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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER NO. 457 OF 1997.
WITH
CIVIL APPLICATION NO. 8831 OF 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S. SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Appearance:
MR SB VAKIL for the Appellant.
MR SN SHELAT instructed by MR DS NANAVATI of M/S NANVATI & NANVATI, for the Respondents.

CORAM : MR.JUSTICE M.S. SHAH
Date of decision: 24/10/97

C.A.V. JUDGEMENT

This appeal is filed by the original plaintiff against the interlocutory order dated September 11, 1997 passed by the City Civil Court, Ahmedabad rejecting the Notice of Motion filed by the appellant-plaintiff in Civil Suit No. 3533 of 1997.

IN A NUTSHELL

2. The subject matter of the present suit is transfer of 3,81,000 equity shares in defendant no. 1 - a Public Limited Company - Gujarat Gas Company Limited

(hereinafter referred to as "the Company" or as "Gujarat Gas") engaged in the supply and distribution of natural gas to domestic and industrial consumers in the State of Gujarat.

The appellant - plaintiff, which is a Company engaged in manufacturing textiles and chemicals, is a shareholder in Gujarat Gas with 49,95,325 shares amounting to about 39% of the shareholding. In all 5,00,000 shares amounting to 3.87% of the total equity capital were sold by the plaintiff to defendant no. 2 a Foreign Institutional Investor (FII) in October, 1993 and the said transfer was registered by the Company in December, 1993. Defendant no. 2 (through defendant no. 8 also an FII) thereafter sold 5,89,000 shares to defendant nos. 6 and 7 (also FIIs) between March and November, 1996 and defendant no. 2 sold 1,19,000 shares to the plaintiff in June, 1997. Claiming a right of pre-emption, the plaintiff has filed the present suit for a decree against defendant No. 2 (FII) to execute transfer forms in respect of the suit shares (i.e. 3,81,000 shares) at the price at which defendant nos. 2 and 8 executed transfer forms in favour of defendant nos. 6 and 7 and in the alternative the plaintiff has prayed for a decree of Rs. 5.25 Crores by way of damages in lieu of specific performance against defendant no. 2.

The plaintiff has taken out the present Notice of Motion for an interim injunction to restrain defendant no. 2 from alienating, encumbering, dealing with or creating any third party rights or selling 3,81,000 shares to any person and also to restrain defendant No. 1 (i.e. Gujarat Gas) from registering the transfer of 3,81,000 shares or any party thereof in favour of any person and has also prayed for appointment of a Receiver to take possession of the share certificates and transfer forms of the suit shares, pending the hearing and final disposal of the suit. The trial Court has dismissed the Notice of Motion. Hence, this appeal by the plaintiff.

3. Before narrating the contentions urged by the learned counsel for the parties, it is necessary to refer to the relevant dates and events in chronological order in order to appreciate the controversy between the parties.

FACTS

4. In 1980, Gujarat Gas was jointly promoted by the plaintiff and defendant no. 4 Gujarat Industrial Investment Corporation - GIIC which is a Government of

Gujarat undertaking. The authorised share capital of Gujarat Gas is 1,28,25,000 equity shares of Rs. 10/each. As per clause 2.20 of the shareholders agreement between the said promoters executed on April 23, 1991, so long as the GIIC holds 5% of the paid up equity share capital of the Company, the plaintiff can reduce its shareholding only with the prior written consent of the GIIC and to such person/s, Companies, institutions acceptable to the GIIC, provided that before offering the shares to any other person, the plaintiff shall offer the shares to the GIIC and in case of acceptance of the offer by the GIIC, the price of the shares shall be determined as per the formula provided in the agreement. Liberty was however reserved to the plaintiff to sell and/or to transfer the shares to any of its subsidiaries or any member of the plaintiff group under intimation to the GIIC and such transferees would also be bound to abide by the shareholders agreement.

Article 33 of the Articles of the Association of the Company provides

> "..... No transfer of shares shall be registered in violation of Shareholders Agreement dated April 23, 1991 between the GIIC and the MIL (plaintiff) so long as the said Agreement subsists."

Of course, there was an absolute prohibition against transfer of shares during the gestation period. There is no dispute about the fact that the gestation period is already over. Thereafter the Company changed its name to the present name.

5. In view of Article 2.20 of the shareholders agreement, the plaintiff could reduce its shareholding in the company only with prior written consent of the GIIC and, therefore, the plaintiff wrote a letter dated September 27, 1993 (Page 165) to the GIIC stating that the plaintiff was desirous of disposing of upto 38,50,000 shares out of the total of 49,95,325 held by the plaintiff and, therefore, in view of the terms of the shareholders agreement, the plaintiff was offering the shares to the GIIC for the first purchase and that in the event of the GIIC declining to take up the shares, the plaintiff would offer the shares to HOEC/HDFC and its associates or to any other interested party at a negotiated price not lower than the price determined under the formula prescribed by the shareholders agreement. The plaintiff also mentioned that in the

event of shares being offered to HOEC and its associates, a fresh shareholders agreement would be drawn up between the purchasers, the plaintiff and the GIIC.

The GIIC did not immediately respond to the aforesaid request, and sometime in October, 1993 the plaintiff sold 5,00,000 shares to defendant no. 2 (Jardine Fleming India Pacific Trust, an FII) at the rate of Rs. 119.45. Defendant no. 2 entered into the said transaction through defendant no. 8 (Fledgeling Nominees International Ltd., another FII). The Company (defendant no. 1) registered in December 1993 transfer of the said 5,00,000 shares in favour of defendant no. 8 a/c. defendant no. 2 i.e. "Fledging Nominees International Limited Account Jardine Flaming India Pacific Trust.".

6. Thereafter, the GIIC sent its reply dated March 7, 1994 (page 162) to the plaintiff. While granting approval to the plaintiff's proposal for sale of its shares as contained in the aforesaid letter of September 27, 1993, the GIIC imposed the following condition:-

"If and when the new partners disinvest their holding in GGCL (Gujarat Gas), they should make the offer to GIIC, which will have the first right to refusal. Even if GIIC refuses to acquire the shares so offered, disinvestment in favour of another party can be done only with the prior approval of GIIC."

After the aforesaid letter of the GIIC imposing the above condition, a letter dated March 16, 1994 (Page 90) was written by Khanna Securities Pvt. Ltd. (a wholly owned subsidiary of Jardine Fleming India Securities Pvt. Ltd.) to the plaintiff and the letter reads as under :-

"Dear Sirs,

This has reference to the 500,000 shares of Gujarat Gas Limited sold by you to Jardine Fleming India Pacific Trust. They have confirmed that in the event of their wanting to sell these shares, the first refusal will be given to Mafatlal Industries Limited at the market rate prevailing at the time or at any offer price that they might be having at the time.

Thanking you,

Yours faithfully,
For KHANNA SECURITIES PVT. LTD.

Sd/-
Rafiq Dossani
Director-Broking"

7. The GIIC sent a letter dated August 26, 1994 (Page 133) to the Managing Director of Jardine Fleming India Securities Pvt. Ltd. that Jardine Fleming India Securities Pvt. Ltd. has invested in 3.89% of the total equity capital of Gujarat Gas as nominees of the plaintiffs and that being a nominee of the plaintiff Jardine Fleming India Securities Pvt. Ltd. was requested to abide by the terms and conditions of the shareholders agreement between the GIIC and the plaintiff signed on April 23, 1991 and that in order to complete these formalities, a draft of Nominee Shareholders Agreement was enclosed; on finalization of this draft, the Nominee Shareholders Agreement would be signed by the GIIC, the plaintiff and Jardine Fleming India Securities Pvt. Ltd. In view of the above, Jardine Fleming India Limited, having their office at the same premises where Jardine Fleming India Securities Pvt. Ltd. has its office, sent its letter dated September 9, 1994 (Page 134) to the Company (Gujarat Gas - defendant no. 1) which reads as under :-

"To,
Gujarat Gas Company Limited
2-C Embassy Apartments,
Opp. Vandana School,
Dr. V. Sarabhai Road, Ambawadi,
AHMEDABAD 390 015.

Dear Sir,

We have received the enclosed letter reference No. GIIC/SEC/MD/3636 dated August 26, 1994 from Gujarat Industrial Investment Corporation Limited.

We would like to inform you that as a representative of Fledgeling Nominees International Limited in India, we are writing on their behalf to say that we have not entered into any Nominee Agreement with Mafatlal Industries Limited. Therefore, unless you revert with a

clarification on the purpose of the enclosed letter, we do not intend to reply to the same.

Thanking you,

Yours faithfully,
For Jardine Fleming India Limited,

Sd/-
Dr Rafiq Dossani."

8. On October 17, 1994 (Page 155), the plaintiff sent a letter to the GIIC stating that the circumstances under which the plaintiff had sought to encash a part of their holding in Gujarat Gas in order to meet certain pressing obligations on the plaintiff's cash flow were explained by the plaintiff to the GIIC at various meetings. There was a protracted delay in replying to the plaintiff's proposal for approval for partial disinvestment and hence the plaintiff had no choice but to make alternative arrangements. The plaintiff further informed the GIIC under the said letter that the conditions stipulated by the GIIC as per their communication dated March 7, 1994 (Page 162) were found unacceptable to Indian Institutional Investors. Therefore, the plaintiff was unable to proceed with their proposal and had only made a small disinvestment of 5,00,000 shares amounting to 3.87% in favour an FII and that the plaintiff has an undertaking from Jardine Fleming India Securities Pvt. Ltd. that if and when they seek to sell the shares, they would offer the first right of refusal to the plaintiff and that the plaintiff would be in a position to strictly observe the terms of the shareholders agreement regarding the right of first refusal. The plaintiff further clarified that Jardine Fleming India Securities Pvt. Ltd. had purchased the shares as an FII and that they were not in a position of nominee shareholders who are contributing any part of the promoters' capital, but they are basically secondary investors.

9. It appears that nothing note worthy happened between October 1994 and March 1996. But on March 27, 1996 defendant no. 2 sold 50,000 of the aforesaid shares in the open market at Rs. 148.50 per share. Thereafter in September, October and by November 6, 1996, defendant nos. 2 and 8 sold in all 5,89,000 shares to defendant nos. 6 and 7, who are also FIIs at rates ranging between Rs. 133.65 and Rs. 118.80. The share transfer forms

with the share certificates were lodged by defendant no. 3, through whom the aforesaid transaction was effected, with defendant no. 1 (i.e. Gujarat Gas) including 4,50,000 shares out of the total 5,00,000 shares purchased by defendant no. 2 from the plaintiff. The aforesaid share transfer forms were lodged by defendant no. 3 acting as a constituted attorney of defendant nos. 6 and 7 on the strength of a power of attorney given by defendant no. 5 which stated that defendant no. 5 had been authorised by defendant nos. 6 and 7 to make investment in Indian stocks and shares.

10. Having come to know about the aforesaid transfer, the plaintiff sent a letter dated November 13, 1996 (Page 97) to the Company - Gujarat Gas stating that in 1993 the plaintiff had sold 5,00,000 shares to defendant no. 2 and that there was a clear understanding that the plaintiff will have a right of pre-emption on those shares; the plaintiff was surprised to know that out of the said 5,00,000 shares, 1,90,000 shares were purportedly lodged for transfer by defendant no. 2 in favour of defendant no. 6. The plaintiff, therefore, protested that the purported transfer of the aforesaid shares was in breach of the undertaking given by Jardine Fleming India Pacific Trust through their representatives Khanna Securities Pvt. Ltd. and in breach of the provisions of the Articles of Association. The plaintiff, thus, lodged their objection before the Company (Gujarat Gas) against the transfer of shares in the name of defendant no. 6. The plaintiff also addressed a letter dated November 26, 1996 to Khanna Securities Ltd. referring to the letter dated March 16, 1994 and its contents and making a grievance about the breach of the agreement for the first right of refusal by transfer to shares by defendant no. 2 to defendant nos. 6 and 7. Mr Ted Pulling of Jardine Fleming Investment Management Ltd. sent his reply on December 10, 1996 by Fax in the following terms :-

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To: Mafatlal Industries, Fax: 9122 202 7750
Mumbai
P.R. Amin

From: Ted Pulling Date: 10 December 1996
Jardine Fleming
Invt. Mgmt.

Subject: Gujarat Gas No. of Page(s) : 1

P.R. Amin

In reference to your fax of 26 November, I must profess ignorance of this agreement. I note that your fax was addressed to Rafiq Dossani who no longer work for JF in India, nor indeed was he ever employed by the fund management division. That would explain why I was not apprised of this agreement.

As you can see, the shares were sold to another FII, so I trust this transaction has no effect on your overall shareholding structure.

Sincerely,

Sd/-
Ted Pulling

11. It is required to be noted that in June, 1997, defendant no. 2 sold 1,19,000 shares in Gujarat Gas to the plaintiff at Rs. 177/- per share. The plaintiff again wrote to defendant no. 2 on June 18, 1997 (Page 107) and June 19, 1997 (Page 109) stating that the plaintiff was still entitled to get 3,81,000 shares from defendant no. 2. By this time British Gas Asia Pacific Holding Pvt. Ltd. had already made an entry into the market and appears to have offered to purchase shares in defendant no. 1 - Company (Gujarat Gas) at Rs. 270/per share. Hence, the plaintiff sent letter dated July 18, 1997 (Page 111) reiterating the above stand and demanding compensation from defendant no. 2 at the rate of Rs. 130/- per share (i.e. Rs. 270/- per share of Gujarat Gas as offered by British Gas Asia Pacific Holding Pvt. Ltd. less Rs. 132/- at which price defendant no. 2 had sold some of the shares to defendant nos. 6 and 7 in November, 1996). The plaintiff thus demanded a sum of Rs. 5,25,78,000/- with 21% interest from defendant no. 2 on account of breach of the agreement to offer 3,81,000 shares. The plaintiff also wrote a similar letter dated December 10, 1996 (Page 98) to defendant no. 2 protesting against violation of the understanding and agreement that defendant no. 2 will not sell the 5,00,000 shares purchased from the plaintiff without first offering the same to the plaintiff and that the understanding and the agreement was confirmed in writing by Mr Rafiq Dossani, but the undertaking and the agreement was being breached by purported sale of the shares by defendant no. 2 to defendant no. 6 and others.

THE SUIT AND TRIAL COURT ORDER ON NOTICE OF MOTION

12. On not getting a positive reply from defendant no. 2, the plaintiff filed the present suit on August 4, 1997 praying for the aforesaid reliefs (para 2 above) which are basically in the nature of relief for specific performance of the agreement referred to in the letter dated March 16, 1994. As stated in para 2 above, the plaintiff also filed the present notice of motion, inter alia, to restrain defendant no. 1 (Gujarat Gas Company Ltd.) from registering the transfer of 3,81.000 shares and also to restrain defendant no. 2 from transferring or selling the said 3,81,000 shares to any person pending the hearing and final disposal of the suit. On August 5, 1997, the City Civil Court issued notice and granted ex-pate injunction in terms of the aforesaid prayers. After hearing the parties, the City Civil Court rejected the Notice of Motion and vacated the said ex-parte order on the following grounds :-

(i) The Civil Court's jurisdiction is barred. The present civil suit would not lie in view of the judgement of the Supreme Court in the case of 1995 (3) Judgment Today SC Page 42.

(ii) The plaintiffs have failed to make out a prima facie case that the suit shares are not freely transferable. Defendant no. 1 company being a public company, the Articles of Association cannot put any restriction on transferability of shares. Reference is also made to the provisions of Section 111-A of the Companies Act.

(iii) Defendant no. 2 had never agreed to be the nominee of the plaintiffs.

(iv) The plaintiffs have prima facie failed to establish that the writing executed by Khanna Securities Pvt. Ltd. is an undertaking on behalf of defendant no. 2, so as to bind defendant no. 2. The letter dated March 16, 1994 of Khanna Securities Pvt. Ltd. does not disclose as to whether the author of the letter was authorised to give commitment about pre-emption rights. Khanna Securities Pvt. Ltd. is not a subsidiary of defendant no. 2 but a subsidiary of another company called Jardine Fleming India Securities Pvt. Ltd.

(v) Considering the conduct of the plaintiff, till the filing of the suit, it appears that the plaintiff was not bonafide interested in the purchase of shares.

It is the aforesaid order of the trial Court rejecting the notice of motion which is challenged in the present appeal. With the consent of the learned counsel for the appellant and the learned counsel for the contesting defendants on caveat, the appeal was heard for final disposal.

BROAD SUBMISSIONS OF BEHALF OF APPELLANT - PLAINTIFF

13. Mr Vakil for the appellant - plaintiff assailed the order of the trial Court and prayed for interim injunction pending disposal of the suit on the following grounds :-

(i) Defendant no. 2 had agreed at the time of purchase of 5,00,000 shares from the plaintiff in October, 1993 that whenever defendant no. 2 will sell the share, it will give first right of refusal to the plaintiff. That agreement was also confirmed by Khanna Securities Pvt. Ltd. through Dr. Rafiq Dossani on behalf of defendant no. 2. Jardine Fleming India Pacific Trust (defendant no. 2) and Jardine Fleming India Securities Pvt. Ltd. (of which Khanna Securities Pvt. Ltd. is admittedly a wholly owned subsidiary), Jardine Fleming Investment Management Ltd., Jardine Fleming Holdings Ltd. are all part of the Jardine Fleming group and, therefore, the trial Court had erred in not relying upon the letter dated March 16, 1994 of Khanna Securities Pvt. Ltd. It is known that group companies having their registered offices at the same address very often operate through their sister concerns and in commercial transactions like this, it is but natural that the plaintiff would act on the basis of such a commitment given on behalf of Jardine Fleming group companies. A distinction between Jardine Fleming India Pacific Trust and Jardine Fleming India Securities Pvt. Ltd. cannot be made a decisive factor at the time of considering a prima facie case in the suit for the purpose of equitable relief of injunction.

(ii) The plaintiff has a right to have its pre-emption right enforced in the present suit filed before

the civil Court and such right is de horse provisions of the Companies Act, and therefore, the Company Law Board established by the Companies Act cannot have exclusive jurisdiction to decide such a dispute about the right of pre-emption.

(iii) Irrespective of the merits of the plaintiff's case on the basis of the right of pre-emption, the plaintiff was entitled to get an injunction to restrain defendant no. 1 - Company - Gujarat Gas from registering the transfer of 3,81,000 shares purported to have been transferred by defendant nos. 2 and 8 to defendant nos. 6 and 7 on the following grounds :-

(a) The transfer forms lodged by defendant nos. 2 and 8 through defendant no. 3 do not include all the material particulars as required by the provisions of Section 108 of the Companies Act.

(b) The transfer forms are lodged by defendant no. 3 without any authority from defendant nos. 6 and 7. All that defendant no. 3 has produced is an authority given by defendant no. 5 stating that defendant no. 5 has authority from defendant nos. 6 and 7 but no such authority given by defendant nos. 6 and 7 in favour of defendant no. 5 is lodged alongwith the transfer forms.

(c) Defendant nos. 6 and 7 are limited partnerships and they cannot be members of companies other than companies established under Section 25 of the Companies Act. Hence, the purported transfer of shares in defendant no. 1 company in favour of defendant nos. 6 and 7 is illegal.

(iv) The suit under Section 9 of the Code of Civil Procedure is competent not merely for enforcement of the right of pre-emption but also for seeking a permanent or temporary injunction to restrain the company from registering the transfer of shares. Reliance is placed on the decision of the Supreme Court in the case of Public Passenger Service Ltd. v. M.A. Khadar, AIR 1966 SC 489.

(v) The plaintiff by its conduct is not disentitled to get this injunction on the ground of delay, laches or acquiescence.

BROAD SUBMISSION ON BEHALF OF CONTESTING RESPONDENT - DEFENDANTS

14. In reply, Mr. S.N. Shelat, learned counsel for defendant no. 2 submitted that -

(1) As regards as the plaintiff's grievances about the alleged non-compliance of the provisions of Section 108 of the Companies Act, any alleged defect in presentation of the transfer forms and about the alleged disqualification of defendant nos. 6 and 7 becoming shareholders of defendant no. 1 company, these are all matters/disputes regarding the alleged rights and liabilities flowing from the provisions of the Companies Act and, therefore, the forum created under the Companies Act alone has the jurisdiction to entertain such disputes and not the civil Court. For this purpose, reliance is placed on the decision of the Apex Court in the case of Canara Bank vs. Nuclear Power Corporation of India Ltd., JT 1995 (3) S.C. 42, particularly in para 30 of the said judgment where the Apex Court has stated that any question relating to the title of any person who is a party before it to have his name entered upon the company's register, and any question which it is necessary or expedient to decide, the Company Law Board has exclusive jurisdiction (except under the provisions of the Special Court Act, 1992).

(2)(a) As far the plaintiff's claim for the right of pre-emption is concerned, the same is vehemently denied. According to the plaintiff, the agreement for giving right of pre-emption alleged to have been executed by defendant no. 2 in favour of the plaintiff was at the time of purchase of 5,00,000 shares in October, 1993, but no contemporaneous document is produced in support of the said allegation. The affidavit in reply on behalf of the defendants has categorically denied this allegation and it has been asserted on behalf of the defendants that no such agrement was entered into nor was any such

promise or commitment given to the plaintiff. It is inconceivable that the plaintiff, which is a giant company incorporated under the Companies Act, would, while transferring 5,00,00 shares worth more than Rs. 5 Crores, rely upon any oral agreement or promise or commitment from defendant no. 2 when defendant no. 2 is also a trust and not a natural person. The plaintiff has not given the particulars of any person or individual who is alleged to have made any such promise at the time of purchase of shares by defendant no. 2 in October, 1993.

(b) Dr Rafiq Dossani of Khanna Securities Pvt. Ltd. had no authority to give any such commitment or promise or even to convey any understanding as mentioned in the letter dated March 16, 1994. Reliance is also placed in the case of M/s John Tinson and Co. Pvt. Ltd. v. Surjeet Malhan, AIR 1997 SC 1411 wherein it is held that if the shareholder has not given authority by any letter in writing or otherwise to her husband to transfer her shares in favour of broker, it could not be said that since the shares with blank transfer forms were entrusted by her to her husband that the husband had any right to transfer the share or that the broker had any right or title in the shares held by her. Jardine Fleming India Pacific Trust is a different entity from Jardine Fleming India Securities Pvt. Ltd.

(c) Without prejudice to the above, shares of a different company are freely transferable as is clearly mentioned in sub-section (2) of section 111-A of the Companies Act. Even in case of private companies, the shares are freely transferable except in so far as there are any restriction as contained in the Articles of the Association of the private limited company. For this purpose, reliance is placed on the decisions of the Supreme Court in case of V.B. Rangaraj v. V.B. Gopalakrishnan, AIR 1992 SC 453, M/s Gujarat Bottling Co. Ltd. v. Coca Cola Company, AIR 1995 SC 2372.

(3) Without prejudice to any of the above submissions, the plaintiff has prayed for the alternative relief of damages and as is the settled legal position whenever damages are an

adequate alternative remedy the Court would refuse to grant specific performance for the alleged right to sell especially when the property is moveable and particularly shares which are being sold in the secondary market. Hence, no interim injunction should be granted in favour of the plaintiff or against the defendants.

CONTOURS OF THE CONTROVERSY

15. It would be convenient to delineate the contours of the controversy by framing the following issues:-

I. Whether the Civil Court has jurisdiction to entertain the suit for the prayers made by the plaintiff on the basis of the claim for pre-emption ?

II. Whether the plaintiff has made out a prima facie case on merits about existence of the agreement for pre-emption ?

III Whether the defendants have made out a case that in view of the concept of free transferability of shares, the alleged agreement for pre-emption cannot be enforced ?

IV If the findings on Issues II and III are in favour of the plaintiffs, whether the plaintiff has made out a case for any temporary injunction to restrain defendant nos. 2 and 8 from transferring shares to any party ?

Whether the balance of convenience is in favour of the plaintiffs on the one hand or defendant nos. 2 and 8 on the other hand ?

V Whether the Civil Court has jurisdiction to entertain the suit in respect of the prayers for permanent and temporary injunction against defendant no. 1 regarding registration of transfer of shares ?

VI Whether the plaintiff has made out a prima facie case on merits and a case for temporary injunction against registration of transfer of shares ?

ISSUES I & V - JURISDICTION OF CIVIL COURT

16. It will be convenient to discuss both these issued regarding jurisdiction together as certain common legal propositions will have to be considered.

17. Mr Vakil has submitted that the trial Court has erred in holding that the civil court has no jurisdiction to entertain the present suit. In support of the said submission, Mr Vakil submitted that earlier whenever the issue of jurisdiction of the Company Court under Section 155 of the Companies Act for decision of any question regarding rectification of the register of the members had arisen, a long line of decisions such as Jayshree Shantaram Vankudre vs. Rajkamal Kalamandir Pvt. Ltd., 30 Company Cases 141, Rao Saheb Manilal Gangaram Sindore v. Western India Theatres Ltd., 33 Company Cases 826, and Kalyani Sundaram vs. Shardlow India Ltd., 67 Company Cases 306 - had all taken the view that under section 155 of the Act the jurisdiction of the Company Court is of a summary nature and complex issues must be tried in a suit and that the aforesaid view of the Bombay High Court has also found approval in the decision of the Supreme Court in the case of Public Passenger Services Ltd. vs. M.A. Khadar, AIR 1966 SC 489 - 33 Company cases pg. 1 wherein it has been clearly observed as under :-

> "Where by reason of its complexity or otherwise the matter can more conveniently be decided in a suit, the Court may refuse relief under S. 155 in exercise of the discretionary jurisdiction and relegate the parties to a suit."

18. Mr Vakil has submitted that in the case of Om Prakash Berlia v. Unit Trust of India, (1983) 54 Company Cases P. 469 the Bombay High Court speaking through Mr Justice Bharucha (as His Lordship then was) held that right to rectify the register of shareholders of a company was recognized at common law and was translated into the statutes, English and Indian. Every shareholder of a company has an individual right and interest in seeing that the share register of the company reflects the true position, as, upon it rests his right to receive his due share of the company's profits by way of dividend, his right to exercise his vote and to have it correctly assessed as against the votes of other rightful shareholders, and his right to acquire new shares in the company pro rata with other rightful shareholders. An entry upon the register which is bad or illegal affects these rights of the individual shareholder. He is

thereby prejudiced and aggrieved. It is recognized by courts that the procedure for rectification made available by the Companies Act is a summary procedure, and that the petitioner may, in the court's discretion, be referred to a suit, if the matter be a complex one.

19. Mr Vakil has also relied on the decision of the Bombay High Court in the case of Killick Nixon Ltd. vs. Bina Popatlal Kapadia, (1983) 54 Company Cases P. 432 wherein a Division Bench of the Bombay High Court comprising of Mr Justice P.B. Sawant and Ms Justice Sujata V. Manohar held that any member, aggrieved or not, had a right to apply to Court for rectification order and the Court had power under the provisions of Sections 154, 155 and 163 (2) of the Companies Act to order rectification even in interlocutory proceedings.

20. Mr Vakil has further placed reliance on the decision of the division bench of Madras High Court in the case of Kalyani Sundaram vs. Shardlow India Ltd., (1990) 67 Company Cases P. 306 wherein the Court held that where the plaintiff is claiming pre-emptive right to purchase shares and is challenging transfer in breach of such right of pre-emption, the rightness or wrongness of the transfer cannot be questioned within the scope of section 155 of the Companies Act. Since the plaintiff was merely attacking the transfer of the shares on the ground that the administrator had no authority to do so, particularly after having had the benefit of administration of the estate by him, the remedy under section 155 of the Act could not be invoked for relief.

21. As regards the decision of the Supreme Court in the case of Canara Bank Vs. Nuclear Power Corporation of India Ltd., JT 1995 (3) SC 42, Mr Vakil submitted that in that case the Supreme Court was required to decide the limited question whether the provisions of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 seeking to exclude the jurisdiction of the Courts to entertain matters or claims arising out of transactions in the tainted securities excluded the jurisdiction of the Company Law Board also or not. The Court was, therefore, examining the question in view of the provisions of Sections 111 and 155 that a Court within the meaning of this Special Courts Act, if it was held to be a Court within the meaning of the Special Courts Act, the jurisdiction of the Company Law Board was ousted and if it was not held to be a Court, the jurisdiction of the Company Law Board would not be

ousted. However, the Supreme Court was not concerned with the jurisdiction of Civil Court under section 9 of the Civil Procedure Code and, therefore, the decision in the Canara Bank case cannot be treated as an authority for the proposition that the jurisdiction of the civil Court for entertaining the disputes regarding transfer of shares or registration of shares is ousted.

Mr Vakil's submission is that the sentence "in regard to all these matters, CLB has exclusive jurisdiction" is a passing observation and not ratio of the judgement. He submitted that by making passing observation the Supreme Court in Canara Bank case did not intend to wipe out a series of decisions like Public Passenger Service Ltd. v. M.A. Khadar, AIR 1966 SC 489 and also decision of Madras High Court in the case of Mohideen Pichai Taraganar (T.A.K.) v. Tinnevelly Mills Co. Ltd., AIR 1928 Mad 571, Kalyani Sundaram v. Shardlow India Ltd., (1990) 67 Company cases 306(307) and Rao Saheb Manilal Gangaram Sindore v. Western India Theatres Ltd., (1963) 33 Company Cases pg. 826 wherein the Courts have taken a view that the civil Court has also the jurisdiction to decide the disputes under the Companies Act. Mr Vakil has further submitted that the Supreme Court had earlier gone to the extent of laying down that the remedies under the Companies Act are in the nature of summary remedies and the civil court can take a more comprehensive review of controversy between the parties on the question of transfer of shares or rectification of registration. If the above observation in para 31 of the judgment is held to be ratio of the decision, it is per incuriam as it overlooked the principles laid down by the Supreme Court in the case of Public Passengers Service Ltd. V. M.A. Khadar, 1966 SC 489 which had approved the settled law on the subject as already held by the Bombay High Court.

22. On the other hand, Mr Shelat for the contesting respondents/defendants has submitted that jurisdiction under Section 155 of the Companies Act has been held to be wide and comprehensive. This Court speaking through Mr Justice D.A. Desai (as His Lordship then was) in the case of Gulabrai Kalidas Naik v. Laxmidas Lallubhai Patel(1978), 48 Company Cases P. 438 had considered the previous decisions of the Bombay High Court and of the Supreme Court in the case Public Passenger Services Ltd. v. Khadar, AIR 1966 SC 489 and then held that the jurisdiction under Section 155 is comprehensive enabling the Court to decide all questions necessary or expedient to decide in connection with the application for rectification.

23. Mr Shelat has then relied on the provisions of Section 111(7) read with Section 111 A(7) of the Companies Act and has submitted that the Company Law Board has power to decide the title of the securities in question before it. Paragraph 31 of the judgement, which is strongly pressed into service by Mr Shelat, reads as under :-

"Now, under Section 111 of the Companies Act as amended with effect from 31st May, 1991, the CLB performs the functions that were therefore performed by courts of civil judicature under Section 155. It is empowered to make orders directing rectification of the company register, as to damages, costs and incidental and consequential orders. It may decide any question relating to the title of any person who is a party before it to have his name entered upon the company's register, and any question which it is necessary or expedient to decide. It may make interim orders. Failure to comply with any order visits the company with a fine. In regard to all these matters it has exclusive jurisdiction (except under the provisions of the Special Court Act, which is the issue before us). In exercising its function under Section 111 the CLR must, and does, act judicially. Its orders are appealable. The CLR, further, is a permanent body constituted under a statute. It is difficult to see how it can be said to be anything other than a court, particularly for the purposes of Section 9A of the Special Act."

Paragraph 34 of the above judgement states that the words "appeal" and "application" in the the context of the provisions of Section 111 have the same meaning and they are seem to be original applications.

24. Mr Shelat has also relied on the decision of the Delhi High Court in Harnam Singh V. Bhagwan Singh, 74 Company Cases Pg. 727

"The Companies Act is a special statute which provides for special and specific remedies, and, in view of the principle enunciated in Nazir Ahmad's case, AIR 1936 PC 253, and reiterated by the Supreme Court in the cases referred to above, keeping in view the fact that the powers of the

company judge to try and dispose of the matters are co-extensive with those of the civil court in view of rule 6 of the Companies (Court) Rules, it would not be right for the civil court to entertain matters which relate to rectification of the register of members or which involve determination of title to shares in companies, when, specifically, under the provisions of section 155(3)(a), questions of title can be determined by the company court.

Learned counsel for the plaintiffs has not cited any single case which was filed an an original civil suit which relates to declaration of title to shares and which was held to be maintainable.

In this view of the matter, in my view, the cognizance of a suit relating to title to shares is impliedly barred by section 9 of the Code of Civil Procedure."

25. Before dealing with the rival contentions, it is necessary to refer to three decisions of the Supreme Court dealing with the question of ouster of jurisdiction of the Civil Court. In the case of Dhulabhai vs. State of M.P., AIR 1969 SC 78, the Supreme Court, inter alia, laid down the following principle.

"Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all question about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

Similarly, in the case of Premier Automobiles Ltd. vs. Kamlekar Shantaram Wadke of Bombay, AIR 1975 SC 2238, the following principles are laid down :-

" The principles applicable to the jurisdiction of the civil court in relation to an industrial dispute may be stated thus :

(1) if the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such a Chapter V-A then the remedy for its enforcement is either section 33 C or the raising of an industrial dispute, as the case may be.

We may, however, in relation to principle no. (2) stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of Section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2 A of the Act will be an industrial dispute even though it may otherwise be an individual dispute. Civil Court, therefore, will have hardly an

occasion to deal with the type of cases falling under principle no. (2). Cases of industrial disputes by and large, almost invariably, are bound to be covered by principle no. (3) stated above."

In the case of Rajasthan S.R.T. Corpnn. V. Krishna Kant, AIR 1995 SC 1715, the Supreme Court examined the aforesaid principles and in para 26 of the said judgment, Their Lordships clarified the judgment in the case of Premier Automobiles and held that the words "under the Act" in principle no. (3) must be understood as referring not only to Industrial Disputes Act but also to all sister enactments (like Industrial Employment (Standing Orders) Act), which do not provide a special forum of their own for enforcement of the rights and liabilities created by them. The Civil Court has no jurisdiction to entertain such suits. In other words, a dispute arising between the employer and the workman/workmen under, or for the enforcement of the Industrial Employment Standing Orders, is an Industrial Dispute, if it satisfied the requirement of section 2(k) and/or Section 2-A of the Industrial Disputes Act and must be adjudicated in the forums created by the Industrial Disputes Act alone. This would be so, even if the dispute raised or relief claimed is based partly upon certified Standing Orders and partly on general law of contract.

In para 32 of the said judgment, Their Lordships summarized the principles and principle no. 2 reads as under :-

"Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act."

26. The thrust of the submissions of the learned counsel for the plaintiff is that the remedy under Section 155 of the Companies Act regarding rectification of register of members, (which provisions are now to be found in Sections 111-A and 111 of the Companies Act) has been held to be one for enforcement of the common law right (vide Mr Justice Bharucha speaking for the Bombay High Court in the case of Om Prakash Berlia v. Unit Trust of India, (1983) 54 Company Cases P. 469) and it has already been held by the Supreme Court and the Bombay

High Court to be remedy of a summary nature. it is submitted that complicated questions of law and fact are still required to be adjudicated in a civil suit, and, therefore, the Civil Court still has jurisdiction because as per principles laid down in Dhulabhai's case and Premier Automobiles case, the jurisdiction of the Civil Court is not ousted that for excluding the jurisdiction of the civil court the statute creating a special right or a liability and providing that the determination of the right or liability must also lay down that all questions about the said right or liability shall be determined by the tribunals created under the Act and that the remedies normally associated with actions in civil court must also be prescribed by the said statute and, therefore, since the remedy under section 155 (now embodied under sections 111-A and 111 of the Companies Act) is held to be of a summary nature and complicated questions are required to be relegated for determination in a civil suit as per the aforesaid lines of decision, it must be held that the jurisdiction of the civil court is not excluded for any of the prayers made in the suit.

27. The submission of Mr Vakil is prima facie attractive but, in the case of Gulabrai Kalidas Naik v. Laxmidas, 48 Company Cases Pg. 438, this Court speaking through Hon'ble Mr Justice D.A. Desai has already examined the decisions of the Bombay High Court and the decision of the Supreme Court in Public Passengers Service Ltd. (Supra) on which Mr Vakil has heavily relied and, thereafter, come to the conclusion that the jurisdiction under Section 155 of the Act is comprehensive.

> "There is nothing in the language of section 155 of the Companies Act, 1956, which even remotely suggests that the jurisdiction conferred on the court is of a summary nature and that it precludes a full inquiry in respect of the title to shares. On the other hand, sub-section (3) of section 155 gives discretion to the court "to decide any question which it is necessary or expedient to decide in connection with the application for rectification". This expression is wider in amplitude than the well-known expression "questions which are ancillary or incidental to the main question". The jurisdiction conferred by section 155 (3) is a comprehensive jurisdiction which enables the court in an application under section 155 to

examine all questions, complex, intricate or otherwise, relating to the title to the shares, and further enlarges the jurisdiction of the court set up under the Companies Act to decide all those questions which the court consider necessary or expedient to decide in connection with the application for rectification. In other words, when an application for rectification of register of shareholders is made, it would be open to the court while considering the main relief to decide all questions that may arise in such an application on rival contentions. To illustrate, if a petitioner asserts tile to the shares and the respondent contends that the title was acquired by a forged document, forgery would be put in issue and it would be necessary to decide the issue of forgery before the main prayer for rectification of register can be granted.

A petition under section 155 would be maintainable against persons who are neither directors nor shareholders. If third parties are impleaded as respondents, the court could proceed to inquire into the allegation of the petitioner. The court's jurisdiction would not be lost merely because third parties are required to be impleaded."

In the case of Canara Bank (1995) also, the Supreme Court has recognised the wide jurisdiction under Section 155 of the Act in the following words :-

"15. Section 155, as it is read before 31st May, 1991, entitled a person aggrieved or any member of a company or a company to apply to the court for rectification of the company's register of members if the name of any person was, without sufficient cause, entered in it or, after having been entered in it, was, without sufficient cause, omitted therefrom or default was made or unnecessary delay took place in entering on it the fact of any person having become, or ceased to be, a member. The Court was entitled to order rectification of the register and to direct the company to pay the damages, if any, sustained by a party aggrieved. The Court was entitled to decide any question relating to the title of any person who was a party to the application to have

his name entered in or omitted from the register. An appeal from the order of the court was provided for.

16. It will be seen that the CLB now exercise the powers that were exercisable by the Court under Section 155. It is entitled to direct rectification of the register and the payment of damages by the company. It is entitled to decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register and to decide any question which it is necessary or expedient to decide in this connection. An appeal to the High Court against any decision or order of the CLB on a question of law is available to any person aggrieved, thereby under the provisions of Section 10 F."

(emphasis supplied)

It must, therefore, be held that the jurisdiction conferred on the Company Court under section 155 of the Companies Act which now inheres in the Company Law Board under the provisions of sections 111 and 111-A of the Companies Act is not jurisdiction of merely a summary nature as the jurisdiction of the Company Law Board includes within its compass power to hold a full-fledged enquiry in respect of the title to shares and to decide any question which it considers necessary or expedient to decide in connection with the application for rectification. Sub-sections (5) and (7) of Section 111 which are also to be found by incorporation in Section 111-A of the Companies Act are required to be reproduced in extenso :-

"(5) The Company Law Board, while dealing with an appeal preferred under sub-section (2) or an application made under sub-section (4) may, after hearing the parties, either dismiss the appeal or reject the application, or by order -

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such other within ten days of the receipt of the order; or

(b) direct rectification of the register and

also direct the company to pay damages, if any, sustained by any party aggrieved.

(7) On any application under this section, the Company Law Board -

(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in, or omitted from, the register;

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification."

Hence, in the opinion of this Court, the aforesaid proposition propounded by this Court in the case of Gulabrai Kalidas Naik (Supra) and by the Supreme Court in the case of Canara Bank will apply with full force to the jurisdiction of the Company Law Board under sections 111 and 111-A of the Companies Act.

28. Mr Vakil has, however, submitted that the remedy of approaching the Company Law Board under Section 111-A and 111 of the Act can be invoked only after the transfer of shares is registered by the Company and not prior thereto and that, therefore, the plaintiff would not be in a position to seek any injunction against registration of transfer. While Mr Vakil's grievance is not without substance, it cannot be helped, because the provisions of sub-section (2) of Section 111-A themselves provide that subject to the provisions of that section, the shares or debentures and any interest therein of a company shall be freely transferable. Company is a creature of this statute and if the rights and obligations created by this statute only provide for a limited remedy, the matter must end there. In any case, the picture is not as gloomy as is sought to be made out by Mr Vakil because sub-section (5) of section 111-A does contemplate that the voting rights of a holder of shares whose name is also entered in the register of members, i.e. of the transferee, may be suspended by the Company Law Board. Hence, the remedies provided by the provisions of Section 111-A read with Section 111 of the Companies Act are a complete code in so far as any dispute about non-compliance with or non-observance of the provisions of the Company Act is concerned. Since the prayer for permanent injunction as well as temporary injunction

against registration of transfer of shares from defendant no. 2 to defendant nos. 6 and 7 can be the subject matter of proceedings before the Company Law Board under Sections 111 and 111-A of the Companies Act, the jurisdiction of the civil court is impliedly barred in respect of the aforesaid prayer.

29. The decision in the case of Omprakash Berlia (Supra) was certainly rendered in a suit but the question there was whether the directors acted mala fide, in breach of the fiduciary duties in waiving the requirement of a clause in the form of debentures, thus enabling the shares to be allotted, earlier than the prescribed period, to the defendants institutions. Hence, the question was about breach of fiduciary duties and not about non-compliance with the provisions of the Companies Act. Hence, this decision does assist the plaintiff's case on the question of jurisdiction of the Civil Court to entertain the prayer based on the claim for pre-emption.

30. There is no dispute that the proposition of law laid down in the case of Killick Nixon Ltd. (Supra) that even a person not aggrieved by an incorrect or a wrong entry in the register would be entitled to file the petition for rectification of the register of members and that such person need not be transferor or transferee because incidentally also his rights as a shareholder are likely to be affected. The provisions of section 155 for rectification of the register are now assimilated with the provisions of Sections 111 and 111-A. This decision does not carry the plaintiff's case any further, because in the above decision also, the Court was a Company Court hearing the matter under Sec. 155 of the Companies Act.

31. In view of the above discussion and in view of the principle laid down in the Rajasthan S.R.T. Corpn. case (Supra), even if the dispute raised or relief claimed is based partly upon a statutory provision and partly on the general Law of Contract, the forum under the statute alone will have the jurisdiction, it is clear that in so far as the plaintiff has prayed for permanent and temporary injunction against the registration of transfer of shares on the basis of the non-compliance with or non-observance of the requirements of the provisions of Section 108, Section 25 and other relevant provisions of the Companies Act, it must be held that for resolving this dispute, the only remedy is to approach the forum created under the Companies Act i.e. Company

Law Board under Section 111-A of the Act which must be held to have exclusive jurisdiction to decide the aforesaid dispute.

32. That still leaves the question about jurisdiction of the Civil Court to entertain suit for adjudication and enforcement of the right for pre-emption. There is no manner of doubt that the said right, if accepted in the facts of the present case, flows from the common law and not from any provision of the Companies Act. In view of the aforesaid decision of the Bombay High Court in the case of Om Prakash Berlia and the decision of the Apex Court in the case of Public Passengers Services Ltd. (Supra), it would not be possible to hold that where the plaintiff is invoking his rights under the general law of contract, the suit for enforcement of such a right would not be maintainable if the relief to be granted would result in rectification of the register. The aforesaid line of decisions therefore, does help Mr Vakil in prima facie dislodging the finding given by the trial Court that the Civil Court would have no jurisdiction even for the dispute of pre-emption.

33. It is true that the preliminary objection regarding jurisdiction of the Civil Court even to entertain the dispute regarding the claim for pre-emption is formidable in view of the observations made in para 31 of the judgment in Canara Bank case. Mr Shelat has argued that the decisions rendered by the Supreme Court and by the High Courts prior to May 31, 1991 would not be applicable to the provisions of Section 111 after May 31, 1991 and to the provisions of Section 111-A inserted with effect from September 20, 1995 and that, therefore, the Supreme Court observation that the Company Law Board has exclusive jurisdiction was intended to oust the jurisdiction of the Civil Court under section 9 of the CPC as well.

In the opinion of this Court, Mr Vakil is right in contending that in the Canara Bank case, the Supreme Court was merely concerned with the question whether the Company Law Board is a Court or not within the meaning of the Special Courts Act and, therefore, the Supreme Court examined the indicia of "Court" and judicial power of the State. It was in this context that the Supreme Court examined the question about jurisdiction of the Company Law Board under the Companies Act and observed that in regard to these matters i.e. questions relating to title of any person to have his name entered upon the company's register and any question which it is necessary or

expedient to decide, the Company Law Board has exclusive jurisdiction but the observation "it (CLB) has exclusive jurisdiction" is required to be confined to exclusivity amongst all the forums created by or under the Companies Act and the observation does not have the effect of ousting the jurisdiction of the Civil Court which it already had for deciding disputes for adjudication of rights under the common law. This conclusion is fortified by the recommendation of Sachar Committee itself which is quoted in para 14 of the judgment in the Canara Bank case as under :-

"Under the existing law, there are two remedies open to an aggrieved person - to file an appeal under Section 111, or to apply to the Court, for rectification of the share register under section 155. We think that these two remedies should now be assimilated and provision be made (at one place) for a person aggrieved (including any person aggrieved by a refusal of the Board of Directors to register a transfer or transmission of shares) to apply to the Company Law Board - as proposed to be constituted - for rectification of the share register on any of the grounds mentioned in sub-clause (a) or (b) of sub-section (1) of the present section 155.

Our proposals are -

Accordingly, we would recommend as follows :

Sections 111 and 155 should be assimilated into a single statutory provision."

It must, therefore, be held that the observation in para 31 of the Supreme Court judgement that the Company Law Board "has exclusive jurisdiction" in the matter of deciding any question relating to the title of any persons to have his name entered upon company's register and any question which it is necessary or expedient to decide - is required to be read as

"out of all the judicial and quasi-judicial forums on which jurisdiction is conferred by the Companies Act, Company Law Board has exclusive jurisdiction in all the matters relating to title of any person to have his name entered in company's register and any question which it is necessary or expedient to decide."

34. The only judgment which has held that jurisdiction of Civil Court is ousted is the judgment of the Delhi High Court in the case of Harnamsingh Vs. Bhagwansingh (1192) 74 Company Cases 727. The following observations on page 733 of the report would show that what weighed with the Court for converting concurrent jurisdiction of the Company Court under Section 155 of the Act into exclusive jurisdiction of the Company Court :-

> "Inasmuch as there is no distinction between the power of a judge of the High Court on the original side to try the matter as a civil suit, and as a judge of the High Court of Delhi, sitting as a company judge to investigate questions of title, it would be appropriate that the proceedings relating to questions of title are also determined by the company judge."

The decision of the Delhi High Court must, therefore, be confined to the cases where special rights and obligations created by the Companies Act are sought to be enforced.

35. The off-shoot of the aforesaid discussion is that the jurisdiction of the Civil Court is certainly barred in so far as the plaintiff has prayed for permanent and temporary injunction to restrain defendant no. 1 company from registering the transfer of shares from defendant nos. 2 and 8 to defendant nos. 6 and 7, but the jurisdiction of the civil court is not barred, in so far as the plaintiff has prayed for reliefs on the basis of the alleged right of pre-emption.

ISSUE II - EXISTENCE OR OTHERWISE OF THE AGREEMENT FOR PRE-EMPTION

36. As far as the merits of the plaintiff's claim for pre-emption are concerned, the plaintiff has heavily relied on the letter dated March 16, 1994 of Khanna Securities Ltd. written on behalf of Jardine Fleming India Securities Pvt. Ltd., which is quoted in para 6 above. It is, however, required to be noted that even according to the plaintiff, the aforesaid letter does not constitute the suit agreement for pre-emption, but it is the record, or reaffirmation, of an pre-existing agreement which was entered into between the plaintiff and defendant no. 8 at the time of transfer of 5,00,000 shares in October, 1993.

37. The stand of the Jardine Fleming Group through Mr Ted Pulling (letter dated December 10, 1994) is that they were ignorant of such communication and Dr Rafiq Dossani was never employed by the Fund Management Division and, therefore, without any authority, he had written the letter dated March 16, 1994 and Mr Ted Pulling was not appraised of this agreement. This stand was also reiterated at the hearing. However, in the pleadings on behalf of the defendants, defendant no. 2 has not taken any categorical stand to the effect that Dr Rafiq Dossani had written such letter without any authority or that Dr Rafiq Dossani had tried to help the plaintiff without any knowledge or consent of defendant no. 2. The stand on behalf of the contesting defendants in the affidavit in reply in para 21 is that no such agreement was ever entered into with the plaintiff and that the purchase of 5,00,000 shares from the plaintiff was without any condition. In paras 9 and 10 of the affidavit in reply, it is stated as under :-

"9. I say that the letter dated 16 March, 1994, neither creates any agreement nor does it reflect any agreement as alleged by the plaintiffs. I say that there was and is no agreement between the Plaintiffs and Defendant No. 2 purporting to grant to the Plaintiffs a right of first refusal in respect of the 5,00,000 shares purchased from the Plaintiffs. I say that, assuming, whilst denying, that the said letter creates an agreement or reflects an agreement as alleged by the Plaintiffs, the same is not binding on Defendant No. 2 or any one on its behalf. Consequently, the sale of the 5,00,000 shares by Defendant No. 2 is valid, binding and subsisting.

10. I say that, assuming, whilst denying, that the said letter creates an agreement or reflects an agreement as alleged by the Plaintiffs, the same is not valid and binding of law. I say that Defendant No. 1 is a public limited company and is listed on the primary stock exchanges in India. Under the law the shares of a public limited company are freely transferable. Consequently, no agreement can exist which restricts the free transferability of the shares of a public limited company. The purported agreement on which the Plaintiffs seek to rely is contrary to law and is thus not valid

and binding. No rights can be therefore claimed under or in furtherance of the purported agreement. Since the ad-interim Order passed by this Hon'ble Court is based on the purported agreement which is not valid in law, the same needs to be vacated forthwith."

38. There is no contemporaneous record to substantiate the plaintiff's case about the aforesaid alleged agreement of October, 1993, but from the facts narrated in paras 5 to 8 of this judgment particularly the plaintiff Company's letters dated September 27, 1993 and October 17, 1994 to the GIIC, it appears that the plaintiff Company was in difficult financial circumstances and, therefore, it had approached the GIIC for permission to sell its shares. The approval was sought as far back as in September, 1993 but the GIIC, (a Government Corporation) took its own time to consult the Government and to take its decision which process took about 5 months' time. In the meantime, the plaintiff was in a hurry to generate some funds and, therefore, it sold off 5,00,000 shares and generated almost Rs. 6 Crores by selling the shares to defendant no. 2 in the open market at Rs. 119.45 when the share price quoted at the Bombay Stock Exchange was Rs. 117.50 approximately. In all probability, at that time the plaintiff had not obtained any agreement or commitment from defendant no. 2 regarding the right of pre-emption and defendant no. 2 being an FII playing in the secondary market was not likely to give any such promise or enter into any such agreement. Admittedly, there is no such written agreement or undertaking either from defendant no. 2 or from anyone else in October, 1993 or even till December, 1993 when 5,00,000 shares sold by the plaintiff to defendant no. 2 were registered, but the plaintiff then found itself in a very embarrassing position when it received conditional approval from GIIC through their letter dated March 7, 1994; one of the conditions being that the purchaser of shares must also agree to the right of pre-emption being conferred on the GIIC. Having been placed in the tight corner, the plaintiff seems to have approached the Jardine Fleming Group. One of the directors connected with the Jardine Fleming Group called Dr Rafiq Dossani then addressed the above communication dated March 16, 1994.

39. In view of the above discussion, it may be concluded that while the plaintiff cannot be said to have made out a strong prima facie case of existence of the agreement for pre-emption, the plaintiff has raised a triable issue which would be required to be adjudicated

at the trial of the suit. Mr Shelat for the contesting defendants has, however, submitted that his clients have not dwelt much on the above question, since the alleged agreement is contrary to law and, therefore, there is no need to go into the above disputed questions of fact. That takes us to the important question about transferability of shares in a public limited company.

ISSUE III - TRANSFERABILITY OF SHARES AND AGREEMENT FOR PRE-EMPTION

40. Mr Shelat, learned counsel for the contesting defendant has very strenuously urged that in view of the provisions of Sections 82 and 111-A (2) of the Companies Act, the Supreme Court has already held that shares are freely transferable and that there cannot be any restriction on transferability of shares except any restriction in the Articles of Association. Sections 82 and 111-A (2) read as under :-

"82. The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.

111-A(2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable."

It is submitted that the above provisions are not made subject to a contract to the contrary.

41. After referring to the aforesaid provisions and the various standard authorities of Company Law, the Supreme Court has, in the case of V.B. Rangaraj v. V.B. Gopalakrishna, AIR 1992 SC 453 held as under :

" Whether under the companies Act or Transfer of Property Act, the shares are, therefore, transferable like any other movable property. The only restriction on the transfer of the shares of a company is as laid down in its Articles, if any. A restriction which is not specified in the Articles is, therefore, not binding either on the company or on the shareholders. The vendee of the shares cannot be denied the registration of the shares purchased by him on a ground other than that stated in the Articles."

41. In support of the aforesaid proposition of law, the Supreme Court relied on its decision in the case of S.P. Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535, certain English decisions and also authorities on Company Law like Palmer and Pennington. In chapter 16 of Gore-Browne on Companies (43rd Edition), it is stated that subject to certain limited restrictions imposed by law, a shareholder has prima facie the right to transfer his shares when and to whom he pleases. This freedom to transfer may, however, be significantly curtailed by provisions in the Articles. In determining the extent of any restriction on transfer contained in the Articles, a strict construction is adopted. The restriction must be set our expressly or must arise by necessary implication and any ambiguous provision is construed in favour of the shareholder wishing to transfer.

In Palmer's Company Law (24th Ed.) dealing with the `transfer of shares' it is stated at page 608-9 that it is well settled that unless the Articles otherwise provide the shareholder has a free right to transfer to whom he will. It is not necessary to seek in the Articles for a power to transfer, for the Act (the English Act of 1980) itself gives such a power. it is only necessary to look to the Articles to ascertain the restrictions, if any, upon it. Thus a member has a right to transfer his share/shares to another person unless this right is clearly taken away by the Articles.

42. Mr Shelat having relied on the above authority submitted that if the concept of free transferability of shares is so propounded in case of a private limited company as was the fact in the case of V.B. Rangaraj, the case of free transferability of shares in a public limited company is on a higher and stronger footing.

Mr. Shelat has further pointed out that in case of M/s Gujarat Bottling Co. Ltd. vs. Coca Cola Company, AIR 1995 SC 2372, the Supreme Court was concerned with a public limited company and in paragraph 42 thereof, the Supreme Court has applied the principle enunciated in the case of V.B. Rangaraj to the public limited company also.

It is also submitted that in the instant case the Articles of Association of defendant no. 1 Company do not incorporate the alleged agreement.

43. Mr Vakil has submitted that the aforesaid

decision cannot be treated as an authority in connection with transferability of shares of a public limited company because -

(1) the Supreme Court was dealing with the case of a private limited company.

(2) free transferability of shares refers to absence of restrictions which may be imposed by third parties, but it cannot exclude the right of a shareholder to impose restrictions on himself in the matter of transfer of shares to another person. It has been held by the House of Lords in the case of Russel Vs. Northern Bank Development Corpn. Ltd. (1193) 3 Company Law Journal 45 (HL) that though an agreement by or amongst shareholders cannot bind the company, it can certainly bind the shareholders.

(3) In the case of Shantiprasad Jain (Supra), all that the Supreme Court had laid down was that an agreement between two shareholders about issuance of shares by the Company cannot bind the Company unless such an agreement was incorporated into Articles of Association of the Company. That case did not deal with restrictions imposed by a shareholder on himself.

(4) If the decision in the case of V.B. Rangaraj is held to have the effect of nullifying the restrictions imposed by a shareholder on himself, merely because they are not contained in the Articles of Association, it is likely to have a serious fall out. The question may arise in the following illustrative cases :-

(i) The promoters of a private or a public limited company borrowing loans from banks and/or financial institutions have to pledge their shares with the lending institutions/banks with an agreement not to transfer the shares without prior written consent of the lending institutions/banks. Will the banks and financial institutions be reduced to a state of helplessness if such agreements are not incorporated into Articles of Association of the Company ?

(ii) A shareholder settles his shares on trust for the benefit of certain minor beneficiaries with a stipulation that the shares shall not be sold before the beneficiaries attain the age of 21 years. The shares may be in big companies like Reliance Industries Ltd or TISCO. Will the restriction in the trust deed not bind the trustees merely because the restrictions are not incorporated in the Articles of Association ? Would it ever be possible for such settlor to get such restrictions incorporated in the Articles of Association of big companies having millions of shareholders ?

(5) Free transferability of shares does not convert shares into currency notes or bearer bonds.

(6) While delivering the judgment in V.B. Rangaraj case, the Supreme Court did not consider the provisions of Sec. 22 A (3)(b) the the Securities Contracts (Regulation) ACt, 1956 which were applicable when the V.B. Rangaraj case was decided. Those provisions empowered the company to refuse registration of transfer of shares if the transfer was in contravention of any law which would include the Contract Act.

It is, therefore, submitted that the interpretation placed by the Supreme Court on the concept of free transferability of shares is required to be reconsidered and rule prohibiting restrictions placed by third parties cannot be construed as a rule prohibiting restrictions placed by a shareholder on himself.

44. It is required to be noted that while V.B. Rangaraj case was certainly concerned with a private limited company, the very distinction between a private limited company and a public limited company is, inter alia, the provision of restriction against transfer being contained in the Articles of Association of a private limited company whereas the Articles of Association of a public limited company cannot contain any such restriction. Hence, Mr Shelat's contention that the ratio in the case of V.B. Rangaraj will apply with much greater force to the case of a public limited company requires to be accepted. Mr Vakil's contention that the concept of free transferability cannot be invoked for avoiding restrictions imposed by a third party on a

shareholder but not by a shareholder on himself, though prima facie attractive, cannot be accepted because in the V.B. Rangaraj case, the Supreme Court was concerned with a similar restriction imposed by a shareholder on himself. It is clear from the facts of that case and it is also highlighted in the concluding paragraph of the judgement which reads as under :-

> "Hence, the private agreement which is relied upon by the plaintiffs whereunder there is a restriction on a living member to transfer his shareholding only to the branch of family to which he belongs in terms imposes two restrictions which are not stipulated in the Article. Firstly, it imposes a restriction on a living member to transfer the shares only to the existing members and secondly the transfer has to be only to a member belonging to the same branch of family. The agreement obviously, therefore, imposes additional restrictions on the member's right to transfer his shares which are contrary to the provisions of Art. 13. They are, therefore, not binding either on the shareholders or on the company. In view of this legal position, the finding recorded by the Courts below that the sale by the first defendant of his shares to defendants 4 to 6 is invalid as it is in breach of the agreement, is erroneous in law."

45. As far as the other arguments of Mr Vakil are concerned, it is not open to this Court to ignore the law laid down by the Supreme Court in the case of V.B. Rangaraj (Supra) and M/s Gujarat Bottling Co. Ltd. on any of the grounds urged by Mr Vakil. (vide B.M. Lakhani vs. Malkapur Municipal, AIR 1970 SC 1002). As per the settled legal position, only a Court of coordinate jurisdiction can consider whether a precedent in per incuriam.

It must, therefore, be held that once defendant no. 8 A/c. defendant no. 2 became shareholders upon registration of the transfer of shares in their favour in December, 1993, they were free to sell the shares to any party and the alleged agreement for pre-emption, even if proved in favour of the plaintiff, not having been incorporated into articles of association of defendant no. 1 Company, cannot be enforced.

ISSUE IV

46. In view of the finding on Issue No. III, this issue is not required to be discussed. However, to complete the discussion, a finding is given on this issue also. Mr Shelat has relied on the provisions of the Special Reliefs ACt and on the following extract on the Law of Contracts by Chitty :-

"Cases where damages are regarded as adequate.

Damages are considered to be an adequate remedy where the plaintiff can readily get the equivalent of what he contracted for from another source. For this reason specific performance is not generally ordered of contracts for the sale of commodities. or of government stock, or of shares which are readily available in the market. On the other hand, a contract to subscribe for shares in a company is specifically enforceable, and so is a contract to buy shares which are not readily available in the market, even (it seems) although the directors of the company have a discretion to refuse to register the transfer."

Mr Shelat has submitted that since the shares are moveable property and the shares of defendant no. 1 company are available in the market just as defendant no. 2 has purchased thousands of shares from the open market and the shares sold by defendant no. 2 to defendant no. 6 are not only those shares which defendant no. 2 had purchased from the plaintiff in October, 1993 but also other shares which it had purchased from the open market, specific performance of the alleged contract for sale of shares or their right of first refusal cannot be enforced. In para 8 of the affidavit in reply, the following assertion is made.

"8. I submit that no specific performance ought to be granted in respect of an agreement for the sale of shares of a company where there is a regular market for the shares of that company. I say that the trading figures at the Bombay and the National Stock Exchanges reveal that from November, 1996 to July, 1997, there was large scale trading in the shares of the defendant no. 1. Consequently, the present case is not one where specific performance is the proper remedy. Assuming, whilst denying, that Defendant no. 2 has committed a breach of the purported agreement, I submit that the Plaintiffs

ought to be left to the remedy of damages at law."

It is further submitted that the plaintiff is basically interested in money as is clear from its various letters and the plaintiff has also prayed for the alternative relief of damages. Damages would be adequate remedy in case the plaintiff ultimately succeeds and, therefore, also the Court should not consider the plaintiff's prayer for interim injunction. There is considerable force in the submission of behalf of the contesting defendants.

47. It is required to be noted that the present shareholding of the plaintiff in defendant no. 1 company is about 5 million shares out of total 12.82 million equity shares which works out to about 39%. The shares which are subject matter of the present suit being 3,81,000 shares constitute only 3.87% of the total shareholding which the plaintiff is presently holding in defendant no. 1 company and, therefore, also damages would be an adequate remedy and there is no ground for giving specific performance of the alleged contract, even if the plaintiff were to finally succeed at the conclusion of the suit.

ISSUE VI

48. In view of the aforesaid discussion, it is not necessary to consider Mr Vakil's submissions on merits in so far as the prayer for injunction against defendant no. 1 from registering the transfer of shares from defendant nos. 2 and 8 to defendant nos. 6 and 7 is concerned. We may only note the two preliminary submissions of Mr Shelat. Firstly, defendant no. 1 company itself returned the transfer forms to defendant no. 5 who had presented the same on behalf of defendant nos. 2 and 8 and, therefore, the above referred prayer is not required to be considered. Secondly, Mr Shelat submitted that if the injunction is granted by this Court it would only mean that the Board of Directors will be required to commit an offence as defendant no. 1 will be rendered incapable of complying with the mandatory, statutory requirement of taking decision to register or refuse to register the transfer of shares within two months from the date on which the instrument of transfer is delivered to the company. This Court is not required to consider the submissions of Mr Vakil on merits or the preliminary defences of Mr Shelat in the view that this Court has

taken that the civil court has no jurisdiction to entertain a suit for a remedy for enforcement, observance or compliance of the rights or obligations created by or under the Companies Act.

CONCLUSIONS :

49. In view of the aforesaid discussion, the conclusions are as under :-

(I) The jurisdiction of the civil court is not barred in so far as the reliefs claimed are based on the claim for pre-emption in respect of the shares in question. Whether the Court can or would grant such relief in view of the concept of free transferability of shares is a question on merits and it does not affect the jurisdiction of the Civil Court to entertain such suit.

(II) The plaintiff has raised a triable question about existence or otherwise of the agreement conferring upon the plaintiff the right of first refusal in case of sale of shares by defendant no. 2 to any other party; though this finding need not be treated as a finding that the plaintiff has made out a prima facie case about existence of the agreement. All that is held at this stage is that the issue about existence of the agreement is a triable issue and it can be decided after the evidence is led.

(III) In view of the concept of free transferability of shares as embodied in Sections 82 and 111 A(2) of the Companies Act and expounded by the Supreme Court in the case of V.B. Rangaraj and followed in the case of Gujarat Coke Bottling Co., the alleged agreement for pre-emption is not binding on any of the defendants.

(IV) The plaintiff has not made out any case for interim injunction against transfer of shares by defendant nos. 2 and 8 to defendant nos. 6 and 7 or to any party, as ultimately even if the plaintiff succeeds in the suit, it will be entitled to get damages which would be an adequate remedy. The balance of convenience is also not in favour of the plaintiff.

(V) As far as the reliefs claimed by the plaintiff

for permanently and temporarily restraining defendant no. 1 company from registering the transfer of shares from defendant nos. 2 and 8 to defendant nos. 6 and 7 are concerned, the civil court has no jurisdiction to entertain the present suit as the suit is impliedly barred by the provisions of Companies Act, 1956 which create special forum in the Company Law Board for remedies as provided in Sections 111-A of the Companies Act in respect of all the special rights and obligations flowing from the provisions of the Companies Act, 1956.

(VI) In view of the aforesaid finding on Issue V, this Court has not examined the merits of the contentions for injunction to restrain defendant no. 1 Company from registering the transfer of shares.

50. Before parting with the matter, this Court would like to place on record the valuable assistance rendered by Mr S.B. Vakil for the appellant as well as Mr Shelat for the respondent on interesting questions of law which are bound to assume much more importance in the days to come.

O R D E R

51. In the result, the appeal deserves to be dismissed and is hereby dismissed. In the facts and circumstances of the case, there shall be no orders as to costs.

52. As the Appeal is dismissed, the stay application is also dismissed. Ad-interim relief granted earlier stands vacated.

Sd/-

(M.S. Shah, J.)

At this stage, Mr Vakil, learned counsel for the appellant prays that the ad-iterim relief granted earlier, may be continued for six weeks to enable the appellant to carry the matter in appeal. In the facts and circumstances of the case, ad-interim relief granted earlier shall continue till November 21, 1997.

Sd/-
(M.S. Shah, J.)