

CASE NO.:
Appeal (civil) 3253-58 of 1991

PETITIONER:
M.S. Madhusoodhanan & Anr.

RESPONDENT:
Vs.
Kerala Kaumudi Pvt. Ltd. & Ors.

DATE OF JUDGMENT: 01/08/2003

BENCH:
Ruma Pal & B.N. Srikrishna.

JUDGMENT:

J U D G M E N T

With CA Nos. 3260, 3259, 3261 of 1991

RUMA PAL, J.

An internecine dispute between the members of a family relating to the controlling interests in companies has given rise to the nine appeals which are being disposed of by this judgment. Given the number and nature of the proceedings, to avoid any confusion, the parties are referred to by their names and not in the capacity in which they have sued or been sued except when describing the collective stand of all the respondents in these appeals, when they are referred to simply as 'the respondents'.

The main protagonists in all the litigations are Madhusoodhanan, Srinivasan, Ravi and Mani who are brothers, with Madhusoodhanan on one side and Srinivasan, Ravi and Mani on the other. The parents of the four were one K. Sukumaran and Madhavi both of whom are deceased. K. Sukumaran died before the litigations between the parties erupted and Madhavi died during the pendency of the litigation. While she was alive she supported Srinivasan, Ravi and Mani. The four brothers are married and have children. It is unnecessary at this stage to clutter the narration of facts with the names of the wives and children, who will be referred to by name when the particular litigation in which they are involved is considered. The dispute began with a struggle over the controlling interest in a company by the name of Kerala Kaumudi Pvt. Ltd. (hereinafter referred to as Kerala Kaumudi)

Kerala Kaumudi is a private company incorporated under the Indian Companies Act, 1913 which was promoted in 1955 by the parents of the four brothers. Besides Kerala Kaumudi other "family" concerns were incorporated including Kaumudi Investments Pvt. Ltd., Kerala Exports (P) Ltd., Kaumudi News Pvt. Ltd., Laisa Publications Pvt. Ltd., Shiv Printers & Publishers, Ravi Printers & Publishers Pvt. Ltd., Kaumudi Films Outdoor Unit, Electronic & Equipment Corporation and Ravi Transports. However, the core of the controversy is the control of Kerala Kaumudi.

The business of Kerala Kaumudi (which was the flagship company) is to own and publish newspapers, journals and other literary works and undertakings. Its authorised share capital is 20 lakhs divided into 2000 shares of Rs.1000/- each. The total number of issued and paid up equity shares in Kerala Kaumudi was 1575. During the life time of K. Sukumaran each of the brothers along with their parents had shares in Kerala Kaumudi and the shareholding was as follows:

Sr. No.		
1.	Mani	222 shares
2.	Valsa Mani (Mani's daughter)	84 shares
3.	Sukumaran Mani (Mani's son)	84 shares
4.	Madhusoodhanan	390 shares
5.	Srinivasan	390 shares
6.	Ravi	390 shares
7.	Madhavi	3 shares
8.	Sukumaran	9 shares
9.	Kaumudi Investments Private Ltd.	3 shares
	Total	1575 shares

Sukumaran died on 18th September 1981. He was the Managing Director of Kerala Kaumudi from 1955 to 1973 and its Chairman from 1973 till his death. He was succeeded as Chairman by his widow Madhavi. Madhusoodhanan was appointed as Managing Director of Kerala Kaumudi in 1973 immediately after Sukumaran died. On 25th January 1985, Madhusoodhanan was appointed as Managing Director and Editor of Kerala Kaumudi for life. He was also empowered to exercise the powers given to the Director under Article 79 of the Articles of Association. At the same time Srinivasan was appointed as General Manager of Kerala Kaumudi for life and Ravi was appointed as Director and Executive for life. To give effect to these appointments, Article 69A and Article 74 of the Articles of Association of Kerala Kaumudi were amended.

The disputes between the parties started soon after the death of Sukumaran in September 1981. When these reached a head, on 29th November, 1984 a resolution was taken at a meeting (Ex. P-190) of the company which was signed by the four brothers and Madhavi by which the controlling interests in the different family companies were agreed to be given to the four brothers on the basis of their active interest in a particular concern. Kerala Kaumudi's control was to be with Madhusoodhanan. In implementation, Transfer of shares in these companies were effected between the brothers and their respective families. The disputes however did not abate. On 24th October, 1985 an agreement was entered into between the parties in an attempt to resolve their differences. This agreement has been exhibited in the proceedings as Ext. P1. On 23rd December 1985, a second agreement (Ext. P-2) was entered into by which it was, inter alia, agreed that all the various family controlled companies and firms would be divided among the four brothers.

On 16th January 1986 a third agreement was entered into, which has been marked as Ext. P.3. The parties to the third agreement were Madhavi, Mani, Madhusoodhanan, Srinivasan and Ravi. Briefly speaking, Ext.P3 is about the division of effective control of the "family" concerns amongst the four brothers. It relates to the transfer of Mani's shares in Kerala Kaumudi to Madhusoodhanan. In addition, the parties' agreement that Madhusoodhanan would have the major share holding in Kaumudi Investments Pvt. Ltd., Kerala Exports (P) Ltd. and Kaumudhi News Pvt. Ltd., Mani the majority share holding of 52 per cent in Laisa Publications Pvt. Ltd. (which has subsequently changed its name to Kala Kaumudi Pvt. Ltd.), Srinivasan 52 per cent in Shiv Printers and Publishers, and Ravi, the majority holding in Ravi Printers and Publishers (P) Ltd., Kaumudi Films Outdoor Unit, Electronic and Equipment Corporation and Ravi Transports, is also recorded.

According to Madhusoodhanan, Mani and his children had already transferred their entire holding of 390 shares in Kerala Kaumudi to Madhusoodhanan in May 1985, prior to the third agreement. As a result, Mani and his children had no shares in

Kerala Kaumudi, Madhusoodhanan had 612 shares, and Sreenivasan and Ravi had 222 shares each. Nine shares continued to stand in the name of the late K. Sukumaran and three shares in the name of Madhavi. In addition, the two children of Madhusoodhanan had 84 shares each, Sreenivasan's daughter, Anju had 168 shares, Ravi's son, Deepu, had 168 shares and KIPL continued to hold 3 shares.

On 23rd July 1986, a Board meeting of Kerala Kaumudi was held at which Madhavi assumed the powers of the Managing Director in purported ouster of Madhusoodhanan. The meeting is disputed by Madhusoodhanan. He says that no such meeting was in fact held and that the minutes were subsequently drawn up. A second Board meeting, which is also disputed by Madhusoodhanan, was held on 1st August 1986 in which a decision was taken to increase the paid-up share capital of Kerala Kaumudi by issuing 425 additional shares of Rs.1000/- each. At a Board meeting held on 8th August 1986 these additional shares were issued to Ravi and Sreenivasan and one share was transferred by Ravi to Mani. This meeting as well as the allotment of the additional shares is not accepted by Madhusoodhanan. On 16th August, 1986 at an Extraordinary General Meeting Madhusoodhanan was removed as Managing Director of Kerala Kaumudi and Article 74 of the Articles of the company deleted.

In this background, several proceedings were filed by the parties against each other some of which may be taken up for consideration together. The first lot consists of six matters relating directly to Kerala Kaumudi and the share holding in Kerala Kaumudi. The six are:

- (i) C.P. No. 14 of 1986 filed by Madhusoodhanan for rectification of the company's share register under section 155 of the Companies Act, 1956 by cancellation of the allotment of 425 shares to Ravi and Sreenivasan and for removal of the name of Mani from the company's share register.
- (ii) Company petition, C.P. No. 31 of 1988 filed by KIPL for similar reliefs.
- (iii) A suit filed by Madhusoodhanan in the Munsif's Court, Trivandrum being O.S. No. 1329 of 1986 (subsequently re-numbered as C.S. No. 3/89, when withdrawn to the High Court) for a decree declaring that he continued to be the Managing Director of Kerala Kaumudi and for a declaration that the Board meetings held on 23.7.86, 1.8.86 and the meetings subsequent thereto were illegal and ultra vires the Articles of Association of the company.
- (iv) A suit being O.S. No. 482/88 (subsequently re-numbered as C.S. No. 5/89, when withdrawn to the High Court) filed by KIPL against Kerala Kaumudi for similar reliefs.
- (v) A suit filed by Madhusoodhanan for specific performance of the third agreement, Ex.P.3.(O.S. No. 483/88, subsequently re-numbered as C.S. 6/89 when withdrawn to the High Court.)
- (vi) C.P. No.26 of 1987 filed in 1987 by Mani and his children for a declaration that the transfer of 390 shares by them to Madhusoodhanan pursuant to the Board's decision dated 21.5.85 was illegal and void and for rectification of the share register by recording them as the owners of 222, 84 and 84 shares respectively.

These six matters are now numbered as CA Nos. 3253-3258 of 1991 before us.

The second set of litigation being Company Petition No. 15 of 1986 was filed in 1986 by Mani's wife Kastoori Bai, daughter Valsa, Ravi's wife Shylaja, and Sreenivasan's wife Laisa as well as Madhavi for rectification of the share register of KIPL. This is now numbered

as CA 3260 of 1991.

The third set consists of CP No.11 of 1987 (now CA 3261 of 1991) filed by Vaishak, the minor son of Madhusoodhanan, for rectification of the share register of Kerala Kaumudi.

The fourth set of proceedings originally consisted of two suits filed before the Munsif's Court, Trivandrum relating to the office premises of Kerala Exports and KIPL. The suit filed by Kerala Exports, (numbered on transfer as CS No. 2 of 1989) was for a mandatory injunction to restrain Kerala Kaumudi, Sreenivasan, Ravi and Madhavi from disturbing its functioning in Kaumudi Buildings. O.S. No. 1569 of 1988 (subsequently numbered as CS 4 of 1989) was a similar suit filed by KIPL before the Munsif's Court for restraining the defendants from preventing the peaceful functioning of KIPL's administrative office in Kaumudi Buildings.

All the original suits were transferred to the High Court under the provisions of Section 446 of the Companies Act and were heard along with the several company petitions noted earlier. About 296 documents were tendered in evidence by the parties. Seven witnesses were examined. The four witnesses who deposed in support of Madhusoodhanan were P.K. Kurien, Advocate (PW 1), Mohan Raj, former Personal Assistant to Madhusoodhanan (PW 2) Vasudevan, former Company Secretary (PW 3) and Madhusoodhanan himself (PW 4). As far as the opponents were concerned, Mani (RW 1), Srinivasan (RW 2) and Laisa Srinivasan (RW 3) gave evidence in support of their stand.

The Single Judge decided CP No. 14 of 1986 in Madhusoodhanan's favour. The application for rectification was allowed and the allotments of shares made in the meeting held on 8.8.86 were set aside and rectification of the share register of Kerala Kaumudi by deleting the further allotment of 425 shares each to Sreenivasan and Ravi was directed. The prayer for cancellation of the transfer of one share in favour of Mani was, however, disallowed. However, the petition filed by KIPL (CP No. 31 of 1986) which had virtually asked for the same reliefs as in CP No. 14 of 1986 was dismissed by the learned Single Judge on the ground of delay. Madhusoodhanan's suit (C.S. No. 3 of 1989) and KIPL's suit (CS No.5 of 1989), were decreed by holding inter alia that the meetings held on 23.7.86, 1.8.86, and 17.8.86 in so far as they affected Madhusoodhanan and by which Madhusoodhanan had been removed as Managing Director and Article 74 of the Articles of Association of the company was deleted, were illegal and invalid. Madhusoodhanan was declared to be the Managing Director of the Company. The suit filed by Madhusoodhanan for specific performance of Ext. P3 (CS No. 6 of 1989) was also decreed. Mani and his children's application for setting aside the transfer of 390 shares (CP No.26/87) was dismissed. An arbitrator was appointed for determining what amount was payable by Madhusoodhanan to Mani for the shares transferred by Mani to Madhusoodhanan.

The second set of proceedings initiated by Mani's wife and others viz. CP No. 15 of 1986, for rectification of the share register of KIPL and the third set filed by Madhusoodhanan's minor son, Vaishak for rectification of the share register of Kala Kaumudi (CP No. 11 of 1987) were dismissed.

The two suits filed by Kerala Exports and KIPL (CS 2 of 1989 and CS 4 of 1989 respectively) relating to their continued possession in Kaumudi Buildings were decreed.

The aggrieved parties preferred appeals in each of the matters. By a common judgment, the Division Bench reversed the findings of the learned Single Judge in all of the appeals except in the appeal from CS 2 of 1989. Nine Special Leave Petitions were filed in this Court in the separate proceedings on which leave was granted on 27th August 1991.

We propose to deal with issues which can be said to be common to the different sets of litigations before giving our conclusions on each appeal separately.

The underlying question in the first set of litigations viz. who has the controlling interest in Kerala Kaumudi has given rise in turn to the following topics:

- A) the transfer of shares by Mani and his children to Madhusoodhanan.
- B) The removal of Madhusoodhanan as Managing Director ;
- C) The issue of additional shares to Ravi and Srinivasan, and
- D) Specific performance of the agreement (Karar) dated 16.1.1986.

Transfer of shares by Mani and his children to Madhusoodhanan

In C. P. 26/87, Mani and his group prayed for rectification of the share register of Kerala Kaumudi by deleting the name of Madhusoodhanan as a shareholder in respect of the shares which Mani and his group had transferred to him in 1985. The prayers proceed on the basis that there was in fact a transfer of shares in 1985 which was, after two years, sought to be set aside. The grounds on which this was asked for were :

- A. The consideration for the transfer had not been agreed upon and no consideration had in fact been paid.
- B. No proper documents had been executed effecting the transfer.
- C. Neither Valsa nor Sukumaran Mani, a minor had any knowledge of the transfer and the transfer of their shares was invalid.
- D. Section 108 of the Companies Act, 1956 had not been complied with in respect of any of the transfers.

The learned Single Judge rejected all four contentions, and in our view, rightly. The Division Bench held in favour of Mani and his group on grounds which are legally and factually unsustainable for the reasons stated in the following paragraphs.

The documentary evidence relating to the transfer, shows without a shred of doubt that there was a valid transfer of shares. To begin with the minutes of the meeting held on 19th March 1985 [Ex. R-62(a)] which were signed by Mani, records: "Shares of Sri M.S. Mani. All the shares in Kerala Kaumudi owned by Sri M. S. Mani and family would be pledged by him to Sri M. S. Madhusoodhanan who shall extend financial facilities to Sri M. S. Mani. The loan will be paid with 22 percent interest by Sri Mani when Sri M. S. Madhusoodhanan shall release the shares of Sri M. S. Mani. The modus operandi of the transaction shall be decided in consultation with barrister P.K. Kurien of Menon and Pai".

The intention of Mani and his group to transfer their shareholding to Madhusoodhanan is evident from this. Although the mode of transfer was subsequently changed, this intention was affirmed at the Board meeting of Kerala Kaumudi held on 23rd April 85. The fifth and sixth resolutions as appearing in the minutes of the meeting (Ex.P.-62(b)) which were also signed by Mani read as under:

"Sri M. S. Mani
Letter of resignation from the direct directorship of Kerala Kaumudi (Pvt) Ltd effective from 23. 4. 85
afternoon submitted by Sri M. S. Mani was
approved by the Board.

(6) Shares owned by Sri M. S. Mani and family in Kerala Kaumudi (P) Ltd.

"Shares owned by Sri M. S. Mani and family in Kerala Kaumudi (p) Ltd will be transferred to Sri M. S. Madhusoodhanan forthwith on a consideration to be mutually agreed between the transferor and the transferee. The liabilities of Sri M. S. Mani to the income tax department etc up to 31st March, 1985 should be settled by Kerala Kaumudi (P) Ltd. before finally deciding a consideration for the share transfer. The Kerala Kaumudi (P) Ltd undertakes to discharge the liabilities arising on account of personal guarantees given by Sri M. S. Mani for the company". (Emphasis supplied).

The sixth resolution clearly envisages three distinct stages: an immediate and unconditional transfer of shares, then, the settlement of the Mani's income tax liabilities by Kerala Kaumudi and, after both these stages, the determination of the consideration for the transfer to be mutually agreed on.

The Division Bench, therefore, erred in holding that the agreement for transfer of shares was conditional on the determination of the price of the shares and in concluding that as there had been no such determination, no transfer could have taken place. The express intention was to effect an immediate transfer of the shares and to agree upon the consideration later. Section 9 of the Sale of Goods Act, 1930 permits this.

Section 4 read with Section 2(10) of the Sale of Goods Act, 1930 require that the contract of sale must provide for the payment of money as a consideration for the transfer of goods, or to put it differently, that a price must be paid. But Section 9 of the 1930 Act allows the parties not to fix the price at the time of the transfer and to leave the determination of the amount of consideration to a later date. An agreement which provides for the future fixation of price either by the parties themselves or by a third party is capable of being made certain and is not invalid as provided under Section 29 of the Contract Act, 1872 [See: Illustration (e)] In view of such categorical and clear statutory provisions, the submission of learned counsel representing Mani that such a contract is void for uncertainty because the price was not fixed, is unacceptable. The passage from Benjamin's Sale of Goods (1974 Edn.) relied on which says "If the price is left to be agreed upon subsequently between the parties, there will ordinarily be no binding contract, on the grounds of uncertainty, unless and until they later reach agreement on a price. Moreover, an agreement to leave the price open to further negotiation will normally exclude any inference that the price should be a reasonable price in accordance with the provisions of section 8(2)."

may be an exposition of the law as it is in England and cannot be seen as an authority on the interpretation of section 9(1) of the Sale of Goods Act. Besides, the same passage cited goes on to say:

"But in accordance with the principle that the Courts will endeavor to uphold bargains which the parties believe themselves to have concluded, especially in the case of executed or partially executed contracts, it may sometimes be possible either to infer an intention that at any rate a reasonable price should be paid if no price is later

settled, or to have regard to other circumstances, such as the course of dealing between the parties."

In this case, there can be no doubt that the first stage of the agreement for the immediate transfer of shares was executed and the Division Bench erred when it held to the contrary.

The questions as to what would be the reasonable price for the shares, the mode of its determination and whether any consideration has already been paid by Madhusoodhanan to Mani are considered subsequently.

The minutes of the Board meeting held on 21st May 1985 [Exhibit P-62 (C)] of Kerala Kaumudi record that the following share transfer deeds were placed before the Board, namely, the deeds relating to the transfer of 222 shares by M. S. Mani to Madhusoodhanan, 84 shares by Valsa Mani to Madhusoodhanan, 84 shares by Sukumaran Mani to M. S. Mani and 84 shares by Mani to Madhusoodhanan. The Board resolution goes on to record.

"After discussion the share transfers were approved by the Board and the Managing Director and any other Director was authorised to sign the relative new share certificates to be issued in favour of Sri M. S. Madhusoodhanan and to affix the common seal of the company in the share certificates in the presence of the Company Secretary"

The minutes of the Board meeting held on 21st May 1985 were read and approved on 4th June 1985. Both meetings were attended by Madhavi, Madhusoodhanan, Srinivasan and Ravi and the minutes signed by Madhavi as Chairman. The transfer of the shareholding of Mani and his children was also admittedly entered in the Company's Share Certificate Ledger (Ex. P-90).

It is evident from this that the share transfer forms which were placed before the Board had been executed and were otherwise duly completed, or else the question of the approval of such transfer would not arise.

Apart from these minutes, are the minutes of the meeting held on 26th August 1986, when Madhusoodhanan, was already effectively removed from the control of Kerala Kaumudi . Item No 4 of the minutes relates to the transfer of a share by Ravi to Mani. Countering Madhusoodhanan's objection to such transfer, the minutes tellingly record:

"Smt. C.N. Madhavi pointed out that the sale consideration of the shares held by Sri. M. S. Mani which was around 24 percent of the total shares of the company at the time of transfer had not been paid by Sri. M. S. Madhusoodhanan. She pointed out Sri M. S. Mani was the senior most Director of the company and he is the eldest son of late Sri. Sukumaran, the founder of the company. She also pointed out that Sri M. S. Mani is eligible for 1/5 of the shares held in the name of his father. She further pointed out that it is prestigious for the company that Sri M. S. Mani, the former senior Director and glorious editor of the newspaper to be a shareholder of the company".

In the Annual Return of Kerala Kaumudi dated 27th June 1985 filed under section 159 of the Companies Act 1956 with the Registrar of Companies, in the list of past and present members and debenture holders, the names of all parties have been given Including the names of Mani, and his children. However against their names It has been mentioned that they had effected transfer of their shareholding

to Madhusoodhanan. Particulars of the transfer made by each as well as the date of registration of the transfers have been given as 21st May 1985. (Ex. P-128).

On 1st March 1986 in keeping with the statutory requirement relating to the ownership of newspapers, a statement was published in Form IV. In the list of shareholders the names of Madhusoodhanan, Ravi, Visakh Madhusoodhanan, Deepu Ravi, M.S. Srinivasan, Julie Madhusoodhanan & Anju Srinivasan are mentioned. There is no mention of Mani or either of his children as shareholders (Ex.P -- 86). There was no protest by Mani or any of the other shareholders which would have naturally been made if the statements were incorrect.

Even after the ouster of Madhusoodhanan from the Board of Kerala Kaumudi, in the Annual Return dated 26 September 1986 (Ex. P.128 (a)), in the list of shareholders filed with the Registrar of Companies as part of the Annual Return of Kerala Kaumudi, Mani is shown as holding only one share and Madhusoodhanan as holding 612 shares in the company. This return has been filed under the signatures of Srinivasan and Ravi as Managing Director and Director of Kerala Kaumudi respectively together with a certificate by Ravi and Srinivasan under section 161(2) of the Companies Act, 1956. They certified that the return states the facts as they stood on the day of the annual general meeting correctly and completely and that since the date of the last annual return the transfer of all the shares and debentures and the issue of all further certificates of shares and debentures had been appropriately recorded in the books maintained for the purpose.

This was again done in the Annual Return of Kerala Kaumudi filed under the signature of Ravi and Srinivasan dated 28th July 1987 (Ex.P.131(a)). Madhusoodhanan is shown as holding 612 shares and Mani is shown as holding only one share. Under section 164 of the Companies Act, 1956, the annual returns, the certificates and statements therein, "shall be prima facie evidence of any matters directed or authorised to be inserted therein" under the Act.

The explanation given by Mani that he did not respond to the statutory declarations although they did not show his name or the names of his children as shareholders of Kerala Kaumudi because there was an agreement to transfer the shares and because of the close relationship between parties, is specious. According to Mani's evidence, he had not agreed to transfer his shares at all because the consideration had not been fixed. Furthermore, the relationship between the parties was anything but cordial. It was only after Madhusoodhanan had initiated proceedings in 1986, that Mani, more than two years after the transfer for shares filed the application for rectification of the share register.

Even if there were any doubt on the issue, the fact which settles the matter conclusively are the admissions in the counter affidavit filed by Madhavi in CP No 14 of 1986 on behalf of herself and on behalf of Ravi, Srinivasan and Mani (wherein Mani is referred to as the "fifth counter petitioner" and Madhusoodhanan as "the petitioner") She has affirmed:

(a) "In fact the fifth counter petitioner left the company in the year 1985 and has transferred all the 390 shares belonging to him and his children (major daughter and minor son) to the petitioner, receiving only a miniscule part of a consideration and accepting the promise of the petitioner to pay him the balance without even insisting on formal documents to evidence the promise of the petitioner ".

(b) "Once Article 74 was amended to the petitioner's liking, his attitude started changing slowly. Even then we did not take it seriously. That is why the fifth counter petitioner

transferred his shares to the petitioner, giving him literally a strangle hold on the company".

(c) " He (Mani) and his minor son had held 306 shares in the company which he had transferred to the petitioner in 1985".

d) "The petitioner holds 612 equity shares of Rs.1000/- each of the company".

Mani has also said in an affidavit affirmed on 28th November, 1986 in Application 305/86 (arising out of CP No.14/86).

"After the meeting was over the petitioner and respondents 2 to 5 that is, the mother and sons had informal talk in the same room. During the course of this, the second respondent asked the petitioner why he has not paid the balance consideration for shares transferred by me to him in 1985. The petitioner said that he would pay the same as and when he had money. The second respondent thereupon suggested that the petitioner may in that event transfer the shares back to me".

The one share which is shown in Mani's name in the Annual Return for 1986 and 1987 was sold by Ravi to Mani at a meeting held on 26 August 1986. As has been recorded in the minutes (Ex P-62(N)) and affirmed in the same affidavit of Madhavi in C.P. No. 14/86 on behalf of Ravi, Srinivasan, Mani and herself: "The meeting of the Board of Directors held on 26th August, 1986 expressly considered the question whether the fifth respondent (Mani) is to be selected as one whom it is desirable in the interest of the company to admit to its membership. The Board resolved that the fifth respondent (Mani) is not only a desirable person, but his admission to the membership of the company will enhance its prestige and strengthen its administration. The Board felt that in the circumstances it was essential that the fifth respondent (Mani) was to be inducted as a member of the company".

That he was "admitted" to membership and "inducted" as a member of the company by the transfer of one share on 26th August 1986 has been acknowledged by Mani himself in his affidavit affirmed in the same proceedings on 28 November 1986.

This admission to membership was in terms of Article 24(a) of the Articles of Association of Kerala Kaumudi, which directs that no share shall be transferred to a person who is not a member so long as any member or any person selected by the Directors as one whom it is desirable in the interest of the company to admit to membership, is willing to purchase the same at fair value. In other words a non-member of the company can be sold a share of the company even when a member wishes to purchase it, provided the Directors select him as "a person whom it is desirable in the interest of the company to admit to membership" and provided that such person is willing to purchase the share.

If the transfer by Mani and his children of their entire shareholding in Kerala Kaumudi to Madhusoodhanan had not been effected, there was no question of "admitting" Mani to the membership of the company. The minutes of the meeting held on 26 August 1986 which have been admitted by Srinivasan and the affidavits of Madhavi and Mani thus prove that Mani and his family

held no shares in the company until the single share was transferred by Ravi to Mani under Article 24(a) on 26th August 1986. We have been unable to understand the logic of the Division Bench by which it sidestepped this inevitable conclusion, when it said "It is open to a party to take an extra precaution to ward off possible disconcerting experiences while planning for the future". Ignoring -

or at least not giving sufficient weight -- to the wealth of evidence in favour of the submissions of Madhusoodhanan, the learned judges of the Appellate Court sought to base their assessment of the evidence on the absence of documents, such as income tax returns of Madhusoodhanan, which according to them would have shown the acquisition of the additional shares by Madhusoodhanan from Mani, an exercise which was entirely uncalled for in the face of the positive evidence already on record and the repeated admissions of Mani and his group before the Court.

Furthermore, under Section 194 of the Companies Act, 1956, minutes of meetings kept in accordance with the provisions of Section 193 shall be evidence of the proceedings recorded therein and, unless the contrary is proved, it shall be presumed under Section 195 that the meeting of the Board of Directors was duly called and held and all proceedings thereat to have duly taken place. The onus was on Mani to disprove that the transfers had not taken place as recorded in the minutes of the Board meeting held on 21 May, 1985, an onus that he has singularly failed to discharge. Learned counsel for Mani submitted that the statutory presumption was not available as Madhusoodhanan had admitted that no formal meetings were held and that the minutes were prepared after informal discussions by the Company Secretary and shown to Srinivasan who signed the same after it was approved by Madhusoodhanan. The submission is unacceptable for three reasons. First: The Articles of Association of the Company (Art.81) allow Directors to regulate their meetings as they think fit. Also Art. 89 says that a resolution in writing circulated to all the Directors and assented to by a majority of them shall be as valid as a resolution passed at a meeting of the Board of Directors. Second, Section 193(1) of Companies Act 1956 provides:

193(1) Minutes of proceedings of general meetings and of Board and other meetings. - Every company shall cause minutes of all proceedings of every general meeting and of all proceedings of every meeting of its board of directors or of every committee of the Board, to be kept by making within thirty days of the conclusion of every such meeting concerned, entries thereof in books kept for that purpose with their pages consecutively numbered".

Therefore, the minutes may be prepared subsequently, but they must be duly entered in the Minute Book and initialed and it is nobody's case that this was not done. Finally, Madhusoodhanan has also said that formal meetings were held and that important decisions were circulated to all members. In any event, our conclusion that the transfer of shares by Mani and his children to Madhusoodhanan would stand without the support of the statutory presumption under Section 195 of the 1956 Act.

Exhibit P-3, the third agreement which was referred to at the outset has a clause which relates to the sale of Mani's shares in Kerala Kaumudi to Madhusoodhanan which both sides have referred to and relied upon but there has been no consensus as to the correct interpretation of the clause. This controversy is addressed in detail in

connection with Madhusoodhanan's suit for specific performance of the agreement.

Had this clause been the only basis on which this Court were called upon to decide whether there had been a transfer or sale of the shares of Mani's group to Madhusoodhanan, no doubt it would have been difficult to determine what had in fact happened. However, the clause is only one of a series of documents, the authenticity of which cannot be disputed, which clearly show that the transfer had taken place although the exact consideration may not have been agreed upon or paid.

Mani did not attend the Board meeting held on 21st May 1985 or any other till he was admitted to membership of Kerala Kaumudi on 26th August 1986. Apart from this telling circumstance supporting Madhusoodhanan's case, Srinivasan had attended and signed the minutes of the meeting on 21st May, 1985. His claim that no such meetings were in fact held and that whenever he signed the minutes of the meetings held during the managing directorship of Madhusoodhanan, he did so at the instance of the latter without being aware of the contents of the minutes is hardly likely. The brothers were already at daggers drawn and it is unbelievable that he would place such unquestioning faith in Madhusoodhanan. Additionally, the entries in the Attendance Register of Kerala Kaumudi (Ex. P-81) also belies this assertion. Besides, the falsity of this explanation is apparent from the minutes of the meeting held and the statutory records submitted by Srinivasan after Madusoodhanan was removed as Managing Director of Kerala Kaumudi which continued to state that Mani and his children had transferred their shares in the company to Madhusoodhanan.

The fact that all the parties, including Ravi, Srinivasan and Mani himself, hardened businessmen all, not only proceeded on the basis that there was effective transfer of Mani and his childrens' shareholding to Madhusoodhanan but also certified the same to the Registrar of Companies, and additionally affirmed that such transfer had taken place on oath in their affidavits can only lead to the conclusion that the transfer had been legally effected on the basis of duly executed share transfer forms in compliance with the provisions of the Companies Act, 1956.

Nevertheless, the respondents argue, there were in fact no share transfer forms which were placed before the Board and the only transfer forms executed by Mani and his children were invalid because of non-compliance with Section 108 of the Companies Act, 1956.

In his examination in chief, in response to the question whether he and his children had transferred their shareholding to Madhusoodhanan, Mani said:

"When I decided to relinquish my directorship, the Secretary brought the required letter, which I signed. Later the forms for transferring our shares to the petitioner (Madhusoodhanan) were brought. But I found that the consideration column in those forms were not filled. Petitioner told me that the consideration can be fixed later and the transfer may be effected immediately. But I said that I will sign it only after fixing the consideration. Even so, in order to assure him that I will transfer the shares, I signed the forms and handed it over to my wife for keeping them in safe custody. I knew that if the matters were not finalised within 60 days the forms cannot be made use of thereafter. So I requested the petitioner several times to fix up the consideration.

But he did not do so. I did not hand over the forms to the petitioner".

The admitted case therefore is that Mani and his children had agreed to transfer their shareholding to Madhusoodhanan, but according to them, such transfer never took place. Mani produced the share transfer deeds, presumably from the custody of his wife as Exhibits R 9-12. Exhibit R 9 is signed on 11.5.1985. It is an unstamped document and purports to record the transfer of 222 shares by Mani to Madhusoodhanan. Similarly R. 10 is a share transfer form signed by Valsa on 11.5.85 transferring 84 shares to Madhusoodhanan. The document bears stamps of the value of 720 rupees on the reverse. R.11 is a share transfer form signed by Mani's wife as a transferee recording the transfer of 84 shares by Sukumaran Mani to MS Mani. It is dated 11th May 1985. It also bears stamps of the value of Rs 720. R.12 is a share transfer form signed on 11th May 1985 by Mani transferring 84 shares to Madhusoodhanan. The document is signed on 11th May 1985. All the share transfer forms bear the stamp of what appears to be of the office of the Registrar of Companies dated 20.4.85. All four exhibits show that they have been entered in the Register of Transfers of Kerala Kaumudi on 23rd May 1985 and bear the serial numbers 30, 33, 31 and 32 respectively.

There is a controversy as to whether these share forms were the share forms which were placed before, and approved by the Board of Directors of Kerala Kaumudi at the meeting held on 21st May 1986. Madhusoodhanan claims that these are not the share transfer forms. Mani and his group contend to the contrary. The issue would be of importance if one were to allow the respondents to resile from their admissions. We are not minded to do so. Nevertheless, since the reasoning of the Division Bench rests to a large extent on the question whether the transfer was in accordance with S.108 of the Companies Act, it would be appropriate to pronounce on this.

Section 108 of the Companies Act, 1956 insofar as it is relevant provides:

"A company shall not register a transfer of shares in, or debentures of the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transfer has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures"

According to Mani, the share transfer forms were not duly stamped and could not be given effect to under Section 108 of the 1956 Act. If Exhibits R9 to R12 are indeed the share transfer forms, he would be correct. In our view they are, in all likelihood, not the transfer forms which were placed before the Board of Directors on 21st May 1985.

It is on record, that Madhusoodhanan had made an application for production of the original share transfer forms from the custody of the company. It must be remembered that from March 1986, Madhusoodhanan no longer had any control over the affairs of Kerala Kaumudi. The papers, books and other records of the company were in the custody and control of those who controlled Kerala Kaumudi namely Srinivasan and Ravi. It is not improbable that the share transfer certificates which had been placed before the Board meeting

were deliberately not produced.

The Division Bench held that exhibits R.9 to R.12 were the "real" share transfer forms because they were dated 23.5.1985 and the evidence of Madhusoodhanan was that he had signed only one set of transfer forms in 1985. The Division Bench also relied upon what appears to be an unsigned stamp of the office of the Registrar of Companies dated 20th April 1985 although no one has pledged his or her oath to it. Having come to the conclusion that the share transfer forms produced by Mani, exhibits R.9 to R.12, were the "real" transfer forms, the Division Bench set about demolishing those documents as being invalid and not legally effective.

In our opinion, given the documentary evidence of completed transfers, it is more than probable that the "real" share transfer forms were never produced by Mani and his group and that exhibits R. 9 to R. 12 were prepared in 1984 as claimed by Madhusoodhanan. Mani has himself stated:

"At that time it was proposed to start Calicut edition of the paper. But the high technology machinery required for what further increased the debts of Kerala Kaumudi. This caused considerable financial strain. I put in some suggestions for rectifying these matters. But mother and brothers were not able to appreciate my views. Therefore, I even told them that I was prepared to relinquish all my shares, 1/3rd each to my brothers. In that connection some papers were also prepared."

The Calicut edition of Kerala Kaumudi was started in September 1984. It is possible "these papers" were Exhibits R-9 - R-12. This inference is in keeping with the repeated admissions of the respondents on oath and their conduct on the basis that the transfer had legally taken place. An additional fact is Exhibit R18 which is a voucher for a cash payment of Rs.2370/- issued to Kerala Kaumudi towards the "cost of share transfer stamps purchased". It is dated 16th May 1985 and signed by Madhusoodhanan, Srinivasan, Madhusoodhanan's wife and Ravi's wife as well as the cashier, the clerk, the accountant, the manager and the Secretary of Kerala Kaumudi. The corresponding entries in the expense account of Kerala Kaumudi which form part of this exhibit, show that the accounts of Mani and Madhusoodhanan have been debited with the amounts of Rs.420/- and Rs.1950/- respectively. It is improbable that stamps having been purchased for the share transfers which was recorded as effected four days later, they would not have been utilised. In this state of the evidence it cannot reasonably be held that Mani and his group have been able to establish that the transfer of the 390 shares by them to Madhusoodhanan was effected in violation of Section 108 or any other provision of the Companies Act, 1956.

The Annual Returns signed by Srinivasan and Ravi (Ex. P 28, P 130 and P-131 (a)), statutory declarations (Exhibits P.86 to P.88) for the years ending on 1st March 1986, 1st March 1987 and 1st March 1988 also signed by Srinivasan and Ravi, the affidavit of Madhavi dated 25th November 1986, the affidavit of Mani dated 28th November 1986 and other documents in all of which repeated admissions were made by Madhusoodhanan's antagonists that Mani and his children had transferred their shareholding to Madhusoodhanan were brushed aside by the Division Bench on the very weak explanation given by Mani as to why these repeated admissions had been made even after the filing of the litigation between the parties. The Division Bench erred in ignoring the affidavits of Madhavi and Mani by saying that it "would not be sufficient or strong enough to operate as a transfer of shares". Nobody can reasonably contend that a transfer of shares can be effected by mere assertion in an affidavit. What the Division Bench

ought to have held was that all this evidence indicated that there were in existence duly executed share transfer forms prepared in conformity with the provisions of Section 108 of the Companies Act, 1956 which everyone had accepted and acted upon and which were deliberately not produced.

On the question of the invalidity of the transfers of Valsa and Sukumaran Mani to Madhusoodhanan, Valsa Mani was admittedly a major on 21st May 1985. And yet the Division Bench held that Mani continued to stand in a fiduciary relationship with her and therefore "the transfer which purports to have been effected by Valsa Mani on her own will clearly indicate the stamp of illegality and invalidity". The reasoning is incomprehensible and unacceptable. Valsa was an adult and legally competent to enter into a contract of sale of her shares to Madhusoodhanan which she duly did.

As far as the shares of Sukumaran Mani are concerned, in our opinion, the learned Single Judge was right when he said that Mani's group could not question the transfer of the shares of Sukumaran Mani on account of his minority, as Sukumar Mani had not effected any transfer directly in favour of Madhusoodhanan. As Sukumaran Mani was at the relevant point of time a minor, his shares were transferred by his mother as guardian to his father, Mani, who had in turn transferred the shares to Madhusoodhanan. The Appellate Court was wrong when it held that the transfer of the shares of Sukumaran Mani was "an absolute nullity in the eye of law" on the ground that the initial transfer by Sukumaran Mani was invalid because it was sought to be effected by Sukumaran Mani's mother who was not his legal guardian and who "figured as a guardian only as a ruse for getting over the statutory provision". The transfer of Sukumaran Mani's share through his mother to Mani has not been challenged. Therefore the issue of Sukumaran Mani's minority and his mother's competence to act as his legal guardian, were not issues which could be relevantly raised before, or decided by the appellate court.

Coming now to the question of consideration, the Division Bench on an interpretation of Sec. 108 held that "the fixation of the price was a condition precedent, even in relation to an important and mandatory procedural formality like the payment of stamp duty to make the transfer lawful and proper".

We have already held that the relevant share transfer forms must be taken to have been duly executed. Although Mani and Madhusoodhanan had agreed to determine the actual consideration later, clearly some consideration was agreed to be shown on the share transfer forms. As noted, Exhibit R.18 produced by Mani's group is a voucher for the cost of share transfer stamps. The stamps must have been purchased on the basis of the consideration which was shown on the share transfer forms at the prescribed percentage under the Stamp Act.

But it is also clear from the evidence on record that this was not the "actual" price which was to be determined consensually by Mani and Madhusoodhanan. On 19th January 1985, Mani wrote a letter to Madhusoodhanan which has been exhibited as P-134. The letter states:

"This is in continuation of discussion I had with you, regarding the sale of Flow line machine, Sheet-fed offset and the Cutting machine to me. My offer is Rs 3 lakhs for all the three machines. This amount may be deducted from the sale value of shares you owe to me. Kindly let me know your decision so that I can arrange to lift the machines".

Then we have the paragraphs from the affidavits of Madhavi and Mani quoted earlier which talk of the "balance consideration".

Finally is the lawyer's notice dated 20.3.87 (Ex.P-83) sent on

behalf of the Mani to Madhusoodhanan threatening legal action unless Madhusoodhanan paid "the balance sale consideration of Rs.50 lakhs". "Since Mani had positively asserted that he must get a price between 50 and 75 lakhs, and that price negotiated was "in between the said figures".

Madhusoodhanan's claim in this regard is inconsistent. At one stage he claimed that the consideration for the transfer was recorded in the transfer form. At another stage he said:

"As far as transferring the shares is concerned, it is already transferred at the face value by fixing the proper stamps and the process have been completed. The excess amount I will pay on the shares will depend upon finally when he transfers the 3 shares to me; but I will not enter into a written agreement, I will continue to pay as and when the 5th respondent required money".

"The only agreement was that whatever be and price paid for the shares, that should not be known to anybody else including our wives".

Madhusoodhanan has claimed that he in fact paid Rs.10 lakhs to Mani. In his letter dated 28.7.86 written to Srinivasan. Madhusoodhanan had asserted (Exhibit P 11) that he had paid Rs 5 lakhs to M. S. Mani as part payment for his shares which had been purchased by Madhusoodhanan and that this brought the total payment made on this account to Rs 10 lakhs. Mani contended that there was a total failure of consideration, a contention which was accepted by the Appellate Court. The truth appears to lie somewhere in between.

There is no dispute that the machines were in fact lifted by Mani, pursuant to Ex. P.134. Exhibit R-14 evidences payment by Kerala Kaumudi of Rs 3 lakhs to Madhusoodhanan for, ostensibly purchasing property at Cochin for Kerala Kaumudi. The Division Bench holds that "It is this money that is utilised for payment to Mani as part consideration of the shares to be transferred by Mani and his group." However the Division Bench discounts this payment because "The very transaction itself may be open to serious challenge. The money of the company cannot be appropriated for a personal purpose of a person having a fiduciary capacity vis-a-vis the company". As a statement of law this is a doubtful proposition. Be that as it may, it is apparent that Mani received some consideration for the transfers although the consideration may have moved from Kerala Kaumudi to Mani. To sum up - the transfers by Mani and his children were effected validly to Madhusoodhanan. Their prayer for rectification of the share register is therefore rejected and the decision of Division Bench in the appeal (MFA 347/90) arising from CP 26/87 is accordingly set aside. The removal of Madhusoodhanan as Managing Director

That Madhusoodhanan had been continuing for some time as Managing Director of Kerala Kaumudi is evident from the minutes of the Board meeting held on 5th July 1983 (Ex.P.-62(g)). The minutes of the Board meeting dated 25th January 1985 (Ex.p.62(H) records the presence of Madhavi, Mani, Madhusoodhanan, Srinivasan and Ravi and the unanimous resolution to appoint Madhusoodhanan as Managing Director and Editor of the company for life. It also records that Madhusoodhanan had been working as the Managing Director of Kerala Kaumudi for 11 years as on that date, in other words since 1973. The decision to so appoint Madhusoodhanan was secured by

proposing an amendment to the Articles of Association of the Company in the following manner:

"Mr. M.S. Madhusoodhanan, presently the Managing Director and Editor be and is hereby appointed the Managing Director and Editor of the Company for life or until he voluntarily retires on the existing remuneration, which remuneration may be revised by the Board from time to time with the consent of Mr. M.S. Madhusoodhanan. He shall also in exercise of his duties as Managing Director exercise the powers given to the directors under Article 79".

It is not a dispute that an Extraordinary General Meeting was held which approved this resolution and that the Articles of the company were duly amended by the introduction of Article 74. The last meeting of Kerala Kaumudi attended by Madhusoodhanan was of 5 February 1986. It does not appear from the minutes of the meeting (Exhibit P2 (J)) that anything of import relevant to the issues to be decided in these appeals took place on that day. Then comes the first meeting, which, according to Madhusoodhanan, was illegal. This was held on 23rd July 1986. The minutes of the meeting (Exhibit P 62 (K)) show that Madhavi, Madhusoodhanan, Srinivasan and Ravi were present. Several resolutions were taken by the Board on that day which were opposed by Madhusoodhanan. Of the several, the relevant are quoted: "Resolved that Smt.C.N. Madhavi, Chairman shall assume the executive powers of the Managing Director of the company with immediate effect for efficient running of the organisation".

"Resolved that an extraordinary general body meeting be convened at a date suitable for the Chairman to discuss and take decisions on matters arising out of the above decisions and that the Chairman be and is hereby authorised to issue notices to all concerned". The fact whether any notices were at all issued to Madhusoodhanan or to the other shareholders in his group including his children or to K. I. P. L. is seriously disputed by them. According to Mani and his group however, notices were duly issued of the meeting which was due to be held on 1st August 1986. The minutes of the meeting held on 1st August 1986 (P-62 (L.)) records that Madhavi, Srinivasan and Ravi attended the meeting. Out of the various resolutions which were taken regarding the administration of Kerala Kaumudi, what is important is the resolution taken by the Board members unanimously to the following effect:

"Resolved that the issued share capital of the company be and is hereby increased to Rs 20 lakhs by issuing additional shares worth Rs 4.25 lakhs (for 25 shares of Rs 1000 each) at par. The Chairman was authorised to issue notices to the existing shareholders to apply for shares within seven days".

Madhusoodhanan and K. I. P. L. say that since they did not get any notice of the meeting and were not otherwise informed of what had taken place, they did not apply for allotment of any part of the additional shares which had been decided to be issued. As a result in the next meeting which was alleged to have been held on 8th August 1986, (Ex. P-62 M) between 9 a.m. and 10 a.m. at Madhavi's residence and attended only by Madhavi, Srinivasan and Ravi, 425 shares were allotted to Srinivasan and Ravi on applications dated 4th August 1986 received from them -- 212 shares being

allotted to Srinivasan and 213 shares to Ravi. The next meeting which is the subject matter of challenge by Madhusoodhanan is the meeting held on 26th August 1986. It was attended by Madhusoodhanan, albeit, according to the minutes [Ex P - 62 (N)], under protest. It was at this meeting that Mani was admitted as a shareholder of Kerala Kaumudi by Ravi's sale of one share to him despite Madhusoodhanan's objection. However, the unkindest cut was yet to come. Madhavi, as Chairman, proposed "that an extraordinary general meeting of the company be convened to remove Sri M. S. Madhusoodhanan from the directorship of the company for his actions against the interest of the company and his misconduct". Madhusoodhanan objected and said that this could not be done without amending the Articles of Association. The minutes go on to record that Madhavi pointed out that Article 74 of the Articles of Association had already been deleted at an extraordinary general meeting of the company held for that purpose and also that the legal opinion was that the Board of the prescribed number of members could convene a general body meeting for removal of a Director in exercise of the powers under section 284 of Companies Act, even if a person be appointed a Director for life. A resolution was then taken to convene an extraordinary general meeting on 25th September 1986 to pass the following resolution:

"Resolved that Sri M. S. Madhusoodhanan be and is hereby removed from being a Director of the company with immediate effect in accordance with section 284 of Companies Act 1956 and all other provisions in this behalf of the Companies Act, 1956 and Articles of Association of the company".

The Extra Ordinary General Meeting of Kerala Kaumudi was held on 25th September 1986 at its registered office. The resolution to forthwith remove Madhusoodhanan as Director under section 284 of the Companies Act 1956 was passed taking into consideration the additional shareholding of Ravi and Srinivasan. Madhusoodhanan and his group did not vote.

On 27th September 1986 the Board of Directors of the Kerala Kaumudi held a meeting attended by Madhavi, Srinivasan and Ravi, at which Srinivasan was appointed as Managing Director of the company, Mani was appointed as additional Director, Madhusoodhanan was removed from the post of editor and Mani was appointed in his place and stead. Madhusoodhanan's final ouster from the control of Kerala Kaumudi was thus completed. According to Madhusoodhanan, resolutions quoted above removing him as Managing Director of Kerala Kaumudi were illegal because in terms of Article 74 of the Articles of Association of Kerala Kaumudi, Madhusoodhanan was appointed the Managing Director and editor of the company for life. It is contended that in accordance with the Memorandum and Articles, 75 percent of the votes was required to amend the Articles. Mani's group (including Madhavi) held only 50% of the shares of Kerala Kaumudi. The remaining 50% shares were held by Madhusoodhanan and his family and KIPL. The second submission of Madhusoodhanan and KIPL is that they were not given any notice of the Board meeting which was purportedly held on 1st August 1986 at which the decision was taken to offer further shares for allotment and that they were not given any opportunity to apply for the additional shares. It is also the submission of Madhusoodhanan and KIPL that in fact no meeting was held on 8th August, 1986, at which the further shares were allotted to Ravi and Srinivasan.

Madhusoodhanan and KIPL's applications Nos. CP 14/86 and CP 31/88 were therefore filed for rectification of the share register of Kerala Kaumudi as noted earlier and suit CS No. 3/89 was filed by Madhusoodhanan for a declaration that he is the Managing Director of Kerala Kaumudi, KIPL's CS No. 5/89 was filed for cancellation of

the impugned annual general meetings and extraordinary general meetings of Kerala Kaumudi.

A. Alteration of Article 74 of the Articles of Association of Kerala Kaumudi

Sub-section (1) of section 31 of the Companies Act, 1956, provides that the company may alter its articles only by special resolution subject to the provisions of the Act and the conditions contained in its memorandum. Our attention has not been drawn to any condition in the memorandum of Kerala Kaumudi which prescribes something different from the provisions of the Act for effecting an alteration of the articles. Article 49 of the Articles of Association of Kerala Kaumudi provides:

"Subject to the provisions of Sub-section (2) of Section 81 of the Indian Companies Act, 1913, relating to special resolutions, fourteen days' notice at the least (exclusive of the day on which the notice is served, or deemed to be served but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in General Meeting to such persons as are, under the Indian Companies Act, 1913 or the Regulations of the Company, entitled to receive such notices from the Company, but the accidental omission to give notice to or the non-receipt of notice by any member shall not invalidate the proceedings at any General Meeting."

The corresponding section in the 1956 Act to Section 81 of the Indian Companies Act, 1913, is section 189. The relevant extract of section 81 of the 1913 Act reads:

"81. Extraordinary and special resolutions.

(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given:

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

.....

(7) For the purpose of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, or under this Act".

Therefore three conditions had to be fulfilled before any alteration of the Articles could take place.

(i) Notice specifying the intention to propose the resolution as an extraordinary resolution must be given.

(ii) The resolution must be passed by 75% of the members present and ;

(iii) Not less than 21 days notice of the meeting must be duly given.

The requirements are cumulative and mandatory.

Coming now to the facts of this case, it is apparent that none of the three preconditions for effecting an alteration in the Articles of Kerala Kaumudi by deleting Article 74 were fulfilled. It may be recalled that at the Board meeting held on 23rd July 1986 (Ex.P.62(K)) in connection with Madhusoodhanan's functioning as a Managing Director, only a limited resolution was taken, namely, that Madhavi "shall assume the executive powers of the Managing Director with immediate effect for effective running of the Organisation". The resolution that an extraordinary general body meeting be convened at a date suitable for the Chairman "to discuss and take decisions on matters arising out of the above decisions" was therefore confined to this limited resolution. Exhibit R -5 is the notice dated 25th July 1986 purporting to call an extraordinary general meeting of the shareholders of Kerala Kaumudi on 16th August 1986 at 11 AM to inter alia consider and if thought fit to pass as a special resolution the following:

"Resolved that the consent of the Company be and is hereby accorded in order to satisfy the requirements of section 192 (c) and other applicable provisions, if any, of the Companies Act 1956, to ratify the following resolutions adopted by the Board of Directors of the Company at its meeting dated 23. 7. 1986.

1. "Resolved that Smt. C.N. Madhavi, Chairman, shall assume the executive powers of the Managing Director of the Company with immediate effect for efficient running of the Organisation".

There is no mention whatsoever in the notice of any intention or proposal to amend the articles of the company. The Explanatory statement annexed with the notice states (in so far as it is relevant) " Special resolutions have been brought before the General Body, since it is felt that the effect of the said resolutions taken by the Board and being implemented may have the effect of curbing the powers of the Managing Director vested with him by the General body". What has been deliberately and completely glossed over is that

Madhusoodhanan's power was not sought to be merely curbed, but completely denuded. At the Extraordinary General meeting held on 16th August 1986 (Ex.P 57 (a)), when the special resolution was taken up for consideration, Madhavi said that she would like to submit a report "in continuation of the Explanatory statement mentioned in the notice" and then proposed that "another special resolution also be passed deleting Article 74 of the Articles of Association of the company".

This acknowledges that there was no earlier extraordinary general meeting deleting Art.74 as Madhavi had claimed in the meeting dated 23.7.1986. Furthermore it shows that the special resolution which was proposed in the notice was not the resolution which was ultimately passed. In the garb of ratifying the resolution taken by the Board of Directors on 23.7.1986, what was in fact "ratified" was not only the proposal to remove Madhusoodnan as Director but also the immediate deletion of Article 74 of the Articles of Association of the Company. The expression of intention in the notice under section 81(1) (corresponding to Section 189 (2)(a) of the 1956 Act) should be sufficiently specific so as to effectively inform each member of the company of the actual resolution sought to be passed in the general meeting. The notice must be frank, open, clear and satisfactory. If it is not, the notice is bad and the special resolution vitiated and cannot be acted upon. "If any attempt is made by the directors to get the sanction of the shareholders, it must be made on a fair and reasonably full statement of the facts upon which the directors are asking the shareholders to vote...and special resolutions obtained by means of a notice which did not substantially put the shareholders in the position to know what they were voting about cannot be supported" (see *Baillie v. Oriental Telephone and Electric Co Ltd*: [1915] 1 Ch. D 503, 514-515; [1914-15] All E.R.Rep. 1420, 1425, 1426).

Since the further resolution to delete Art. 74 formed no part of the notice of the Extraordinary General Meeting, which in all fairness it should have, we have no doubt in our minds that the special resolution on the basis of such defective notice is insupportable in law and cannot be given effect to. This finding is sufficient to hold that the deletion of article 74 of the Articles of the company was invalid and that therefore Madhusoodhanan continued to be the managing director of Kerala Kaumudi as claimed by him in CS 3/89.

However we may also indicate briefly here our additional reasons for reaching this conclusion. The notice (Ex.R-35) was required to have been served on all the members of the company either by post or personally in terms of Article 108 or section 53 of the Act. The second imperative for a special resolution to be validly passed is that notice of the general meeting must be 'duly' given. The mode of service of notice on members has been provided for under Article 108 which is similar to Section 53 of the 1956 Act in all material respects. The two modes envisaged are personal service and service by post. There is no other mode envisaged. We are not satisfied that the service of the notice was effected either on Madhusoodhanan or any other share holder in his group, including KIPL by either of the modes specified.

The submission of the respondents that under Article 49 of the Articles of Association of the Company even if no notice were given of the Extraordinary General Meeting, this would not vitiate the proceedings is misconceived. This was no ordinary general meeting, but a meeting where a special resolution was to be passed. This had to be done under section 81 of the 1913 Act, to which Article 49 is expressly subject, and the requirement for giving due notice under section 81 is mandatory. Furthermore, Article 49 speaks of an "accidental omission" to give notice not officiating the proceedings. In other words the omission must be bona fide, and not an omission which was wilful as it was in this case. Furthermore, The third condition to be fulfilled before the

Articles can be amended under section 81(1) of the 1913 Act, (S. 189 (2) (c) of the 1956 Act) is that at least 75 percent of the members entitled to vote and voting must support the resolution. This mandatory need to have the special resolution passed by a statutory majority of 75% was also sought to be circumvented by the respondents by the purported issue of additional shares to Ravi and Srinivasan. Both these aspects are dealt with in connection with the issue of additional shares.

B) Issue of additional shares.

In order to push through the so-called special resolution deleting Article 74 with the requisite majority of 75 percent, it was necessary from the respondents' point of view to ensure that Madhusoodhanan's shareholding which was more than 50% of the paid-up share capital of the company was reduced to 25 percent. This was sought to be achieved by the respondents in two stages. First, by taking a decision to increase the paid up share capital of the Company by issuing an additional 425 shares. Second, by not giving Madhusoodhanan or any of his group to any chance participate in the fresh allotment of shares and ensuring that the shares were allotted to Ravi and Srinivasan. The evidence on record amply bears this out. As we have seen, Madhavi assumed charge as Managing Director of the company on 23.7.86 with the object of ousting Madhusoodhanan from his control over the affairs of Kerala Kaumudi. This needed to be ratified by the general body of shareholders. The minimum period of notice for a general body meeting under Article 49 read with Section 81 of the Act is "not less than 21 days", that is there should be a clear interval of 21 days and in computing the period the date of the meeting and the date of service of the notice is to be excluded. (See Nagappa Chettiar V. The Madras Race Club AIR 1951 Mad 831, 838; In re Hector Whaling Lt. [1936] 1 Ch.208). So the notice dated 25. 7. 86 (Ex. R.-35) was issued for holding the extraordinary general meeting on 16th August 1986 with the requisite statutory majority of 75 percent .

A decision was taken by the respondents at the meeting of the Board on 1st August 1986 (Ex..P-62(1)), to increase the share capital of the company to Rs. 20 lakhs by issuing additional shares worth Rs 4.25 lakhs. At the same meeting , the Chairman (Madhavi) was authorised by the two other directors present namely Ravi and Srinivasan "to issue notices to the existing shareholders to apply for shares within seven days". What is noteworthy is that the last day for making an application for allotment of any of these additional shares was fixed at seven days from the date of the Board meeting so that Madhusoodhanan's shareholding could be reduced to 25% before the Extraordinary General Meeting to be held on 16th August 1986. According to Madhusoodhanan and his group they neither knew of the meeting dated 1st August 1986 nor did they receive any notice with regard to the allotment of additional shares nor of the meetings said to have been held on 8.8.86 and 16.8.86, in which the allotment of additional shares to Ravi and Srinivasan were made and later confirmed.

The Learned Single Judge held that no notice either of the Board meeting held on 1st August 1986 or for the issue of additional shares had been served on Madhusoodhanan. He also referred to Articles 40, 41 and 18 of the Company to hold that the notice period of seven days to apply for allotment of additional shares was far too short. He upheld the contention of Madhusoodhanan that no meetings were in fact held on 8.8.86 or 16.8.86 and that there was as such no valid allotment of the additional shares to Ravi and Srinivasan. Madhusoodhanan's claim for rectification of the share register of Kerala Kaumudi was accepted and a fresh allotment of the additional shares was directed to be held. The Division Bench disagreed on all counts with the learned Single Judge, in our view, erroneously. Let us consider in the first place whether the notice of the meeting dated 1st August 1986 was served on Madhusoodhanan.

The evidence produced by the respondents in this regard is as

follows:

(i) an entry dated 25th July 1986 in the local delivery book of Kerala Kaumudi (Ex. R. 8 (a)) which shows against the name and address of Madhusoodhanan that "one letter regarding Board and General Body Meetings" was acknowledged as having been received on behalf of Madhusoodhanan by one Mohanraj, the then personal assistant of Madhusoodhanan (P.W.2) who has written that he "handed same over to Mrs Madhusoodhanan through Mr Raghunathan, peon". There is no remark under the column "By whom delivered".

(ii) an entry in the outward register of Kerala Kaumudi (Ex.p 93 (p)) which shows that "one letter Board meeting on 1.8.86.Gl. Body meeting on 16.8.86" was dispatched on 25.7.86 to Madhusoodhanan with copies to Srinivasan, Ravi and Mani.

(iii) an affidavit of Mohan Raj affirmed on 25th August 1986 in O. S. 1329 of 1986 (Ex. R-7) in which he has affirmed "sealed envelopes from the Chairman, Kerala Kaumudi (P) Ltd was served on me on 25.7. 86 and 1.8.86 and I have signed the local delivery book as a token of its acknowledgement and I have duly forwarded the letters to Sri M.S. Madhusoodhanan". Not one of these pieces of evidence at all establish that the notice dated 25th July 1986 of the Board meeting to be held on 1st August 1986 was served on Madhusoodhanan. As far as item (i) is concerned, it certainly does not amount to personal service on Madhusoodhanan as required under the Articles or section 53 of the Companies Act, 1956. Apart from this fatal legal flaw, the exhibit merely records that an unknown or at least an unnamed person handed over a sealed envelope to Mohan Raj who then handed it over to a peon, Raghunathan, who was to hand it over to Mrs Madhusoodhanan. No one has come forward to say that the sealed envelope contained the notice dated 25th July 1986. Assuming it did, there is nothing to show that the envelope ultimately reached Madhusoodhanan. The affidavit affirmed by Mohan Raj on 25th August 1986 (Ex R 7) contradicts the entry in the local delivery book. Apart from anything else, Mohan Raj has himself admitted that he had not forwarded the notice to Madhusoodhanan in several documents namely in Exhibits P.36, P.46, P.53 and in an affidavit exhibited as P.49, besides also giving oral evidence to this effect. We find no reason to disbelieve Mohan Raj's oral testimony as to the circumstances under which he had affirmed the affidavit relied on by the respondents.

As far as the outward register is concerned, it has not been proved as to who dispatched the notice nor does the register show how the dispatch was effected. It is unclear on what material the Division Bench proceeded on the basis that it was sent by post under certificate of posting. In any event, if this were indeed so, where is the certificate? Its absence is significant. Also significant is the absence of the actual notice alleged to be dated 25th July 1986 of the Board meeting held on 1st August 1986. Why was it not produced by the respondents? What did the notice say? Did it indicate the intention to issue additional shares for the purposes of increasing the share capital company as it should have? We do not know. But we can only observe that the absence of the notice raises a presumption against the respondents. And in so far as the outward dispatch register is concerned, the mode of dispatch has not been mentioned nor is there anything to show that the notice was in fact dispatched. In the circumstances, we have no doubt that Madhusoodhanan was not given any notice of the Board meeting said to have been held on 1st August 1986.

The respondents have relied on Madhusoodhanan's letter dated 8th August 1986 to Srinivasan (Ex. P.35) in which he complained that he had not been receiving his personal mail or letters addressed to him as Managing Director since 4th August 1986 and

that the usual method of handing over such mail to his personal assistant was not been followed, to contend that the notice dated 25th July 1986 had been duly served on Madhusoodhanan and received by him.

The letter is a complaint regarding the complete blocking of all mail both personal and official by the respondents since 4th August 1986. It cannot be construed as an admission that all mail prior to that date had been duly received. In fact, on the same date that exhibit P.35 had been written by Madhusoodhanan to Srinivasan, he also wrote to Madhavi (Ex.P.24) that on 3rd August 1986 he came to know "while holding discussions with the Deputy Manager of Canara Bank, Trivandrum, that you purported to hold a Board meeting on 1.8.86. I have had no notice of this meeting and consequently this was illegal. Any decision taken there is invalid and not binding on the company or me. You purported to pass a resolution regarding the operating of the bank accounts. My power to operate bank accounts of the company on my own as managing director is not depended (sic) on any resolution of the board. The board cannot take away those powers or make it necessary that someone else who sign (sic) with me". The letter was admittedly received but not replied to. Apart from the categorical assertion of lack of notice of the meeting held on 1.8.86, it is clear from the contents of the letter that Madhusoodhanan had no knowledge of what actually transpired there.

Since Madhusoodhanan did not know of the meeting held on 1st August 1986, he was not aware, as the respondents were, either that additional shares were being issued or that the application for additional shares had to be made within seven days of the meeting. Exhibit R. 26 Is a Notice Dated 1.8.86 issued under the signature of Madhavi. It refers to financial difficulties faced by the company which made it necessary for the Board by its Resolution dated 1.8.86 to issue 425 equity shares of Rs.1000/- each for subscription to the existing shareholders. The notice which appears to be addressed to Madhusoodhanan, his two children, Srinivasan and his daughter, Ravi and his daughter and finally to KIPL finally states: "You are eligible to apply for additional shares within seven days".

Article 40 of the Articles of the company requires all new shares to be offered to all existing shareholders "in proportion, as nearly as the circumstances admit to the amount of the existing shares to which they are entitled". The offer is required to be made by notice "specifying the number of shares offered, and limiting the time within which the offer, if not accepted, will be deemed to be declined..."

The notice, exhibit R-26, is not in this form at all. However, the respondents have sought to rely upon the following evidence in support of their contention that Madhusoodhanan was given an opportunity to apply for the additional shares by service of a notice dated 1.8.86. :

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

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

(c) A Certificate of Posting dated 1.8.86 (Ex.R.25) which purports to relate to service of the notice on Madhusoodhanan, his children and KIPL

Both the learned Single Judge and the Division Bench accepted that the signature of the person acknowledging receipt of the notice was Mohan Raj. Where they have differed is whether this amounted to service upon Madhusoodhanan, his children or on KIPL either in

fact or in law. The learned single judge held it did not. The Division Bench disagreed. Considering the facts, we have no hesitation in holding the learned Single Judge was right.

We have already held that service on Mohan Raj did not amount to personal service within the meaning of Article 108 of the Articles of Association of the Company or Section 53 of the Companies Act, 1956. Even on the factual score, for the reasons set out by us earlier in connection with service of the notice dated 25-7-86, we are not satisfied that Madhusoodhanan was in fact served with a notice through Mohan Raj. Besides, the relevant entry does not refer to the notice.

As far as the certificate of posting is concerned, it is not explained why it does not record the dispatch of notices to any other shareholder. When the relationship between the parties was already so embittered, proof of service of notice by certificate of posting must be viewed with suspicion. Judicial notice has been taken that certificates of posting are notoriously "easily" available. What was seen as a possible but rare occurrence in 1981 (*Ummu Saleema v. B.B.Gujral* (1981) 3 SCC 317) is now seen as common. Thus in *Shiv Kumar v. State of Haryana* 1994(4) SCC 445,447, this Court said: "We have not felt safe to decide the controversy at hand on the basis of the certificates produced before us, as it is not difficult to get such postal seals at any point of time".

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

This Court in *Ummu Saleema's* case (supra) said that a certificate of posting might lead to a presumption if the letter was addressed and was posted, that it, and in due course, reached the addressee. "But, that is only a permissible and not an inevitable presumption. Neither section 16 nor section 114 of the Evidence Act, compels the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of case, the Court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the Court may hold a presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever dispatched as claimed".

This general rule regarding certificates of posting has not been changed under section 53 of the Companies Act., although it does provide that if a document is sent by post in the manner specified, "service thereof shall be deemed to be effected". The word "deemed" literally means "thought of" or, in legal parlance "presumed". There is a distinction between "presumption" and "proof". A presumption has been defined as "an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted" (*Izhar Ahmad v. Union of India* :AIR (1962) SC 1052, 1060). They are rules of evidence which attempt to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred (ibid.). Sometimes a discretion is left with the Court either to raise a presumption or not as in Section 114 of the Evidence Act. On other occasions, no such discretion is given to the Court so that

when a certain set of facts are proved, the Court is bound to raise the prescribed presumption. But that is all. The presumption may be rebutted.

While construing section 28-B. of the U.P. Sales Tax Act which inter alia provides that if a transit- pass is not produced at the check post on entry and at the point of exit, "it shall be presumed that the goods carried thereby have been sold within the State", the contention that the phrase "it shall be presumed that " meant that "it shall be conclusively held" was negatived. After referring to section 4 of the Evidence Act it was held by this Court in M/s. Sodhi Transport Co. v. State of U.P. :AIR (1986) SC 1099, 1105:):

"The words "shall presume" require the Court to draw a presumption accordingly, unless the fact is disproved. They contain a rule of rebuttable presumption. These words i.e. "shall presume" are being used in the Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and we should expect that the U.P. legislature also has used them in the same sense in which Indian Courts have understood them over a long period and not as laying down a rule of conclusive proof. In fact these presumptions are not peculiar to the Evidence Act. They are generally used wherever facts are to be ascertained by the judicial process"

It was accordingly held that the words "shall presume" contained in section 28B of the U.P Sales Tax Act only require the authorities concerned to raise a rebuttable presumption that the goods must have been sold in the State if the transit pass is not handed over at the check post at point of exit and that it was open to the transporter to still prove that the goods had been disposed of in a different way. (See also Syed Akbar V. State of Karnataka: AIR (1979) SC 1848; State of Madras v. Vaidyanatha: AIR (1958) SC 61)

Raising of a presumption, therefore, does not by itself amount to proof. The result of a mandatory requirement for raising a presumption cast on Court, as there is under section 53 (2) of the Companies Act, is that the burden of proof is placed on the person against whom the presumption operates for disproving it. It is only if such person is unable to discharge the burden, that the court will act on the presumed fact. (See Dahyabhai V. State of Gujarat: AIR (1964) SC 1563). A presumption however is of course not always rebuttable. But the mere use of the word "shall" before the word "presume" or other like word does not mean that the presumption is irrebuttable or conclusive. An irrebuttable presumption is couched in different language, normally indicating that proof of one set of facts shall be "conclusive proof" of a second set. An example of this is Rule 3 of the Rules framed in 1956 under section 18 of the Citizenship Act, 1955 which was the subject matter of challenge in Izhar Ahmad's case (supra). Section 53(2) contains no such language.

Consequently, the words "shall presume" in section 53 subsection (2) means a rebuttable presumption which the Court must raise provided the basic facts namely the due posting of the document is proved, the onus being on the addressee to show that the document referred to in the certificate of posting was not received by him.

In the present case, the certificate of posting is suspect. Assuming that such suspicion is unfounded, it does not in any event amount to conclusive proof of service of the notice on Madhusoodhanan or on any of the other addressees mentioned in the certificate as held by the Division Bench. Except for producing

the dispatch register and the certificate of posting, no one on behalf of the respondents came forward to vouch that they had personally sent the notice through the post to Madhusoodhanan and his group. Madhusoodhanan had written two letters contemporaneously dated 4.8.86 and 8. 8.86 (Ex.P-24 and Ex.P-35) to Srinivasan, the General Manager of Kerala Kaumudi and to Madhavi complaining that he was not receiving any mail at all. These letters were admittedly received but not replied to by the respondents. It is also apparent from a perusal of those letters that Madhusoodhanan had no knowledge whatsoever of the notice for application for allotment of additional shares. Had there been such notice it is improbable that Madhusoodhanan who was fighting for retaining his control over Kerala Kaumudi, would have risked losing such control by abstaining from applying for the additional shares.

In the circumstances we hold that Madhusoodhanan and his group were not served with the notice dated 1.8.86 . It is therefore unnecessary to decide whether the period prescribed in the notice to apply for the shares was too short or contrary to the Articles of Association of Kerala Kaumudi.

Once we have held that Madhusoodhanan and his group, all of whom held shares in Kerala Kaumudi, were not given notice to apply for allotment of the additional shares, it must be held that the subsequent allotment of the shares to Ravi and Srinivasan at the meeting held on 8.8.86 and the affirmation of such allotment at the meeting allegedly held on 16.8.86 were vitiated thereby and invalid. Although there appears to be substance in the submission of Madhusoodhanan, as accepted by the learned Single Judge , that no meetings were in fact held on 8.8.86 or on 16.8.86, in view of our finding relating to the non-service of the notice dated 1.8.86, we refrain from deciding the issue.

We, therefore, set aside the decision of the Division Bench in MFA 330/90, AS No. 164/90 and AS No. 165/90 and affirm the judgment and order of the learned Single Judge in CP 14/86 and the decree in CS No. 3/89 and CS No. 5/89 including the directions in connection with the allotment of the additional 425 shares. KIPL's application CP 31/88 was dismissed by the Single Judge and the appeal therefrom (MFA 559/90) also rejected. Since the subject matter of KIPL's application is covered by Madhusoodhanan's application CP 14/86 and was for identical reliefs, we merely dispose of the appeal in terms of this judgment without any further observation.

Specific Performance of the Karar 16th January, 1986

The last proceeding relating to Kerala Kaumudi was CS 6/89 which was a suit filed by Madhusoodhanan for specific performance of the Karar dated 16th January 1986.

We have already held that by May, 1985, Mani and his group had transferred their shareholding in Kerala Kaumudi to Madhusoodhanan, and that as a result of such transfer Madhusoodhanan and his group held more than 50% of the shares in the company. On 15th July 1985, Madhavi is alleged to have executed two agreements and a will transferring the 9 shares of the late Sukumaran and her own 3 shares to Ravi and Srinivasan [Ex.R.-59, Ex.R.-59(a) and Ex.R. 60]

It is in this background that the agreement dated 16th January 1986 must be read. The original of which is in Malayalam and which has been described by the parties as the Karar, has 11 clauses. It is admittedly written by Mani and is signed by Madhavi, Mani, Madhusoodhanan, Srinivasan and Ravi. It seeks to record the partition of assets by mutual consent. Clause 1 of the Karar provides that Madhavi would be the chairman of Kerala Kaumudi during her lifetime. Clause 2 provides that there will be no change in the existing share structure during the lifetime of Madhavi and that after the death of Madhavi, the shares of Kerala Kaumudi should be so given that Madhusoodhanan gets 50% of the total shares of the company including the shares owned by Mani, and Srinivasan and

Ravi get 25% each. It was also agreed that the shares of the late Sukumaran and Madhavi should be divided according to this percentage. The shares of KIPL in Kerala Kaumudi were also to be given to Madhusoodhanan, Ravi and Srinivasan in the same ratio. Then comes clause 3. While there is no controversy on the translation of clauses 1, 2, 4, 5, 6, 7, 8, 9, 10 or 11, the translation of clause 3 is seriously in dispute. We give the three different versions as put forward by Madhusoodhanan, the respondents and finally the official translator of this Court.

A) "Mr M. S. Mani is selling some of his shares in Kerala Kaumudi to Mr M. S. Madhusoodhanan and the price of that share will be informed to the other parties in time".

B) "the value of the shares of Kerala Kaumudi which is to be sold by M. S. Mani to M. S. Madhusoodhanan will be informed to others at the appropriate time".

C) "the price paid by M. S. Madhusoodhanan on the sale of Kerala Kaumudi shares by M. S. Mani will be intimated to other parties as and when (it is done)".

Having regard to our finding on the question of transfer of Mani's 390 shares to Madhusoodhanan in May, 1985, perhaps the appropriate translation is the one put forward by the official translator which is set out above as (C). This difference of opinion, however, is really of no moment, because the subject matter of Madhusoodhanan's claim for specific performance is limited to that part of the Karar which provides for the division of shares of the late Sukumaran and Madhavi in the percentage of 50: 25: 25 between Madhusoodhanan, Ravi and Srinivasan, on Madhavi's death. Before considering the merits of this claim, we may briefly refer to the remaining clauses of the Karar. Clauses 4 to 10 relate to the division of assets and shareholding in various family concerns so that each of the brothers had 52 percent shareholding in different concerns as specified below:

Mani	Laisa Publications Private Ltd
Madhusoodhanan	Kaumudi Investment Private Ltd ; Kaumudi Exports Private Ltd; Kaumudi News Service Private Ltd
Ravi	Ravi Printers and Publishers Private Ltd; Kaumudi Films Outdoor Unit ; Electronics and Equipment Corporation; Ravi Transport
Srinivasan	Srinivasan Printers and Publishers Private Ltd.

All other establishments were required to be closed down and Madhusoodhanan was appointed for that purpose. Clause 9 provides that if any shareholder in any of the concerns wishes to sell his shares, they must be offered to the "52% shareholders" at a price to be fixed by the others. If the 52% shareholders refuse to purchase the share, the others would have to do so at the value fixed by the concerned company's auditors according to the Company's balance-sheet for the previous year. Clause 10 provides that the agreement would bind the four brothers and their heirs in the event of the death of any one of them before the agreement was completely implemented. The last clause in the Karar is clause 11. It provides that all pending litigation regarding the subject matter of the Karar, should be withdrawn and that all disputes should be mutually settled, and if this is not possible the matter should be referred to an

acceptable third party whose decision would be binding.

On 2nd December 1987 Madhavi died and on 10th October 1988, Madhusoodhanan filed C. S. 6/89 for transfer of 50% of the late Sukumaran and Madhavi's shares to him and the transfer of 50% of KIPL's shareholding in Kerala Kaumudi to Ravi and Srinivasan in terms of the Karar. The defendants in the suit were Mani, Srinivasan, Ravi, Kerala Kaumudi and KIPL. They first filed a four page written statement in which they contended that the suit was not maintainable, that the suit was bad for mis-joinder and non-joinder of parties, that the suit had been improperly valued and proper court fees not paid, that the suit was barred by limitation, that the Karar was barred by the provisions of the Specific Relief Act, 1963 and that the court did not have the jurisdiction to entertain the suit.

The learned Single Judge decided each of the issues raised in favour of Madhusoodhanan and decreed the suit. The Division Bench allowed the appeal (A.S. 211/9). The reasons which persuaded the Division Bench to allow the appeal were first: no steps had been taken by Madhusoodhanan for determination of the price of 390 shares or the 'inherited shares' or for making the same known to the other parties or for carrying out the other provisions in the Karar -- in particular closing down of Blue Travels, Kaumudi Hotels and Blue Transports. Second, there was no averment in the plaint regarding consideration and no relief sought for in relation to the fixation or payment of consideration. Third, in contravention of Section 16 of the Specific Relief Act there was no averment in the plaint about the preparedness of Madhusoodhanan to pay the consideration; fourth, since there had been no transfer of the 390 shares, it was not possible to enforce the Karar in respect of the bulk of shares regarding which specific performance had been claimed. Fifth, Madhusoodhanan could not claim specific performance of only that part of the agreement which was in his favour without performing the obligations which were cast on him by the other clauses. These clauses were inseparable and part performance of the agreement was not possible. Sixth, there was an undue delay in filing the suit. Seventh, compared to the assets owned by Kerala Kaumudi and KIPL, both of which were to go to Madhusoodhanan in terms of the Karar, the worth of Kala Kaumudi (allotted to Mani) and Ravi Printers (allotted to Ravi) was insignificant, the last fact justifying the court's refusal to grant specific performance of the Karar under section 20 of the Specific Relief Act. The appeal was, therefore, allowed and the suit dismissed.

We have already said that except for clauses 1, 2, 3 and 11, all the other clauses of the Karar related to the division of the several concerns among the four brothers. In deciding whether the agreement should be implemented, the Appellate Court overlooked the basic fact that each of brothers had been given the majority shareholding of 52 percent in the companies specified against their names in the Karar. Since the other three brothers had taken the full benefit of the Karar, they were bound to comply with all its terms. It was not open to them to accept that portion of the Karar which was in their favour and jettison the rest. And the Karar which is in the nature of a family settlement seeking to settle disputes between brothers, having been already acted upon at least to the extent that the four brothers were each given the majority shareholding in the different companies as mentioned in the Karar, should not be lightly interfered with. (See: K.K. Modi versus K.N. Modi and others: (1998) 3 SCC 573).

The Division Bench has not adverted to this all. It is also on record that Madhusoodhanan had transferred the bulk of his shareholding in the companies which were to be under the majority control of the other three brothers. The learned Single Judge had held that Madhusoodhanan had given evidence that he had taken steps for closing down the companies not mentioned in the Karar. This finding has not been questioned. All the clauses except for the

transfer of the 'inherited shares' to Madhusoodhanan had been acted on. Madhusoodhanan was entitled to insist on the performance of this clause as well.

The respondents cited Article 29 of the Articles of the company in support of their argument that exhibits R. 59 and 60 overrode the Karar insofar as it required that 50% of the shares of the late K. Sukumaran and Madhavi had to be transferred to Madhusoodhanan on Madhavi's death. Article 29 says that the executors or administrators of the deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. It was the contention of the respondents that insofar as the Karar provided for the transfer of the shares of the late Sukumaran and Madhavi to Madhusoodhanan, it was contrary to Article 29 of the Articles of Association of the company and could not be enforced. This submission is made on the basis of the decision of this Court in V.B. Rangaraj versus B. Gopalakrishnan: (AIR 1992 SC 453).

That decision must be understood and read after enunciating certain basic principles relating to the transfer of shares and in the background of earlier decisions on the subject. It is settled law that shares are movable properties and are transferable. As far as private companies like Kerala Kaumudi are concerned, the Articles of association restrict the shareholder's right to transfer shares and prohibit any invitations to the public to subscribe for any shares in, or debentures of, the company. This is how a "private company" is now defined in section 3 (1) (iii) of the Companies Act, 1956 and how it was defined in section 2 (13) of the 1913 Act.

Subject to this restriction, a holder of shares in a private company may agree to sell his shares to a person of his choice. Such agreements are specifically enforceable under section 10 of the Specific Relief Act, 1963, which corresponds to section 12 of the Specific Relief Act, 1877. The section provides that specific performance of such contracts may be enforced when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its nonperformance would not afford adequate relief. In the case of a contract to transfer movable property, normally specific performance is not granted except in circumstances specified in the Explanation to section 10. One of the exceptions is where the property is "of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market". It has been held by a long line of authority that shares in a private limited company would come within the phrase "not easily obtainable in the market" (See: Jainarain Ram Lundia v. Surajmull Sagarmull & Ors.: A.I.R. (36) (1949) F.C. 211, 218;). The Privy Council in The Bank of India Ltd versus J.A.H. Chinoy: (A.I.R. 1950 P.C. 90) said: "it is also the opinion of the Board that, having regard to the nature of the company and the limited market for its shares, damages would not be an adequate remedy" specific performance of a contract for transfers of shares in a private limited company could be granted.

In 1965, this Court while dealing with proceedings arising out of sections 397, 398, 402 and 403 of the Companies Act, 1956 in the case of S.P. Jain versus Kalinga Tubes: A. I. R. 1965 SC 1535, had occasion to consider the effect of an agreement relating to the issue of new shares in a company between two shareholders and an outsider. It may be noted at the outset that there is a distinction between the issue of new shares by a company and the transfer of shares already issued by a shareholder. In the first case, it is the company which issues and allots the new shares. In the second, the transaction is a private arrangement and the company comes into the picture only for the purposes of recognition of the transferee as the new shareholder. Therefore, while it is imperative that the company should be a party to any agreement relating to the allotment of new shares, before such an agreement can be enforced, it is not

necessary for the company to be a party in any agreement relating to the transfers of issued shares for such agreement to be specifically enforced between the parties to the transfer.

In S.P. Jain's case, the company was a private limited company to begin with. An agreement was entered into between two shareholders and S.P. Jain, who was not a member, which internally provided that S.P. Jain would be allotted shares after the share capital of the company was increased equal to those held by the said two shareholders. The company was not a party to it nor were the other shareholders. In terms of the agreement there was an increase in the share capital and shares were allotted to S.P. Jain. Some years later, after the company had been converted into a public company, a decision was taken by the company to issue fresh shares. The shares were not allotted to S.P. Jain. Alleging oppression by the majority shareholders, S.P. Jain filed proceedings in which it was contended that the subsequent allotment of the new shares was in violation of the agreement between S.P. Jain and the two shareholders. In this context, this Court rejected S.P. Jain's plea on the grounds that S.P. Jain was not a member of the company when the agreement was entered into; the company was not a party to the agreement and was not bound by its terms; there was no provision in the agreement as to what would happen if and when the share capital was actually increased beyond the increase at the time of the agreement. Therefore it was held that as far as the company was concerned, it was free to dispose of shares as its directors or shareholders in a general meeting considered proper without regard to the agreement.

The decision does not in any way hold that the transfer of shares agreed to between shareholders inter se does not bind them or cannot be enforced like any other agreement.

In Rangaraj's case, relied upon by the respondents, an agreement was entered into between the members of the family who were the only share holders of a private company. The agreement was that for all times to come each of the branches of the family would always continue to hold equal number of shares and that if any member in either of the branches wished to sell his share/shares, he would give the first option of purchase to the members of that branch and only if the offer so made was not accepted, the shares would be sold to others. This was a blanket restriction on all the shareholders, present and future. Contrary to the agreement, one of the shareholders of one branch sold his shares to members of the second branch. Such sale was challenged in a suit as being void and not binding on the other shareholders. This Court rejected the challenge holding that the agreement imposed a restriction on shareholders' rights to transfer shares which was contrary to the articles of association of the company. It was therefore held that such a restriction was not binding on the company or its shareholders. The decision is entirely distinguishable on facts. There is no such restriction on the transferability of shares in the Karar. It was an agreement between particular shareholders relating to the transfer of specified shares, namely those inherited from the late Sukumaran and Madhavi, inter se. It was unnecessary for the company or the other shareholders to be a party to the agreement. As provided in clause 10 of the Karar, Exhibits R-59 and R-60 did not obviate compliance with the Karar. Both Ex. R-59 and R-60 were executed on 15.7.85 several months prior to the Karar. The parties who had consciously entered into the agreement regarding the transfer of their parents shares are therefore obliged to act in terms of the Karar. The defence of Ravi and Srinivasan based on Ex.R-59 and R-60 should not, in the circumstances, have been accepted by the Division Bench. Having regard to the nature of the shareholding, on the basis of the law as enunciated by the Federal Court and Privy Council in the decisions noted above, it must be held that the Karar was specifically performable.

As far as the question of consideration is concerned, we have

already held that parties can agree to subsequently determine the price at which the shares were sold and section 9 of the Sale of Goods Act, 1930 expressly provides that such contracts are perfectly legal. Besides, the Karar in terms does not call upon parties to determine the consideration. All it says is that once the consideration was determined by Madhusoodhanan and Mani, it would be made known to the others. Since there was no such determination, there was no question of informing anyone. The finding that there was no determination of the consideration in respect of the inherited shares as a ground for holding that the Karar was not specifically performable is similarly incorrect as the determination of the price formed no part of the Karar.

Coming to the reasoning of the Division Bench with regard to non-compliance with section 16 of the Specific Relief Act, 1963. The section provides :

"S.16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person -

x x

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.- For the purpose of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

We called for the plaint filed by Madhusoodhanan in order to verify whether the Division Bench was correct in coming to the conclusion that section 16 of the Specific Relief Act had not been complied with. We found that paragraph 14 of the plaint reads :

"the plaintiff was always ready and willing to perform his part of the agreement and is even now ready to perform his part of contract. The transfer of shares in respect of other companies have already taken place in accordance with the Karar dated 16 -1-86".

In view of this clear averment, the finding of the Division Bench regarding the contravention of section 16 of the Specific Relief Act, was perverse.

On the question of delay the cause of action arose when Madhavi died in December, 1987. It cannot reasonably be said that filing of the suit ten months later was unreasonably delayed since some time must be given to see whether the parties did what they were required to do under the Karar after Madhavi's death.

Finally, the exercise of discretion by the Division Bench

purportedly under section 20 of the Specific Relief Act was contrary to the terms of the section itself. Guidelines for the exercise of the Court's discretion to decree specific performance of an agreement have been statutorily laid down in sub-section (2). The Division Bench appears to have relied on clause (a) of section 20(2) to deny specific performance of the Karar by holding that Madhusoodhanan had obtained an unfair advantage over others under the Karar because he had been allotted the more 'substantial' companies. This logic flies in the face of clause (a) of sub-section (2) to section 20 and the explanation thereto - which say :

"S.20. Discretion as to decreeing specific performance.- x x

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

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant;

X X

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

This section is an instance of such legislative clarity that it needs no paraphrasing to highlight its intent. The Division Bench was clearly wrong in its foray into the question of the value of the assets allotted under the Karar. It has, despite Explanation 1 to Section 20(2) refused specific performance of the Karar on one of the excluded grounds viz., inadequacy of consideration.

The parties are at loggerheads and it is unlikely that they will mutually agree to a price to be paid for the 390 transferred shares or the 'inherited shares' as envisaged at the meeting held on 23rd April, 1985 (Ex. P.62(b)) or to a mutually acceptable third party in terms of clause 11 of the Karar dated 16th January, 1986 (Ex.P-3). The solution to this impasse is available under sub Section 9(2) of the Sale of Goods Act, 1930 read with Art. 25 of the Articles of Association of Kerala Kaumudi. Under the first if the price is not fixed in the manner agreed to in the contract of sale, the buyer shall pay the seller a reasonable price and what would be a reasonable price would be dependent on the circumstances of the case. Article 24 of the Articles of Association of the company speaks of the 'fixed price' and the 'fair price'. Both of these relate to the ostensible price shown on the transfer deeds. Nevertheless for the purposes of this case, Article 25 which lays down guidelines for the resolution of disputes between the transferor and transferee, may be relied on. It says: Article 25: "The fair value of a share shall be fixed by the Company by a resolution passed by a majority of not less than three fourths of the holders of such shares declaring the fair value. Such resolution shall remain in force for two years from the date of its passing or until annulled whichever is earlier. If at the time a transfer notice is given no resolution

fixing the fair value is in force: then any difference in regard thereto shall be referred to two arbitrators, one to be appointed by each party and the provisions of the Indian Arbitration Act, 1940, shall apply".

Although the learned Single Judge in disposing of CP 26/87 gave directions for the appointment of Arbitrators, to determine the value of the shares, in our view it would be more appropriate to do so in decreeing the suit for specific performance of the Karar. It is also not clear from the material on record, in which of the brothers' name 9 shares of the late Sukumaran and the 3 shares of Madhavi now stand. Who ever is recorded as the owner of the shares shall further transfer six of those shares to Madhusoodhanan.

For all these reasons, we have no hesitation in setting aside the decision of the Appellate Court and restoring the decree as passed by the Trial Court as modified below.

"Madhusoodhanan will appoint one Arbitrator and Mani and his children, Sukumaran and Ravi will appoint one Arbitrator within one month to decide the following matters. Failing this any one of them may move this Court to appoint an Arbitrator to decide:

(a) What was the fair value of one share
of Kerala Kaumudi (P) Ltd. on
21.5.1985?

(b) What amount was paid or adjusted
by or on behalf of M.S.
Madhusoodhanan to M.S. Mani
towards the value of shares ? What
is the balance amount due from
Madhusoodhanan to Mani and his
children in respect of the transfer of
the 390 shares transferred to M.S.
Madhusoodhanan.

(c) What would be the value of one
share on the date of Madhavi's
death ?

It will be open to the parties entitled to the consideration as determined by the Arbitrators to recover the sums due to them from Madhusoodhanan".

Rectification of the Share register of KIPL

The application for the rectification of the share register of KIPL under Section 155 of the Companies Act was filed by Mani's wife and daughter -- Kastoori and Valsa respectively, Srinivasan's wife -- Laisa, and Ravi's wife -- Shylaja. Of the 1000 shares issued of KIPL, Madhavi had 10, Kastoori had 240, Valsa had 10, Madhusoodhanan's wife, Geetha, had 250, Laisa had 250 and Shylaja and 240 shares in 1985. On 4th March 1985, Laisa who, along with Geetha, was a director of the company till then, resigned. She has admitted her resignation in her evidence when she said "I became the director of the company in 1972. I became a shareholder of the company in 1972. I'm not a director of the company now. In March, 1985 I ceased to be a director. I resigned my directorship in March, 1985".

According to Madhusoodhanan, at the Board meeting held on 4th March 1985, which was attended by Geetha and Laisa, Laisa's resignation was accepted and he was appointed as additional director. At the same meeting, the Board approved the transfer of shares by Laisa, Shylaja, Madhavi and Kasturi to Madhusoodhanan, Ravi's minor sons-Deepu and Darsan, Valsa (Mani's daughter) and Srinivasan so that the shareholding in KIPL became as follows :

Geetha	250 shares
Madhusoodhanan	270 shares

Srinivasan	160 shares
Valsa	160 shares
Deepu Ravi	80 shares
Darsan Ravi	80 shares

According to the four applicants for rectification, they had effected no such transfer. Of the four, only Laisa came forward to give evidence in support of the case for rectification of the share register of KIPL [Ex. P-123 (F)] by restoring the position with regard to the shareholding as it existed prior to March 1985. In her deposition Laisa admitted that she had signed the attendance register of KIPL (Ex.P.-123) which showed that she had attended the Board Meeting on 4th March 1985. She also admitted that she had signed the minute books of the company including the minutes of the meeting held on 4th March 1985 as well as blank share transfer forms. However she has come forward with this explanation :

"I have given blank share transfer forms and other papers signed when Sri Madhusoodhanan brought them to me. I signed those blank transfer forms and papers because Mr Madhusoodhanan was looking after the affairs of all sister concerns and my husband told me to sign whatever papers be brought by Mr Madhusoodhanan".

The learned Single Judge dismissed the application for rectification. He held that the 4 brothers had admitted their signatures in Exhibit P-190 which is a record of decisions taken at a meeting held on 29.11.1984 when one of the decisions taken was to entrust separate concerns to each of the brothers, depending upon who was taking an active interest in the company. The decision was implemented by the share transfers in the sister concerns of Kerala Kaumudi and it was not disputed that in respect of Laisa Publications, Srini Printers, Ravi Printers etc, the respective brothers who were in control of those concerns were given 52 percent shares. As far as KIPL was concerned it was decided :

"3 (b). In Kaumudi Investments and Kaumudi Exports 52 percent of shares will be held by Sri. M. S. Madhusoodhanan and family and 16 percent each of shares will be held by Sri.M.S. Mani and family, Sri M. S. Srinivasan and family and Sri M. S. Ravi and family".

This was effected as far as KIPL was concerned on 4th March, 1985. It was held that the evidence showed clearly that all the necessary steps had been taken to effect the share transfers and that it was immaterial that the petitioners were not parties to exhibit P-190 because the share transfer deeds had been signed and the signatories were bound by that, particularly when they had not established that they had signed the share transfer documents under any misrepresentation, fraud or undue influence or mistake.

The Division Bench reversed the decision of the learned single judge in M. F. A. No 312 of 1990. It was held that since exhibit P-3, or the Karar, had not been accepted as a valid document, "the projected basis of the transfer disappears" and "the further recording in the minutes of the company would not be sufficient to give legal efficacy to the transfer of shares".

Since we have held that the Karar was a valid agreement, this reason of the Division Bench will not stand. Besides, as observed by the learned single judge, all the necessary documents had been duly executed to effect the transfers of the shareholding as approved in the meeting held in March 1985. In the annual return of KIPL in respect of the year ending on 30 September 1985, this share holding is reflected. (Ex.P-212). Further this is in keeping not only with the Karar but also with Ex.P.190 according to both of which Madhusoodhanan and his group were to have 52 percent

shareholding in KIPL and the remaining three brothers - 16 percent each.

The explanation given by Laisa that she used to sign whatever papers had been sent by Madhusoodhanan is unbelievable. The Division Bench by relying upon a narrative in a biography of Norman Birkett (The Life of Lord Birkett of Ulverston by H. Montgomery Hyde) chose to accept it. According to Laisa herself, she had been a director of the company, operated the banking accounts and otherwise done whatever was necessary in the discharge of her duties as a director since 1972. As we have noted earlier, differences between the 4 brothers had been simmering for a long time which manifested itself in 1984. This was also noted by the Division Bench when it said, "in the year 1984, differences became somewhat apparent". In the circumstances, Laisa's facile explanation, that she signed every document in 1985 because of her faith and trust in Madhusoodhanan is clearly false.

The next reason given by the Division Bench for allowing the application for rectification was that the original share transfer deeds had not been produced. Madhusoodhanan had filed an application for production of the original share transfer deeds. He said that he could not produce the share transfer deeds because they were in the administrative office of KIPL and that he had been prevented from entering that office. That the administrative office of KIPL is within the Kerala Kaumudi premises in a separate room was also the finding of the Division Bench. Madhusoodhanan and his group's grievance that they were being denied access to KIPL's office since April, 1986 was not rejected by the Division Bench as not genuine. But the Division Bench observed "A mere alibi of inability to enter the office, cannot be accepted as a sufficiently strong reason for their grievous omission". This conclusion is as startling as it is unreasonable. For the reasons given earlier in connection with transfer of shares in Kerala Kaumudi, we are of the view that here also, the minutes and the other records of the company, which prima facie raise a presumption of their veracity, have not been sufficiently disproved by the evidence tendered on behalf of the petitioners in the application for rectification.

Apart from the provisions of the Companies Act, Article 41 of the Articles of Association of KIPL (Ex. P-180) also provides : "Where minutes of the proceedings of any general meeting of the company or of any meeting of the Board of Directors has been made and signed in accordance with provisions contained in the preceding article 10 unless the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings thereat to have duly taken place, and in particular, all appointment of directors made at the meeting shall be deemed to be valid".

The only evidence or "proof" to the contrary in this case is Laisa's unacceptable oral evidence. Therefore the minutes of the meeting held on 4th March, 1985 must be taken to have correctly recorded the transfer of shares resulting in the present shareholding, the appointment of Madhusoodhanan as additional director and the resignation of Laisa as a director of KIPL.

The next reason given by the Division Bench for permitting rectification of the share register of KIPL was that no price had been fixed for the shares and that there were not even negotiations with parties regarding such fixation of price. This is, for reasons already stated, an incorrect statement of the law. Moreover in this case there is the additional factor which has persuaded us to hold that the Division Bench was wrong, namely Article 16 of the Articles of Association of KIPL which says : "the Board of Directors shall fix price at which the shares for the time being forming part of

the capital of the company may be purchased in pursuance of transfer notice and the price thus fixed shall be known as the 'fair value'. Until the 'fair value' has been fixed as herein provided, a sum equal to the capital paid up on any share shall be deemed to be the fair value of such share."

The Division Bench's final conclusion that there had been a non-compliance with section 108 of Companies Act because there was no indication about any purchase of stamps or about the share transfer deeds having been duly stamped, is an exercise in speculation. The Articles of Association of KIPL themselves require compliance with section 108 before any transfer can be effected. When the minutes recorded that share transfer deeds had been placed before the Board, when the transfers were approved by the Board in the presence of the only witness for the petitioners, and when none of the documents which were duly maintained by the company recording the transfers of the shares had been disproved, we cannot uphold a finding that the share transfer deeds must have been improperly stamped or executed in violation of the provisions of Section 108 of Companies Act.

No further reason has been given by the Division Bench for upholding the prayer for rectification of the share register of KIPL. We have, therefore, no compunction in setting aside the decision of the Division Bench and restoring that of the learned Single Judge dismissing the application.

Rectification of the Share Register of Kala Kaumudi

The next matter is the application for rectification of the Share Register of Kala Kaumudi filed by the minor son of Madhusoodhanan, Visakh (CP 11/87; MFA No. 285/90; CA 3261/91). This appeal need not detain us as both the courts below have concurrently held that the application had no merit.

In keeping with the Karar, Mani and his family have the controlling interest in the company. In June 1985, of the 500 issued shares, Mani and his family held 260, Madhusoodhanan and his children held 80 shares, Srinivasan and his children held 80 shares and Ravi and his children held 80 shares after effecting share transfers by the brothers and their respective groups inter se. A decision was taken by the Board of Directors to increase the paid-up capital of company from Rs 5 lakhs to Rs 10 lakhs by the issue of 500 equity shares of Rs 1000 each. Notice of this was given to the applicant who received it but did not apply to be allotted any of the additional shares. Mani and his wife, Kasturi, offered to purchase 279 shares each. The offer was accepted and additional shares issued in the name of Mani and his wife. According to Visakh, he had not been given notice of the offer of the additional shares. The trial court considered the various exhibits tendered in evidence by Mani and his group, including the local delivery book (Ex. R.-48), which was signed by Madhusoodhanan, the father and guardian of Visakh, to negative the submission of Visakh. We see no reason to interfere with this finding of fact. It is true that the Division Bench proceeded on an erroneous basis when it held that the learned Single Judge had dismissed the application on the ground of delay. Since we have upheld the factual finding of the court of the first instance, this misreading of the Trial Court's judgment by the Division Bench is of no consequence.

We accordingly dismiss the appeal being C.A. 3261/91 without any order as to costs.
Civil Suit No. 4 of 1989

This brings us to the remaining appeal which arises from a decree passed in a suit filed by KIPL. The suit was originally numbered as OS 1569/88 when it was filed in the Munsiff's court in

Trivandrum. After it was withdrawn on 16 February 1989 by the order of the High Court, it was renumbered as C. S. 4/89. In the suit, KIPL had prayed for a decree of permanent injunction restraining Kerala Kaumudi or any of its Directors or staff or anyone claiming through or under them or any of their agents from disturbing or preventing the peaceful functioning of KIPLs administrative office or in any way obstructing the peaceful possession and enjoyment of the said premises by the defendants until KIPL was evicted under due process of law.

That the administrative office of KIPL was in Kaumudi Buildings, Pettah, Trivandrum cannot be in dispute in view of the categorical finding of the Division Bench to this effect, as noted earlier. According to KIPL, the entire administration of KIPL was carried on from this office. It has been further averred in its plaint, that Geetha, Madhusoodhanan's wife, had been denied access to the administrative office when she went there along with a staff in August 1986. She was informed by the reception office that the keys to the room were with Srinivasan who refused to hand over the keys to Geetha.

Srinivasan filed a written statement on behalf of Kerala Kaumudi in which it was denied that KIPL had its administrative office in Kaumudi Buildings. According to Srinivasan, Geetha used to sit in Madhusoodhanan's office when he was the Managing Director of Kerala Kaumudi.

On behalf of the plaintiffs, entries in the telephone directory (Ex.p-181), notices and letters issued by the income tax office addressed to KIPL at Kaumudi Buildings (Ex-p 182, 184 and 185) as well as a letter from the Commissioner of Income Tax (Ex.P. 183) similarly so addressed were proved by Madhusoodhanan. Srinivasan has been unable to explain why the letters and notices to KIPL by the concerned authorities should be addressed to Kaumudi Buildings unless KIPL was functioning from that place. Additionally, Srinivasan also said, in his evidence, "All the sister concerns of Kerala Kaumudi had postbox No 99 and post office was instructed to put the correspondence addressed to the sister concerns in that postbox No". The postbox number in question was Kerala Kaumudi's. He also said, "At the time when application for telephone was given, applications were given in the name of all sister concerns as well as Kerala Kaumudi, in order to get telephone easily. These telephones were allotted. All the telephones are installed in Kerala Kaumudi Buildings "and that for all the sister concerns the telex No is the same. In view of all this evidence, including the admission by Srinivasan, amply justifies the conclusion reached by the Trial Court while decreeing the suit that KIPL had an office in Kaumudi Buildings to which members of its management and staff have the right of access.

A similar suit had been filed by Kaumudi Exports which was decreed by the learned Single Judge on substantially the same evidence. (C. S. No 2 of 1989). The appeal from the decree was dismissed by the Division Bench (A S. No 205 of 1990). No further appeal has been preferred by the respondents.

Logically, the Division Bench should have also rejected the appeal preferred from the decree in CS No 4/49. However the Division Bench rejected the appeal on the sole ground that although KIPL had been denied access in 1986, the suit had been filed only in 1988. According to the Division Bench "The inaction for a period of two years can be taken to have resulted in the extinction of the present possession. If the plaintiff does not have present possession, injunction could not be an available relief". This strange piece of reasoning appears to proceed on the basis that the period of limitation for extinction of a possessory right is two years which it is not. Besides the claim of KIPL was that it was being denied access. The denial was a continuous one. It was therefore open to KIPL to file a suit while such denial continued by seeking to injunct the obstructers from continuing with the obstruction. Srinivasan's

evidence and the documents referred to hereinabove prove beyond a shadow of doubt, that the administrative office of KIPL was in Kaumudi Buildings. That is also what the Division Bench has held. Having come to this conclusion, the division bench erred grievously in denying KIPL the relief it claimed only on the ground of delay, as if what was being dealt with by the Division Bench were an interlocutory application for interim relief.

This appeal, C. A. 3259/91, is therefore allowed.

To sum up: Civil Appeals 3253-58 of 1991 from M. F. A 330/90 are allowed, and the decision of the Trial Court affirmed with the directions earlier specified. Civil Appeals 3260 and 3261 of 1991 are dismissed. Civil Appeal No. 3259 of 1991 is also allowed. The decision of the Division Bench is set-aside and the decree of the Trial Court is restored.

Before concluding our judgment in all these appeals, we would like to record our displeasure in the manner in which the paper books have been prepared. Documents which are vital for decision on the several issues raised, continue to remain in Malayalam without being translated, several exhibits as well as the pleadings, such as complaints, written statements etc are not on record. Therefore, although our decisions in these nine appeals, except for two, are in favour of Madhusoodhanan and his group, we make no order with regard to the costs to which the appellants would otherwise have been entitled.

Ascertainment of price - (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.