafted as per the instructions given by the original Plaintiffs. Thus, inference of knowledge of shareholding by Defendant No.11 by the original Plaintiffs can easily be gathered from Plaintiffs’ own evidence. In my view, this is



sufficient to hold that Defendant No.11 actually held one share in the first Defendant Company at least on the day of execution of the SPA. Whether Defendant No.11 held such share prior to 27 October 1998 is inconsequential and therefore enquiry into the manner of acquisition of such share of Defendant No.11, in my view, is unnecessary for the purpose of determining of the controversy at hand.

193) Mr. Dhond's reliance on column VIII under the heading "Equity Share Capital break up" (percentage of total equity) and sub-column (viii) under heading "Bodies Corporate (not mentioned above)" reflecting 'Nil' in the annual returns to show that Somerville did not own any share, does not cut any ice in view of the fact that in the Annual Return for financial year ending on 31 March 2000, Somerville was shown to have been owning 75,001 shares and therefore mere reflection of the word 'Nil' in column VIII (viii) of the return cannot be a ground to presume that Somerville did not own one share prior to 30 September 2000.

194) Both the parties have led evidence and have advanced detailed submissions in support of their rival contentions about factual controversy of ownership of one share by Defendant No.11. While it is not necessary to go into detailed enquiry in this regard in view of the above findings recorded, it would be sufficient to make reference to just one question put in by Plaintiffs to D.W.1 with regard to one share of Defendant No.11. Following question No.1092 is asked to D.W.1 in his cross-examination :

Q. 1092. I put it to you that the name of Defendant No.11 appeared in the records of Defendant No.1 in its capacity as a partner of Tapia Livestock



Breeding and Research Farm/Gupta Livestock Breeding and Research Farm and not in the individual capacity of Defendant No.11.

Ans. That is not correct.

195) Thus, Plaintiffs themselves asked question to D.W.1 in cross-examination suggesting that name of Defendant No.11 appeared in the records of Defendant No.1. That the capacity in which such name appeared is disputed by Plaintiffs. Once again what is admitted is the fact that the name of Defendant No.11 did appear in the record of Defendant No.1. On this, further case is built by Mr. Dwarkadas by relying upon judgment of this Court in ***Re: Severn Trent Water Purification*** (supra) by contending that when company is closely held company or private limited company, it is in the nature of a glorified partnership. He has further contended that since first Defendant Company is in the nature of a glorified partnership, human conduct demanded an enquiry on the part of Plaintiffs to enquire as to why the name of Defendant No.11 was appearing in the Register of Members. Reliance in this regard is placed on definition of the term “*member*” under Section 41 of the Companies Act as well as provisions of Sections 153 and 163 of the Companies Act relating to maintenance of Register of Members. Mr. Dwarkadas also relied upon provisions of Section 114 of the Evidence Act in support of his argument of human conduct. He has also taken me through the relevant portions of cross-examination of P.W.1 in which admissions are given about Original Plaintiff No.1 not bothering to inspect the Register of Members at the time of signing the SPA. In my view a person acquiring 99.96% stake in a Company (24,990 shares) would naturally enquire as to who continued to hold the balance 10 shares in the Company. The factum of Defendant No.11 being included in the definition of “*First Party*” with clear understanding given to original Plaintiffs that First Party was 100% equity shareholder in the Company, it is safe to assume that original Plaintiffs had full knowledge of the fact that Defendant No.11 held one share in the Company at the



time of execution of the SPA. Issue No.15 is accordingly answered in favour of Defendants and against Plaintiffs.

196) Since Defendant No. 11 held one share of the first Defendant Company, its director-Defendant No. 12 was entitled to attend the AGM held on 30 September 2000. Issue No. 9 is also answered against Plaintiffs and in favour of contesting Defendants.

197) Issue Nos. 15 and 9 are accordingly answered as follows:

No.	Issue	Answer
15	Whether the Defendants prove that on equity share of the 1st Defendant Company was legally and lawfully transferred from the 10th Defendant to the 11th Defendant on 15th June 1992 as alleged in para 9 of the Written Statement of the 10th Defendant and para 2 of the Written Statement of the 11th Defendant ?	Yes
9	Whether the Defendant Nos. 2 and 12 prove that the 12th Defendant was entitled to attend, participate in or vote at the Annual General Meeting of the 1st Defendant held on 30th September 2000 either on his own, or on behalf of the 11th Defendant ?	Yes

F. 6 VALIDITY OF DECISIONS TO INCREASE SHARE CAPITAL AND TO ALLOT 75,000 SHARES TO 11TH DEFENDANT

ISSUE NOS. 7,10, 12 ,13, 14 & 18

198) As observed above, the contesting Defendants have contended that even if it is assumed that original Plaintiffs did purchase 24,990 shares of the first Defendant Company vide SPA dated 27 October 1998, their stake in the



Company is only 24.99% and not 99.96%. This contention of the contesting Defendants is premised on their assertion that in the 24th AGM held on 30 September 2000, the authorised share capital of the first Defendant Company was increased from Rs. 25,00,000 to Rs. 1,50,00,000/- (comprising of 1,50,000 equity shares of Rs. 100 each) and that 75,000 shares were allotted to Defendant No. 11 by converting its debt of Rs. 1,12,50,000/- into equity in the Board Meeting dated 18 October 2000. Plaintiffs have disputed the theory of alleged debt of Defendant No. 11 as well as validity of AGM and Board Meetings, its minutes as well as the resolutions adopted therein

F. 6.1 DEBT BY DEFENDANT NO. 11 OF RS. 2,02,63,302/- TO FIRST DEFENDANT COMPANY

199) As observed above, allotment of 75,000 shares of the first Defendant Company to Defendant No.11 is shown to have been effected for the purpose of reduction of the debt of Rs. 2,02,63,302/- of Defendant No.11 to Defendant No.1. In the AGM held on 30 September 2000, it is recorded that there was outstanding loan of Rs. 2,02,63,302/- from Defendant No.11 and that decision was taken to convert part of the said outstanding loan into equity shares of the Company for the purpose of reduction of the said loan. Thus, alleged loan of Rs. 1,12,50,000/- is shown to have been converted into equity by allotting 75,000 shares to Defendant No.11.

200) It is contended by Mr. Dwarkadas that if the shares are issued in the larger interest of the Company, the decision to issue shares cannot be struck down on the ground that it has incidentally reduced a majority shareholding to minority. Thus, contention of the contesting Defendants is that once necessity of converting debt into equity is proved, this Court cannot interfere with the



decision to allot 75,000 shares to Defendant No.11. Plaintiffs have disputed that such debt of Rs. 2,02,63,302 was due from Defendant No. 1 to Defendant No. 11. In the light of this position, the factual controversy about existence of debt of Rs. 2,02,63,302/- is required to be resolved, before determining the issue of validity of various meetings held and decisions taken therein.

201) Before proceeding further to decide whether Defendant No.11 actually owed debt of Rs. 2,02,63,302/- to Defendant No.1, it would be necessary to make a quick reference to three decisions relied upon by Mr. Dwarkadas. In *Nanlal Zaver* (supra) the Apex Court while interpreting the provisions under Section 105 (c) of the Companies Act, 1939 which corresponds with Section 81 of the Companies Act, 1956 has held in paragraphs 62, 63 and 64 as under:-

62. It will be noticed that in each of the aboveresferred three cases the act of the Directors was not only not of advantage to the company but was in essence to its detriment in that it was calculated to reduce the *existing majority* into minority and to prevent the majority of the *existing shareholders* from exercising their discretion with respect to what they conceived to be in the best interests of the company. Those cases were not cases of mixed motives at all. The only motive operating in those cases in the minds of the Directors was detrimental to the interests of existing shareholders and, therefore, to the company itself. Our attention was drawn to *Palmer's Company Law*, 18th Edn., p. 183, where it is stated that "in exercising their powers, whether general or special, Directors must always bear in mind that they are in a fiduciary position, and must exercise their powers for the benefit of the company, and for that alone." Relying on the words "and for that alone," it is urged that the power to issue shares must be exercised *wholly and solely* for the benefit of the company, that there must not be any other motive whether or not that other motive is injurious to the company and that if that power is exercised for that purpose and also for some other purpose then irrespective of the nature of that other purpose the Directors would be guilty of an abuse of their power. I am not prepared to read the passage in the way urged by learned counsel for the plaintiffs. None of the cases cited on that point in *Palmer's Company Law* was concerned with mixed motives at all. In none of them was there any motive beneficial to the company or to the existing shareholders. In my view what that passage means is that the power must be exercised for the benefit of the company and that as between the Directors and the company there must be no other motive which may operate to the detriment of the company. If the Directors exercise the power for the benefit of the company and at the same time they have a subsidiary motive which in no way affects the company or its interests or the existing shareholders then the very basis of interference of the Court is absent, for, as I have pointed out, the Court of equity only intervenes in order to prevent a breach of trust on the part of the



Directors and to protect the *cestui que trust*, namely the company and possibly the existing shareholders. If as between the Directors and the company and the existing shareholders there is no breach of trust or bad faith there can be no occasion for the exercise of the equitable jurisdiction of the court.

63. I find support for my views in the following observations of Their Lordships of the Judicial Committee in *Hirsche v. Sims* : (AC pp.660-61)

"If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with dolus malus or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits."

64. On the facts of this case the concurrent finding is that the company was in need of funds and, therefore, the issue of further shares was clearly necessary and is referable to such need. The further motive of keeping out the Singhanian group, who are not yet shareholders but are strangers, does not prejudicially affect the company or the existing shareholders and the presence of such further motive cannot vitiate the good motive of finding the necessary funds for the company. In my judgment it is impossible to hold that the issue of fresh shares was, in the circumstances, illegal or void.

202) The decision in *Nanlal Zaver* (supra) has been followed by the Apex Court in subsequent decision in *Needle Industries (India) Ltd.* (supra) in which the Apex Court in paragraph 111 has held as under :

111. Whether one looks at the matter from the point of view expressed by this Court in *Nanlal Zaver* or from the point of view expressed by the Privy Council in *Howard Smith*, the test is the same, namely, whether the issue of shares is simply or solely for the benefit of the Directors. If the shares are issued in the larger interest of the Company, the decision to issue shares cannot be struck down on the ground that it has incidentally benefited the Directors in their capacity as shareholders. We must, therefore, reject Shri Seervai's argument that in the instant case, the Board of Directors abused its fiduciary power in deciding upon the issue of rights shares.

203) The decisions in *Nanlal Zaver* and *Needle Industries (India) Ltd.* (supra) have been further followed in by the Apex Court in *Hasmukhlal Madhavlal Patel* in which Apex Court has held in paragraph 38 as under :



38. The fact that the Directors may also benefit from a decision takes primarily with the intention to promote the interests of the Company, cannot vitiate the decision. In other words, if in the implementation of the decision taken primarily with a view to safeguard the interest of the Company, the appellants have made a gain, it cannot by itself render the decision vulnerable.

204) Thus, the law as settled by the Apex Court in *Nanlal Zaver, Needle Industries (India) Ltd.* and *Hasmukhlal Madhavlal Patel* (supra), is that promotion of interest of the company is paramount and the decision taken for issuance of shares of company cannot be invalidated only for the reason that other shareholders are reduced to minority. Mr. Dhond does not seriously dispute this proposition. What he however disputes is that sum of Rs. 2,02,63,302/- was due from Defendant No.11 to Defendant No.1 as well as the validity of decisions to increase share capital and allotment shares to Defendant No.11. At this juncture, only the first argument of Mr. Dhond about correctness of assertion of Rs. 2,02,63,302/- being due by Defendant No.11 to Defendant No.1 is taken up for consideration.

205) Mr. Dhond has relied upon letter dated 23 November 1998 issued by Defendant No.11 to Defendant No.1, which reads thus :

23 November, 1998

To:
Manju Meadows Pvt. Ltd.,
Metro House, 2nd. Floor,
M.G. Road,
Mumbai 400 020.

Dear Sirs,

Re: Sum of Rs,67,97,470/- due to us.

The abovementioned sum of Rs. 67,97,470/- is due to us from you. We hereby confirm that we do not and shall not hold you responsible for payment of the said sum. Mr. Govind Gupta and Mrs. Manju Gupta shall be held personally



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liable for the said amount of Rs. 67,97,470/- due and payable to us, which please note.

We confirm that we are
Responsible for repayment.

Yours sincerely,
Sd/-
(Sommerville Farms)

Sd/-
(Govind Gupta)

Sd/-
(Manju Gupta)

206) Thus, as on 23 November 1998, Defendant No.11 stated that sum of Rs. 67,97,470/- was due from first Defendant Company to Defendant No.11. The issue is how this figure of Rs. 67,97,470/- escalated to Rs.2,02,63,302/- on the day when AGM was held on 30 September 2000 ? Thus, increased lending of additional sum of Rs. 1,34, 65,832/- is shown by the contesting Defendants for the purpose of justifying the allotment of 75,000 shares to Defendant No.11. Contesting Defendants have admittedly not led any direct evidence to prove that additional sum of Rs. 1,34,65,832/- was actually and factually disbursed by Defendant No.11 to Defendant No.1. No bank statements are placed on record to prove transmission of funds of Rs. 1,34,65,832/- from accounts of Defendant No.11 to Defendant No.1. Thus, contesting Defendants have failed to lead primary evidence of actual disbursement of amount of Rs.1,34,65,832/- during the period of 23 November 1998 to 30 September 2000.

207) Having failed to produce the best evidence in the form of bank entries, contesting Defendants have sought to rely upon audited Balance Sheets. Plaintiffs have serious objections to reading of Balance Sheet for the year 1999-2000 in evidence on account of failure to produce certified copies of ROC. Even if this objection is momentarily ignored, even the said Balance Sheets for the year



1999-2000 do not reflect a specific entry to prove that Defendant No.1 owed an outstanding amount of Rs. 2,02,63,302/- to Defendant No.11. The only document, which is produced on record by the Plaintiffs in his examination-in-chief is 'unaudited' balance sheet for the period from 1 April 2000 to 31 August 2000, which appears to have been produced for a different purpose of demonstrating as to what was given by second Defendant to original Plaintiff No.1 at the relevant time. Mr. Sancheti has contended that since document is produced by Plaintiffs, it has to be read in evidence. Even if this contention is accepted, the said document is merely an unaudited Balance Sheet and no inference can be drawn on the basis of the said unaudited Balance Sheet that amount of Rs. 2,02,63,302/- was indeed due by Defendant No.11 to Plaintiffs. Another document is in the form of letter dated 10 October 2000 (after AGM of 30 September 2000) issued by Defendant No. 2 to Defendant No. 1 confirming amount of Rs. 2,02,63,302/- to be paid to Somerville forming part of personal liability and responsibility of Defendant No. 2. Thus, except unaudited Balance Sheet and the Letter of Defendant No. 2 dated 10 October 2000, there is absolutely no document on record to indicate as to how the alleged dues of Defendant No. 11 to Defendant No. 1 skyrocketed from Rs. 67,97,470/- to Rs. 2,02,63,302/-. I am therefore not inclined to believe that Defendant No.1 actually owed sum of Rs. 2,02,63,302/- to Defendant No. 11. To prove that the said amount was actually owed by Defendant No.1 to Defendant No.11, concrete evidence of transmission of funds ought to have been produced. It must be noted here that both the parties have filed several documents on record in proof of their respective contentions and it is quite unlikely that contesting Defendants would inadvertently omit to produce Bank Statements in this regard.

208) Also of relevance is the fact that contesting Defendants have not produced any resolution passed by the Board of Directors of Defendant No.11-Company authorizing Defendant No.11 either to provide any loan to Defendant



No.1 or to convert the alleged debt for purchase of shares of Defendant No.1- Company. In this regard following cross-examination of DW1 is relevant :

Q.979 Is it correct that you have not produced a single resolution passed by the Board of Directors of Defendant No.11 authorizing Defendant No.11 to make any loan to Defendant No.1?

Ans: Yes.

Q.980 I put it to you no such resolution has ever been passed by the Board of Directors of Defendant No.11 and that is why you are not in a position to produce it? Do you agree?.

Ans: I will check and revert.

209) Furthermore, in the Balance Sheet of the first Defendant Company for the period ending on 31 August 2000, a loan amount of Rs. 1.74 crore to M/s Gyan Impex is shown. It is inconceivable that the first Defendant Company, who itself had borrowed loan from Shamrao Vithal Bank and from original Plaintiffs, would lend Rs. 1.74 crores to another company. Therefore it would be unsafe to place reliance only on balance sheets for inferring that Defendant No.1 had borrowed Rs. 2,02,63,302/- from Defendant No. 11. Also, the plea raised by Mr. Dhond that Defendant No. 2 was using his various companies to route funds for his own use is not entirely unbelievable. Therefore lending of sum of Rs. 2,02,63,302/- by Defendant No. 11-Company to the first Defendant Company, in absence of any concrete evidence of actual transmission of money cannot be believed.

210) After considering the oral and documentary evidence on record, I am of the view that contesting Defendants have failed to prove that a sum of Rs. 2,02,63,302/- was actually lent by Defendant No. 11 to Defendant No. 1 or that the same was due or payable by Defendant No. 1 to Defendant No. 11.



F.6.2 **INCREASE IN AUTHORISED SHARE CAPITAL OF DEFENDANT NO.**
1, WHETHER *BONAFIDE*

211) It is contended by Plaintiffs that decision to increase share capital of first Defendant Company from Rs.25 lakhs to Rs.1.50 crores is malafidely taken with a view to decrease the stake of Plaintiffs in such a manner that Plaintiffs would not be in a position to manage and control the Company. On the contrary, it is the contention of the contesting Defendants that the decision has been taken in larger interest of the Company. I have already made reference to the decision of the Apex Court in *Nanlal Zaver, Needle Industries (India) Ltd.* and *Hasmukhlal Madhavalal Patel* (supra) relied upon by Mr. Dwarkadas in which it is held that decision taken in larger interest of Company to increase share capital or to allot shares cannot be questioned in Court of Law only on the ground of rejection of stake of majority to minority. At the same time in *Hasmukhlal Madhavalal Patel* (supra) the Apex Court has made reference to its decision in *Dale & Carrington Investment (P) Ltd.* (supra) in which the Apex Court, while referring to provisions of Section 81 of the Companies Act, has held that Directors of Private Limited Company are expected to make disclosure to the shareholders of the Company when further shares are being issued. The Apex Court has held that this requirement flows from their duty to act in good faith and to make full disclosure to the shareholders regarding the affairs of the Company. Thus, though a private limited company could be treated as a glorified partnership firm, as sought to be suggested by Mr. Dwarkadas, the ratio of the Apex Court in *Dale & Carrington Investment (P) Ltd.* would clearly suggest that the Directors of a Private Limited Company will owe responsibility to act in good faith by making the full disclosure to the shareholders regarding affairs of a Company. *Dale & Carrington Investment (P) Ltd.* involved issue of validity of equity shares of a Private Limited Company where the Managing Director thereof got allotted 6865 equity shares to himself in first meeting and further



9800 equity shares to himself in the second meeting. Doubts were raised about validity of the Meetings in which the additional equity shares were allotted to the Managing Director. Before the Apex Court, one of the defences raised was about applicability of provision of Section 81 of the Companies Act, which do not apply to Private Limited Companies. In the light of above factual position, the Apex Court has held in paragraph 11(d) of the judgment as under :

11(d) It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the Directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows from their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of Directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of Section 81 of the Companies Act in case of private limited companies casts a heavier burden on its Directors. Private limited companies are normally closely held i.e. the share capital is held within members of a family or within a close-knit group of friends. This brings in considerations akin to those applied in cases of partnership where the partners owe a duty to act with utmost good faith towards each other. Non-applicability of Section 81 of the Act to private companies does not mean that the Directors have absolute freedom in the matter of management of affairs of the company.

212) Thus, in *Dale & Carrington Investment (P) Ltd.* the Apex Court has held that non-applicability of Section 81 of the Companies Act to private limited companies does not mean that Directors have absolute freedom in the matter of management of affairs of the Company. In fact, the facts involved in *Dale & Carrington Investment (P) Ltd.* appear to be almost similar to the present case, which are recorded in paragraphs 11 and 11(a) of the judgment which reads thus :

11. This is the main issue which arises for consideration in this case. As already noted, Ramanujam who was the Managing Director of the company got allotted 6865 equity shares to himself in a meeting of the Board of Directors of the



company alleged to have been held on 24-10-1994. Again on 26-3-1997 he managed to get allotted further 9800 equity share to himself. Prathapan has challenged these allotments of shares in favour of Ramanujam as acts of oppression on the part of Ramanujam, the Chairman and Managing Director of the company for which he filed a petition under Sections 397 and 398 of the Companies Act before the Company Law Board. A doubt has been cast about whether the alleged meetings in which additional equity shares were allotted to Ramanujam were held at all. In this behalf the following facts are noticeable:

(a) The appellants have filed a photocopy of the minutes of the alleged meeting of the Board of Directors said to have taken place on 24-10-1994. As per the photocopy the minutes appear to be signed by Ramanujam as Chairman. The presence of Suresh Babu as a Director of the Company has been shown in the minutes. However, there is no evidence of presence of Suresh Babu in the said meeting. Article 36 of the Articles of Association of the company requires that a notice convening the meetings of the Board of Directors shall be issued by the Chairman or by one of the Directors duly authorized by the Board in this behalf. Suresh Babu filed an affidavit in the proceedings before the Company Law Board wherein he has categorically stated that at no point of time he was involved in the affairs of the company and in running the business of the company. Further he has stated in the said affidavit that at no point of time he was informed that he had been appointed as Director of the company. He had never received any notice of any Board Meetings nor had he ever attended any Board meeting. In view of this categorical denial by Suresh Babu about attending any meetings of the Board of Directors of the company, it was incumbent on the part of Ramanujam who was the Chairman and Managing Director of the company and was in possession of all the records of the Company, to place on record a copy of a notice calling a meeting of the Board of Directors in terms of Article 36. No copy of the notice intimating Suresh Babu about the meeting of the Board of Directors and asking him to attend the same, has been placed on record to show that Suresh Babu was informed about holding of the meeting in question.

Here reference is required to be made to certain other Articles of the company which are relevant for the controversy. Article 8 provides that shares of the company shall be under the control of the Directors who may allot the same to such applicants as they think desirable of being admitted to membership of the company. Article 10 provides that allotment of shares "shall exclusively be vested in the Board of Directors, which may in its absolute discretion allot such number of shares as it thinks proper...". Article 38 requires that the Directors present at the Board Meeting shall write their names and sign in a book specially kept for the purpose. Article 4(iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company. The above provisions of the Articles of Association show that the Board of Directors have an absolute discretion in the matter of allotment of shares. But this presupposes that such a decision has to be taken by the Board of Directors. The decision is taken by the Board of Directors only in meetings of the Board and not elsewhere. Ramanujam, the Managing Director cannot take a decision on his own to allot shares to himself. If Suresh Babu was Present in the meeting, as is the case of Ramanujam, he must have signed a book specially kept for recording presence of the Directors at the Board Meeting in terms of Article 38. Ramanujam should have been the first person to produce such a book to show the presence of Suresh Babu at the alleged Board meeting said to have been held on 24-10-1994



specially when Suresh Babu was denying his presence at the meeting. Nothing has been produced. Thus neither a copy of a notice convening the Board meeting nor the logbook mean to record signatures of Directors attending the meeting of the Board of Directors were produced. In the absence of these documents and any other proof to show that a meeting was held as alleged, we are unable to accept that a meeting of the Board of Directors was held on 24-10-1994. If no meeting of the Board of Directors took place on that date, the question of allotment of shares to Ramanujam does not arise. We are inclined to believe that photocopy of the minutes of the alleged meeting dated 24-10-1994 produced by appellants, is sham and fabricated. The alleged allotment of additional equity shares of the company in favour of Ramanujam is, therefore, wholly unauthorized and invalid and has to be set aside.

Normally this Court would not have gone into these questions of fact. However, the learned counsel for the appellant in the course of his arguments drew our attention to the various Articles of Association of the company, which unfortunately neither the Company Law Board nor the High Court considered. We cannot help referring to them, particularly in view of the fact that the Articles of a company are its constituent document and are binding on the company and its Directors.

The facts on record show that the company was being run as one man show and Ramanujam was maintaining the minutes book of meetings of Board of Directors only to comply with the statutory requirement in this behalf. The minutes were being recorded by him according to his choice and at his instance. The minutes do not reflect the actual position. Article 38 mandated that a book should be maintained to record presence of Directors at meetings of the Board of Directors. If a book for recording signatures of Directors attending meetings of the Board of Directors was not maintained, it was in clear violation of Article 38 of the Articles of Association of the company. The Company Law Board without going into these relevant aspects, proceeded on an assumption that a meeting of the Board of Directors did take place on 24-10-1994. This assumption of the Company Law Board is clearly without any basis.

213) As observed above, the judgment in *Dale & Carrington Investment (P) Ltd.* has been followed by the Apex Court in *Hasmukhlal Madhavlal Patel* (supra). Thus, merely because Defendant No.1 is a private limited company, its affairs could not have been managed at the whims of the contesting Defendants and it is necessary for the contesting Defendants to establish that increasing the share capital was a *bonafide* act in the interest of the Company. I have already held that debt of Rs. 2,02,63,302/- has not been proved to be due to Defendant No.11 from Defendant No.1. No cogent evidence has appeared on record to prove such debt. In that view of the matter, decision to



increase share capital for the purpose of converting non-existent debt of Defendant No.11 into equity does not appear, to my mind, to be a *bonafide* act of the contesting Defendants. On the contrary, the same appears to be a deliberate design employed by the contesting Defendants to reduce shareholding of Plaintiffs with a view to frustrate the SPA.

F.6.3 REDUCTION OF SHAREHOLDING OF PLAINTIFFS FROM 99.96% TO 24.99%

214) As observed above, after execution of SPA on 27 October 1998, original Plaintiffs became owners of 24,990 shares of Defendant No.1-Company and thus became owners of 99.96% stake in the Company. Despite execution of SPA, Defendant Nos.2, 8 and 9 continued to remain Directors of the first Defendant Company. Original Plaintiff No.1 was also appointed as Director of the first Defendant Company in Resolution adopted by the Board of Directors on 30 September 1999. It is the case of contesting Defendants that despite his appointment as Director, original Plaintiff No.1 did not bother to attend even a single Board Meeting or Annual General Meeting held during the years 1999 and 2000. The case of the contesting Defendants is that the first Defendant Company was indebted to Defendant No.11-Somerville in the sum of Rs.2,02,63,302/- and the first Defendant Company was desirous of seeking further loans from Banks and therefore desired to reduce the liability of Defendant No.11 in its books to improve its debt to equity ratio. The total paid up equity share capital of the first Defendant Company was Rs.25 lakhs whereas according to the contesting Defendants, the debt due to Defendant No.11 was Rs.2,02,63,202/- by the year 2000. To improve debt to equity ratio, Defendant No.1 decided to convert part of the outstanding loan of Defendant No.11 into equity by allotting shares of the first Defendant Company to Defendant No.11.



According to the contesting Defendants, steps were by adopting resolutions in Board Meetings and in the AGM to convert the outstanding loan of Defendant No.11 into equity by allotting 75,000 equity shares in discharge of debt of Rs.1,12,50,000/-. The net result of various decisions taken in the Meetings of Board of Directors and Annual General Meeting is that the share capital of the first Defendant Company is increased from Rs.25 lakhs to Rs.1.50 crores and Defendant No.11 became owner of 75,000 shares whereas Plaintiffs remain owner of only 24,990 shares. This is how the stake of Plaintiffs in the first Defendant Company is reduced from 99.96% to 24.99%. Before deciding the issue of validity of various decisions taken in the meetings of Defendant No.1-Company effecting reduction of stake of Plaintiffs from 99.96% to 24.99%, it would be first necessary to take a quick stock of various meetings held and resolutions adopted therein :

I) Meeting of Board of Directors held on 10 August 2000:

According to the contesting Defendants, the first step taken was to convene a meeting of Board of Directors on 10 August 2000, which was attended by Defendant Nos.2, 8 and 9. In the meeting, financial position of the Company was discussed where the Chairman informed the Board that in order to raise finance from Banks and Institutions, it was necessary to improve the debt equity ratio of the Company and that as per the advice of the financial consultants, it was necessary to reduce the liabilities of the Company to raise institutional funds. The Board noted that the largest creditor of the Company was Defendant No.11 which was also Gupta Group concern, to whom "*over Rupees Two crores*" were due since quite some time and that Defendant No.11 was interested in and was willing to convert substantial part of their outstanding loan amount into equity of the Company. The Board therefore decided that since issue of shares to Defendant No.11 required increase in the authorized capital of the Company, the matter should be put up before Annual General Meeting. The relevant



Minutes of the Meeting shown to have been held on 10 August 2000
read thus:

Financial Position of the Company:

The Chairman informed the Board that in order to raise finance from Banks and institutions, it was necessary to improve the Debt Equity Ratio of the company. The Board discussed that as per the advice of financial consultants, if the company wanted to raise any institutional funds it was necessary to reduce the liabilities of the company. The Chairman explained that for this purpose the Paid up Capital of the company needs to be increased and the loan liability needs to be reduced.

The Board noted that the largest creditor of the company was Sommerville Farms Private Limited which was also a Gupta Group Concern, to whom over Rupees Two Crores were due since quite some time. The Board was informed that in view of the above Sommerville was also interested in and were willing to convert the substantial part of their outstanding loan amount into Equity of the Company. This would not only help reduce the liabilities of the Company but also at the same time increase the Equity Capital of the Company and make it financially more sound.

The Board decided that since the issue of shares to Sommerville requires increase in the Authorised Capital of the company, the matter should be put up before a General Body Meeting.

II) Board Meeting held on 4 September 2000 :

This Meeting is shown to have been attended by Defendant Nos. 2 and 9. In the meeting, the issue of increasing the authorized share capital of the Company is shown to have been discussed and the Chairman informed the Board that in view of understanding arrived at with Defendant No.11 to issue 75,000 equity shares, it would be suitable to increase the authorized capital of the Company from Rs.25 lakhs to Rs.1.50 crores. It was further discussed that for increasing the authorized share capital, it would be necessary to pass special resolution by shareholders in the ensuing Annual General Meeting. It



was decided to include the agenda in the notice of Annual General Meeting. Following resolutions were adopted:

"RESOLVED that the subject to approval of the shareholders in the next annual general meeting, the Authorised Share Capital of the Company be increased from existing Capital of Rs.25,00,000 (Rupees Twenty Five Lakhs only) divided into 25,000 Equity Shares of Rs.100/- each to Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs only) divided into 1,50,000 Equity Shares of Rs. 100/- each. Accordingly clause V of the Memorandum of Association and Articles 5 of the Articles of Association of the Company be altered".

Notice of Annual General Meeting:

The draft Notice for convening the Annual General Meeting of the Company on 30th September, 2000 at the registered office of the company at 11.00 a.m. was placed before the Board and the same was approved.

After due deliberation, the following resolution was passed:

"RESOLVED that the Notice for calling the Annual General Meeting of the Company as placed before the meeting be and is hereby approved."

III) Annual General Meeting held on 30 September 2000:

The 24th Annual General Meeting of the first Defendant Company is shown to have been held on 30 September 2000, which is shown to have been attended by Defendant No.2 and Mr. Vinod Haritwal, Director of Defendant No.11. Apart from usual business of adopting auditor's report, reappointment of auditors etc., special business is shown to have been conducted in the AGM, where Defendant No.2 informed the meeting that the authorized share capital of the Company was Rs.25 lakhs and Defendant No.11 was willing to convert part of outstanding loan of Rs.2,02,63,302/- into equity shares and that it was necessary to increase the authorized share capital of the Company from Rs.25 lakhs to 1.50 crores divided into 1,50,000 equity shares of Rs.100/- each. Following resolution is shown to have been adopted in the AGM held on 30 September 2000:



"RESOLVED that the Authorised Share Capital of Company of the Company be increased from existing Capital of Rs 25,00,000/- (Rupees Twenty five lacs only) divided into 25,000 Equity Shares of Rs.100/- each i.e. Rs. 1,50,00,000/- (Rupees One Crore fifty lacs only) divided into 1,50,000 Equity Shares of Rs. 100/- each. Accordingly, Clause V of the Memorandum of Association and Articles 5 of the Articles of Association of the Company be altered".

Proposed by Mr. Vinod Haritwal and seconded by Mr. Govind Gupta, the resolution was passed unanimously.

IV) Meeting of Board of Directors dated 18 October 2000 :

The meeting is shown to have been attended by Defendant Nos.2, 8, 9 and Mr. Vinod Haritwal, Special Invitee. The Chairman informed the Board that the Company had passed Special Resolution for increasing authorized capital from Rs.25 lakhs to Rs.1.50 crores. The Board decided that 75,000 equity shares of Rs.100/- each be allotted to Defendant No.11 at premium of Rs.50/- per share. The consideration against the aforesaid allotment was shown to have been already received and credited to the share application money account.

Following resolutions are shown to have been adopted:

"RESOLVED that 75,000 equity shares of Rs. 100 each of the company be and are hereby allotted to M/s. Sommerville Farms Pvt. Ltd. at a premium of Rs. 50 per share in lieu of part of their loan amount already paid to the company by M/s. Sommerville Farms Ltd., bearing distinctive nos. 25,001 to 1,00,000, both inclusive."

"RESOLVED FURTHER that Mr. Govind Gupta and Mr. Rajesh Khandelwal, Directors of the company are hereby authorised to sign and issue the Equity Share Certificate No. 94 on behalf of the company under its common seal."

"RESOLVED FURTHER that Mr. Rajesh Khandelwal, a Director of the company, be and is hereby authorised to file the Return of Allotment, with the Registrar of Companies, Maharashtra."

....



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"RESOLVED that Mr. Vinod Haritwal be and is hereby appointed as an Additional Director of the Company with immediate effect."

"RESOLVED further that Mr. Rajesh Khandelwal, a Director of the company, be and is hereby authorised to submit the Form No.32 with the Registrar of Companies for appointment of Mr. Vinod Haritwal on behalf of the Board of Directors."

215) This is how Defendant No.11 not only became owner of 75,000 shares of the First Defendant Company but Mr. Vinod Haritwal, Director of Defendant No.11 also became Director of the first Defendant Company.

216) According to Plaintiffs, all the aforesaid four meetings shown to have been held were never actually held and that the minutes thereof as well as resolutions shown to have been adopted therein are all fabricated. As seen above, none of the four meetings are attended by original Plaintiff No.1 who was appointed as a Director of the first Defendant Company on 30 September 1999. AGM of 30 September 2000 is not attended by original Plaintiff No. 2 also. According to Plaintiffs, original Plaintiff No.1 was not given notice of either of the three board meetings, and original Plaintiffs were not given notice of AGM of 30 September 2000 and that they were absolutely unaware about holding of such meetings. It would be therefore necessary to consider the correctness of these assertions of Plaintiffs.

217) So far as the first meeting of the Board of Directors dated 10 August 2000 is concerned, it is the defence of the contesting Defendants that notice of the proposed meeting was issued but original Plaintiff No.1 did not attend the same. However, no document is placed on record to show that any such notice was even prepared. Since the notice itself is not placed on record, the question of producing proof of its service on original Plaintiff No.1 does not arise.



Thus there is neither notice nor proof of service in respect of the meeting of Board of Directors dated 10 August 2000. It is therefore difficult to believe that original Plaintiff No.1 was issued notice of meeting dated 10 August 2000, in which important decision was taken for convening Annual General Meeting for increasing authorized share capital of the first Defendant Company from Rs.25 lakhs to Rs.1.50 crores. It must be borne in mind that as on 10 August 2000, original Plaintiffs held 99.96% stake in the company. However, the meeting dated 10 August 2000 is shown to have been attended only by Defendant Nos. 2, 8 and 9.

218) There is a great deal of debate between the parties about production of original Minutes Book in respect of the Board Meeting of 10 August 2000. This aspect has been separately dealt with while dealing with the issue of requirement of production of original records by the contesting Defendants. Suffice it to observe here that Plaintiffs have taken a stand that Defendant No.1 did not tender/produce the original Minute Book or even a copy certified by Registrar of Companies (**ROC**). What is produced on record is a certified copy which is certified by the Advocate for Defendant No.2.

219) Plaintiffs have relied upon Section 193 of the Companies Act in support of their contention that the said provision requires a Company to keep and maintain a book containing Minutes of the Proceedings of its Directors. It is further contended that presumption under Section 195 of the Companies Act does not apply to the Minutes of the Meeting allegedly held on 10 August 2000. Reliance in this regard is placed on judgment of the Madras High Court in *M/s. Micromeritics Engineers Pvt. Ltd.* (supra) in which it is held in paragraphs 14, 15 and 17 as under :



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14. The submission of Mr. T. V. Ramanujam, learned senior counsel is that under the provisions of section 195 of the Companies Act, the Minutes of the Meeting held on 14.4.1997 is presumed to be valid and since the respondents have not produced any evidence, the Company Law Board was not correct in holding that the presumption under section 195 of the Companies Act cannot be drawn. As far as the presumption under section 195 of the Companies Act is concerned, the presumption would apply where there is compliance of the provisions of section 193 of the Companies Act. Under section 193 of the Companies Act, the entries of minutes of the Board meeting shall be made in the book kept for that purpose with its pages consecutively numbered, and the same shall be kept for 30 days of the conclusion of the meeting. Section 193 also provides that each page of the minutes book shall be initialled or signed and last page of the minutes shall be dated and signed by the Chairman of the Board meeting. The appellants have not produced the original minutes book and only a copy of the minutes book was produced before the Company Law Board and a perusal of the copy of the minutes book shows that no page numbers were given and there are no initials as required under section 193 of the Companies Act. Therefore the requirements of section 193 of the Companies Act have not been complied with and hence, the presumption under section 195 of the Companies Act cannot be drawn.

15. Mr. T. V. Ramanujam, learned senior counsel submitted that the argument against the presumption as to the minutes book was raised only before this Court and according to him, the original minutes book is available and pages therein were numbered consecutively. However, the appellants have not produced the same before the Company Law Board and hence, it is impermissible for them to rely upon the provisions of section 195 of the Companies Act. His submission is that had the respondents raised objection against the presumption before the Company Law Board, the appellants would have an opportunity to produce the same before the Company Law Board. However, when the appellants are relying upon the entries in the minutes book for the allotment of shares and to show that the meetings were validly held, the onus is on them to produce the original minutes book before the Company Law Board. I hold that since they have failed to discharge the burden, the burden does not shift to the respondents, though they question the resolution.

(1997) 10 SCC 488.17. Mr. T. V. Ramanujam, learned senior counsel for the appellants submitted that the respondents have not produced any evidence against the resolution dated 14.4.1997 and in the absence of any evidence, the presumption under section 195 of the Companies Act would apply. The submission is also not acceptable as the appellants have not produced the original minutes book. First, the appellants have to make out a case for drawing the initial presumption and only if they satisfy that the initial presumption is available to the appellants, the respondents are required to let in evidence to rebut the presumption. Since the initial presumption is not available to the appellants, the failure on the part of the respondents to let in evidence to rebut the presumption is not a vitiating factor.



220) Reliance is also placed by Mr. Dhond on judgment of Single Judge of this Court in *Ashish C. Shah* (supra) in which it is held in paragraph 15 as under :

15. Next comes the document No.1 - the certified true copy of the resolution dated 16-2-2009, whereby the complainant company had allegedly resolved to give consent of the Board of Directors to execute power of attorney in favour of Ashwin Sheth, Managing Director and/or Sharad Doshi, Executive Assistant to the Managing Director to institute or defend any suit or criminal proceedings. The learned trial Court observed in the impugned order that there is no clear-cut provision about issuance of certified copy of extract of minutes book but if sub-sec. (2) of Section 196 of the Companies Act is read, it may be stated that certified copy of the minutes can be given. The learned trial Court observed that the witness Sharad Doshi in his affidavit had deposed about the said document and thereby he has proved the genuineness of the document. Under Section 195 of the Companies Act, where minutes of the proceedings of any general meeting of the company have been kept in accordance with the provisions of section 193, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place. Section 194 of the Companies Act provides that the minutes of meetings kept in accordance with the provisions of section 193 shall be evidence of the proceedings recorded therein. However, no provision in the Companies Act is brought to my notice which provides that the certified copy or extract of the minutes would be admissible in evidence without proof of the original. Section 65(f) of the Evidence Act provides that secondary evidence may be given of the existence, condition and contents of the document when the original is the document of which a certified copy is permitted by the Evidence Act or by any other law in force in India to be given in evidence. As no provision from the Companies Act is brought to my notice under which the certified copy of the minutes of the meetings of the board of directors is admissible in evidence without proof of the original, it must be said that the copy of the minutes cannot be admitted in evidence directly unless the original is proved or the copy is admitted by opposite party. Therefore, even though that document is given exhibit number, it cannot be treated to have been proved, unless the complainant leads appropriate evidence to prove the minutes.

221) In the present case, contesting Defendants have neither produced certified copy which is certified by ROC nor have granted inspection to the Plaintiffs of original entire Minutes Book for the purpose of enabling them to cross-examine Defendants' witness. Though repeated claims were made by the contesting Defendants about making available original records for inspection to Plaintiffs and failure on the part of Plaintiffs to avail an opportunity of inspection



of original records, when DW1 was put a question about production of “entire Minutes Book”. He gave following answers:

Q.286 Have you produced this entire Minutes Book of the meetings of the Board of Directors?

Ans. No.

Q.287 Why did you not produced the Minutes Book of the meetings of the Board of Directors?

Ans. Since, the record is very voluminous I referred to and produced the minutes of those meetings which I thought were relevant and important.

222) A quick reference here also needs to be made to the statement of Mr. Dwarkaprasad Ramanlal Khandelwala, an employee of the first Defendant Company recorded by the police, in which he stated that he had written the Minutes Book for the years 1992 to 1998 in the year 2001-2002 on instructions from Defendant No.9. Though the said statement made to police in criminal proceedings may not strictly form an evidence for civil proceedings, the said statement does cast a shadow of doubt on the manner in which the Minutes are prepared and maintained by the contesting Defendants.

223) In view of bitter contest between the parties about authenticity of the Minutes of Book and contents thereof, it was necessary for the contesting Defendants to produce the entire original Minutes Book for inspection of Plaintiffs for the purpose of conducting effective cross-examination of their witnesses. Merely stating that the original Minutes Book was in their custody was not sufficient. Apart from the original entire Minutes Book, contesting Defendants did not even produce ROC certified copy of the Minutes of Meeting



dated 10 August 2000. In my view, therefore, since provisions of Section 193 of the Companies Act are not met with, presumption under Section 195 cannot be drawn.

224) I am therefore not inclined to hold that the Meeting of Board of Directors dated 10 August 2000 was lawfully held. The same is held behind the back of Original Plaintiff No.1 who was also a Director of the first Defendant Company at the relevant time. The Resolution shown to have been adopted in the alleged Meeting dated 10 August 2000 is also not proved and cannot be relied upon.

225) There is also nothing to suggest that the Minutes of the Meeting dated 10 August 2000 were circulated to the original Plaintiff No.1 who allegedly did not attend the meeting despite being served with notice.

226) So far as the Board Meeting shown to have been held on 4 September 2000 is concerned, contesting Defendants have not produced the purported Minutes of the Meeting of 4 September 2000 either in original or any copy. Only a “typed copy” is produced alongwith the Written Statement. Thus so far as Minutes of the Meeting of 4 September 2000 is concerned, the same stands on worse footing than the Minutes of purported Meeting of 10 August 2000. Again no document is placed on record to show that a notice of meeting of 4 September 2000 was prepared or was attempted to be served on Original Plaintiff No.1. Therefore for the same reasons as recorded above, I am not inclined to hold that meeting of the Board dated 4 September 2000 is validly held nor its minutes or resolutions can be held to have been validly recorded.



227) So far as the AGM of 30 September 2000 is concerned, contesting Defendants have relied upon two documents in support of their contentions that the notice of the said meeting was served on original Plaintiffs. Firstly, contesting Defendants have relied upon “Notice to all shareholders” dated 4 September 2000 and secondly they have relied upon “Under Certificate of Posting” towards proof of addressing the said Notice to Original Plaintiff Nos.1 and 2. Plaintiffs deny that the said notice dated 4 September 2000 was ever dispatched and that the same has not been received by them.

228) There is a great deal of contest between the parties about proof of service of notice dated 4 September 2000. According to the contesting Defendants, the notice has been served through UCP, which is sufficient compliance under provisions of Section 53(2)(a) of the Companies Act. Section 53 reads thus :

53. Service of documents on members by company. —

(1) A document may be served by a company on any member thereof either personally, or by sending it by post to him to his registered address or if he has no registered address in India, to the address, if any, within India supplied by him to the company for the giving of notices to him.

(2) Where a document is sent by post,-

(a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member ; and

(b) such service shall be deemed to have been effected-

(i) in the case of a notice of a meeting, at the expiration of forty-eight hours after the letter containing the same is posted, and

(ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.

(3) A document advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly served on the day on which the advertisement appears, on every member of the company who



has no registered address in India and has not supplied to the company an address within India for the giving of notices to him.

(4) A document may be served by the company on the joint-holders of a share by serving it on the joint-holder named first in the register in respect of the share.

(5) A document may be served by the company on the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India supplied for the purpose by the persons claiming to be so entitled, or until such an address has been so supplied, by serving the document in any manner in which it might have been served if the death or insolvency had not occurred.

229) Here the debate about UCP is of two kinds. Firstly, Plaintiffs dispute the authenticity of copy of UCP produced on record on the ground that the original UCP has not been tendered/produced in evidence on the pretext of the same being seized by EOW. The contesting Defendants on the other hand have contended that after return of the original UCP by EOW, the same was made available for inspection of Plaintiffs and that therefore it cannot be contended that the original UCP has not been tendered. In fact, I was shown the original UCP during the course of submissions by Mr. Sancheti. The second debate is about the probative value of production of such UCP in support of proof of service of notice. According to Mr. Dhond, mere production of UCP is not sufficient to assume service of notice on the noticee. On the contrary, according to Mr. Sancheti, production of UCP is sufficient service within the meaning of Section 53(2)(a) of the Companies Act.

230) So far as the issue of failure to tender/make available for inspection original UCP by contesting Defendants is concerned, I have already observed that it was incumbent for DW1 during the course of his cross-examination to tender the original UCP to enable the Plaintiffs to effectively cross-examine him. Mere statement in the Affidavit of Evidence of DW1 that he undertook to



produce all original documents at the time of examination and as and when called by the Court was not sufficient. Also the concerned employee of post office is not examined to prove the UCP sought to be relied upon by contesting Defendants. Thirdly, the observations made by Single Judge of this Court in Criminal Writ Petition No.1491 of 2009 casts serious doubt about the genuineness of the said UCP. This Court in judgment dated 27 October 2016 has referred the statement of Mr. Genbhau Bhinge posted at the relevant time at Kalbadevi Post Office, Mumbai in which he stated that “*the said UCP has not been done from Kalbadevi Office*”. The Order record that the said sentence in the statement was struck off. This Court thereafter referred to statement of Mr. Mahendra Bajirao Gajbhiye, Chief Post Master in which he stated that the acknowledgement receipt on the UCP does not bear stamp and impression of his Post Office. He stated that some of the features of the stamp are missing from the impressions on the acknowledgement dated 5 September 2000 such as embossment, stamp code number, signature of person accepting the same, etc. He further stated that the UCP bears bogus stamp impression. Mr. Sancheti is at pains to submit that the statements recorded during the course of investigations and even findings recorded in a judgment of criminal court are of no evidentiary value in civil proceedings and that therefore the observations made by Single Judge while deciding Criminal Writ Petition No.1491 of 2009 are required to be ignored while deciding the present Suit. He has relied upon judgment of the Apex Court in ***Seth Ramdayal Jat*** (supra) in which it is held in paragraphs 10, 11, 12, 15 and 16 as under :

10. Indisputably, the law relating to the admissibility of a judgment in a criminal proceedings vis-à-vis the civil proceedings and vice-versa is governed by the provisions of the Indian Evidence Act. Section 43 of the Indian Evidence Act reads thus:

“43. *Judgments, etc., other than those mentioned in Sections 40, 41 and 42, when relevant.* - Judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant, under some other provision of this Act.”



11. In terms of the aforementioned provision, the judgment in a criminal case shall be admissible provided it is a relevant fact in issue. Its admissibility otherwise is limited. It was so held in *Anil Behari Ghosh v. Smt. Latika Bala Dassi* in the following terms: (AIR p.571, para 15)

“15. ... The learned counsel for the contesting respondent suggested that it had not been found by the lower appellate court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence.”

12. In *Perumal v. Devarajan* it was held: (AIR p.15, para 2)

“2. Even at the outset, I want to state that the view of the lower appellate court that the plaintiff has not established satisfactorily that the first defendant or the second defendant or both were responsible for the theft is perverse and clearly against the evidence and the legal position. The lower appellate Court refused to rely on Exhibit A3 which is a certified copy of the judgment in C.C. No. 1949 of 1965. It is true that the evidence discussed in that judgment and the fact that the first defendant had confessed his guilt in his statement is not admissible in evidence in the suit. But it is not correct to state that even the factum that the first and the second defendants were charged under Sections 454, and 380, I.P.C. and they were convicted on those charges could not be admitted. The order of the Criminal Court is, in my opinion, clearly admissible to prove the conviction of the first defendant and the second defendant and that is the only point which the plaintiff had to establish in this case.”

15. A civil proceeding as also a criminal proceeding may go on simultaneously. No statute puts an embargo in relation thereto. A decision in a criminal case is not binding on a civil court. In *M.S. Sheriff v. State of Madras*, a Constitution Bench of this Court was seized with a question as to whether a civil suit or a criminal case should be stayed in the event both are pending. It was opined that the criminal matter should be given precedence. In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment.

16. If a primacy is given to a criminal proceeding, indisputably, the civil suit must be determined on its own keeping in view the evidence which has been



brought on record before it and not in terms of the evidence brought in the criminal proceeding. The question came up for consideration in *K.G. Premshanker*, wherein this Court inter alia held: (SCC p.97, paras 30-31)

“30. What emerges from the aforesaid discussion is — (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of *res judicata* may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A and suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of B over the property. In such case, A may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is — whether judgment, order or decree is relevant, if relevant — its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case.”

231) No doubt the law in the subject appears to be crystallized in *Seth Ramdayal Jat* (supra) wherein the Apex Court has referred to provisions of Section 43 of the Evidence Act as well as various decisions delivered by it in the past for holding that the findings of Criminal Court or a decision given in criminal case are not binding on Civil Court. While there can be no debate about the proposition that finding recorded in criminal case cannot be applied in proceedings to be decided by Civil Court, I am not relying on the findings recorded by this Court while deciding Criminal Writ Petition No.1491 of 2009 for holding that UCP sought to be relied upon by contesting Defendants is a bogus document. The observations made by this Court in judgment in Criminal Writ



Petition No.1491 of 2009 are utilized only for the limited purpose of holding that in the light of shadow cast on genuineness of the UCP, it was necessary for the contesting Defendants to examine the concerned official/employee from post office for proving the UCP. In the present case, neither the original UCP was made available for inspection by Plaintiffs nor any official/employee of post office is examined to prove the said UCP. DW-1 has deposed that Mr. Rajesh Khandelwal (Defendant No. 9) had instructed dispatch of notice by UCP. However even Mr. Khandelwal is not examined as witness. The person who actually went to post office to dispatch notice by UCP is also not examined as witness. In that view of the matter, the UCP sought to be relied upon by contesting Defendants cannot be treated as effective service on original Plaintiffs in respect of AGM shown to have been held on 30 September 2000.

232) This takes me to the next issue of the probative value of the UCP as a proof of service on the noticee. Mr. Dhond has relied upon judgment in *Shiv Kumar* (supra), in which the Apex Court has held in paragraphs 5 and 6 as under :

5.The point for examination, therefore, is whether there is material on record to show that the workmen concerned had been served with the copies of the application as required by Section 25-N read with Rule 76-A of the Industrial Rules, 1957, which was the point on which notice was ordered on 21- 1-1994. In reply to this contention advanced by the workmen, what has been stated by the management in its counter-affidavit is that the notices had been sent to all workmen under postal certificates and proof of service had been submitted to the specified authority. Learned counsel appearing for the management produces before us some certificates evincing posting of some letters to the workmen concerned on 26-12-1992.

6.We have not felt safe to decide the controversy at hand on the basis of the certificates produced before us, as it is not difficult to get such postal seals at any point of time. To assure our mind that the notices had really been sent out to the workmen concerned, we perused the application which had been filed by the management seeking permission. We did so because Rule 76-A(2) requires that the application shall be made in triplicate and copies of the same shall be served by the employer on the workmen concerned and "proof to that effect shall also be submitted by the employer along with the application". But the



application (Annexure A) has not mentioned anything about "proof" of service to the workmen concerned. The statement in the counter-affidavit that proof of service had been submitted to the specified authority has not satisfied our mind in this regard.

233) Mr. Dhond has also relied upon judgment of the Apex Court in *M.S. Madhusoodhanan* (supra) in which it is held in paragraphs 112, 115, 116, 117, 122 and 124 as under :

112. However, the respondents have sought to rely upon the following evidence in support of their contention that Madhusoodhanan was given an opportunity to apply for the additional shares by service of a notice dated 1-8-86:

(a) An entry in the local delivery book of Kerala Kaumudi [Ext. R-8 (b)] which ostensibly records that on 1-8-1986, Madhusoodhanan, Managing Director, Kerala Kaumudi, Trivandrum was "authorised to issue notices to the existing shareholders and one letter for Board meeting". There is an unidentified signatory who has acknowledged receipt of this document on 1-8-86. According to Srinivasan's oral testimony, the signature is that of Mohan Raj.

(b) Exhibit P-93 (a) is an entry in the outward register of Kerala Kaumudi indicating the dispatch of the notice.

(c) A Certificate of Posting dated 1-8-86 (Ext. R-25) which purports to relate to service of the notice on Madhusoodhanan, his children and KIPL.

115. As far as the certificate of posting is concerned, it is not explained why it does not record the dispatch of notices to any other shareholder. When the relationship between the parties was already so embittered, proof of service of notice by certificate of posting must be viewed with suspicion. Judicial notice has been taken that certificates of posting are notoriously "easily" available. What was seen as a possible but rare occurrence in 1981 (*L.M.S. Ummu Saleema v. B.B. Gujral*) is now seen as common. Thus in *Shiv Kumar v. State of Haryana* (SCC at p.447, para 6), this Court said:

"6. We have not felt safe to decide the controversy at hand on the basis of the certificates produced before us, as it is not difficult to get such postal seals at any point of time".

116. Despite this ground reality and on a misinterpretation of the provisions of Section 53, the appellate court came to the indefensible conclusion that "evidence regarding dispatch of a communication under certificate of posting attracts the irrebuttable statutory presumption under Section 53(2)(b) that the notice had been duly served", that "it is not open now to project a plea of absence of service of notice and a substantiation thereof by evidence" and that even if it were proved that the notice did not reach the addressee, the evidence could not be "formally accepted and formally acted upon by the court" such contrary evidence "being necked (sic) out at the threshold".



117. This Court in *Ummu Saleema* case (supra) said that a certificate of posting might lead to a presumption if the letter was addressed and was posted, that it, and in due course, reached the addressee:

"But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever dispatched as claimed." (SCC p.322,para 6)

122. Raising of a presumption, therefore, does not by itself amount to proof. The result of a mandatory requirement for raising a presumption cast on Court, as there is under Section 53 (2) of the Companies Act, is that the burden of proof is placed on the person against whom the presumption operates for disproving it. It is only if such person is unable to discharge the burden, that the court will act on the presumed fact. (See *Dahyabhai v. State of Gujarat.*) A presumption however is of course not always rebuttable. But the mere use of the word "shall" before the word "presume" or other like word does not mean that the presumption is irrebuttable or conclusive. An irrebuttable presumption is couched in different language, normally indicating that proof of one set of facts shall be "conclusive proof" of a second set. An example of this is Rule 3 of the Rules framed in 1956 under section 18 of the Citizenship Act, 1955 which was the subject matter of challenge in *Izhar Ahmad* case. Section 53(2) contains no such language.

124. In the present case, the certificate of posting is suspect. Assuming that such suspicion is unfounded, it does not in any event amount to conclusive proof of service of the notice on Madhusoodhanan or on any of the other addressees mentioned in the certificate as held by the Division Bench. Except for producing the dispatch register and the certificate of posting, no one on behalf of the respondents came forward to vouch that they had personally sent the notice through the post to Madhusoodhanan and his group. Madhusoodhanan had written two letters contemporaneously dated 4.8.86 and 8. 8.86 (Ext.P-24 and Ext.P-35) to Srinivasan, the General Manager of Kerala Kaumudi and to Madhavi complaining that he was not receiving any mail at all. These letters were admittedly received but not replied to by the respondents. It is also apparent from a perusal of those letters that Madhusoodhanan had no knowledge whatsoever of the notice for application for allotment of additional shares. Had there been such notice it is improbable that Madhusoodhanan who was fighting for retaining his control over Kerala Kaumudi, would have risked losing such control by abstaining from applying for the additional shares. In the circumstances we hold that Madhusoodhanan and his group were not served with the notice dated 1.8.86. It is therefore unnecessary to decide whether the period prescribed in the notice to apply for the shares was too short or contrary to the Articles of Association of Kerala Kaumudi.



234) On the other hand, Mr. Sancheti has relied upon judgment of the Apex Court in *V.S. Krishnan* (supra) in which the Apex Court has referred to the decision in *M.S. Madhusoodhanan* and has held in paragraph 30 as under :

30. Sub-section (2) of Section 53 makes it clear that after expiry of 48 hours a notice duly addressed and stamped and sent under certificate of posting is deemed to have been duly served. In *M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd.* this Court held that the fact of posting has to be proved by the sender and that statutory presumption is only a rebuttable presumption. In the case on hand, dispatch of notice in time by certificate of posting was proved. In addition to the same, the High Court has very much relied on the fact that first appellant was party to the Board Meeting which decided the convening of AGM on 29-09-2005. The above information pressed into service by respondent Nos. 1 and 2 cannot, lightly be ignored.

235) Mr. Sancheti has also relied upon the judgment in *Mohd. Asif Naseer* (supra) in which it is held in paragraphs 17 to 20 as under :

17. The other case of *U.Sree v. U.Srinivas*, relates to Hindu Marriage Act, where also the Evidence Act is applicable. The question there was with regard to certain document, which had been filed and not proved. The same was filed without being accompanied by an affidavit, whereas in the case at hand, the receipt under certificate of posting was filed along with an affidavit, which is permissible under Section 34 of the Rent Control Act.

18. The other case of *Shiv Kumar v. State of Haryana*, relates to Industrial Disputes Act. In the said case, this Court held that in the facts of that case, where reliance was placed only on service under certificate of posting without any other circumstances and proof, there could be no presumption of service of notice. Reliance was placed on Rule 76 A(2) of the Industrial Rules which provided for a specific manner of service. Such is not the position in the present case, where the Act provides for notice to be given, without providing the manner in which it is to be given. As such, this case will also not be of direct relevance to the case at hand.

19. On the contrary, in the case of *Samitri Devi v. Sampuran Singh*, which has been relied upon by learned Senior Counsel for the Appellant, this Court has held that : (SCC p.565, para 29)

“29. ... it will all depend on the facts of each case whether the presumption of service of notice sent under postal certificate should be drawn. It is true that as observed by the Privy Council in its above referred judgment, the presumption would apply with greater force to letters which are sent by registered post, yet, when facts so justify, such presumption is expected to be drawn even in the case of a letter sent under postal certificate.”

Considering the facts and circumstances of that case, this Court held the notice sent under certificate of posting to be sufficient service.



20. In the case of *Ranju v. Rekha Ghosh*, this court was considering a case where one month's notice was to be given to the tenant for eviction. After considering the provisions of the relevant Tenancy Act, Transfer of Property Act and the Bengal General Clauses Act, it was held that "clause (6) provides mere "one month's notice"; in such event, the said notice can be served in any manner and it cannot be claimed that the same should be served only by registered post with acknowledgement due." In the facts of that case, it was held that service of notice sent under certificate of posting was sufficient. Similar is the case at hand, where the Act provides for that 'the landlord has given a notice...', without specifying the mode of such notice, and in the facts of the present case, notice sent under postal certificate has rightly been held to be proper service.

236) In *M.S. Madhusoodhanan*, the Apex Court found that the Certificate of Posting in that case was suspect. In the present case also, the UCP is suspect, both on counts of non-grant of inspection of original to Plaintiffs as well as observations made by this Court in Criminal Writ Petition No.1491 of 2009. Thus as held by the Apex Court in *M.S. Madhusoodhanan*, production of UCP does not amount to conclusive proof of service of notice on original Plaintiffs. In fact in *Shiv Kumar*, the Apex Court has observed that it is not difficult to get such postal seals at any point of time. In my view therefore, apart from the fact that production of UCP is weak piece of evidence of service of notice, in the present case it is highly dangerous to rely upon the UCP sought to be produced by contesting Defendants for the purpose of recording a definitive finding that original Plaintiffs were served with the notice of AGM allegedly held on 30 September 2000. Reliance of Mr. Sancheti on the judgment of the Apex Court in *V.S. Krishnan* does not cut any ice in that in *V.S. Krishnan* the Apex Court has reiterated the findings in *M.S. Madhusoodhan* that the fact of posting has to be proved by the sender and that presumption of Section 53 is rebuttable. Furthermore in *V.S. Krishnan*, the dispatch was held to be proved. Mr. Sancheti's reliance on the judgment in *Mohd. Asif Naseer* is again misplaced in view of the fact that in paragraph 22 of the judgment, the Apex Court has held that mere receipt of notice having been sent Under Certificate of Posting, in itself, is not sufficient proof of service unless it is coupled with other facts and



circumstances to show that party had noticed. In the facts and circumstances of the present case, apart from reliance on UCP, which itself is a doubtful document, no other evidence is produced by contesting Defendants for this Court to draw an inference that Original Plaintiffs had notice of meeting scheduled to be held on 30 September 2000. I am therefore of the view that contesting Defendants have failed to prove that the purported notice of 4 September 2000 in respect of meeting scheduled to be held on 30 September 2000 was served on the Original Plaintiffs.

237) A vital decision of increasing share capital of the first Defendant Company from Rs.25 lakhs to Rs.1.50 crores is shown to have been taken in the AGM allegedly held on 30 September 2000. The meeting was attended only by two persons viz. Mr. Govind Gupta (DW2) and Mr. Vinod Haritwal (Director of the Defendant No.11). Defendant Nos.2 and 11 held total 10 shares out of 25,000 shares of first Defendant Company as on 30 September 2000. Thus persons holding 10 shares (0.4%) stake in the Company took vital decision of increasing share capital from Rs.25 lakhs to Rs.1.50 crores for the purpose of allotting 75,000 shares to Defendant No.11 in absence of other shareholders (original Plaintiffs) owning 99.96% stake in the first Defendant Company. This is the extent of illegality committed by Defendant Nos.2 and 11 in holding the purported AGM of 30 September 2000. Since AGM of 30 September 2000 is held behind the back of the Original Plaintiffs, who owned 99.96% stake in the first Defendant Company, the resolution adopted in the said meeting are invalid.

238) So far as the meeting of Board of Directors shown to have been held on 18 October 2000 is concerned, the same was essentially to give effect to the decisions already taken in the alleged meetings on 10 August 2000, 4 September 2000 and 30 September 2000. In the meeting of Board of Directors, shown to



have been held on 18 October 2000, Defendant No.11 was allotted 75,000 shares of the first Defendant Company by converting debt of Rs. 1,12,50,000/- into equity. No document is placed on record in the form of notice of meeting dated 18 October 2000, which could have been served on original Plaintiff No. 1. Obviously therefore no document is produced to prove service of any such notice on him. Thus there is nothing on record to indicate that any attempt was made to serve notice of meeting dated 18 October 2000 on original Plaintiff No.1 who was Director of the first Defendant Company. Thus it is difficult to hold that Board Meeting dated 18 October 2000 is validly conducted by the contesting Defendants.

239) The general defence of contesting Defendants is that original Plaintiff No.1 had not participated in the management of the first Defendant Company after execution of the SPA dated 27 October 1998 and that therefore it was not necessary for the contesting Defendants to serve notices of the aforesaid Board Meetings dated 10 August 2000, 4 September 2000 and 18 October 2000. This defence is premised on assertion that not even a single Board Meeting was ever attended by the original Plaintiff No.1 prior to 10 August 2000. Here one thing must be noticed, which is stark contradiction in the defences taken by the contesting Defendants. While disputing the nature of SPA and contending that SPA was executed merely as a comfort document and towards security for loan, the contesting Defendants have sought to suggest that Original Plaintiffs were merely “*namesake shareholders*” of the first Defendant Company. This means that the defence of the Defendants is that original Plaintiffs never became shareholders of the first Defendant Company even after execution of SPA on 27 October 1998. The lame attempt made by contesting Defendants to prove service of notices in respect of various Board Meetings and AGM on original Plaintiffs is required to be considered in the light of this defence taken by them that the original Plaintiffs had never become shareholders. If original Plaintiffs were not



shareholders, what was the need to dispatch notice dated 4 September 2000 under alleged Certificate of Posting in respect of AGM of 30 September 2000 is something which has not been explained by contesting Defendants. I have already held that there is no concept such as “*namesake shareholder*” under the Companies Act and that original Plaintiffs became full-fledged shareholders in respect of 24,990 shares purchased by them under SPA dated 27 October 1998. Therefore, the defence of original Plaintiffs not becoming shareholders of first Defendant Company has already been repelled. However, when the conduct of the contesting Defendants in conducting various meetings behind the back of original Plaintiffs is taken into consideration in the light of the defence taken by them about original Plaintiffs not becoming shareholders, an inference can easily be drawn that original Plaintiffs were deliberately not served with notices of any of the meetings by the contesting Defendants.

240) As on 10 August 2000, when contesting Defendants started taking series of steps for reducing the stake of original Plaintiffs, Defendant Nos. 2 and 11 were owners of only 10 shares, representing 0.04% stake in the first Defendant Company. Defendant Nos. 2, 8 and 9 who allegedly conducted the meeting of 10 August 2000, were under obligation to tender their resignations as per the covenants of the SPA. They were merely permitted to remain in management for time being, till they were asked to resign. Thus what Defendant Nos. 2 (in his capacity as owner of only 9 shares), 8 and 9 (who did not own any shares) were supposed to do was to just manage the activities of the stud farm of the first Defendant company till original Plaintiffs nominated their directors. However what has happened in the present case is that Defendant No. 2, who owned just 9 shares and was under obligation to resign as Director, decided to take vital decision of increasing the authorised share capital of the first Defendant Company for the purpose of allotting 75,000 shares to his own company (Defendant No. 11). All this is done behind the back of owners of 99.96% stake.



Thus Defendant No. 2 fraudulently increased his stake (through Defendant 11) from 0.04% to 75% without paying a farthing. Thus a person who was under obligation to resign from directorship of the company owing to reduction of his stake to 0.04%, misused his position as *pro tem* director along with Defendant Nos. 8 and 9 and proceeded to make second Defendant's company (Defendant No. 11) 75% owner of the first Defendant company by correspondingly reducing the stake of original Plaintiffs. Curiously, all this is done without a single rupee being actually exchanged and completely behind the back of original Plaintiffs. This is the extent of fraud committed by the contesting Defendants in the present case.

241) Also of relevance is the fact that in the letter dated 17 November 2000 addressed by Defendant Nos. 2, 8 and 9 and letter dated 21 November 2000 addressed by Defendant Nos. 1 to 3 there is no reference to increase in the authorized share capital of the first Defendant Company in pursuance of alleged AGM dated 30 September 2000 or allotment of 75,000 shares to Defendant No. 11 in the Board Meeting of 18 October 2000. Letter dated 17 November 2000 was addressed by Defendant Nos. 1, 8 and 9 in response to letter dated 16 November 2000 addressed by original Plaintiffs calling upon Defendant Nos. 2, 8 and 9 to submit resignations from Board of Directors of First Defendant Company. In response, Defendant Nos. 2, 8 and 9 submitted Reply dated 17 November 2000 vaguely contending that "*you are aware that you are not 100% shareholders of Manju Meadows Private Limited*". While stating so Defendant Nos. 2, 8 and 9 did not state on 17 November 2000 that the stake of original Plaintiffs got reduced 24.99% in pursuance of meetings of 30 September 2000 and 18 October 2000. They merely and vaguely stated in Reply dated 17 November 2000 that "*you No. 1 are party to decisions and both of you are party to reorganization of Manju Meadows Pvt. Ltd. and its working*". Similarly letter dated 21 November 2000 was issued by Defendant Nos. 2 and 3 for themselves and in capacity as Director of Defendant No. 1 responding to Plaintiffs' letter dated 16 November



2000 seeking resignations. In that letter as well, there is absolutely no reference to conduct of the Board Meetings of 10 August 2000, 4 September 2000 and 18 October 2000 as well as the AGM of 30 September 2000. In fact absolutely contradictory stand was taken in the letter dated 21 November 2000 that SPA was mere security towards loan transaction and Defendant Nos.2 and 3 offered to refund the balance loan amount of Rs.70,98,800/- to original Plaintiffs on the ground that there was “no real sale of shares” of Defendant No.1. Thus the stand taken by Defendant Nos.1 and 2 within few days of conduct of alleged AGM of 30 September 2000 and Board Meeting of 18 October 2000 is that original Plaintiffs were not shareholders of Defendant No.1 at all and this stand was exactly contrary to the annual return purportedly filed for year ending 31 March 2000 and referring to AGM of 30 September 2000, in which original Plaintiffs were shown to be owners of 24,990 shares of Defendant No.1. Thus from stand taken by Defendant Nos.1, 2, 3, 8 and 9 in letters dated 17 November 2000 and 21 November 2000 it appears that the Board Meetings of 10 August 2000, 4 September 2000 and 18 October 2000 as well as AGM of 30 September 2000 had not really taken place. It appears that for the first time when EOGM was held on 9 January 2001 the contesting Defendants came out with the theory of purported increase in authorized capital of the first Defendant Company and allotment of 75,000 shares to Defendant No.11. The contents of letters dated 17 November 2000 and 21 November 2000 lead credence the plea raised by Plaintiffs that the minutes of the said four meetings are fabricated by the contesting Defendants.

242) There is yet another factor which creates serious doubt about the authenticity of claim of holding Annual General Meeting on 30 September 2000 and Meeting of Board of Directors on 18 October 2000 and allotment of 75,000 shares to Defendant No.11. The Advocate of the first Defendant Company supplied to the original Plaintiffs, a copy of minutes of the 24th AGM allegedly held on 30 September 2000. During the course of inspection, copy of the



document purported to be annual return as on 30 September 2000 filed by first Defendant Company with ROC was furnished to the Advocate of the original Plaintiffs. This document, being 'Annual Return as on 30 September 2000' reflected Defendant No.11 to be owner of 75,001 shares as on 30 September 2000. In the said Annual Return, the shareholding of the first Defendant Company is shown as under:-

- i) Govind S. Gupta (D1) - 9 shares
- ii) Anil K. Bodani (Original P1) - 17,990 shares
- iii) Chandrika Anil Bodani (Original P2) - 7,000 shares
- iv) Somerville Farms Pvt. Ltd. (D11) - 75,001 shares.

243) If the allotment of shares allegedly took place on 18 October 2000, it is inconceivable as to how ownership of 75,001 shares by Defendant No.11 could be reflected in the 'Annual Return as on 30 September 2000'. This is subsequently sought to be explained by the Advocate of the first Defendant Company by claiming that the return was merely "unsigned draft format". In my view, this is yet another factor why the genuineness of the claim of the contesting Defendants about holding AGM on 30 September 2000 and meeting of Board of Directors on 18 October 2000 as well as resolutions adopted therein appears to be highly doubtful.

F.6.4 LETTERS DATED 10 OCTOBER 2000

244) Plaintiffs have taken a stand that neither AGM was actually held on 30 September 2000 nor any decision was actually taken for increasing authorized share capital to Rs.1.50 crores. Plaintiffs have relied upon three letters dated 10 October 2000 of Defendant No.2 addressed to Defendant No.1-Company. The said three letters read thus :

**LETTER 1 :**10th October 2000

Manju Meadows Pvt. Ltd.,
Metro House, 2nd Floor
M.G. Road
Mumbai 400 020

Dear Sirs,

This is to confirm that the amount of Rs. 1,02,61,000/- (Rupees one crore two lakhs and sixtyone thousand only) to be paid to Gupta Livestock Breeding & Research Farm as on 31st August 2000 is my personal liability and responsibility.

Sincerely,

Sd/-

Govind Gupta

LETTER 2 :10th October 2000

Manju Meadows Pvt. Ltd.,
Metro House, 2nd Floor
M.G. Road
Mumbai 400 020

Dear Sirs,

This is to confirm that the amount of Rs. 89,54,126/- (Rupees eightynine lakhs fiftyfour thousand one hundred and twentysix only) to be paid to Gupta Emerald Mines Pvt.Ltd. as on 31st August 2000 is my personal liability and responsibility.

Sincerely,

Sd/-

Govind Gupta

LETTER 3 :10th October 2000

Manju Meadows Pvt. Ltd.,
Metro House, 2nd Floor
M.G. Road
Mumbai 400 020

Dear Sirs,



This is to confirm that the amount of Rs. 2,02,63,302/- (Rupees two crore two lakhs sixty three thousand three hundred and two only) to be paid to Sommerwille Farms Pvt. Ltd. as on 31st August 2000 is my personal liability and responsibility.

Sincerely,
Sd/-
Govind Gupta

245) Thus by letter dated 10 October 2000, Defendant No.2 had confirmed that Rs.2,02,63,302/- was due to be paid to Defendant No.11-Somerville and that the same was the responsibility of Defendant No.2. If decision was already taken in the Board Meeting of 10 August 2000 and 4 September 2000 and in AGM of 30 September 2000 to increase authorised share capital to Rs.1.50 crores for converting part of the alleged debt of Defendant No.11 of Rs.2,02,63,302/- into equity, it is inconceivable that Defendant No.2 would confirm on 10 October 2000 that the said amount of Rs.2,02,63,302/- was still due or payable to Defendant No.11-Somerville.

246) Since, letters dated 10 October 2000 in relation to Defendant No.11 becomes unexplainable for contesting Defendants for justifying theory of conversion of debt of Defendant No.11 into equity, the contesting Defendants have taken three defences. Firstly, they sought to contend in letter dated 30 November 2000 that “blank papers/documents” were misused by original Plaintiffs for preparation of letters dated 10 October 2000. However, in the Written Statement filed by Defendant No.2 genuineness of letters dated 10 October 2000 is not disputed and Defendant No.2 admits that he issued the said three letters. Thus the first defence of misuse of blank papers taken in letter dated 30 November 2000 is proved to be false. The second defence in respect of letters dated 10 October 2000 is to be found in the Written Statement of



Defendant No.2 in which he contends that the letters were issued in pursuance of “*financial restructuring scheme*” proposed for the benefit of Defendant No.1. The third defence taken during the course of submissions of Mr. Sancheti is that the said letters were issued purely with a view of comforting the original Plaintiffs. I find all the three defences to be contradictory to each other. The first defence of misuse of blank papers is proved wrong on account of specific admission given by the Second Defendant in paragraph 25 of the Written Statement. The second defence of so called financial restructuring does not go in tune the third defence of provision of “*comfort*” to Original Plaintiffs. Also, the third defence of “*comfort*” does not go in tune with the alleged decisions already taken in the Board Meetings of 10 August 2000 and 4 September 2000 and AGM of 30 September 2000 to convert alleged debt of Defendant No.11 into equity. In my view therefore, the letters dated 10 October 2000 admittedly issued by Defendant No.2 *qua* the alleged debt of Defendant No.11 completely demolishes the false theory of holding of Board Meeting dated 10 August 2000 and 4 September 2000 and AGM dated 30 September 2000.

247) I therefore hold that the Board Meetings dated 10 August 2000, 4 September 2000 and 18 October 2000 as well as the AGM shown to have been held on 30 September 2000 were either not held at all and/or were not validly held and therefore decisions taken therein cannot and does not affect the stakeholding of Original Plaintiffs in the first Defendant Company. Therefore the decisions to increase authorised share capital of first Defendant company to Rs.1,50,00,000 and to allot 75,000 shares of the first Defendant Company to Defendant No.11 are *ab initio void*. Since the decision of allotment of 75,000 shares to Defendant No.11 is *ab initio void*, all the subsequent consequential actions taken by the contesting Defendants for effecting actual transfer of shares in the name of Defendant No.11 are consequently void.



248) On two separate occasions, various alleged creditors of the first Defendant Company had confirmed that the liability to repay their alleged debts was on Defendant Nos. 2 and 3 and that the first Defendant Company was not responsible for repayment of such debts. On 23 November 1998, Defendant Nos. 10 and 11 issued letters addressed to the first Defendant Company confirming that amounts of Rs.1,27,08,069/- and Rs.67,97,470/- respectively, though due from first Defendant Company, was personal liability of Defendant Nos.2 and 3. Again on 10 October 2000, Defendant No.2 personally confirmed by issuing letters to the first Defendant Company that the amounts due to Gupta Livestock and Breeding and Research Farm, Gupta Emerald Mines Private Limited and Defendant No.11 was his personal liability and responsibility. Though Mr. Sancheti has strenuously attempted to contend that the said letters were only issued to comfort original Plaintiffs, in my view, since the contesting Defendants admit issuance of the said two sets of letters, some meaning will have to be ascribed to the same. The money was allegedly due were to various group companies of Defendant No.2. The Defendant No.2 undertook the responsibility in respect of the said amounts on to himself, both immediately after execution of the SPA as well as after conduct of the alleged AGM dated 30 September 2000. Once the responsibility of repaying the said sums was accepted by Defendant Nos.2 and 3 on 23 November 1998 and by Defendant No.2 on 10 October 2000, they cannot be permitted to wriggle out of consequences of issuance of such letters. So far as the alleged debt due to Defendant No.11 is concerned, once Defendant Nos.2 and 3 had taken the responsibility of repaying the said amount (Rs.67,97,470/-) to Defendant No.11, it was highly illegal on their part to subsequently convert the alleged debt of Defendant No.11 by allotting the equity shares of Defendant No.1-Company to Defendant No.11. In fact the letter dated 23 November 1998 issued by Defendant Nos.2 and 3 and countersigned by Defendant No.11 make the entire theory of conversion of alleged debt of Defendant No.11 into equity to be highly doubtful. The subsequent letter dated 10 October 2000 issued in respect of alleged debt of Defendant No.11 confirms



the said doubt as the said letter is issued after holding of the AGM on 30 September 2000 and after deciding to increase share capital for allotment of 75,000 shares to Defendant No.11 by converting alleged debt into equity. Thus both letters dated 23 November 1998 and 10 October 2000 in respect of Defendant No.11 show that the theory of allotment of 75,000 shares to Defendant No.11 could not have been taken in the AGM dated 30 September 2000 and in the meeting of Board of Directors dated 18 October 2000.

F.6.5 NECESSITY OF PRAYER TO CHALLENGE TITLE OF DEFENDANT NO. 11 IN RESPECT OF 75000 SHARES.

249) Mr. Dwarkadas has strenuously attempted to contend that no specific relief is sought in the Plaint for declaration of transfer of 75,000 shares in favour of Defendant No.11. He has contended that the title to movable property viz. 75,000 shares stands transferred to purchaser (Defendant No. 11) since the transaction has already been performed and completed, in absence of prayer for setting aside the transfer, the effect of transfer cannot be negated. He has relied upon judgment of the Apex Court in *BOI Finance Ltd.* (supra) in which it is held in Para 47, 61 and 64 as under:

Position in Law if the Transactions are not Severable

47. Even if it be assumed that the agreements were not severable, and they were composite agreements even then the ready leg having been performed, the position in law is that the illegality of the agreements cannot affect the transfers which had already taken place.

61. There can be little doubt that the appellants, when they paid the market price and took delivery of the securities had become owners of the same. According to Section 5 of the Transfer of Property Act, 1882, “transfer of property” inter alia means an act by which a person conveys property to another person. Section 6 of this Act deals with what property may be transferred. What is relevant in Section 6(h) according to which no transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object, or consideration within the meaning of Section 23 of the Indian Contract Act, or (3) to a person legally disqualified to be transferee. According to Section 23 of the Contract Act the consideration or



object of an agreement will be unlawful if it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy. In the instant case the object of the contracts entered into between the banks and the notified parties was for the transfer and, subsequently, re-transfer of the securities. The transfer took place on delivery of securities on payment of market price as consideration. The consideration for the transfer of the securities, in the ready leg, was the payment of market price.

64. The following conclusions flow from the aforesaid discussion:

(A) Infringements of the instructions issued by the Reserve Bank of India under the Banking Regulation Act prohibiting the banks from entering into buy-back arrangements do not invalidate such contracts entered into between the banks and its customers.

(B) The ready-forward contract is severable into two parts, namely, the ready leg and the forward leg. The ready leg of the transaction having been completed, the forward leg, which alone is illegal, has to be ignored.

(C) With the ready leg having been performed the illegality of the forward leg contained in the agreements cannot affect the transfers which had already taken place.

250) In my view, the judgment in *BOI Finance Ltd.* has no application to the facts of the present case. The Apex Court has essentially dealt with the issue of severability of valid and void parts of contract and has held that the valid part of contract resulting in transfer of securities would not be affected because of illegality in forward leg of contract, which was held to be separable from ready leg of contract. The issue in the present case is altogether different. If the decision taken in the AGM of 30 September 2000 is rendered illegal, the first Defendant Company's authorised share capital would continue to remain at Rs. 25,00,000 divided in 25,000 equity shares of Rs. 100 each. Therefore no additional shares (75,000) would remain allottable to Defendant No. 11 as 24,990 shares were held by Plaintiffs, 9 by Defendant No. 2 and 1 by Defendant No. 11. Thus non-existent shares (75,000) cannot be treated to have been validly transferred in favour of Defendant No. 11 by making reference to Section 5 of the Transfer of Property Act, 1882 under a specious premise that Plaintiffs failed to seek declaration in



respect of 75,000 shares already transferred in the name of Defendant No. 11. When the shares were not in existence and also not allottable at all, mere effect of transfer of such non-existent shares in the Register of Members would not save the illegal decisions of increasing authorised share capital and allotment of shares. In my view therefore such prayer was not necessary once it is held that decision to allot 75,000 shares to Defendant No.11 is *ab initio void* as every consequential action taken in pursuance of such void decision automatically becomes invalid. Despite absence of a specific prayer for a declaration of transfer of shares in the name of Defendant No.11 in the Plaint, such transfer being merely a consequential action, the same would also be rendered void.

**F.6.6 VALIDITY OF VARIOUS FORMS ALLEGEDLY SUBMITTED BY
CONTESTING DEFENDANTS**

251) The Plaintiffs have also raised doubts about defences raised by contesting Defendants about filing of various forms in pursuance of the aforesaid four meetings. According to Plaintiffs, the exact dates on which Form 2 or Form 5 were allegedly filed are not indicated (deliberately) by contesting Defendants in Written Statement or evidence. Though Plaintiffs do not dispute filing of the said forms with ROC, they suspect that the said forms are filed subsequently after creating forgery in respect of Minutes of the four meetings. Plaintiffs have referred to the letter of Solicitor of Defendant No.1 dated 7 February 2001, in which it is stated that both Forms 2 and 5 were filed on 14 November 2000. Plaintiffs contend that since Form 5 relate to increase in authorized share capital, the same ought to have been filed at prior point of time before filing of Form 2 which was for reporting allotment of shares to Defendant No.11. However in the present case, Form 5 is shown to be dated 14 November 2000 whereas Form 2 bears the date of 25 October 2000. This clearly appears to be illogical and also contradicts the stand taken in the Advocate's letters dated 7 February 2001. Also



Mr. Bharat Pathak, who conducted search on behalf of the original Plaintiffs, did not find the said two forms in the records of ROC. Though detailed submissions are canvassed on the aspect of the date of filing of various forms, in my view it is not necessary to delve deeper into this aspect especially when the conduct of the four meetings as well as minutes thereof are not found to be authentic by this Court. Filing of forms are merely consequential actions and once the decisions taken in the purported meetings are found to be invalid, filing of forms would not validate the invalid decisions.

F.6.7 MINUTES OF MEETING DATED 10 JANUARY 2001

252) Contesting Defendants have contended that Board Meeting was conducted of first Defendant Company on 10 January 2001 wherein it was resolved that Defendant Nos. 13, 14 and 15 were appointed as additional directors of the first Defendant Company and that Form 32 was filed with ROC about their appointment as additional directors. I have gone through the Minutes of Meeting of Board shown to have been held on 10 January 2001, in which the resolutions of EOGM dated 9 January 2001 are shown to have been discussed and thereafter, Defendant Nos. 13, 14 and 15 are shown to have been appointed as additional directors. Under Clause 5.3 of Article V of the SPA, Confirming Parties (Defendant No.2 , 8 and 9) were to appoint such further persons as directors of the first Defendant Company as the Second Party (original Plaintiffs) were to direct. It appears that original Plaintiffs were not present in the purported Board Meeting of 10 January 2001. There is no contention by contesting Defendants that even an attempt was made to serve the original Plaintiffs with notice of Board Meeting of 10 January 2001. Furthermore, original Plaintiffs did not direct Defendant Nos. 2, 8 and 9 to appoint Defendant Nos. 13, 14 and 15 as additional directors. In my view therefore, holding of purported meeting of 10 January 2001 as well as resolution adopted therein are *ab initio* void and cannot be acted upon.



253) Issue Nos. 7, 10, 12, 13, 14 and 18 are answered accordingly:

No.	Issue	Answer
7	Whether the Plaintiffs prove that the resolutions passed at the 24 th Annual General Meeting of the 1st Defendant Company held on 30th September 2000 are illegal, null and void ?	Yes
10	Whether the Plaintiffs prove that the Minutes of the 24 th Annual General Meeting of the 1st Defendant Company held on 30.09.2000 are fabricated and got up documents and are illegal, null and void ?	Yes
12	Whether the Plaintiffs prove that the meetings of the Board of Directors of the 1 st Defendant Company purportedly held on 18 th October 2000 and 10 th January 2001 were illegally/invalidly convened and that the resolutions passed at the said meetings are illegal, null and void and of no legal effect?	Yes
13	Whether the Plaintiffs prove that the Board Resolution dated 18th October 2000 to allot, and the allotment of 75,000 equity shares of Rs. 100/ each of the 1st Defendant Company to the 11 th Defendant are illegal, null and void and of no legal effect ?	Yes
14	Whether the 2 nd Defendant proves the allotment of 75,000 equity shares of the 1st Defendant Company to the 11 th Defendant was with the knowledge and consent of the Plaintiffs as alleged in para 45 to 47, 58 and 106 of its Written Statement ?	No
18	Whether the Plaintiffs prove that the following documents are liable to be delivered up for cancellation and cancelled (a) The minutes of the 24th Annual General Meeting of the 1st Defendant Company held on 30th September 2000 ? (b) The minutes of the Extraordinary General Meeting of the 1st Defendant Company held on 9th January 2001 ? (c) The minutes of the meetings of the Board of Directors of the 1st Defendant Company held on 18th October 2000 and 10th January 2001 ?	Yes



F. 7 CONTINUATION OF DIRECTORSHIP OF ORIGINAL PLAINTIFF NO. 1
AFTER 30 SEPTEMBER 2000.
ISSUE NO. 4

254) It is the case of contesting Defendants that though original Plaintiff was appointed as Additional Director of the first Defendant Company w.e.f. 30 March 1999, as per Section 260 of the Companies Act, such appointment was only till the next AGM and that the appointment automatically stood vacated by effect of law, without taking any further action. This is how contesting Defendants claim that the original Plaintiff No. 1 ceased to be director of the first Defendant Company after 30 September 2000. Section 260 of the Companies Act, provides thus:

260. Additional Directors .-

Nothing in section 255, 258 or 259 shall affect any power conferred on the Board of Directors by the articles to appoint additional Directors:

Provided that such additional Directors shall hold office only up to the date of the next annual general meeting of the company:

Provided further that the number of the Directors and additional Directors together shall not exceed the maximum strength fixed for the Board by the articles.

255) In my view, the stand taken by contesting Defendants about directorship of original Plaintiff No. 1 coming to an end on 30 September 2000 is directly linked to the issue of validity of the said AGM shown to have been conducted on 30 September 2000. I have already held that the purported AGM of 30 September 2000 was either not held at all or has been illegally held and that the resolutions adopted therein are void. Therefore, minutes of AGM of 30 September 2000 cannot be relied upon for inferring that the appointment of original Plaintiff No. 1 as director automatically came to an end on account of non-confirmation in the illegally held AGM.



256) Also contention of contesting Defendants about directorship of original Plaintiff No. 1 coming to an end on 30 September 2000 is contrary to the contents of letter dated 17 November 2000 of Defendant Nos. 2, 8 and 9, in which it was stated that '*You no. 1 are director of Manju Meadows Pvt. Ltd along with others and You No. 2 are not a Director of Manju Meadows Pvt. Ltd.*' Thus letter dated 17 November 2000 addressed by Defendant Nos.2, 8 and 9 to original Plaintiffs contains a categorical admission that Original Plaintiff No.1 remained as a Director till that date.

257) Thus appointment of original Plaintiff No. 1 did not come to an end on 30 September 2000. Issue No. 4 is answered accordingly.

No.	Issue	Answer
4	Whether the 1st Plaintiffs ceased to be a Director of the 1st Defendant Company in September 1999 ?	No

F. 8 **EOGM DATED 9TH JANUARY 2001**
ISSUE NOS. 3, 5, 8, 11

258) By notice dated 7 December 2000, the original Plaintiffs wrote to the first Defendant Company and requisitioned a meeting under Section 169 of the Companies Act for the purpose of removing Defendant Nos. 2, 8 and 9 as directors and for appointment of original Plaintiff No.2, original Defendant Nos. 16 to 19 in the place of such removed directors. By Notice dated 26 December 2000, EOGM of the first Defendant Company was convened and scheduled to be held on 9 January 2001.

259) The minutes of the EOGM have been recorded as under:



Minutes of the requisitioned Extra ordinary general meeting of the members of Manju Meadows Pvt. Ltd. held on Tuesday the 9th January 2001 at 4.00 pm at M. C. Ghia Hall, 2nd Floor, Rampart Row, Behind Museum, Mumbai - 400 001.

Present:

Mr. Ashwin Mehta	Chairman
Mr. Govind Gupta	Director and member
Mr. Vinod Haritwal	Director and Authorized Representative of Sommerville farms Pvt. Ltd.
Mr. Rajesh Khandelwal	Director
Mr. Sailesh Vaidya	By invitation (representing M/s. Kanga & Co. - Legal Advisors of the Company.)
Mr. K. C. Todarwal	By invitation (representing M/s. K.C. Todarwal & Co., Statutory auditors of the company)
Mr. Hemant Shetye	By invitation (Company Secretary in practice)
Mr. Dharmil A. Bodani	Proxy of Mrs. Chandrika A. Bodani
Mr. Ashwin J. Ahya	Proxy of Mr. Anil K. Bodani

Proceedings:

Mr. Ashwin Mehta, Chairman of the Board of Directors of the Company, took the chair and proceedings of the meeting commenced under his chairmanship. The Chairman welcomed the members and proxies to the meeting. After ensuring that the quorum was present, i.e. two members in person, the meeting was called to order.

The chairman announced that the company had received two valid proxies aggregating to 24,990 equity shares.

Mr. Ashwin Arya a proxy holder, proposed a motion about appointment of Mr. Dharmil Bodani as the chairman of the meeting. This motion was seconded by Mr. Dharmil Bodani.

However, Mr. Govind Gupta opposed the motion on the ground that a proxy cannot be made a chairman, Mr. Vinod Haritwal, authorized representative of M/s. Sommerville farms Pvt. Ltd. also opposed the motion on the grounds that the chairman of the Board of Directors of the company can only take the chair, as per the Article of Association of the company, read with the provision of table 'A' in this regard, which must be followed.

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It was also brought to the notice of the Chairman by Mr. Vinod Haritwal that the Board of Directors had, at their earlier meeting, duly appointed Mr. Ashwin Mehta, as the Chairman of the Board of Directors and he is duly entitled and authorized to Chair this meeting of the shareholders. The Chairman, after due discussion with the company's legal advisors, Mr. Shailesh Vaidya of M/s. Kanga & Co., Advocates and Solicitors, about the relevant provision of the companies Act, 1956 and the Articles of Association of the company, declared the motion proposed by Mr. Ashwin Ahya as not maintainable.

The Chairman than informed the members present that since the meeting was called on requisition and the notice of the meeting was sent to all the persons who were required to receive it and as all the four shareholders were present in the meeting either in person or through proxies, the notice convening the meeting could be taken as read.

Mr. Vinod Haritwal proposed the Notice to be taken as a read.

Mr. Dharnil Bodani asked for a copy of the Notice, which was given, and than seconded the motion that the Notice be taken as read.



The Chairman than tabled before the meeting, nine resolutions as proposed by the requisitionists. Since the requisitionists of the resolution were represented by proxies, he ordered a poll to be taken for all the nine resolution.

The Chairman than asked Mr. Hemant Shetye, company secretary in practice, to show the Ballot box to the members and proxies present and than seal it. After doing the needful, Mr. Hemant Shetye put before the Chairman a draft of Ballot paper for the approval of the chairman. After due approval from the chairman, the ballot papers were kept ready for distribution to the members for exercising their option. The ballot box was locked and the key handed over to the chairman.

The Chairman than appointed two scrutineers in accordance with the provision for section 184 of the companies Act, 1956. The two scrutineers were (i) Mr. Vinod Haritwal and (ii) Mr. Hemant Shetye (not being officer or employee of the company)

The above scrutineers were explained the procedures and asked to submit report of the poll, duly authenticated by both of them.

Then Mr. Hemant Shetye distributed four ballot papers duly initiated by the chairman to the concerned members and proxies of exercising their votes on resolution No. 1 on the poll which was read out as under:

Resolution No. 1

"Resolved that Mr. Govind Gupta Director of the company be and is hereby removed from the office of Director of the company".

After all the four members / proxies put the ballot papers in the Ballot Box, the chairman requested Mr. Govind Gupta to take the chair for resolution no. 2, being himself interested in the resolution.

Then the Hemant Shetye distributed four ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no. 2, on the poll which was read out as under:

Resolution No. 2

Resolved that Mr. Ashwin Mehta, Director of the company be and is hereby removed from the office of the Director of the Company".

After Resolution no. 2, was put to vote, all the four members / proxies put the ballot papers in the Ballot box. Then Mr. Ashwin Mehta again accepted the chair.

Then the Hemant Shetye distributed four ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no. 3 on the poll which was read out as under:

Resolution No. 3

Resolved that Mr. Rajesh Khandelwal, Director of the Company, be and is hereby removed from the office of the director of the Company"



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After Resolution No. 3 was put to vote, all the four members / proxies put the ballot papers in the ballot box.

Then Mr. Hemant Shetye distributed from ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no. 4 on the poll, which was read out as under:

Resolution No. 4

"Resolution that Mr. Dharnil A. Bodani be and is hereby appointed as director of the company".

After resolution no 4, was put to vote, all the four members / proxies put the ballot paper in the ballot box.

Then Mr. Hemant Shetye distributed from ballot paper duly initiated by the chairman to the concerned members and proxies for exercising their votes or resolution no. 5, on the poll which was read out as under:

Resolution No. 5

Resolved that Mrs. Chandrika A. Bodani, be and is hereby appointed as Director of the Company"

After resolution no. 5 was put to vote, all the proxi members / proxies put the ballot papers in the Ballot box.

Then the Hemant Shetye distributed from ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no. 6 on poll which was read out as under.

Resolution No. 6

"Resolved that Mr. Ashwin J. Ahya be and is hereby appointed as director of the company".

After Resolution No. 6 was put to vote, all the four-members/ proxies put the ballot papers in the Ballot box.

Then Mr. Hemant Shetye distributed form ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no. 7 on the poll which was read out as under:

Resolution No. 7

Resolved that Mr. Bharat J. Arya be and is hereby appointed as Director of the 'Company'.

After resolution no.7 was put to vote, all the four members/proxies put the ballot papers in the ballot box.



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Then Mr. Hemant Shetye, distributed four ballot papers duly initiated by the Chairman to the concerned members and proxies for exercising their votes on resolution no.8 on the poll which was read out as under.

Resolution no. 8

Resolved that Mr. Bhaven H. Soonderji be and is hereby appointed as director of the 'Company'.

After resolution no.8 was put to vote, all the four members/proxies put the ballot papers in the ballot box.

Then Mr. Hemant Shetye distributed four ballot papers duly initiated by the chairman to the concerned members and proxies for exercising their votes on resolution no.9 on the poll which was read out as under.

Resolution no. 9

Resolved that Mr. Shyamal A. Bodani is hereby appointed as Director of the 'Company'.

After resolution no. 9 was put to vote, all the four members/proxies put the ballot papers in the ballot box.

After the poll was over, the Chairman handed over the key of the Ballot box to the scrutineers and asked them to count the votes and submit a detailed signed report on it.

The scrutineers then counted the votes in the meeting hall itself, by segregating nine resolution and then separating "YES" and "NO" for each resolution. A detailed signed report stating the number of shares "IN FAVOUR" and "AGAINST" each resolutions, alongwith percentage was submitted to the Chairman.

The Chairman then tabled and read out the report of the scrutineers as under:

Resolution No.	Votes in favour		Votes against		Carried /Defeated
	Nos.	%	Nos.	%	
1	24990	24.99	75010	75.01	Defeated
2	24990	24.99	75010	75.01	Defeated
3	24990	24.99	75010	75.01	Defeated
4	24990	24.99	75010	75.01	Defeated
5	24990	24.99	75010	75.01	Defeated
6	24990	24.99	75010	75.01	Defeated
7	24990	24.99	75010	75.01	Defeated
8	24990	24.99	75010	75.01	Defeated
9	24990	24.99	75010	75.01	Defeated

Total Votes: 1,00,000

The Chairman then declared that all the resolutions from 1 to 9 (both inclusive) were defeated as vote for each resolution "IN FAVOUR" were 24,990 (Twenty four thousand



nine hundred ninety only) constituting 24.99% of the total voting power while the votes "AGAINST" each resolution were 75,010 (Seventy five thousand ten only) constituting 75.1% of the total voting power.

After declaration of the results by the Chairman, Mr. Vinod Haritwal thanked the chair and then the meeting was terminated.

260) Though the authorised share capital of the first Defendant Company was shown to have been increased in the purported AGM of 30 September 2000, the issued, subscribed and paid up capital was shown to be Rs. 1,00,00,000/- comprising of 1,00,000 shares. Defendant No. 11 (who is shown to be the majority shareholder of 75001 shares) has averred in its written statement in Para 4 as under:

4. With reference to paragraph 1(a) of the Plaint, this Defendant says that the issued, subscribed and paid up share capital of Defendant No. 1 is Rs. 1,00,00,000 comprising of 1,00,000 shares of Rs. 100 each. This Defendant says that the current shareholding of Plaintiffs in the said Defendant No. 1 is 24.99% and not 99.96% as alleged in the paragraph under reference.

Out of 1,00,000 shares shown to have been issued, 24990 shares were shown to have been owned by original Plaintiffs and 75010 shares were shown to be owned together by Defendant Nos. 2 and 11. This is how 1,00,000 votes are shown to have been cast in favour and against the 9 resolutions proposed on behalf of the original Plaintiffs.

261) Minutes of EOGM held on 9 January 2001 shows that the meeting has been attended by Defendant No. 11 in its capacity as owner of 75,001 shares of the first Defendant company. While casting votes also, Defendant No. 11 was permitted to cast 75,001 votes against the proposed resolutions. Thus the decisions taken in the EOGM are direct consequences of decisions to increase the authorised share capital of the first Defendant Company and to allot 75,000



shares to Defendant No. 11. Since I have held that allotment of 75,000 shares to Defendant No. 11 itself is void, the manner of conduct of EOGM of 9 January 2001 will have to be necessarily held to be invalid.

262) In view of findings recorded on 7, 10, 12, 13 and 14 above, EOGM of 9 January 2001 ought to have been held on the basis of ownership of shares of the first Defendant company as under:

Anil K. Bodani	17990 shares
Chandrika A. Bodani	7000 shares
Govind Gupta	9 Shares
Sommerville Farms	1 share

Total	25,000 shares

263) Thus 24990 votes constituting 99.96% ought to have been treated 'IN FAVOUR' of the 9 resolutions proposed in the EOGM of 9 January 2001 and only 10 votes constituting 0.04% ought to have been treated as 'AGAINST' the said resolutions. In my view therefore all the 9 resolutions adopted in the EOGM of 9 January 2001 are required to have been validly adopted. Issue No. 5 is framed about alleged agreement by second Defendant for resignation as director of the first Defendant Company in meeting held in November 2000. In my view, whether Defendant No. 2 agreed to resign or not becomes irrelevant in view of the findings being recorded about adoption of all the 9 resolutions in the EOGM of 9 January 2001.

264) Issue Nos. 3, 5, 8 and 11 are accordingly answered as under:



No.	Issue	Answer
3	Whether the Plaintiffs prove that Defendant Nos. 2, 8 and 9 ceased to be Directors of Defendant No.1 Company with effect from 9 th January 2011 as alleged in para 2(b) of the Plaint ?	Yes
5	Whether the Plaintiffs prove that the 2 nd Defendant agreed in the meeting alleged by the Plaintiffs to have been held in November 2000 that the 2 nd Defendant and his nominees would resign as Directors of the 1st Defendant ?	Not necessary to answer
8	Whether the Plaintiffs prove that Defendant Nos. 16 to 20 are validly appointed Directors of Defendant No.1 Company as alleged in para 2(h) of the Plaint ?	Yes
11	Whether the Plaintiffs prove that resolutions were validly passed/carried at the Extraordinary General Meeting of the 1st Defendant held on 9 th January 2001 removing Defendant Nos. 2, 8 and 9 as Directors of the 1st Defendant Company and whether the said Directors thereupon ceased to be Directors of the 1st Defendant Company and, if so, from what date ?	Yes

F.9 TERMINATION OF SPA AND OTHER DOCUMENTS
ISSUE NO. 6

265) Defendant No. 2 has contended in para 34 of his written statement that an urgent meeting of the Board of Directors was convened on 20 November 2000 and that in the said meeting, the chairman explained to the Board the alleged emergency situation arising from the letters of the first Plaintiff and his attempts to take illegal possession of the company's assets and properties, including the bank accounts. The Board of Directors in the Meeting held on 20 November 2000, resolved that all documents, letters, agreements, power of attorney and any other paper executed by the company or any of its directors in favour of the plaintiffs were cancelled and revoked. The Resolution shown to have been adopted in the Board Meeting of 20 November 2000 reads thus:



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“RESOLVED that all documents, letters, agreements, Power of Attorney and any other paper executed by the company or any of its directors in favour of Mr Anil K Bodani, be and are hereby cancelled and revoked.

RESOLVED further that Mr Govind Gupta be and is here by authorised to write suitable letters to Mr Anil K Bodani and inform him of such cancellation and revocation.”

266) Accordingly, it is the case of contesting Defendants that, by letter dated 21 November 2000, Defendant Nos. 1 to 3 cancelled and revoked all the documents executed by them, particularly the powers of attorney in favour of original Plaintiff Nos. 1 and 2. Letter dated 21 November 2000 has already been reproduced above.

267) It is contended by contesting Defendants that Plaintiffs have not challenged the minutes/resolutions of Board meeting dated 20 November 2000 or the act of cancelation and revocation of all documents and that therefore the same are final and binding. I am unable to agree. The so called Board Meeting is shown to have been attended by Mr. Ashwin Mehta, Mr. Govind Gupta, Mr. Rajeev Khandelwal and Mr. Vinod Haritwal, without any notice to original Plaintiff No. 1. It is not even the case of contesting Defendants that notice of Board meeting of 20 November 2000 was attempted to be given to original Plaintiff No.1. The holding of meeting dated 20 November 2000 is this itself illegal. Even if it is to be assumed that the Board meeting of 20 November 2000 was validly held, the Resolution passed therein did not and cannot have the effect of terminating the SPA. Board’s resolution for cancellation or revocation of ‘*all documents, letters, agreements, Power of Attorney and any other paper executed by the company or any of its directors*’ did not mean that the SPA got terminated in any manner. There is no specific cancellation or revocation of the SPA dated 27 October 1998. Furthermore, in the letter dated 21 November 2000, Defendant



Nos. 1 to 3 particularly cancelled '*all power of attorney*' executed in favour of original Plaintiffs and again there is no specific cancellation of the SPA.

268) SPA dated 27 October 1998 effected sale and transfer of 24,990 shares in favour of original Plaintiffs. The transaction of sale of shares was acted upon by transfer of share certificates and entry of names of original Plaintiffs in the Register of Members. The transaction of sale of shares thus became final and original Plaintiffs became owners of 24,990 shares of the first Defendant Company. Such transaction of sale of shares cannot be unilaterally cancelled or revoked by adopting resolution of Board of Directors of first Defendant company. Therefore in my view, the resolutions shown to have been adopted in the purported Board Meeting of 20 November 2000 did not have the effect of cancellation, termination or revocation of the SPA dated 27 October 1998. Issue No. 6 is accordingly answered as under:

No.	Issue	Answer
6	Whether the 2 nd Defendant proves that the Share Purchase Agreement and other documents dated 27th October 1998 were validly cancelled/terminated on 21st November 2000 as alleged in para 34 of the 2nd Defendant's Written Statement ?	No

F.10 PLAINTIFFS ENTITLEMENT FOR GRANT OF DECREE OF SPECIFIC PERFORMANCE
ISSUE NO. 16

269) Both Mr. Sancheti and Mr. Dwarakadas have contended alternatively that grant of decree of specific performance is not warranted in the facts and circumstances of the present case and what could be awarded in favour of the



Plaintiffs, at best, is compensation/damages, which is also a specific prayer in the Plaintiff.

270) Before I go into the issue of permissibility to award decree of specific performance in favour of Plaintiffs it would be necessary to take into consideration various prayers sought for in the Plaintiff. The main prayer of the Plaintiffs is to seek a declaration that the authorized share capital of the first Defendant Company is Rs.25 lakhs comprising of 25,000 equity shares of Rs.100/- each out of which 17,990 equity shares are owned by Original Plaintiff No.1 and 7,000 equity shares are owned by Original Plaintiff No.2. The next prayer sought for by the Plaintiffs are about decisions taken in the Annual General Meeting on 30 September 2000 by which authorized share capital of first Defendant Company is shown to have been increased from Rs. 25 lakhs to Rs.1.50 crores. Plaintiffs have also challenged allotment of 75,000 shares to Defendant No.11. The next set of prayers sought by the Plaintiffs are in respect of resolution proposed by original Plaintiffs in the EOGM meeting held on 9 January 2001 for removal of Defendant Nos.2, 8 and 9 as Directors of the Company and for appointment of original Defendant Nos.16 to 20 as its Directors. Prayer clause (b) in the Plaintiff is for specific performance of obligations by Defendant Nos.2 to 9 under Share Purchase Agreement. Prayer clause (c) is for award of damages of Rs.10 crores as an alternative to prayer clause (b). In prayer clause (d) Plaintiffs have sought cancellation of documents relating to Minutes of AGM dated 30 September 2000, EGM dated 9 January 2001 and Board of Directors of 18 October 2000. Prayer clauses (e) and (f) are for consequential injunctions.

271) Perusal of the above prayers sought in the Plaintiff would indicate that the main reliefs sought for by the Plaintiffs are in the nature of declaratory



prayers in prayer clause (a) of the Plaint. Once prayer clause (a) is granted, Plaintiffs' ownership of 99.96% stake in the first Defendant Company gets restored. Grant of prayer clause (a) (vii) ensues that Defendant Nos.2, 8 and 9 are removed from directorship of the first Defendant Company. Once they are removed from as Directors of the Company, it is for Plaintiffs to decide whom to be appointed as its Directors. In that sense, the prayer for specific performance of SPA dated 27 October 1998 is made only to ensure removal of Defendant Nos. 2, 8, 9, 12 to 15 as directors and for appointment of Plaintiffs' nominees as directors. I have already held that all the nine resolutions proposed in the EOGM dated 9 January 2001 are required to be treated as having been validly passed/adopted. This ensures removal of Defendant Nos. 2, 8, 9, 12 to 15 as directors and for appointment of Plaintiffs' nominees as directors. In that sense, nothing depends on specific performance of the SPA. It is therefore not really necessary to decide the issue of grant of relief of specific performance in view of the provisions of Section 20 of the Specific Relief Act. However since Issue No.16 has been framed with regard to Plaintiffs' entitlement to decree of specific performance, it would be necessary to answer this issue as well.

272) It is the case of the contesting Defendants that since relief of specific performance of SPA is sought, there is an implied admission on the part of the Plaintiffs that SPA has not been acted upon. Reliance is placed by contesting Defendants on Section 20 of the Specific Relief Act and according to the contesting Defendants, since the relief of specific performs is discretionary in nature and since SPA is sham, illusory and unconscionable, relief of specific is required to be denied to Plaintiffs. According to contesting Defendants, Plaintiffs' conduct in attempting to take forcible physical possession from the contesting Defendants is yet another factor to be taken into consideration for denying equitable relief of specific performance. On the contrary it is the case of



the Plaintiffs that facts of the present case overwhelmingly warrant grant of every relief including that of specific performance.

273) I have already held that the nature of SPA is to effect sale of 24,990 shares of first Defendant Company to the original Plaintiffs. Contesting Defendants in the suit have taken not just false but contradictory defence that the SPA was executed merely as a comfort document and towards security for loan. In the entire transaction, I have not found any of the actions of Plaintiffs to be gross so as to deny the relief of specific performance of SPA. Even during filing of the suit, Plaintiffs have paid off the debt of Shamrao Vithal Co-operative Bank and have spent substantial amount of money on maintaining the Stud Farm in addition to payment of royalty to the tune of Rs. 14,85,02,106/-. Therefore, if decree of specific performance of SPA dated 27 October 1998 is required in the present case, there is nothing on record which would disentitle Plaintiffs from grant of such discretionary relief. Reliance of contesting Defendants on judgment of the Calcutta High Court in *Sen Mukherjee and Co.* (supra) is therefore totally misplaced. Even otherwise, the case before Calcutta High Court involved lady Defendant not having independent advice. As against this the contesting Defendants are seasoned players in the game and were fully aware about consequences of their actions. In my view therefore, Issue No.16 deserves to be answered in favour of Plaintiffs and against the contesting Defendants.

No.	Issue	Answer
16	Whether the Plaintiffs prove that they are entitled to a decree of specific performance of the Share Purchase Agreement dated 27th October 1998 against Defendant Nos. 2 to 9 ?	Yes



F.11 ALTERNATE RELIEF OF COMPENSATION/DAMAGES
ISSUE NO. 17

274) Issue No.17 has been framed with regard to grant of alternate relief of compensation/damages of Rs.10 crores claimed by Plaintiffs. Since the Plaintiffs are being granted the main relief sought for in prayer clauses (a) and (b), in my view there is no necessity of considering the alternate relief of award of compensation/damages to Plaintiffs.

No.	Issue	Answer
17	If the answer to Issue 16 above is in the negative, whether the Plaintiffs prove that they are, in the alternative, entitled to a decree in damages jointly and/or severally against Defendant Nos. 2 to 15 and if so, in what amount ?	Not necessary to answer in view of issue No. 16 being answered in affirmative

G. CONCLUSIONS

275) After having considered the entire conspectus of the case, I am of the view that the action of the contesting Defendants in showing authorised capital of the first Defendant Company to have increased from Rs. 25,00,000 to Rs. 1,50,00,000 as well as 75000 shares to have been allotted to Defendant No. 11 are wholly illegal, void and of no legal effect. It is highly objectionable for Defendant Nos. 2 and 11, who together owned only 10 shares (0.04%) of the first Defendant company to reduce the stake of 99.96% owner to minority (24.99%). In fact, the series of actions taken by contesting Defendants for reduction of stake of Plaintiffs in the first Defendant company are contrary to their defence that SPA did not effect 'real sale of shares' and that the same was executed merely as a comfort document towards security for loan. This defence of 'no real sale of



shares' was invented on 21 September 2000, after stake of original Plaintiffs in first Defendant Company was acknowledged in series of illegal actions taken for its reduction to 24.99%. Contesting Defendants did not remain firm on their stand of 'no real sale of shares' and once again admitted stake of original Plaintiffs by permitting their proxies to cast 24.99% votes in the EOGM dated 9 January 2001. I have therefore no hesitation in holding that the action of reduction of stake of original Plaintiffs in the first Defendant Company is not just illegal but an outcome of systematic fraud. Mr. Sancheti has relied upon judgment of Apex Court in *Bishnudeo Narain* (supra) in support of his contention that fraud has to be properly pleaded with material particulars and proved. In my view, Plaintiffs have pleaded and proved commission of fraud by contesting Defendants by taking series of actions for reduction of original Plaintiff's stake from 99.96% to 24.99% in the first Defendant Company. Contesting Defendants deliberately kept 10 shares of the first Defendant Company with themselves and also secured right to remain in management of the company by incorporating a covenant to that effect in the SPA. They however misused this concession extended to them by convening and holding meetings of Board and AGM behind the back of 99.96% owners of the company and illegally and fraudulently increased the shareholding of Defendant No. 11 (which is second Defendant's group company, having no real business) from 1 share to 75,000 shares without actually paying a farthing. It therefore becomes imperative to reverse all the illegal and fraudulent actions taken by the contesting Defendants in increasing the authorised share capital of first Defendant Company, in allotting 75,000 shares to Defendant No. 11 as well as all consequential actions by restoring its authorised share capital to 25,00,000 divided into 25,000 equity shares of Rs. 100 each with original Plaintiffs owning 24990 shares.



H. DEPOSIT OF ROYALTY BY PLAINTIFFS AND DISCHARGE OF COURT RECEIVER

276) By Order dated 5 March 2004, this Court appointed Court Receiver in respect of assets of the first Defendant Company including immovable and movable properties, including the stud farm, livestock together with all statutory books, records, book debts, bank accounts, etc. The Court Receiver has accordingly taken symbolic possession of the stud farm on 1 April 2004. Plaintiffs have been appointed as agent of the Court Receiver and accordingly are possessing and operating the stud farm of the first Defendant Company. By Order passed in Chamber Summons Nos. 168 and 228 of 2008, royalty to be paid by Plaintiffs has been fixed at Rs. 6,81,600/- per month. By the time of conclusion of hearing of the Suit, Plaintiffs have deposited Royalty of Rs. 14,85,02,106/- in this Court. As directed by this Court, Plaintiffs have filed reports of income and expenditure in respect of the stud farm with the Court Receiver. The representative of the Court Receiver has visited the stud farm alongwith Veterinarian from time to time and has submitted reports. From various reports of the veterinarian, it appears that the activities of the stud farm have been kept operational by Plaintiffs. As per the last report of the Veterinary Diagnostic Centre and Allied Services (Dr. Abhay M. Desai), 24 horses listed in the Report were found at the stud farm. As per the reports of the Court Receiver, Plaintiffs have paid the electricity bills, Gram Panchayat taxes as well as irrigation charges in respect of the stud farm from time to time.

277) From various quarterly reports filed by Plaintiffs of income and expenditure in respect of the stud farm, it appears that from 1 April 2004 till filing of the last report upto 31 December 2023, as against total income of Rs. 21,98,36,513/-, Plaintiffs have claimed expenditure of Rs. 45,22,76,951/-, thereby showing that Plaintiffs have spent amount of Rs. 23,24,40,437/- from their own pockets towards maintenance of the stud farm, inclusive of royalty deposited in



this Court. These are approximate figures gathered by the office of the Court Receiver from quarterly reports filed with it. As against this figure, Plaintiffs have quoted the figure of Rs. 29,03,17,667/- being incurred for the purpose of running the stud farm. Without going into correctness of these figures, which, in my view is unnecessary for deciding the Suit, suffice it to observe that running of the stud farm during pendency of the present suit has proved to be more of a liability than income generating venture for Plaintiffs.

278) Original Plaintiffs are held to be owners of 99.96% stake in the first Defendant Company. As per the amended plaint, upon death of original Plaintiff No. 1, his estate was succeeded by his wife-original Plaintiff No. 2 by virtue of Will dated 9 April 2007. It is pleaded that original Plaintiff No. 2 had secured probate in respect of will of original Plaintiff No. 1 from this Court. After death of original Plaintiff No. 2, it is pleaded that, the two transposed Plaintiffs have become entitled to succeed to the estate of original Plaintiff No. 2 by virtue of her Will dated 31 August 2015. This is how Plaintiffs have claimed ownership rights in respect of 24,990 shares which were earlier owned by their parents-original Plaintiffs.

279) Since the suit is being partly decreed with a declaration of ownership of 24,990 shares by Plaintiff representing 99.96% stake in the first Defendant Company, the Court Receiver appointed as per the order of this Court needs to be discharged and symbolic possession of the Court Receiver in respect of immovable and movable properties of the first Defendant Company would come to an end and need to be handed over to Plaintiffs. Similarly, since original Plaintiffs are held to be owners of 99.96% stake in the first Defendant Company, the amount of royalty deposited by the Plaintiffs along with accrued interest needs to be refunded to them.



I. ORDER

280) I accordingly proceed to pass the following Order :

- a)** Plaintiffs' suit is partly decreed with costs.
- b)** It is declared that the 24th Annual General Meeting of the first Defendant Company shown to have been held on 30 September 2000 as well as the meeting of Board of Directors shown to have been held on 18 October 2000, minutes thereof and Resolutions passed therein as well as allotment of 75,000 shares of the first Defendant Company to Defendant No. 11 are illegal, null and void and do not have any legal effect.
- c)** Consequently, it is declared that the authorized share capital of the first Defendant Company is Rs.25 lakhs comprising of 25,000 equity shares of Rs.100/- each and that original Plaintiff No.1 owned 17,990 equity shares of face value of Rs.100/- each and original Plaintiff No.2 owned 7000 shares of face value of Rs.100/- each.
- d)** It is declared that the resolutions passed in the Extra-ordinary General Meeting of the first Defendant Company held on 9 January 2001 are illegal and void and all the nine resolutions moved on behalf of original Plaintiffs are deemed to have been passed and adopted, consequently resulting in removal of Defendant Nos. 2, 8 and 9 as directors and appointment of original Plaintiff No. 2 and original Defendant Nos. 16 to 20 as directors of the first Defendant company.



- e) It is declared that the resolutions shown to have been adopted in the Meeting of the Board of Directors of the first Defendant Company of 10 January 2001 are illegal and void and consequently appointment of Defendant Nos. 13, 14 and 15 as directors of first Defendant company is illegal and void.
- f) It is declared that all actions shown to have been taken consequent to the resolutions adopted in the Annual General Meeting of 30 September 2000, Meeting of Board of Directors of 18 October 2000, Extra-ordinary General Meeting of 9 January 2001 and Meeting of Board of Directors dated 10 January 2001 are illegal, null and void and of no legal effect.
- g) If any obligation under Share Purchase Agreement still remains to be performed, Defendant Nos.2 to 9 are directed to specifically perform their obligations under the Share Purchase Agreement dated 27 October 1998.
- h) Defendant No.22 is permanently enjoined from acting upon Form No. 5 (intimating increase in the share capital) filed on or about 14 November 2000, Form No. 23 (registering the resolution in respect of the increase in Authorised Share Capital) filed on or about 14 November 2000, Form No. 2 being a return of allotment filed on or about 14 November 2000, Form No. 32 (furnishing the particulars of new directors) filed on or about 11 January 2001, Form No. 32 (furnishing the particulars of appointment of Defendant No. 12 as director) filed on or about 14 November 2000 filed by the first Defendant Company with Defendant No. 22 and if already acted upon, Defendant No. 22 is directed to cancel entries passed in his records and registers on the basis of the said forms.



- i) Defendant Nos. 2, 8, 9, 12 to 15 are restrained from holding themselves out as directors of the first Defendant Company, from acting as its directors, dealing with or disposing off any of its immovable or movable properties, acting on its behalf or making representations on its behalf.
- j) It is declared that Defendant No. 11 is owner of only 1 share of the first Defendant Company and it is restrained from exercising any rights in respect of said 75,000 shares or any part thereof.
- k) Defendant Nos. 2 to 15, their employees, officers or agents are restrained from entering upon the property of first Defendant company including but not limited to the first Defendant's Stud Farm situated at village Shirgaon, near Somatne Phata, Mumbai Pune Highway, Maval, District Pune.
- l) Defendant Nos. 2 to 15 are directed to hand over all documents, papers, registers, records and property of the first Defendant Company in their possession or control to the Plaintiffs or their nominees.
- m) On expiry of period for filing Appeal against the Decree, the Court Receiver shall stand discharged without passing accounts subject to costs, charges and expenses of Court Receiver to be borne by Plaintiffs and the symbolic possession of the Court Receiver in respect of the assets of the first Defendant Company including of immovable and movable properties as well as of the stud farm and the livestock therein, shall also come to an end and Plaintiffs are permitted to remove the signboards put by the Court Receiver at the stud farm. Court Receiver shall hand over all records and documents relating to first Defendant Company to Plaintiffs.



- n) On expiry of period for filing Appeal against the Decree, the royalty amount deposited by Plaintiffs with the Court Receiver from time to time alongwith accrued interest shall be refunded to Plaintiffs after deducting costs and charges of the Court Receiver as per Rule 591 of the Bombay High Court (Original Side) Rules, 1980
- o) Decree be drawn up accordingly.

[SANDEEP V. MARNE, J.]

281) After the judgment is pronounced, Mr. Sancheti, the learned counsel appearing for Defendant No.2 requests for stay of the operative portion of the order for a period of 8 weeks. Mr. Sancheti would submit that Plaintiffs would hold meeting of the First Defendant and take various decisions relating to its control and management and that therefore, the operative directions are required to be stayed. Mr. Dhond, learned senior Advocate appearing for Plaintiffs would oppose the request for stay on the operative directions in the judgment. However, after taking instructions from his client, Mr. Dhond makes a statement that for a period of 8 weeks from today, Plaintiffs shall not hold any meeting in respect of First Defendant Company. The statement is recorded and accepted.

[SANDEEP V. MARNE, J.]