Indian Iron and Steel Co. Ltd. and ors. Vs. Dalhousie Holdings Ltd. and ors.

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Court : Kolkata

Decided On : Dec-14-1956

Reported in : AIR1957Cal293

Judge : P.B. Mukharji and Bachawat, JJ.

Acts : Companies Act, 1956 - Sections 41, 54A, 77, 100, 291 and 402; ;Iron and Steel Companies Amalgamation Act, 1952 - Section 13; ;Code of Civil Procedure (CPC) ; ;Sale of Goods Act, 1930 - Section 4 and 4(2); ;Trusts Act, 1882 - Section 3; ;Indian Companies Act, 1913 - Sections 54A(1) and 153C(5)

Appeal No. : A.F.O.D. No. 35 of 1953

Appellant : Indian Iron and Steel Co. Ltd. and ors.

Respondent : Dalhousie Holdings Ltd. and ors.

Advocate for Def. : S.M. Bose, Adv. General and ;S. Choudhury, Adv.

Advocate for Pet/Ap. : A.K. Sen and ;S. Roy, Advs.

Disposition : Appeal dismissed

Judgement :

P.B. Mukharji, J.

1. This appeal is a lively example of the struggle of now ideas in the old habits of thought. The new idea is the amalgamation of two companies by Special Statute of Parliament. The old habits of thought are the company law notions of amalgamation. Two companies coalesced in a strange unfamiliar setting. This is no ordinary amalgamation. An Ordinance followed by an Act of Parliament blessed this union. The impact of this Special Statute is great on the familiar Company Law under the Companies Act with its set patterns for amalgamation and the classical notions or impropriety of a company trafficking in its own share and obtaining its own shares leased on the old inheritance bequeathed by the House of Lord's dispensation in Trevor v. Whithworth (1887) 12 AC 403 (A). The struggle is keep and hard. The issue is 'whether the new ideas will succeed or the old habits of thought will prevail.

2. The principal actors in the scene are two limited companies, one the Indian Iron and Steel Company Limited and the other the Steel Corporation of Bengal Limited known respectively in the industrial world as the IISCO and the SCOB and both managed by the same Managing Agents Martin Burn Ltd. The President of India promulgated an Ordinance, the Iron and Steel Companies Amalgamation Ordinance

on the 29th October 1952 in respect of these two Companies. This was followed by the from and Steel Companies Act, 1952, on the 29th December, 1952. There is no material difference between the Ordinance and the Act. An analysis with a bird's eye-view of thewhole scope of this legislation is necessary for the appreciation of the present dispute.

3. The object of this legislation appearing from the preamble is to make a special provision in the interests of the general public & the Union for the amalgamation of these two companies closely connected with each other in the manufacture and production of iron and steel and for the purpose of securing efficient and economical expansion and the working of the iron and steel industry in India. The preamble also recites that successive recommendations had been made by the Tariff Board and the Tariff Commission.

4. The major effect of this legislation is to dissolve the Steel Corporation of Bengal Limited from the 1st January 1953 and to transfer and vest its undertaking in the Iron and Steel Company from the appointed day of the 1st January 1953. Section 3 of the Act defines the undertaking of the Steel Corporation of Bengal Limited, to include inter alia all its rights, powers, authorities and privileges and all its property, movable or immovable including cash, reserves, investments as well as all its debts, liabilities and obligations. Section 7 of the Act then provides for the terms of transfer as affecting the shareholders of the dissolved company. Its main effect for the purpose of this litication is that Section 7 provides that as soon as may be after the 1st January 1953, The Iron and Steel Company shall subject to the rules, if any, allot to every person registered as a shareholder in the dissolved company immediately before the appointed day if he is the holder of ordinary shares, four ordinary shares for rupees ten each in the Iron and Steel Company for every five ordinary shares for rupees ten each held by him in the Steel Corporation of Bengal immediately before the appointed day. Various provisions are made in Section 7 indicating how the allotment will be made and within, which time applications will have to be made. They are followed by provisions for priority as between secured creditors of the Steel Corporation of Bengal and secured creditors of the Iron and Steel Company and provisions for taxation, interim dividends and the existing directors and staff of the Steel Corporation of bengal. Thereafter the statute goes on to provide in Section 13 the terms of the dissolution of the Steel Corporation of Bengal. Section 13 provides that from the 1st January 1953 the Steel Corporation of Bengal shall be dissolved and thereafter no person shall make, assert or take any claims, demands or proceedings against the dissolved company or against a director or officer thereof in his capacity as such director or officer, except in so far as may be necessary for enforcing the provisions of this Act, and the right of every shareholder to or in respect of any share in the dissolved company shall be extinguished and thereafter no such shareholder shall make, assert or take any claims or demands or proceedings in respect of any such share except as provided in this Act. Finally, in Section 14 of the Act power 13 given to the Central Government to make rules for facilitating amalgamation. The importance of Section 14 and its various sub-sections lies in the fact of express recognition of rule making power in respect of allotment of IISCO shares by replacement of SCOB shares and also in respect of increasing the capital of the company and the borrowing powers, of the directors notwithstanding the Companies Act and the Memorandum and Articles of Association of IISCO.

5. The Act repeals the Ordinance.

6. Between the Ordinance and the Act, before the appointed day of the 1st January 1953, the Indian Iron and Steel Company entered intoan agreement with Dalhousie Holdings Limited, another limited company, for the sale of 11.00,000 fully paid ordinary shares of Rs. 10/- each in the Steel Corporation of Bengal. Now, these shares of the Steel Corporation of Bengal were held by the Iron and Steel Company as owners. These shares are the subject of the present litigation. By this agreement dated the 6th December 1952 certain terms were agreed between the Iron and Steel Company any Dalhousie Holdings Limited on which the sale was to take effect. Incidentally it must be pointed out that although the agreement bears the date 6th December, 1952, in tact the evidence is that the date was the 4th December 1952.

7. A critical survey of this agreement is necessary for any decision in this appeal. The agreement describes the Indian Iron and Steel Company as the vendor and the Dalhousi Holdings Limited as the purchaser. It recites that as the Indian Iron and Steel Company is desirous of selling the said shares and as the purchaser has agreed to purchase the same at the price and on the terms and conditions contained, the parties agree as follows:-- What followed were five different., clauses. The first part of the clause provides:--

'(1) The Vendor agrees to sell and the purchaser agrees to purchase the said shares.' The second clause provides:--

'(2) The Vendor shall be entitled to all dividends that may hereafter be declared by SCOB and payable on the said shares in respect of any period or periods prior to and ending on the 31st December 1952 and the purchaser will account to the Vendor for any such dividends that may be received by it.'

The third clause provides:--

(3) Subject to the provisions of Clause (4) hereof the price payable by the purchaser for the said share shall be the sum of Rupees Twenty per share which shall be paid to the Vendor against delivery of definitive certificates relating to the said shares and duly executed transfer deeds relating thereto. Such delivery shall be made and payment effected at, the office of the purchaser's Bankers The National Bank of India Ltd., Calcutta, within seven days from the date hereof.'

The fourth clause provides:

'The vendor may at any time before effecting delivery or the said shaves as required by Clause 3 hereof call upon the purchaser not to resell all or any of the said shares save at such time (but in no event exceeding five years from the date hereof on the expiration of which period any shares remaining unsold shall be sold at the market rate then prevailing) at such prices as may be mutually agreed between the parties.'

The last clause is the fifth clause which provides:

'In the event of the vendor exercising the right conferred upon it by Clause (4) hereof, then the purchaser shall be released from all obligation to make payment of the purchase price provided in Clause 3 hereof and in lieu thereof shall pay to the vendor such sum as shall be equivalent to the net price realised by it on the resale of all or any of the said shares less all costs and expenses, including brokerage where payable, incurred by it in connection with the sale of the said shares and less one per

cent of such net price. Such purchase shall only become due and payable by the purchaser three days after the receipt by it of such resale price. Provided that the vendor will be entitled to receive and/or retain and be liable to pay all taxes in respect of any dividendsthat may be declared in respect of the said shares or on any other shares received in lieu thereof or so many of them as remain unsold in terms of Clause 4 hereof pending resale by the purchaser in manner indicated above.'

8. After that agreement followed the transfer deed dated the 6th December 1952. The terms of the transfer deed are:--

'We Indian Iron & Steel Company Ltd., of 12 Mission Row, Calcutta-1, in consideration of the sum of Rs. 2,20,00,000/- only Rupees two crores twenty lakhs paid to us by M/s Dalnousie Holdings Ltd. of B 4, Clive Buildings, Calcutta, hereinafter called the transferee, do hereby transfer to the said transferee the 11,00,000 ordinary shares numbered 1389916 to 2489915, Standing in our name in the Books of the Steel Corporation of Bengal Ltd. to hold unto the said transferee, his executors, administrators, and assigns subject to the several conditions on which I (?) held the same immediately before the execution hereof and I (?) the said transferee do hereby agree to take the said shares subject to the same condition.'

9. The reason for setting out in extenso these two documents, namely, the agreement and the transfer deed is that they have been challenged as being ineffective to make the transfer Which they purport to do.

10. On or about the 23rd December 1952 the present suit was brought by the Indian Iron and Steel Company and six other shareholders of the Indian Iron and Steel Company for selves and as representing the other share-holders against nine defendants. The first defendant is Dalhousie Holdings Limited & the following other eight defendants are directors and shareholders of the Indian Iron and Steel Company. The reliefs sought in the plaint are a declaration that the transfer of the said 11,00,000 ordinary shares in the Steel Corporation of Bengal by the defendants Nos. 2 to 9 to the first defendant and the agreement entered into by them in respect thereof are void and inoperative and not binding on the plaintiffs and that such purported transfer or agreement should be cancelled and the documents in reject thereof be similarly delivered up and cancelled. Consequential reliefs of injunction and delivery of possession were also sought in the plaint. There are three written statements. The first one was by the defendants Dalhousie Holdings Limited. The second one is by defendants 2, 4, 5, 6 and 8 and the third one is by defendants 3, 7 and 9.

11. The issues raised before the learned trial Judge were:

(1) Has the name of the company been properly used as plaintiff?

(2) Is the suit maintainable?

(3) Is the Ordinance No. VIII of 1952 ultra vires?'

(4) Is the transfer of 11,00.000 ordinary shares by the company to Dalhousie Holdings Ltd. valid?

(5) To what reliefs, if any, are the plaintiffs entitled?

12. The learned trial Judge dismissed the plaintiffs' suit without costs.

13. The present appeal attacks the transfer by the Indian Iron and Steel Company of 11,00,000 shares of the Steel Corporation of Bengal on various grounds. It is said first that such transfer was made without any reference to the shareholders of the Indian Iron and Steel Company and that the particulars of such scheme of amalgamation were never supplied to the shareholders of the Indian Iron and Steel Company. In fact, the allegation in the plaint is that the defendantsapproached the Union of India with a request to bring about an amalgamation between the Indian Iron and Steel Company and the Steel Corporation of Bengal by an Ordinance of the President without any reference to the shareholders either of the Indian Iron and Steel Company or the Steel Corporation of Bengal. It is alleged further that the defendants other than the transferee have wrongfully and illegally and without any authority from the shareholders of the Indian Iron and Steel Company and without complying with the provisions of the Indian Companies Act regarding merger or amalgamation of the companies transferred the said shares. It is pleaded that the effect of the said agreement and transfer is that the Indian Iron and Steel Company has parted with its assets valued at over rupees one crore to the first defendant Dalhousie Holdings Limited without receiving any price. It is alleged that such transfer was made solely for the purpose Of enabling the defendants to control the voting rights which would accrue in respect of the transferred shares after the proposed merger & that such transfer was not bona fide. It is said that these defendants 2 to 9 were not competent to effect such transfer and that transfer is void, is contrary to the Articles of Association of the Indian Iron and Steel Company and also of the Indian Companies Act and that it is a colourable transaction and a fraud on the rights of the share-holders of the Indian Iron and Steel Company.

14. The defence, as disclosed in the different written statements, is a complete denial of these allegations and a submission that the transfer was within the powers of the directors of the Indian Iron and Steel Company and that it was valid and was bona fide.

15. Whether such a transfer is valid or within the powers of the Directors is a question which must first be determined with reference to the Articles of Association of the Indian Iron and Steel Company. The Indian Iron and Steel Company were the owners and holders of these 11,00,000 shares of the Steel Corporation of Bengal. Article 149 of the Articles of Association inter alia provides:--

'The control of the company and the business of the company shall be vested in the Directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute law expressly directed or required to be exercised or done by the company in General Meeting but subject nevertheless to the provisions of any statute law and of these presents and to any regulations not being inconsistent with these presents from time to time made by the company in General Meeting.'

The Article expressly vests both the 'control'' of the company and its 'business' in the directors. Transfer of shares which are company's properties, comes within the meaning of the words business of the company and its control. Therefore it is well within the express powers of Article 149. What the Article docs is to clothe the directors with all the powers which the company itself has with the specific

exceptions of those which are otherwise exercisable by statute or by the general meeting of share-holders. Then it argued that they may exercise only such powers as could be exercised or done by the company itself. The question, therefore, is, could the company transfer these shares? Prima facie the company as the owners of those shares, like any other owner, can certainly transfer its own shares or its property. Therefore, prima facie the company has a legalright to transfer the shares which it holds. Right to transfer is an obvious incident of legal ownership. What, however, is argued is that in this case there is a difference. It is said that the apparent transfer to Dalhousie Holdings Limited is really not a sale at all but a device and a colourable transaction whose main object is to cloak the fact that the Indian Iron and Steel Company purchased its own shares. This argument is made with a view to invoke the doctrine that a company cannot traffick in its own shares and that the company cannot become its own member. It is said that after the extinction of the Steel Corporation of Bengal by reason of the Act and after the assets of the Steel Corporation of Bengal had become part of the Indian Iron and Steel Company, the shares of the Steel Corporation of Bengal held by the Indian Iron and Steel Company had become IISCO's own property and. therefore, the Indian Iron and Steel Company should not be allowed to buy its own shares. The argument is seductive but has many fallacies behind it.

16. The first fallacy is that this is not at all a case of a company purchasing its own shares. It is not a purchase at all. In fact, this is an amalgamation enforced by the statute and not an amalgamation as is usually found under the Companies Act by the voluntary act of parties with or without the aid of the courts. The second defect of this argument is that even before the doctrine of traffiksing in shares can be invoked, it has to be first found that the agreement of the 4th December 1952 misdated as the 6th December 1952 is not what it says but something else, for unless the appellants succeed in establishing that the agreement of the 6th December 1952 is not a sale but a device by which the Indian Iron and Steel Company purchased its own shares, the whole question of trafficking in shares by the company's purchase of its own shares does not arise at all.

17. Before proceeding to analyse this argument it is best to clear the ground first on the main thesis of the argument which rests on the doctrine that the company, cannot be its own share-holder and member. The well known decision on this point is of the House of Lords in (1887) 12 AC 409 (A). In that case the Articles authorised the company to purchase its own shares. The company having gone into liquidation a former share-holder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for. The House of Lords came to the decision that such a company had no power under the Companies Act to purchase its own shares and that the purchase was, therefore, ultra vires, and that the claim must fail. The House of Lords disapproved the reasoning of the Court of Appeal in In re, Dronfield Silkstone Coal Co. (1880) 17 Ch D 76 (B). At page 424 of the report in (18C7) 12 AC 409 (A) Lord Watson said in the House of Lords:--

'It appears to me that, as the late Master of the Rolls pointed out in (1880) 17 Ch D 78 at p 83 '(B), it is inconsistent with the essential nature of a company that it should become a member or itself. It cannot be registered as a share-holder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in

the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls.'

The learned Lord proceeds to observe further at page 428 of the report:

'When a company, in order to get rid of a troublesome share-holder, buys his shares and continues to hold them, as in (1880) 17 Ch D 73 (B) the object may be different, but the result so far as regards the capital of the company, is precisely the same as if it had purchased the shares as an investment. If the shares are purchased with the view of being refold, that is simply a speculation with the funds of the company. If they are purchased with the view of their being retained by the company, that is a permanent withdrawal of the money invested in them from the trading capital of the company, I, do not agree with Cotton L.J. in thinking that if such a transaction is invalid no forfeiture or surrender could be supported. When shares are forfeited or surrendered and not reissued, that affects only the nominal amount of the shares so far as unpaid; when they are bought and not reissued that diminishes the paid up as well as the nominal capital.'

18. I am convinced that this doctrine has no application to the facts of the present case, I shall state my reasons briefly. The first reason is that here the Indian Iron and Steal Company is not buying, its own shares. In fact, the Indian Iron and Steel Company is selling its property, namely, SCOB shares which it held as owners. My second reason is that no reduction of capital is established here. As will be clear from the decision of the House of Lords the main ground on which this prohibition against traffick in shares rests is that it reduces the trading capital of the company and this was explained clearly by Lord Watson again in the subsequent case of British & American Trustee & Finance Corporation Ltd. v. John Coper, 1894-AC 399 at p. 409 (C). That is obvious enough. After all what is a company for? The company creates its fund by asking for subscriptions of capital and issuing shades in lieu thereof and with that capital the company carries on its business. But if the company goes on buying its own shares, it spends its own capital and thereby reduces its own capital and trading funds both and thereby strikes at the very root of company finance and destroys the very substratum on the basis of which a joint stock company does its business. I am satisfied in this case before us, that this is neither a purchase nor a reduction of capital. Therefore the whole of that argument based, on the principle of Trevor v. Whitworth (A) is misplaced in the facts of this appeal. As I hold on facts in this case that no reduction of capital has been established. I consider it unnecessary to discuss and decide in what circumstances, for what purposes and under what limitation Companies Act permits such reduction. It is also in my now useless in this case to discuss questions of forfeiture or surrender of shares, for the present case before us is neither one of forfeiture nor of surrender by act of parties, and this could only have been relevant if there was a reduction of capital.

19. My third reason is based on Lord Watson's observation that a device for taking the transfer to a nominee is not unknown even where the charge could be so easily made and validly made on the ground of a company trafficking in its own shares. When such a device is valid then the present transfer even if construed as making Dalhousie Holdings Ltd. a mere nominee of IISCO Ltd. cannot be impugned on the ground of a company trafficking in its own shares. Developing still further this well known device of a nominee Romer J in recent times in Kirby v. Wilkins,(1929) 2 Ch 444 (D) came to the conclusion that such a transfer did not offend against the principle laid down by any of the decided cases to prohibit a company from trafficking

in its own shares, and upheld a transfer in that case of shares to the Chairman of the Board of Directors of the company upon trust to use or sell them for the benefit of, the company.

20. By the statutory amalgamation as provided in the present case before us I find it difficult to appreciate how and in what circumstances there is reduction of capital when by the statute itself the Indian Iron and Steel Company as owner of the Steel Corporation of Bengal shares finds itself in the position of holding its own shares because SCOB shares and SCOB properties have by statute been added to IISCO and secondly when all the assets of the Steel Corporation of Bengal are added to the Indian Iron and Steel Company, The reduction of capital happening in the ordinary process of the company purchasing its own shares is a fact which is wholly absent in the present case. In this case there is neither any purchase by the IISCO of its own shares nor any reduction of IISCO capital. Therefore, the whole basis of this argument is destroyed.

21. In India Section 54A of the Old Companies Act or Section 77 of the new Companies Act makes statutory provisions in this respect and I do not think that it is necessary really to go to the doors of the English jurisprudence on this point unless it is with a view to appreciate better the object of this doctrine. Section 54A provides:

'No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by Ss. 55 to 66.'

Here again the limits of these statutory provisions are clear. The restriction of the bar is only with respect to buying. There is in my view no question of the Indian Iron and Steel Company buying its own shares in the present case. It is unnecessary to deal with Sub-section (2) of Section 54A of the Companies Act because the learned Counsel for the appellant concedes that it does not help the appellant's case. I need only, therefore, say that I am in entire agreement with the learned trial Judge in the view that he has expressed on Sub-section (2) of Section 54A of the Indian Companies Act.

22. In my view, the terms of the special statute must govern the present case. In fact, the statutory amalgamation is the new idea. The old habits of thought are derived from the provisions of the Indian Companies Act. The statute makes it quite clear in this case that this is not. a voluntary amalgamation nor an amalgamation with the help of the courts. The interpretation of the statute to my mind makes it clear that although all the asserts of the dissolved Steel Corporation of Bengal vest in the Indian Iron and' Steel Company, the shares of the Steel Corporation of Bengal reappear in the form laid down in Section 7 of the Iron and Steel Companies Amalgamation Act 1952. This Act must govern the question not only because it is a statute but because it is a subsequent statute and a special statute dealing with these two particular companies and in case of any conflict with the Companies Act, must prevail because of the principle, generalia special bus non derogant. While describing the main provisions of the statute it has been made clear that on the appointed day the 1st January 1953 or so soonthereafter the Indian Iron and Steel Company has to or shall allot to every person registered as a share-holder in the Steel Corporation of Bengal in the ratio of 4 to 5 in respect of the ordinary shares which include the subject-matter of this litigation. It is not, therefore, that the Steel Corporation of Bengal

shares disappear in a manner whose later transformation cannot be seen. While Section 13 of this Act says that the right of every share-holder to or in respect of any share in the dissolved company is extinguished, it goes on to provide that such shareholder tan make or shall make assert or take any claims or demands or proceedings in respect of such shares as provided in this Act. It is not irretrievable extinction. It is, therefore, a case of death with resurrection. It is true that the resurrection has to take place according to the provisions of the statute but nevertheless the fact of resurrection remains. In fact, after determining the ratio of 4 to 5 Sub-section (4) of Section 7 goes on to say that the Iron and Steel Company shall cause a notice to be published in the Gazette of India and shall also send by post to every person whose name was entered immediately before the appointed day in the register of shareholders in the, Steel Corporation of Bengal a notice' giving particulars of the terms set out as to the allotment of new shares and the disposal in the prescribed manner of fractional shares and an allotment letter for the new shares which shall also contain a statement of the fractional shares, if any to which a share-holder would be 'entitled if fractional shares are to be allotted. Sub-section (5) of Section 7 of the statute lays down that every share-holder in the dissolved company whose name appears in the register of the Steel Corporation of Bengal immediately before the appointed day shall be entitled on presentation within the prescribed period of the allotment letter and the share certificate in respect of the shares held by him in the Steel Corporation of Bengal to receive in due course share certificates of the Iron and Steel Company in accordance with the provisions of this Act and the rules made thereunder. In Sub-section (8) of Section 7 of the Act it is further provided. that any rights specified in Sub-section (5) shall during the period beginning with the appointed day and ending with the day cm winch the Iron and Steel Company issues fresh share certificates to the shareholders of the Steel Corporation of Bengal be transferable in like manner as the shares in the Iron and Steel Company themselves are transferable, and the transferees of such rights shall be entitled upon submission of the letter of allotment the relative share certificate in the dissolved company and the document of transfer to share certificates in the same manner and to the same extent as the transferors would have been entitled. All these various and detailed statutory provisions are ample proof to show that by the statutory amalgamation the SCOB shares are not lost for ever but are resurrected in new forms of ISCO shares.

23. It was then argued that even then the statutory amalgamation cannot help the defendants. Reliance was then placed on the decision in In re: Sovereign Life Assurance Co. (1892) 3 Ch 279 (E). There the Directors of a life insurance company were authorised by special Act of Parliament to purchase in the name of the company or otherwise the company's own shares. Pursuant to that power certain shares were purchased in the names of the trustees for the company and subsequently transferred into the name the company. Later on the company was ed to be wound up compulsorily and theliquidator sought on behalf of the policy holders to make a call upon the shareholders to the extent of the amount unpaid on the purchased shares. There it was held that the effect of the purchase by the company of these shares whether in the names of trustees or of the company was necessarily to extinguish the shares. The case is interesting because the power to purchase-shares in the name of the company itself was also a statutory power in that case. Lindley, L.J. at page 288 after drawing attention to Ss. 21 and 37 of that particular statute called the Sovereign Life Assurance Company Act, 1860, observed:--

'It is impossible to read this section without coming to the conclusion that the

company was authorised to buy its own shares. But what does this necessarily involve? It involves the purchase of part of the capital for the benefit of the holders of the rest of the capital -- i.e., it involves a reduction of capital; and this again alters the relation proportion of profits to be divided, and of the number of shares among which they are to be apportioned. * * * * A reduction of capital is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of its own shares.'

24. On the basis of this decision the argument is that in this case if the Indian Iron and Steel Company had retained the Steel Corporation of Bengal shares, then after the 1st January 1953 when the Steel Corporation of Bengal would be dissolved these shares would be regarded as extinguished because on that date the Indian Iron and Steel Company would be holding its own shares. I am unable to accept that argument first because the Indian Iron and Steel Company would not then be holding its own shares as such on the 1st January 1953, by its own act but by the force of a Special statute and, secondly, because the terms of the statute here speak to the contrary on this particular point. Far from the' SCOB shares being extinguished elaborate provisions are made by the statute for their revival in different forms. Now, Section 21 of the Sovereign Life Assurance Company Act, 1860, said:--

'It shall be lawful for the directors to lay out and invest, in the name of the company or otherwise, all or any part of the money funds or property of the company in (inter alia) the purchase of the shares or policies of the company or any bonuses declared thereon with power to cause any of the money so to be laid cut and invested as aforesaid to be sold or transferred, or to be changed and varied into any other of the stocks, funds' securities, annuities, shares, policies or other property hereinbefore mentioned.'

and thereafter Section 37 of the Sovereign Life Assurance Company Act, 1860, said:--

'Nothing in this Act contained shall extend, or be construed to extend, to incorporate the company, or to relieve or discharge the company, or any of the members thereof, from the responsibility, contract, duty, or obligation whatsoever, to which by law they, or any of them, now are, or at any time hereafter may be, subject or liable, as between the company and others; and all contracts, either express or implied, and made or to be made, and all present and future liabilities of any person being, or who shall hereafter be, a member of the company, or any person in trust for the company, or for the use and benefit thereof, shall have such and the same operation and effect and be attended with such and the same legal consequences in every respect as if such person had not been such member.'

It is plain that these two statutory provisions on which that decision in (1892) 3 Ch 279 (E) isbased are entirely different from the statutory provisions contained in the Iron and Steel Companies Amalgamation Act, 1952, with which we are concerned. I have tried to show that how in the Indian Act the most elaborate provisions are made for revival of the Steel Corporation of Bengal shares after the date of dissolution of the Steel Corporation of Bengal. The other objection also remains that this is not a case of the Indian Iron and Steel Company using its own funds to purchase its own shares.

25. Having disposed of the doctrine of trafficking in shares, I shall revert to the Articles of Association to refer to the specific Article 150. I have already explained

why I consider that the particular transfer comes within the general powers under Article 149 of the Articles of Association. Coming now to the more specific Article 150 of the Articles of Association, the words used are 'Without prejudice to the general powers conferred by the last preceding Article'. Therefore, these special powers under Article 150 which are expressly given do not in the least derogate from the wide general powers given under Article 149. Now what are the express powers which the directors are declared to possess under Article 150? By Sub-clause (2) of Article 150, express power is given to the directors 'to sell, let, exchange or otherwise dispose of absolutely or conditionally any part of the property, privileges and undertaking of the Company upon such terms and conditions and for such consideration as they may think fit.' Now, whether the particular transfer is an act of sale or an act of agreement to make the Dalhousie Holdings Ltd. a selling agent or an act of trust, it is clear to my mind that this transfer must come within the very wide general expression 'otherwise dispose of absolutely or conditionally' appearing in Sub-clause (2) of Article 150. No doubt, such transfer is a disposition. If it is a disposition, whether conditional or not, then it is covered by Sub-clause (2) of Article 150 within the express powers of the directors. I need only add that under Sub-clause (6) of Article 150 the directors are given powers to appoint any person or persons whether incorporated or not to accept and to hold in trust for the company any property belonging to the company, and in Sub-clause (17) of the same Article 150 the directors have special powers to enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts, deeds and things in the name and on behalf of the company as they may consider expedient for or in relation to any of the matters aforesaid or otherwise for the purpose of the company.

26. I, therefore, hold that this transfer is within the powers conferred upon the directors by the Articles of Association of ITSCO and is not ultra vires of the Articles of the Company or of the directors.

27. It will be desirable at this stage now to refer in some detail to the attack made in the argument on behalf of the appellants upon the nature of the agreement dated the 6th December, 1952. Recalling the clauses of this agreement, as already set out elsewhere in this judgment, some predominant conclusions are clear. Now, so far as the language of this agreement is concerned, it is the language of sale. IISCO is described as the vendor and Dalhousie Holdings Ltd. is described as the purchaser. The recital in the agreement expressly says that the shares are being sold for a price. The operative parts of the agreement are also written in the language of Bale. Clause 1 is the usual clause by which the vendor agrees to sell and the purchaser agrees to purchase.Clause 2 is the special provision for dividends; It provides that the vendor shall be entitled to the dividends that may be declared by the SCOB and payable on those shares in respect of any past period prior to and in respect of the period ending on the 31st December, 1952. It also provides that the purchaser will account to the vendor for any such dividends that may be received by it. It is, therefore, a special provision for the dividends for the special limited period as set out there. The retention by the vendor of such dividends or the conferment of the right to get dividends on the vendor does not, in my view, detract from the transaction as a sale. In an arrangement for the sale of shares it is perfectly conceivable to have such provisions of dividends being made, particularly in respect of the time prior to the sale, and the date being a broken period like the 4th or 6th December, 1952, to provide for dividends up to the end of the year to make the period complete for which dividends are usually and normally declared.

28. The main force of the attack, however, is upon Clauses 3,4 and 5. It is necessary to analyse in detail these clauses in order to come to an appreciation of the nature of their provisions. Learned counsel for the appellants argued that by reason of these clauses it is clear that what was being done was not a sale of these shares but the appointment of the Dalhousie Holdings Ltd. as a mere selling agent of the shares held by IISCO. The main ground in support of this argument is drawn from Clause 5 of this agreement but before I go to Clause 5, it is better in my view to follow the sequence, and I shall, therefore, start with the interpretation of Clause 3. Clause 3 is subject to Clause 4, and Clause 4 is subject to Clause 3 and Clause 5 represents a condition where the vendor has exercised his right as in Clause 4.

28a. Clause 3 stipulates that the price is payable by the . purchaser. It fixes the price to be Rs. 20 per share and provides that such price shall be paid to the vendor against delivery of definitive certificates relating to the said shares and duly executed transfer deeds in respect thereof. It also provides the procedure of delivery and of payment by stipulating that both delivery and payment shall be made and effected by the purchaser's Bankers, the National Bank of India Ltd. It also defines the week's time within which such payment is to be made. Now, by itself, Clause 3 is again in the language of sale, because it determines the price and defines when it is payable and how it is payable. That is therefore a perfectly legitimate clause in a transaction of sale.

29. Clause 4 then proceeds to say that before effecting delivery of the shares the vendors may call upon the purchaser not to resell all or any of the said shares except at such time and at such place as may be mutually agreed between the parties. It is contended on behalf of the appellants that if there was a sale how could the vendor prevent the resale. It is true enough, 'out here, the vendor can only prevent the resale before it has actually delivered the shares and not afterwards: in other words, before the sale has become complete by delivery the vendor is given the right to call upon the purchaser not to resell those shares. It is well known in the law of sale of property and certainly of movables like shares that before a purchaser gets possession the seller has certain rights well recognised in law, such as a right to lien, and the right of stoppage in transit and recovery of the articles sold. A sale under Section 4(2) of the Sale of Goods Act may be either conditional or absolute and I do not see why asale becomes any the less a sale because the seller before delivery reserves a condition that the purchaser should not resell. It is a condition of limited operation and applies only when there no delivery has been effected. Now, what is the meaning or essence of Clause 4? The essence to my mind is that it is an attempt to regulate both the time and the price of the sale of these shares. It is a very significant provision and for the purpose of construing this particular provision, its true meaning and scope, it is necessary to recall the circumstances in which the sale took place. To unload a whole bulk of shares to the tune of 11 lakhs in the market all at once would be to create the most unusual situation in the market with depression in prices and many other consequences. It is to my mind commercial prudence that in respect of a large bulk of shares with an Ordinance already announced and with an Act in the offing nothing should be done to put the market into a racket. Nor do I. consider this agreement as an improvident or negligent act on the part of the directors of IISCO by considering the risk of any possible insolvency of Dalhousie Holdings Ltd. in future because there is no allegation whatever that Dalhousie Holdings Ltd. is not a stable or solvent company of unquestioned status and responsibility and there is certainly not the remotest suggestion or proof or evidence that it is not so. It is for that reason that the provision was ma do that without shocking the market the vendor was given the right

before delivery of the shares to the purchaser to ask him not to resell them extent when both the vendor and the purchaser were agreed as to the time and price. It would be to the interest of both the vendor and the purchaser to effect such an agreement. It was to the interest of both to see that the prices of these shares were not jeopardised by putting them into the market at the same time for sale. It was also in the interest of the steel industry, as I understand it, that such racketting in shares should be avoided. Even then Clause 4 not only makes it clear that it could operate only before the delivery of the shares, but also provides another limitation and that is that this right is in no event to exceed a period of five years from the date of the agreement on the expiration of which Clause 4 clearly lays down that the shares shall be sold at the market rate then prevailing. Left to myself. I should have thought that it was a very reasonable provision which does not in the least make it any the less a sale; five years I should have thought a reasonable time within which to clear 11 lakhs of shares. It is not an unusually long time at all, having regard to the number of shares involved. At the same time five years would have given time enough to IISCO to readjust itself to the terms and conditions of the statute extinguishing SCOB and substituting the SCOB shares by IISCO shares at the ratio laid down in the statute. On a true and proper construction, therefore, of Clause 4, I am of opinion that it is not inconsistent with a sale, but having regard to all the circumstances and the facts of this case, it was a very prudent and normal measure. I need only repeat that here again also in Clause 4 the language continues to be the language of sale. What the purchaser is asked is not to 're-sell'. Clause 4 really regulates the price and qualifies Clause 3. It also says that the price, although stated to be Rs. 20 in Clause 3, will stand qualified before the delivery of shares and upon the vendor calling upon the purchaser not to resell by mutual agreement for a period of five years and thereafter at the market rate.

30. The last clause was attacked on the ground that it did not make the Dalhousie Holdings Ltd. a purchaser but only appointed it a mere selling agent for IISCO. Now, Clause 5 comes into effect when the vendor exercises the right conferred in Clause 4, by calling upon the purchaser not to resell. It, therefore, naturally provides that the purchaser in that event should be released from the obligation to make payment of the purchase price as provided in Clause 3. Therefore Clause 5 from this point of view is a regulator of price. It stipulates that in such an event instead of the price mentioned in Clause 3, the purchaser shall pay a sum equivalent to the net price that the purchaser will realise by resale of all or any of the said shares. In calculating this net price when a resale occurs, the purchaser is allowed to deduct his costs, expenses and brokerage, incurred or payable in connection with such resale and the purchaser is further given one per cent. of the net price. It is argued that by the use of the term 'brokerage' and giving the purchaser one per cent. of the net price the purchaser does not become really the purchaser, but a mere selling agent. This argument is enforced by appeal to the further provision in Clause 5 which provides that such purchase price shall become due and payable by the purchaser only out of the resale proceeds within three days of the receipt thereof. There are many answers to this argument of the appellants.

31. The first answer is in the consideration of the particular situation in which Clause 5 operates. Why should a purchaser pay a price after the vendor asks him not to resell? It would be most unfair in that event to continue to make the purchaser liable to pay the price, and at the same time take away his right to sell. Having taken away his right to sell under Clause 4 of the agreement that deprivation is, in my opinion, good enough consideration to release him from the obligation to pay the price except

out of the sale proceeds of the shares when they are allowed to be sold. In that event, I think, it protects both the purchaser as well as the vendor. The market may be up; the market may be down in either event the purchaser does not suffer by reason of the interdict not to resell, issued by the vendor in Clause 4. If that direction in Clause 4 immobilises the sale of shares for the period mentioned therein then it is only right that in that event the price that would be payable by the purchaser would be when the immobilised share had thawed again and produced the yield. It is paid that one does not even then pay one per cent. of the net price to the purchaser or any brokerage or costs and expenses for resale. That is normally so in case of an ordinary sale, where the purchaser is not restrained from reselling the goods he has purchased and which have thus become his own property without any condition attached to it. This was an extraordinary sale in an extraordinary number of shares. To compensate the purchaser placed in this position with a direction of, the vendor not to sell by paying the purchaser the casts and expenses of subsequent sale and one per cent. does not, in my view, convert the purchaser into a broker. I read the provision for payment of brokerage, costs and expenses of resale and the provision for payment of one Per cent. of the net price of resale as the consideration for which the purchaser agrees not to resell the shares he has purchased in circumstances mentioned in Clause 4. It is the price that the purchaser considers as the proper price in sale of shares under such an embargo as provided by the facts and circumstances of this case. I read this provision as a condition of sale under Section 4(2) of the Sale of Goods Act.

32. It is then argued that the proviso in Clause 5 of the agreement which entitles the vendor to receive and/or to retain and he liable to pay all taxes in respect of any dividends that may be declared in respect of the said shares or In any other shares received in lieu thereof or so many of them as remain unsold in terms of Clause 4 pending resale by the purchaser shows that the true ownership of the shares remained with IISCO and not with the purchaser Dalhousie Holdings Ltd. If it was a case of payment and receipt of dividends themselves, the argument would have had a good deal of force. What, however, is done by this proviso is that a provision is made for the vendor to receive, retain or be liable for payment of all taxes in respect of such dividends. Without going into the question of Income tax law as to who would be liable for the taxes, and how and in what eventuality such tax is contemplated. I do not see how and in what eventuality such tax is contemplated, I do not see how a purchaser in these circumstances becomes any the less purchaser, because the vendor agrees to pay the taxes in respect of dividends mentioned there. Where there is a delayed sale Or sale spread over a period of time, such as in this case, it is not at all an unusual provision to indicate in the contract of sale which of the contracting parties to. the sale would be liable to pay taxes. Such a provisions is consistent with a contract of sale. Here again I shall repeal; that the language in Clause 5 is a language or sale, with the use of the words 'sale', 'resale', 'price', 'sum equivalent to the price', and the essence of Clause 5 is again regulation of the original price mentioned in Clause 3.

33. I consider that the right interpretation of this contract is to read Clauses 3, 4 and 5 together. The true construction that appeals to me is that Clause 3 being the clause regulating price and defining when and how it shall be payable is the main clause and then the subsequent Clauses 4 and 5 qualify or modify that price and make it and its payment contingent upon events specifically mentioned in those subsequent clauses. An agreement for sale where the price is. variable according to certain conditions or where the price is contingent upon certain events is, in my opinion, a good and valid

agreement for sale, it is a conditional sale expressly recognised by Section 4(2) of the Sale of Goods Act.

34. It is then argued on behalf of the appellant that this is a sham or colourable transaction and that it is mala fide. In support of this argument reliance is placed on two considerations. The first relates to the agreement of the 6th December, 1952. and the other relates to the transfer deed of the 6th December, 1952.

35. The agreement is attacked as mala fide. because it is said that after all SCOB was already under the sentence of extinction, by the Ordinance to be followed by the Act,' and therefore how could SCOB's shares be the subject for any possible sale if they did not exist after the 1st January, 1953. It is a plausible argument, but there are a good many answers on this point. Before dealing with the answers, it is however, necessary to point out that if this argument was good then the agreement could not also be construed as constituting or nominating the Dalhousie Holdings Ltd. as selling agents for the SCOB shares, because SCOB shares could not exist after the 1st January. 1953. But the real answers are manifold. Although the SCOB shares are described as such, that does not mean that they will have to be sold as SCOB shares, but that must be read and taken subject to the statute. The SCOB shares which are the subject-matter of theagreement of the 6th December, 1952, are mentioned there by their actual numbers for their identification. The statute made it plain that they would be replaced after complying with the statutory conditions by IISCO shares as laid down in Section 7 of the Act and Clause 5 of the Agreement, itself uses the express words 'or any other shares-received in lieu thereof'. The parties are presumed to know the law and certainly the. statute. In this case they knew and there was no concealment.

36. In the letter of the 10th November, 1952, written by 'the Chairman of the Indian Iron & Steel Co. Ltd. and the Steel Corporation of Bengal Ltd. to Ram Mohan Seal both the IISCO and the SCOB expressly disclosed that they were going to sell those eleven lakhs shares to Dalhousie Holdings Ltd. In fact, it is there clearly stated.

'Arrangements concerning the 11 lakhs Ordinary shares of the Steel Corporation at present held by the Indian Iron & Steel Co. Ltd. are in the process of being finalised and it is hoped that by the date of the Annual General Meeting it will be possible to give shareholders a clearer picture of this arrangement. Briefly, it is intended to sell the Steel Corporation shares held by the Indian Iron & Steel Co. Ltd. to Messrs. Dalhousie Holdings Ltd. before the merger is completed, the position being that if the Indian Iron & Steel Co. Ltd. were shareholders in SCOB at the date of the merger, IISCO would be subject to heavy taxation (approximately Rs. 15 lakhs) on the 1952 profits of Steel Corporation. The Indian Iron & Steel Co. shares which will be issued in place of the Steel Corporation will be held by the Holding Company and will be sold from time to time in accordance with instructions from the Directory of IISCO. The sale proceeds, less a small commission, will be credited to IISCO and will form part of the working capital which IISCO is to provide for the expansion scheme. It is Intended that the sale of these shares shall be spread over a considerable period since the proceeds will not be required immediately and to avoid as far as possible any undue interference with the share market conditions.'

In the reply from Ram Mohan Seal, dated the 12th November, 1952, there was no objection to this particular arrangement with Dalhousie Holdings Ltd. In fact, the reply dated the 12th November, 1952, was more a grievance against what was called 'the blind and unqualified support given to the promulgation of the Ordinance for the

merger' The reply of the 12th November, 1952, ended with the request.

'I would request you Mr. Chairman to place all my letters in this connection before the respective Boards and acquaint them with my views and suggestions for due consideration.'

The Managing Agents replied on the 14th November, 1952, saying;

'As requested by you your letters will be placed before the respective Boards at their next meetings in order that the Directors shall be acquainted with your views and suggestions.'

It is, therefore, not right to say that the directors were actually trying to keep back this fact of arrangement with the Dalhousie Holdings Ltd. from IISCO's shareholders.

37. The failure, therefore, to describe SCOB shares as SCOB shares and not as replacement shares to be substituted by IISCO shares does not make the transaction or the agreement of the 6th December, 1952, a mala fide one. After all on the 6th December, or rather the 4th December, 1952, when the transaction was taking place it wasbest to describe them as SCOB shares because IISCO shares had not been or could not then be issued replacing those shares. The statute was clear in making it obligatory on IISCO to allot to every person registered as shareholder in the SCOB four ordinary shares in IISCO for every five ordinary shares in the SCOB. That obligation was inescapable. The statute itself expressly recognises this position and lays down indetail the whole procedure of allotment in Sub-sections (5) and (6) of Section 7 of Iron and Steel Companies Amalgamation Act. 1952, whose outstanding features are issue of allotment letter and making even the light to get the IISCO shares a transferable right between the 1st, January, 1953. and the date of actual issue of IISCO shares in substitution of relative SCOB shares.

38. I am therefore, unable to go behind the express language and tenor of the agreement of the 6th December, 1952, and to hold that this is not a sale as it purports to be but something else or that it is mala fide on the ground that the SCOB shares have been described as such and not as shares to be replaced by IISCO shares. I am content to describe the Agreement as a Conditional Sale under Section 4(2) of the Sale of Goods Act. That is enough for the decision on the point. It is not necessary in my opinion for the purposes of this case to go further to discuss far less to decide whether these conditions are in the nature of trust or not. Conditions can be manifold and the hazards of defining conditions are base illustrated by such examples of sales as Complex Hire-Purchase Agreements.

39. The next argument on the point of mala fide is that the defendants have made a false statement in the transfer deed of the 6th December, 1952, by saying that Rs. 220 lakhs have been paid to IISCO by Dalhousie Holdings Ltd. That statement is put forward as a proof of mala fides and fraud, and has been overworked in argument at the bar by the appellants counsel. There is no attempt on the part of the directors to say that this statement is not accurate in the sense that Rs. 220 lakhs were not in fact, paid. It is not shown in Company's books as having been paid. It is not even alleged that this huge sum of money had been pocketted by the directors. It is true that the statement of the consideration having been paid is not correct. But it appears from the evidence that a statement of actual consideration was necessary for the purpose of payment of the stamp duty. For the purpose of stamp it was necessary to

specify the amount of the price. Nobody was mised by the statement that so much money had been paid when in fact it was not paid. No Injury has been done either to the Companies concerned or to any of the shareholders.

40. The inaccurate statement can be defended on the ground that it only puts the consideration for the purposes of calculating the stamp payable. As a good deal has been made of this technical misstatement it is essential, therefore, to see whether even technically it can be defended. Now, the value is correctly stated to be Rs. 220 lakhs, because that would be the price of eleven lakhs of shares at Rs. 20 for each share. The mistake was in saying that it had been 'paid', but if the word 'paid' is understood, as I think in fairness it should be, in relation to the agreement of the 6th December, 1952, then the word 'paid' is correctly written. Then the word 'paid' means paid according to Clauses 3, 4 and 5 of the agreement which did not require immediate payment in cash of this sum of money. Secondly again the directors' are bound normally to followstrictly the form given in the Articles of Association. Article 46 of the Steel Corporation's Articles of Association provides the very form which has been used in this transfer deed. The form uses the word 'paid'. If the defendants were a little more alert they could have surely avoided it and by taking the words therein 'as near thereto as circumstances will admit' they could have complied with Article 46 and at the same time could have made the statement of the consideration of the purchase more consonant with the actual situation as laid down in the Agreement of the 6th December, 1952, for Article 46 lays down,

'The instrument of transfer of any share shall be in writing in the usual common form, or in the following form as near thereto as circumstances will admit.'

Thirdly again in the form set out there is a possible justification. It is clear from the other parts of the transfer deed that it was 'subject to special conditions'. Although normally such conditions would mean conditions in the Articles of Association, I do not see why technically in the interpretation of this particular transfer deed in the circumstances of this case, the conditions of the agreement, in writing dated the 6th December, 1952, could not also be included in those conditions. In that view of the interpretation th3 word 'paid' should be construed as paid according to conditions of that Agreement.

41. I am, therefore, unable to find and hold that the defendants are guilty of fraud or mala fides because the word 'paid' in the Transfer Deed was a misstatement. I hold that such consideration was put either by mistake or it could be justified even as being paid according to the terras of the agreement of the 6th December, 1952, read with the relevant Article 46 of the Articles of Association. In any event none has been misled and no fraud has been practised and there has been no concealment whatever by the use of the word 'paid'.

42. The next argument on this branch of mala fides was that by the sale of eleven lakhs of shares to the Dalhousie Holding Ltd. the directors being defendants Nos. 2 to 9 wanted to keep Intact their voting rights and this sale was, therefore, a device to retain control. Except that being a suggestion, I do not find any proof on this particular point. No evidence is forthcoming except the fact that one director is common, to show that IISCO exercised any control over the Dalhousic Ltd. It is in my opinion impossible for this Court to hold on the charge of mala fides and bad faith and to come to the conclusion that this whole transaction was a device to retain control on no evidence or on the flimsiest of suggestions such as this.

43. I need only point out that the preamble to the statute which it will not be for this Court to question expressly says that this amalgamation was done in the national interest and in the interest of the general public and the steel Industry in this country. Although the plaintiffs say that they are representing other shareholders, the fact remains that in spite of having filed a representative suit none has come forward either to object to the transfer or even to side with the plaintiffs.

44. It may not be out of place in this context to refer to the fact that the authorised capital of the Company is Rs. 750 lakhs divided into 75 lakhs ordinary shares of Rs. 10 each and plaintiffs Nos. 2 to 7 are at best holding 6513 shares altogether among themselves. It was, however, of sufficient interest to maintain the suit, but the point is that the suit claims to be of a representative character and whether it is in the interest of the Companyor of anybody except themselves that the suit was brought, they can only in that event succeed if they can establish that what the directors had done was ultra vires of the Articles of Association or of the Companies Act, or that what they had done was a fraud on the minority. I am unable to find any case of fraud on minority in this case or that the transfer was ultra vires of the Articles of Association of the Company.

45. For these reasons, this appeal, in my Judgment, should fail, and must be dismissed but there will be no order as to costs.

Bachawat, J.

46. This appeal arises out of a representative suit brought by certain shareholders of the Indian Iron & Steel Co. Ltd. in which the plaintiffs seek to set aside a transfer of eleven lakhs ordinary shares in the Steel Corporation of Bengal Ltd. in favour of Dalhousie Holdings Ltd. The real plaintiffs are six shareholders of the Indian Iron & Steel Co. Ltd. They have also joined the Indian Iron & Steel Co. Ltd. as plaintiffs.

47. The transfer is impugned on the grounds

(a) that it is in contravention of the Indian Companies Act and therefore illegal,

(b) that the directors had no authority to effect the transfer,

(c) that the transaction is mala fide and is colourable.

48. The impugned transaction is evidenced by an agreement and a deed of transfer, both bearing the date 6th December, 1952. The agreement and the transfer deed are contemporaneous documents. The agreement must be looked at in order to understand upon what terms the transfer was effected. The transfer has been read out in extenso in the judgment already delivered. Clauses 1 to 5 of the agreement dated the 6th December, 1952, are as follows:--

'(1) The vendor agrees to sell and the purchaser agrees to purchase all those the hereinbefore recited eleven lakhs fully paid ordinary shares of Rs. 10 each numbered 1389916 to 2489915 Inclusive in the capital of SCOB (which said shares are hereinafter referred to as 'the said shares'').

(2) The vendor shall be entitled to all dividends that may hereafter be declared by SCOB and payable on the said shares in respect of any period or periods prior to and

ending on the 31st December, 1952, and the purchaser will account to the vendor for any such dividends that may be received by it.

(3) Subject to the provisions of Clause (4) hereof the price payable by the purchaser for the said shares shall be the sum of Rs. 20 per share which shall be paid to the vendor against delivery of definitive certificates relating to the said shares and duly executed transfer deeds relating thereto. Such delivery shall be made and payment effected at the office of the purchaser's bankers, the National Bank of India Ltd., Calcutta, within seven days from the date hereof.

(4) The vendor may at any time before effecting delivery of the said shares as required by Clause (3) hereof call upon the purchaser not to resell all or any of the said shares save at such time (but in no event exceeding 5 years from the date hereof on the expiration of which period any shares remaining unsold shall be sold at the market rate then prevailing) at such prices as may he mutually agreed between the parties.

(5) In the event of the vendor exercising the right conferred upon it by Clause (4) hereof, then the purchaser shall be released from all obligation to make payment of the purchase price provided in Clause (3) hereof and in lieu thereof shallpay to the vendor such sum as shall be equivalent to the net price realised by it on the resale of all or any of the said shares less all costs and expenses including brokerage where payable by it in connection with the sale of the said shares and less one per cent. of such net price. Such purchase price shall only become due and payable by the purchaser three days after the receipt by it of such resale price provided that the vendor will be entitled to receive and/or retain and be liable to pay all taxes in respect of any dividends that may be declared in respect of the said shares or on any other shares received in lieu thereof or so many of them as remain unsold in terms of Clause (4) hereof pending resale by the purchaser in manner indicated above.'

49. The agreement is in form of an agreement of sale. I am satisfied that in substance also it is an agreement of sale,

50. Clause (4) of the agreement gives an option to the seller to call upon the buyer not to resell the shares save at such times and at such prices as may be mutually agreed upon until the option specified in Clause (4) is exercised. Clauses (1), (2) and (3) of the agreement are operative. These clauses contain ordinary terms which are to be found in an ordinary contract of sale. The transaction, therefore, is clearly a sale until the option is exercised.

51. On the exercise of the option specified in Clause (4) the seller becomes liable to pay to the buyer in lieu of the price specified in Clause (3) the net price realised by the buyer on resale of the shares less costs and expenses and less one per cent. of the net price. The buyer is under an obligation to pay this sum within three days after the receipt of the resale price.

52. On the exercise of the option certain other consequences also follow. The buyer is charged with duty not to resell the shares save at such time and at such price as may be mutually agreed upon within the period of five years and also with the duty of selling the shares in any event On the expiration of part of that period. The seller is entitled to receive and retain all dividends that may be declared in respect of the shares and is also made liable to pay all taxes in respect of such dividends.

53. The option given by Clause (4) has been exercised. In spite of the exercise of such option the transaction continues to be a contract of sale. There is still transfer of property for a price. The price is variable and dependent upon the proceeds of resale received. The payment of price is contingent upon the receipt of the proceeds of resale by the buyer. The price paid under a contract of sale may however be variable and payable upon a contingency.

54. Mr. Sen contended that Dalhousie Holdings Ltd. is an agent of the Indian Iron & Steel Co. for sale of the shares. I find no trace of agency in the contract.

55. Mr. Sen contended that under the contract Dalhousie Holdings Ltd. is constituted a bare trustee of the shares of the Indian Iron & Steel Co. and that the entire beneficial ownership of the shares is vested in the Indian Iron & Steel Co. Mr. Choudhury, on the other hand, contended that the contract is an out-and-out contract of sale and that there is no element of trust in it. I am unable to accept either of these extreme contentions. Section 3 of the Indian Trusts Act defines trust as an obligation annexed to the ownership of property arising out of a confidence reposed in and accepted by the owner or declaredand accepted by him for the benefit of another or of another and the owner.

56. Confidence may be reposed and accepted by a contract. Trust in its origin was a form of contract distinctively enforced in equity. A contract creates a trust where it has brought into existence an obligation annexed to the ownership of property for the benefit of a person other than the owner. No technical words are required to create a trust. The question is fundamentally a question of the intention of the parties to the contract. A passage in G. W. Keeton's Law of Trust, 5th Edition, page 7, gives valuable hints for discovering the real intention where that is not clearly expressed. The learned author observes:--

'The first requirement of a trust, he says, is a segregation of assets and their devotion to a function; an equity lawyer reaches the same conclusion by saying that the property must be ascertained with reasonable certainty and appropriate to some object for a definite end. One indication of intention will therefore be a definite appropriation of property to an end. This is something more than a mere obligation to pay a third party a sum in the future, and the whole transaction must be scrutinised carefully to see whether, in fact, such an appropriation has been made. If it has, then a trust, has been created.'

57. By the contract dated December 6, 1952, the dividends of the shares are exclusively appropriated and devoted to the benefit of the seller. The beneficial interest in the dividends is vested exclusively in the seller. The shares are also affected by certain obligations as to their resale for the benefit of the seller. The ownership of the Dalhousie Holdings Ltd. in the shares is, therefore, with a trust as defined in Section 3 of the Indian Trusts Act. Dalhousie Holdings Ltd. is, however, not a bare trustee of the shares. The entire beneficial ownership is not vested in the Indian Iron & Steel Co. Ltd. Dalhousie Holdings Ltd. is entitled to appropriate the sale proceeds of the shares to its own use and is under an obligation to pay the equivalent of the net sale proceeds less one per cent. Dalhousie Holdings Ltd. has also active duties to perform in connection with the resale.

58. The contract is, therefore, a complex contract of sale under which the ownership of the buyer is impressed with certain trust for the benefit of the seller.

59. Mr. Sen contended that the directors had no authority under the Articles of Association of the Indian Iron & Steel Co. Ltd. to enter into the Impugned transaction. This contention is baseless. Wide and ample powers and authority are vested in the directors by Articles 149 and 150 of the Articles of Association. The impugned transaction is a sale and also a disposition of property for a consideration and is well authorised by Article 149. The transaction is incidental to the control of the company and its business and is an act or thing which may be done by the company and which is not expressly required to be done by the company in a General Meeting and as such is also authorised by Article 150. The specific powers conferred by Article 150 do not restrict the general powers conferred by Article 149.

60. Mr. Sen contended that the transaction is colourable, mala fide and was entered into with ulterior motive. To appreciate that argument it is necessary to state certain facts.

61. On December 29, 1952, the President of India promulgated the Iron and Steel Companies' Amalgamation Ordinance (Ordinance No. VIII of 1962), providing for the amalgamation of the SteelCorporation of Bengal Ltd with the Indian Iron & Steel Co. Ltd. The amalgamation was to take effect from the appointed day, namely, the 1st of January, 1953. The Ordinance was later replaced by the Iron & Steel Companies' Amalgamation Act (Act No. XXIX of 1952). There is material difference between the provisions of the Ordinance and the Act. The Act provides that as from the 1st of January, 1953, (a) the undertaking of the Steel Corporation of Bengal would vest in the Iron & Steel Co. and the Steel Corporation shall be dissolved and a shareholder in the dissolved company will have no right except as provided in the Act, (b) the Iron & Steel Company shall subject to the rules, if any, made in this behalf under Section 14 allot to every person registered as holder of ordinary shares in the dissolved company four ordinary shares in the Iron & Steel Company for every five shares held by him in the dissolved company and such person shall have a transferable right to receive the relative share certificate on presentation within the prescribed period of the allotment letter and the certificate of the corresponding shares in the dissolved company.

62. The Ordinance and the Act do not make provision with regard to the block of 11 lakhs ordinary shares of the Steel Corporation of Bengal held by the Indian Iron & Steel Company or to the shares substituted in lieu thereof. The directors took legal advice. It was thought that the Indian Iron and Steel Co. could not own the substituted shares and that it was necessary to transfer that before the 1st of January, 1953. The directors decided to transfer the shares to Dalhousie Holdings Ltd. They did not consult the shareholders but they were not bound to do so.

63. It was suggested that the directors should have distributed these shares pari passu amongst shareholders of the Indian Iron & Steel Company either free or at their par value. The market value of the shares was more than their par value. The suggested distribution necessarily involved release of part of the assets of the Company to the shareholders. It is not known If the accumulated profits justified such course of action. It was essential for the directors to decide whether such distribution should be made. The directors thought it fit to conserve the assets and decided to sell the shares to Dalhousie Holdings Ltd. The directors had a discretion in the matter. The Court cannot review their discretion.

64. In course of argument it was suggested that Clause (4) and the main part of

Clause (5) of the Agreement refer to resale of the Steel Corporation of Bengal's shares and not to any substituted shares and that there could be no re-sale of any shares after the 1st January, 1953, when the shares of Steel Corporation of Bengal were extinguished and that, therefore, the whole argument is colourable inasmuch as the obligation of the Dalhousie Holdings Ltd., to pay the price is by Clause (5) contingent on receipt of the proceeds of re-sale. I am unable to accept the suggestion. The Ordinance and the Act do not destroy the subject-matter of the agreement but in lieu thereof substitutes shares in the Indian Iron & Steel Company and/or the right to obtain such shares. The agreement on its true construction fastens upon the substituted subject-matter. The intention is also clearly manifest from the proviso to Clause (5). Clause (4) and the main part of Clause (5) should have been drafted and should have expressly referred to the substituted rights and shares. This, however, is a comment on the bad draftsmanship.

65. Mr. Sen asks us to infer that the transaction is colourable and mala fide because thedeed of transfer contains a false recital. I am unable to make this inference. The recital in the deed of transfer acknowledges payment by Dalhousie Holdings Ltd., to the Indian Iron & Steel Company of the sum of Rs. 2,20,00,000. Beyond doubt, this recital is untrue. Messrs. Dalhousie Holdings Ltd., have not paid a single piece to the Indian Iron & Steel Company on the 6th December, 1952. Neither the requirements of stamp and registration laws nor Article 146 or of the Articles of Association of the Steel Corporation of Bengal justifies the making of this untrue statement. It is to be regretted that such an incorrect statement should have been made in an instrument of transfer of this magnitude by a public Company of national importance. Both the Indian Iron & Steel Company and Dalhousie Holdings Ltd., frankly admit that the recital is not correct. They have made no attempt to support the recital by perjured evidence or by any false entry in their books. It is not suggested that the false recital is a device to swindle the Company of the sum of Rs. 2,20,00,000. The plaintiffs have not established that the incorrect statement was made deliberately or with ulterior motives.

66. The plaint charges that the transfer was made solely for the purpose of enabling the Directors to control the voting rights in respect of the transferred shares and was, therefore, not bona fide. This charge is not proved. One person was a common Director in Dalhousie Holdings Ltd., and the Indian Iron & Steel Company. There is no evidence on record, however, that this common Director or the other Directors of the Indian Iron & Steel Company control Dalhousie Holdings Ltd.

67. Mr. Sen argued that the transaction is improvident because (a) the price is payable contingently on the receipts of the proceeds of the sale, (b) if Dalhousie Holdings Ltd., becomes an insolvent and is wound up, the Indian Iron & Steel Company will not be able to obtain payment of the full price. There is no evidence on the record to show that Dalhousie Holdings Ltd. is insolvent or that there is likelihood of the purchase price being lost to the Indian Iron & Steel Company Ltd. The question whether the Directors are negligent and such negligence has caused loss to the Company is not the subject-matter of this litigation. That question is not now being decided and is left open.

68. Mr. Sen contended that the transaction is in contravention of the Companies Act and is, therefore, ultra vires the Company and its Directors.

69. Mr. Sen contended that by the transaction dated the 6th December, 1952 the

Indian Iron & Steel Company was in substance purchasing its own shares through the medium of Dalhousie Holdings Ltd., with effect from the 1st January, 1953 and that accordingly the transaction offends the provision of Section 54A (1) of the Indian Companies Act, 1913 corresponding to Section 77 of the Indian Companies Act, 1956.

70. Sub-section (1) of Section 54A of the Indian Companies Act reads:--

'No Company limited by shares shall have power to buy its own shares or the shares of a public Company of which it is a subsidiary Company unless the consequent reduction of capital is effected and sanctioned in the manner provided by Sections 55 to 66.'

71. Section 54A (1) explicitly prohibits what was already impliedly prohibited by the provisions in the Companies Act with regard to the reduction of capital. Even in the absence of a statutoryprovision corresponding to Section 54A (1), the House of Lords in (1887) 12 AC 409 (A) decided that a purchase by a Company of its own shares necessarily involved reduction of capital and as such was impliedly prohibited by the scheme of the Companies Act relating to the reduction of capital.

72. The impugned transaction does not contravene Section 54A (1) of the Indian Companies Act, 1913 for the following reasons:--

(1) The Indian Iron & Steel Company did not buy its own shares either on the 6th December, 1952 or on and after the 1st January, 1953.

(2) Even Dalhousie Holdings Ltd., was not purchasing shares of the Indian Iron & Steel Company on or after the 1st January, 1953. The word 'purchase' in Section 54A (1) cannot be appropriately applied to the compulsory substitution of shares by the special Statute.

(3) Dalhousie Holdings Ltd., is not a nominee or a mere trustee of the Indian Iron & Steel Company in respect of the Steel Corporation of Bengal's shares and the acquisition by Dalhousie Holdings Ltd., of the Indian Iron & Steel Company's share in lieu thereof was not an acquisition by the Indian Iron & Steel Company.

(4) Even if the compulsory substitution of shares in the Indian Iron & Steel Company be regarded as purchase by the Indian Iron & Steel Company of its own shares through the medium of Dalhousie Holdings Ltd. such purchase is lawful. Section 54A (1) does not invalidate a compulsory substitution of its own shares in lieu of its other assets by a special Statute or even a purchase by a Company of its own shares by authority of a special Statute such as (i) Section 153-C (5) of the Indian Companies Act, 1913, corresponding to Section 402(b) and (c) of the Indian Companies Act, 1956 or (ii) the special Statute noticed in (1892) 3 Ch. 279 (E). The compulsory substitution as also such purchase is lawful though the consequence may be reduction of capital.

73. Section 54A (2) of the Indian Companies Act, 1913 is also not contravened for the same reasons. The contention that Section 54A (2) is contravened was advanced before Bose, J. but is not pressed before this Bench.

74. Mr. Sen next argued that the impugned transaction is an acquisition by the Indian Iron & Steel Company of its own shares on and after the 1st January, 1953 necessarily involving reduction of capital in a manner not authorised by Statute and is therefore,

illegal.

75. The Companies Act by sanctioning reduction of capital under certain conditions and with certain restrictions impliedly prohibits such reduction unless the prescribed conditions and restrictions are observed. This doctrine was firmly established by the decision of the House of Lords in (1887) 12 A. C. 409 (A) and has a wider application than Section 54A of the Indian Companies Act, 1913. Lord Macnaughten observed in the same case at pages 437-38:--

'When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.'

76. Section 55 of the Indian Companies Act, 1913, corresponding to Section 100 of the Indian Companies Act, 1956 without being exhaustive, mentions three modes of reduction of capital, namely, (1) extension or reduction of the liability on any of the shares in respect of share capital not paid up, (2) cancellation of any paid up sharecapital and (3) paying off any paid up share capital. An illustration of the first mode of reduction of capital is surrender of a partly paid up share not liable to forfeiture in consideration of release by the Company of the surrender from further liability in respect of the shares; see Bellerby v. Rowland and Marwood's Steamship Co. Ltd. (1902) 2 Ch. 14 (F). Illustrations of the third mode of reduction of capital are:--

(1) Payment of dividend out of paid up share capital;

(2) Purchase by the Company of its own shares; see (1887) 12 A. C. 409 (A),The last matter is now the subject-matter of express legislative enactment.

77. There has been no reduction of capital by the Indian Iron & Steel Company by the impugned transaction. The Indian Iron and Steel Company has not paid off nor cancelled any paid up share capital. It has not extinguished or reduced liability in respect of any partly paid up shares. The shares in question are fully paid up.

78. Mr. Sen next argued as a result of acquisition of the Indian Iron & Steel Company's Shares by the Dalhousie Holdings Ltd., the Iron and Steel Company will become its own member and as such the impugned transaction is invalid.

79. It is well established that a limited Company cannot be a member of itself. It is inconsistent with the essential nature of a Company that it should be a member of itself to the effect of becoming a debtor to itself for calls or being placed in the list of contributories in its own liquidation: Per Lord Watson in (1887) 12 A. C. 409 (429) (A) approving Jessel, M. B. in (1880) 17 Ch. D. 76 (83) (B). This rule is distinct from the rule which prohibits the purchase by a Company of its own shares or a reduction of capital in a manner not sanctioned by the Companies Act. Without violating this rule, a trustee for a Company may be a member of the Company and may acquire and hold the shares of the Company in trust for the Company, see (1929) 2 Ch. 444 (D); see also the observations of Lord Heatherly in Cree v. Somervail (1879) 4 A. C. 648 at p. 661 (G). If the acquisition of shares by the trustee is In substance purchase of its own shares by the Company involving illegal reduction of capital, the transaction would be invalid on the ground that it amounts to illegal reduction of capital and infringes Section 54A of the Indian Companies Act and not on the ground that the trustee

cannot be a member of the Company.

80. In this connection our attention was drawn to the decision in (1892) 3 Ch. 279 (E). In that ease the directors of a life insurance company were authorised by a special Act of Parliament to purchase in the name of the Company or otherwise the company's own shares. Pursuant to this power several tenpound shares with 2 -10s. paid up were purchased in the name of the trustee for the company and subsequently transferred to the name of the company. The company was subsequently ordered to be wound up compulsorily. The Liquidator sought on behalf of the policy holders to place the company upon the list of contributories in respect of these shares and to obtain an order for a call of 7 - 10s. per share on the purchased shares upon all the contributories of the company.

It was argued for the Liquidator that the effect of placing the company on the list of contributories would be to render the company liable to the proposed call and that the company being unable to pay the other contributories were liable to pay the amount of the company's contribution on the ground that the company was a trusteefor these share-holders for the time being remaining on the register and that such share-holders were bound to indemnify the company as their trustee. The argument was somewhat fanciful and was rejected both by Chitty, J. and the Court of Appeal below.

The Court of Appeal held that the purchase under the statutory authority necessarily involved reduction of capital and did not and could not increase the liability of the other shareholders and that the policy holders were unsecured creditors who are entitled to payment out of the assets of the company including its uncalled share capital but not out of the capital which was extinguished by the purchase under the statutory authority. The facts and argument and the question arising for decision in his case are entirely different. Reliance however is placed on the following observations of Chitty, J. at page 283 of the report.

'The purchase in the names of trustees was an extinguishment in equity and the transfer of the shares to the company which was justified by the Act was an extinguishment in law and in equity.'

81. In this case the Dalhousie Holdings Ltd., is not a bare trustee of the Indian Iron & Steel Co. Ltd. and the entire beneficial ownership is not vested in the Indian Iron & Steel Co. Ltd The shares are not extinguished either in law or in equity simply because they are Impressed with certain trust for the benefit of the Indian Iron & Steel Co. Where its own shares are purchased by a company under statutory authority, the shares are not extinguished either in law or in equity, in a proper case, for example, where the shares; are subject to a pre-existing charge in favour of third party. In the very case relied upon Lindley, L. J. observed at page 289 of the report:--

'If they (policyholders) had had independently of the Act an equitable charge on the uncalled-up capital of the company, that charge would, I think, have become preserved, and the appellant would have been right and machinery would have had to be found for giving effect to his rights.'

82. No other argument was advanced before us in support of this appeal.

83. I agree that the appeal be dismissed. Ialso agree to the order as to costs.

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