

PETITIONER:
S. P. JAIN

Vs.

RESPONDENT:
KALINGA TUBES LTD.

DATE OF JUDGMENT:
14/01/1965

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
GAJENDRAGADKAR, P.B. (CJ)
SIKRI, S.M.

CITATION:
1965 AIR 1535 1965 SCR (2) 720
CITATOR INFO :
RF 1976 SC 565 (29)
RF 1981 SC1298 (59,51)
R 1990 SC 737 (27)
R 1992 SC 453 (7)

ACT:
Companies Act (Act 1 of 1956), ss. 397 and 398-Scope of.

HEADNOTE:

In July 1954, two groups of shareholders led by P and 1, who, together held an equal number of shares of the value of Rs. 21 lakhs out of a total share capital of Rs. 25 lakhs in the respondent company (then a private ate company), entered into a private agreement with the Appellant, whereby, (i) the share capital of the company was to be increased by Rs. 10 1/2 lakhs and shares of this value allotted to the appellant so that the total shares held by him would be equal to the holding of each of the other two groups; (ii) each of these three groups of shareholders would have an equal number of representatives on the Board of Directors; (iii) the appellant undertook to arrange certain credit facilities for the company; and (iv) the appellant was to be the Chairman of the Board. In accordance with this agreement, the appellant was made the Chairman and though various resolutions were passed by the company to implement the agreement, these resolutions did not in terms refer to the agreement. and no change was made in the Articles of Association of the company so as to embody the terms of the agreement. Some time later, the subscribed capital of the company was increased to Rs. 61 lakhs and the new shares were so allotted as to maintain the parity in the share holdings of the three groups. When one of the two minority shareholders sold 250 shares, these were equally divided between the three groups and one odd share was held by P, L and the Appellant jointly.

In 1956-57, the company desired to raise a loan from the Industrial Finance Corporation and as this Corporation made advances only to public limited companies, in January 1957 the company was converted into a public company. Appropriate amendments were made in its Articles of Association, but even on this occasion, no attempt was made

to incorporate into the Articles the terms of the Agreement of July 1954. After sanction had been obtained of the Controller of Capital Issues for the issue of additional share capital, the appellant suggested at a meeting of the board of directors in March 1958 that the new shares should be issued proportionately to the existing shareholders in accordance with the provisions of Section 81 of the Companies Act, 1956. On the other hand those representing the P and L groups proposed that the new shares should be offered privately in the best interests of the company at the sole discretion of the directors; this proposal was made because these two groups did not have money to subscribe for the new capital and they feared that if shares were offered in the first instance to existing shareholders, the appellant could get all of them and thus acquire control of the company. In view of the majority of the P and L groups in the Board, their proposal was adopted and subsequently a resolution to that effect was also accepted at a General Meeting of the shareholders held in March 29, 1958. The appellant thereafter instituted a suit to have the resolution declared illegal and void and obtained an ex parte injunction against the company from allotting shares pursuant to this resolution. On July 13, 1958, the appellant's suit was dismissed by the Subordinate Judge and the injunction vacated by him

721

at 11 A.M. The Board of Directors at a meeting held on that date, immediately on receiving the news that the injunction had been vacated, allotted the new shares to seven persons who had previously applied for them. On the same day, the appellant filed an appeal and applied for and obtained an order staying the operation of the order of the Subordinate Judge. Eventually these appeals were also dismissed and the stay vacated.

In September 1960 another General meeting of the company was called to approve a proposal to increase the share capital of the company from Rs. 1 crore to Rs. 3 crores. It was also intended that these new shares should be offered to outsiders with a view to making the company more broad-based.

At that stage the appellant filed a petition in the High Court under Section 397 and 398 of the Companies Act, 1956, complaining inter alia, that the issue of new shares was in furtherance of a continuing oppression of the apperant's minority group; that by allotting such shares to benamidars of P and L in disregard of the agreement of July 1954, it was intended to exclude the appellant from all control of the affairs of the company; that the resolutions passed in March 1958 as to the manner of allotment of new shares contravened s. 81 of the Companies Act, 1956 and this resolution as well as the hasty allotment on July 30, 1958 were in abuse of the power of the P and L groups and oppressive of the minority. The petition was allowed by the single Judge but this decision was reversed in appeal by a Division Bench of the High Court. On appeal to the Supreme Court.

HELD : (i) On the facts no case had been made out, of oppression within the meaning of section 397.

For a petition under section 397 to succeed, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this require.,, that events have to be considered not in

isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless lack of confidence springs from oppression of the minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. [937 C-F]

Elder v. Watson, (1952) S.C. 49; George Meyer v. Scottish Cooperative Wholesale Society Ltd. (1954) S.C. 381; Scottish Co-operative Wholesale Society Ltd. v. Meyer and another, [1958] 3 All. E.R. 66. Re. H. R. Harmer Ltd., [1958] 3 All E.R. 689; discussed and applied.

(ii) The agreement of July 1954 on which the case of oppression was based was not binding even on the private company and much less so on the public company when it came into existence in 1957. It was really an agreement between a non-member and two members of the company and although for some time the agreement was in the main carried out, clearly some of its terms could not be put in the articles of association of the public company. As the company was not bound by the

722

agreement, the mere fact that it was decided at the meeting in March 1958 to offer the new shares to outsiders and not the existing shareholders did not necessarily amount to an oppression of the minority shareholders. The majority shareholders were not bound to accept a proposal of the minority shareholders that the new shares should be allotted only to the existing shareholders. Furthermore the general meeting having decided that new shares should not be issued to the existing shareholders but to others, there was no contravention of s. 81 of the Companies Act 1956 and the resolution of March 28, 1958 was in accordance with law as it stood at the time. [739 B-C; 740 G-H; 741 C-E; 745 D-F]

(iii) it could not be said that the allottees of new shares were benamidars or stooges of the P or L group and that by allotment of shares to them, the majority shareholders were oppressing the minority. These allottees were independent persons and the fact that the P and L groups might be able to get the support of the holders of the new shares did not necessarily mean oppression of the appellant, for the new shareholders may support the P and L groups on the ground that such support would be for the benefit of the Company. [744 C-E]

(iv) The haste in issuing new shares upon the vacation of the injunction of July 30, 1958 could not be held to be a part of the design to oppress the minority. The company was in need of money for expansion and its ability to obtain a loan from the Finance Corporation depended upon the increase of its subscribed share capital. The haste became necessary because the injunction was vacated on that day and it was felt that if immediate action was not taken and the new shares allotted, there might be a further injunction and consequent delay. The haste in the allotment of shares arose out of circumstances brought about by the appellant's conduct. [743 A-E]

Held also, that no case had been made out for action under section 398 on the ground that the affairs of the company were being conducted in a manner prejudicial to its

interests. [749 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 734-747 of 1964.

Appeals from the judgment and order dated April 18, 1963 of the Orissa High Court in A.H.O. No. 13 of 1961 and A.H.O. Nos. 2 to 14 of 1962.

N. C. Chatterjee, S. Roy Chowdhury, M. L. Jhunjhunwala, S. Murty and B. P. Maheshwari, for the appellant (in all the appeals).

M. C. Setalvad, A. V. Viswanatha Sastri, Ranadeb Chaudhri, M. K. Banerjee, J. B. Dadachanji, O. C. Mathur and Ravinder Narain for respondent No. 1.

Ranadeb Chaudhuri and J. B. Dadachanji, for respondent No. 2. G. S. Pathak, B. Dutta and J. B. Dadachanji, for respondent No. 3.

A.V. Viswanatha Sastri and J. B. Dadachanji, for respondent No. 4.

723

Sachin Chowdhury, S. N. Andley, Rameshwar Nath and P. L. Vohra, for the respondent Nos. 9, 10, and 12.

C.K. Daphtary, Attorney-General, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for respondent No. 13.

Sachin Chowdhury, B. Sen, Dipak Dutta Chowdhury, for respondent No. 14.

Niren De, Additional Solicitor-General and Rajinder Narain & Co. for respondent No. 15.

S. V. Gupte, Solicitor-General and Rajinder Narain, & Co. for respondent No. 16.

The Judgment of the Court was delivered by

Wanchoo, J. These fourteen appeals on certificates granted by the High Court of Orissa raise common questions of law and fact and will be dealt with together. They are a consequence of a fight between two groups of business magnates for the control of Messrs Kalinga Tubes Limited (hereinafter referred to as the Company). They arise out of an application under ss. 397, 398, 402 and 403 of the Indian Companies Act, No. 1 of 1956, (hereinafter referred to as the Act) made by the appellant in the High Court. Most of the facts are not seriously in dispute and it is necessary to set them out in detail in order to decide the main point raised on behalf of the appellant, namely, that the affairs of the Company were being conducted in a manner oppressive to him and his group of members.

The Company was floated as a private limited company on December 1, 1950 with an authorised capital of Rs. 25 lacs. Originally, the shares were held by two groups of shareholders equally, except a few shares. These groups of shareholders may for our purposes be taken to be represented by Patnaik and Loganathan. The Company raised a sum of Rs. 36 lacs by the issue of two series of debentures which were guaranteed by the Government of Orissa between 1952 to 1954. In 1954, the appellant was approached by Dr. Mohanty, then Secretary to Government of Orissa (Industries Department) which was naturally interested in the Company having guaranteed debentures to the tune of Rs. 36 lacs, for helping the Company which was in financial and administrative difficulties. The appellant was requested to help the Company by providing finance and by arranging loans from banks and other sources and further by providing the necessary administrative guidance. The appellant agreed to do so and consequently on July 27, 1954, an agreement was

entered into

724

between the appellant, and Patnaik and Loganathan To this agreement, the Company was not a party. We shall refer in detail to the various terms of the agreement later. In brief, however, the agreement provided that the appellant would be allotted shares in the Company equal to those held by Patnaik and Loganathan after increasing the share capital of the Company- Thus the Company would have three groups of shareholders represented by the appellant, Patnaik and Loganathan holding equal number of shares, besides a French company and one Rath, who between themselves held shares worth Rs. 4 lacs. These shareholders however were not party to the agreement. It was also provided that these three groups of shareholders would have equal number of representatives on the Board of Directors of the Company, namely, two each for the time being. The appellant also undertook to arrange for cash credit facilities to the limit of Rs. 50 lacs on the security of raw materials and finished goods of the Company. And finally, the appellant Jain was to be the chairman of the Company. This agreement was followed by certain resolutions passed by the Company on August 16, 1954 by which some of the terms of the agreement were substantially carried out, the authorised capital was increased to rupees one crore (though it was issued later in instalments), and the appellant was made the chairman of the Company. It may however be noted that the resolutions did not refer to the agreement in terms and no change was made in the Articles of Association of the Company to bring them in conformity with all the terms of the agreement. In January 1955, Narayanswami who had been appointed Managing Director resigned and Patnaik was appointed the Managing Director. In April 1955, the Company started production. Sometime thereafter the share capital was further subscribed up to Rs. 61 lacs and the three groups, namely, the appellant Jain, Patnaik and Loganathan held one-third of the shares leaving out shares held by the French company. Mr. Rath had sold his shares numbering 250 and these shares were equally divided between the three groups and the one odd share was held by all the three namely Jain, Patnaik and Loganathan, jointly. In September 1956, a resolution was passed by the Board of Directors referring the question of conversion of the Company to a public limited company to a sub-committee consisting of the appellant, Loganathan and Patnaik. About the same time, an application was made to the Controller of Capital Issues for the sanction of the issue of further shares to the extent of Rs. 39 lacs out of the authorised capital of rupees one crore and for the

725

issue of debentures to the extent of Rs. 64 lacs. In this application it was stated that the shares were intended to be issued privately to the existing shareholders and/or their nominees. In December 1956 a resolution was passed by the Board of Directors for converting the Company into a public limited company and for amending the Articles of Association in consequence at the next annual general meeting. This was necessary as the Company wanted to borrow from the Industrial Finance Corporation which however made advances only to public limited companies. On January 11, 1957, the Company was converted into a public company and the Articles of Association were amended. Even so, no attempt was made to incorporate the terms of the agreement dated July 27, 1954 in the Articles of Association so amended.

Trouble however seems to have arisen between the appellant

and the other two groups as early as September 1955 in consequence of an advertisement issued by the appellant in newspapers suggesting that his group was engaged in the manufacture of black and galvanised steel tubes and in this advertisement the emblem of the Company was also printed, as if the Company was part of the appellant's group. This led to strong protests by Patnaik and Loganathan and eventually the appellant withdrew the advertisement. However, the appellant continued to be the chairman of the Company in spite of growing differences between him and Patnaik and Loganathan. Articles of Association were further amended in November 1957. At that time also nothing was put therein on the basis of the agreement dated July 27, 1964. In December 1957, the Controller of Capital Issues sanctioned the issue of shares of the face value of Rs. 39 lacs and debentures of the face value of Rs. 64 lacs subject to the provisions of s. 81 of the Act. Real trouble started after this sanction for the issue of fresh shares. We shall have occasion to refer to s. 81 of the Act later; it is enough to say here that that sanction provides that the new shares would be offered in the first instance to the existing shareholders in proportion, as nearly as the circumstances admit, to the capital paid up on the existing shares at that date "subject to any direction to the contrary which may be given by the Company in general meeting". So unless the Company decided otherwise at a general meeting, the new issue of shares to the tune of Rs. 39 lacs would have had to be offered under s. 81 of the Act to the existing shareholders in proportion to their existing shares. At that time as already indicated, the appellant group held one-third share

726

and Loganathan and Patnaik groups held two-thirds share except for certain shares held by the French company and therefore in the absence of a direction to the contrary at a general meeting, the new shares would also have gone in equal shares to the three groups subject to the shares which would go to the French Company.

The question of the issue of new shares came up before a meeting of the Board of Directors on March 1, 1958, and the differences between the three groups which had already begun came to the surface at that time. The appellant proposed to the Board of Directors that the new shares should be issued to the existing shareholders as provided in s. 81 of the Act. Patnaik on the other hand proposed that a general meeting should be called for the purpose of passing a resolution for the issue of new shares and for the manner and proportion in which shares were to be offered privately to the shareholders and other persons and for such other incidental matters as provided in the section. It is apparent from this conflict between the appellant group and Patnaik and Loganathan groups in this meeting that the groups of Patnaik and Loganathan did not want the appellant's group to get roughly one-third of the new shares. The fear of Patnaik in this connection was that if shares were offered privately to the existing shareholders, the appellant might get all of them, for the groups of Patnaik and Loganathan did not have the money to subscribe to the new shares if offered in the first instance to the existing shareholders. Thus if the appellant got all the new shares, his group would become the majority shareholder and would thus get control of the Company. Consequently, Patnaik put forward the resolution already referred to at the meeting of the Board of Directors on March 1, 1958 which provided for calling a general meeting for directions as to the issue of new shares, which directions it was hoped would

override the provisions of S. 81 of the Act. Patnaik's resolution was passed and the appellant's proposal was outvoted for the obvious reason that the Patnaik and Loganathan groups held the majority of shares. In consequence a general meeting of shareholders was called for the purpose on March 29, 1958.

The appellant did not attend the meeting of March 29, 1958 though he was present by proxy. Patnaik presided at that meeting. Two resolutions were put forward at that meeting, one on behalf of the appellant's group and the other on behalf of Patnaik and Loganathan groups. The appellant's resolution proposed that the new shares should be offered to the existing shareholders of the Company in the proportion of their share-

7 27

holdings and the offer should remain open for a period of fifteen days with the right to accept or renounce the whole or part of the offer in their names or in the names of their nominee or nominees and if a shareholder did not accept within that period the offer should be deemed to have been declined. The second resolution on behalf of the Patnaik Loganathan groups proposed that the new shares should not be offered or allotted to the existing shareholders or to the public and that they should be allotted privately in the best interest of the Company at the sole discretion of the directors to such persons as might have applied or thereafter apply on the condition that at least 5 per centum of the face value of shares applied for was paid as application money and 10 per centum of the face value was paid on allotment and the balance paid as and when called upon in accordance with the Articles of Association of the Company. As was to be expected, the resolution put forward on behalf of the appellant was lost and the resolutions put forward on behalf of Patnaik and Loganathan groups as to the allotment of new shares were passed. Thus in that meeting there was a complete breach between the three groups.

This was followed on April 18, 1958, by a suit by the appellant and some other shareholders of his group for a declaration that the resolutions dated March 29, 1958 were ultra vires, illegal, void and not binding on the appellant, the Company and its shareholders with a prayer for permanent injunction restraining the defendants in the suit (namely, the other two groups) and their servants and agents from giving effect to or acting in any way in pursuance of the said resolutions and further restraining each of the defendants, their servants and agents from issuing and allotting the new shares in terms of the impugned resolutions. That suit was filed in the court of the Subordinate Judge, Cuttack. It is unnecessary here to refer to the details of that suit. It is enough to say that an ex parte interim injunction was obtained on the same day restraining the Company and other defendants from issuing and allotting the new shares to persons other than the existing shareholders and giving effect to the resolutions in that regard passed at the meeting held on March 29, 1958. The Company then made an application for setting aside the ex parte interim injunction. This matter came up before the court on May 15, 1958. At that time an offer was made on behalf of the Company that in view of the urgent necessity for funds, the Company might be permitted to issue two-thirds of the shares, keeping back one-third which would have gone to the appellant if the shares had been offered to the existing shareholders; but this was not accepted on behalf of

728

the appellant. The hearing of the injunction matter was postponed on several dates and it appears that the Patnaik and Loganathan groups continued to call meetings of the Board of Directors on the dates fixed in the suit, and the agenda always provided for the allotment of the new shares. Eventually on July 30, 1958 the Sub-ordinate Judge delivered judgment and vacated the injunction at about 11 a.m. A meeting of the Board of Directors was being held on the same day from 10-30 a.m. and as soon as a message was received that the injunction had been vacated the new shares were allotted to seven persons who had applied for the same along with the application money. This happened about midday and the return as required by the Act was duly filed with the Registrar of Companies at 12-40 p.m. The same day, an application was made at 12-40 p.m. on behalf of the appellant before the Subordinate Judge praying that the order vacating the injunction be stayed till the appellant obtained orders from the High Court where he wished to appeal. The Company's lawyer however intimated to the court that the shares had already been allotted. Even so, the court passed an order staying the operation of its judgment delivered earlier for two days. The matter was then taken in appeal to the High Court by the appellant. The appeal was dismissed in September 1958. There was a Letters Patent appeal following the dismissal but that was not pressed and was eventually dismissed in November 1960.

The case of the appellant was that the seven persons to whom the new shares were allotted were nominees or benamidars of Patnaik and Loganathan and therefore these groups really allotted the new shares to themselves through their benamidars. It was also alleged that these seven persons only paid 5 per centum of the share money and this showed, even though it was said that the Company was in urgent need of money, that the shares were allotted to persons who were not in a position to pay the share money in full. The appellant contended that the allotment of the new shares was made surreptitiously and deliberately with the sole idea of defeating the rights of shareholders represented by him and his group and this amounted to oppression of the minority shareholders.

To continue the narrative, it appears that an extraordinary general meeting of the Company was called on September 21, 1960 to consider increasing the share capital from rupees one crore on which it stood after the increase in 1958 to rupees three crores by issue of additional equity shares numbering one lac of the value of rupees one crore and the issue of another one lac cumulative

7 29

redeemable income-tax free preference shares of the value of rupees one crore subject to such rights and privileges attaching to such preference shares as might be specified in the new Article to be inserted in the Articles of Association. It was also intended that these new shares should be offered to outsiders (i.e. other than the existing shareholders) with a view to making the Company more broad based. This meeting was called by a notice issued on August 25, 1960.

It was the calling of this meeting which led to the application under s. 397 etc. on September 14, 1960 by the appellant. It was urged in the application that this issue of new shares was in furtherance of the continuing and continuous process of oppression of the appellant and his group being the minority shareholders and was designed for the purpose of completely excluding the appellant and his group from all control in the affairs of the Company and to

deprive the financial advantage to be gained by them by the issue of new shares at par and to retain such advantage exclusively to the Patnaik and Loganathan groups so that the appellant and his group might be forced to sell their holdings to the Patnaik and Loganathan groups at a nominal value. That was why the new shares were being offered to outsiders and not to the existing shareholders, the object being to offer the shares to nominees and/or benamidars of the Patnaik and Loganathan groups and to such persons who would be within their control. The result of this would be that Loganathan and Patnaik groups would acquire more than 75 per centum of the voting strength of the Company and would be in complete control of it and so gain enormous financial advantage for themselves. This would cause irreparable loss and prejudice to the rights of the appellant and his group of minority shareholders. It was alleged that this was being done by the Patnaik and Loganathan groups who were in control of the majority of shares. Finally it was urged that the affairs of the Company were conducted in a manner prejudicial to the interest of the Company by Loganathan and Patnaik groups and there was mismanagement in conducting such affairs. It was further alleged that the conduct of Loganathan and Patnaik groups towards the minority shareholders was oppressive, burdensome, harsh and wrongful and the entire manoeuvre was that these groups should be able to control over 75 per centum of the voting strength in the Company. Further it was alleged that the conduct of these groups involved a visible departure from the standard of fair dealing and violation of the conditions of fair play to which the appellant and his group as minority shareholders were entitled. In particular

730

the denial to the existing share holders to subscribe, to the new shares in proportion to their respective holdings and the issue of such shares to benamidars of the Patnaik and Loganathan groups was oppressive to the appellant and his group of minority shareholders and also amounted to mismanagement of the affairs of the Company. This was also in breach and violation of the agreement dated July 27, 1954 to which the Patnaik and Loganathan groups were parties. Further it was said that although in form the Company was a public company in reality it was a partnership consisting of the three groups namely, the appellant's group, and of Loganathan and Patnaik groups. The last two groups had combined together against the appellant group which had resulted in justifiable lack of confidence on the part of the appellant and his group in the conduct of the affairs of the Company by the other two groups. Such lack of confidence had been caused by lack of probity in the conduct of the affairs of the Company by these two groups, which were acting to benefit themselves personally and were not concerned with the welfare of the Company. The appellant and his group would not get any relief by calling a general meeting of the Company, and the facts and circumstances aforesaid would justify the making of a winding-up order on the ground that it was just and equitable that the Company should be wound up. Therefore the appellant prayed for directions under s. 397 of the Act, as the winding-up of the Company which was in a prosperous condition would unfairly prejudice the appellant and other members of the minority group and redress against such oppression could be given by the High Court by making suitable directions in that behalf. The affairs of the Company were being conducted in a manner prejudicial to the interest of the Company for reasons

already stated and there had been a material change in the management or control of the Company by alteration in its Board of Directors and by fraudulent changes introduced in the ownership of the Company's shares and by reason of the wrongful act and conduct of the Patnaik and Loganathan groups. The appellant therefore prayed for the removal, of the present Board of Directors, for re-constitution of the Board of Directors with at least two permanent representatives from his group and for ensuring equal representation in the Board of the three groups of shareholders, and for alterations in the Articles of Association to incorporate therein the provisions of the agreement dated July 29, 1954. The appellant also sought a declaration that the resolutions passed by the Board of Directors on March 1, 1958 and at the general meeting dated March 29, 1958,

731

were null and void and were passed in abuse of the power of Patnaik and Loganathan groups and in oppression of the minority Shareholders and prayed that the said resolutions be set aside in so far as they related to the issue and allotment of 39,000 new shares. The allotment made on July 30 should be declared illegal and null and void as it was made in abuse of the powers of the Patnaik and Loganathan groups and in oppression of the minority shareholders and was not binding upon the Company, the appellant and his group. It was prayed that directions be given to sell the said 39,000 shares by the allottees to the Company upon payment of the amounts actually paid thereon so far and the Company be permitted to offer the same to the shareholders as on July 29, 1958 in proportion to their respective shareholdings. An injunction was also prayed for restraining the Company from holding the meeting on September 21, 1960. Finally it was prayed that orders be passed for investigation into the conduct of the affairs of the Company by the Loganathan and Patnaik groups and suitable directions be made with a view to regulating the affairs of the Company in future and if necessary in administrator of the Company be appointed for carrying out such directions as the High Court might be pleased to make for purposes of removing the oppression and the acts of misconduct and mismanagement and for regulating the conduct of the affairs of the Company. The seven persons to whom the new shares were allotted in July 1958 were also made parties and injunction was prayed for restraining them from transferring those shares.

The application was opposed on behalf of the Company, and its main contention was that the Company was not a party to the agreement dated July 27, 1954 and was not bound by it. It was further contended that there was no mismanagement and the Company and its affairs were not being conducted in a manner prejudicial to it. It was also contended that there was no oppression on the undisputed facts in the present case. The application was also opposed on behalf of Loganathan and Patnaik groups and their case was that they had not acted in any manner which could be said to be oppressive of the rights of the minority shareholders represented by the appellant. They also contended that the affairs of the Company were not being mismanaged nor were they being conducted prejudicially to the interest of the Company. Further the seven persons to whom the shares had been allotted on July 30, 1958 contended that they were not benamidars of the Patnaik and Loganathan groups. Their case was that they were independent persons of substance and had applied for the

7 32

new sham themselves and not as benamidars of Loganathan and Patnaik groups. They denied that there was any oppression of the minority shareholders as alleged or that there was any mismanagement of the affairs of the Company or any conduct which was prejudicial to the interest of the Company. They contended that the resolutions of March 1, 1958, March 29, 1958 and July 30, 1958 were perfectly legal and proper and they were entitled to the shares which had been allotted to them.

The application was heard in the first instance by a learned Single Judge of the High Court. He came to the conclusion that the way in which the Patnaik and Loganathan groups had acted in the matter of the issue of new shares was oppressive of the minority shareholders represented by the appellant and the subsequent conduct of the two groups amounted to continuing and continuous process of oppression of the minority shareholders and also amounted to mismanagement likely to be prejudicial to the interest of the Company. He came to the conclusion that the persistent acts of the Loganathan and Patnaik groups showed that their motive was to oust the minority group of shareholders completely and the sole object of convening the meeting of September 21, 1960 and to pass the proposed resolutions was in furtherance of the continuing and continuous process of oppression of the appellant and his group, being the minority shareholders. Finally it was held that in view of the oppression there was just and equitable cause for winding-up the Company. The learned Judge therefore allowed the petition and granted certain reliefs to which it is unnecessary to refer.

This was followed by fourteen appeals to a Division Bench by the Company and the various shareholders. These appeals were consolidated and heard together. The Division Bench came to the conclusion that the agreement of July 27, 1954 was not binding on the public company which came into existence after July 11, 1957, whatever might have been the position under the agreement when it was a private company. It also came to the conclusion that the seven persons to whom the new shares were offered were not benamidars of Loganathan and Patnaik groups but were independent persons of substance, even though they might be friends of the majority group of shareholders. But there was nothing to show that they were under the control of the majority group and therefore it could not be said that 75 per centum of the voting strength was concentrated in the hands of Loganathan and Patnaik groups except where these new allottees chose to vote with these groups. On a careful consideration of

733

the facts, the Division Bench came to the conclusion that no such oppression had been established as would justify an order under s. 397 of the Act. As to mismanagement under s. 398, the Division Bench came to the conclusion that no case had been made out under that section. On this view of the matter, the appeals were allowed and the application of the appellant was dismissed and the parties were ordered to bear their own costs. Thereupon the appellant applied for and obtained certificates to appeal to this Court and that is how the matter has come up before us.

We shall first take up the case under s. 397 of the Act and proceed on the assumption that a case has been made out to wind-up the Company on just and equitable grounds. This is a new provision which came for the first time in the Indian Companies Act, 1913 as s. 153-C. That section was based on s. 210 of the English Companies Act, 1948, which was

introduced therein for the first time. The purpose of introducing s. 210 in the English Companies Act was to give an alternative remedy to winding up in case of mismanagement or oppression. The law always provided for winding up, in case it was just and equitable to wind up a company. However, it was being felt for sometime that though it might be just and equitable in view of the manner in which the affairs of a company were conducted to wind it up, it was not fair that the company should always be wound up for that reason, particularly when it was otherwise solvent. That is why s. 210 was introduced in the English Act to provide an alternative remedy where it was felt that though a case had been made out on the ground of just and equitable cause to wind up a company, it was not in the interest of the shareholders that the company should be wound up and that it would be better if the company was allowed to continue under such directions as the court may consider proper to give. That is the genesis of the introduction of s. 153-C in the 1913-Act and s. 397 in the Act.

Section 397 reads thus :-

"Application to Court for relief in cases of oppression(1) Any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Court for an order under this section, provided such members have a right so to apply in virtue of section 399.

up./65-13

734

(2) If, on any application under sub-section (1), the Court is of opinion-

(a) that the company affairs are being conducted in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Court may, with a view to bringing to an end the matters complained of, make such order as it fit"

It gives a right to members of a company who comply with the conditions of S. 399 to apply to the court for relief under s. 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The court then has power to make such orders under s. 397 read with s. 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The law however has not defined what is oppression for purposes of this section, and it is left to courts to decide on the facts of each case whether there is such oppression. as calls for action under this section.

We may in this connection refer to four cases where the new s. 210 of the English Act came up for consideration, namely,

(1) Elder v. Elder and Watson,(1), (2) George Meyer v. Scottish Cooperative Wholesale Society Ltd.(2), (3) Scottish Co-operative Wholesale Society Ltd. v. Meyer and another(3), which was an appeal from Meyer's case(2), and (4) Re. H. R. Harmer Limited(4). Among the important considerations which have to be kept in view in determining the scope of s. 210, the following matters were stressed in Elder's case(1) as summarised at p. 394 in Meyer's case(2) :-

"(1) The oppression of which a petitioner complains must relate to the manner in which the affairs of the

(1) [1952] S. C. 49:

(3) [1958] 3 All. E.R. 66:

(2)[1954] S. C. 181:

(4)[1958] 3 All. E.R. 689.

735

company concerned are being conducted; and the conduct complained of must be such as to oppress a minority of the members (including the petitioners) qua shareholders.

(2) It follows that the oppression complained of must be shown to be brought about by a majority of members exercising as shareholders a predominant voting power in the conduct of the company's affairs.

(3) Although the facts relied on by the petitioner may appear to furnish grounds for the making of a winding up order under the 'just and equitable' rules, those facts must be relevant to disclose also that the making of a winding up order would unfairly prejudice the minority members qua shareholders.

(4) Although the word 'oppressive' is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are 'treating the company and its affairs as if they were their own property' to the prejudice of the minority shareholders-and in which just and equitable grounds would exist for the making of a winding up order.... but in which the 'alternative' remedy provided by S. 210 by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority.

(5) The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to be order sought by a complainer as the appropriate equitable alternative to a winding-up order."

Meyer's case was between a parent company and a subsidiary company and it was held that "(1) when a subsidiary company is formed with an independent minority of shareholders, the parent company must, if engaged in the same class of business, conduct the affairs of the subsidiary, even though these are in a sense its own, in such a way as to deal fairly with the subsidiary; (2) that, if the parent company deliberately pursues a course calculated to destroy its subsidiary, with resulting loss to the minority shareholders, this may amount to oppression within the meaning of sec. 210; (3) that the conduct of a majority shareholder may amount to oppression notwithstanding the

fact that up./65-

736

his own shares depreciate in value pro rata with those of the minority; and (4) that, even if the majority shareholder has virtually destroyed the substratum of the company by his oppressive conduct and it is conceded by all parties to be just and equitable that the company be wound up, the oppressed minority may nevertheless be entitled to a remedy under sec. 210."

These observations were approved by the House of Lords in appeal and it was held that "whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary."

In Harmer's case(1), it was held that "the word 'oppressive' meant burdensome, harsh and wrongful". It was also held that "the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the 'just and equitable' rule, but only to those cases of that character which have in them the requisite element of oppression". It was also held that "the result of applications under s. 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision". The circumstances must be such as to warrant the inference that "there had been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy". The phrase "oppressive to some part of the members" suggests that the conduct complained of "should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. ... But, apart from this, the question of absence of mutual confidence per se between partners or between two sets of shareholders, however relevant to a winding up seems to have no direct relevance to the remedy granted by S. 210. It is oppression of some part of the shareholders by the manner in which the affairs of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not come within s. 210. It is not lack of confidence between shareholders per se that brings s. 210 into play, but lack of confi-

(1)[1958] 3 All. E.R. 689.

737

dence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

These observations from the four cases referred to above apply to s. 397 also which is almost in the same words as s. 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as

preliminary to the application of s. 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to s. 397.

The main plank of the appellant's case to prove oppression is the agreement of July 27, 1954 between himself and Patnaik and Loganathan. At that time he was not a member of the Company. It is not disputed that the Company was not a party to that agreement and is thus strictly speaking not bound by its terms. But even apart from this strict legal aspect of the matter, let us see what exactly the agreement provides. At that time Patnaik and Loganathan groups held shares of the value of Rs. 21 lacs in the Company, and the main provision of the agreement is that the share capital would be increased and the appellant would be given shares of the face value of Rs. 10,50,000 so that his holding should be equal to the holdings of the other two groups. It also provides that the three groups would have an equal number of representatives on the Board of Directors and the appellant would be its Chairman. Other provisions of the agreement refer

738

to matters of detail to which it is unnecessary to refer. It will be seen, however, that there is no provision in the agreement as to what would happen if and when the share capital was actually increased beyond the increase envisaged at the time of the agreement. There is also no provision in the agreement to the effect that the Articles of Association of the private company as it then was would be amended suitably to bring the provisions of the agreement with respect to shareholding and the Board of Directors into line with the agreement. Thus there is nothing in the agreement about the future in the matter of allotment of shares in case capital was actually increased thereafter. In this connection our attention is drawn to the fifth term of the agreement which is in these terms --

"Ordinary shares of the face value of Rs. 4 lacs held by the French company (Rs. 3,75,000) and Mr. Rath (Rs. 25,000) will continue to be held by them as heretofore, and none of the parties hereto will have any interest therein so that the shareholding in the Company of all the three parties hereto will remain equal and in the same proportion."

It is urged that this term shows that the intention was that the shareholding of the three groups would remain equal for ever. We are not prepared to read this implication in this term. It was easy to provide in the agreement that whenever capital was actually increased, it would be divided equally between the three parties thereto. In the absence of such a provision we do not think that the fifth term is capable of

the interpretation which is put on it on behalf of the appellant. It only deals with the shares worth Rs. 4 lacs held by the other two persons and provides that besides those shareholdings capital shares would be held equally by the three parties. Therefore as we read the agreement we cannot come to the conclusion that it provides that if in future there was an actual increase in capital that will necessarily be shared equally by the three parties.

However, it is said that the conduct of the three parties later on shows that when there was actual increase of capital to Rs. 61 lacs sometime after July 1954, this increase was shared equally by the three parties and further when Mr. Rath sold his holdings in the Company they were purchased equally by the three parties so much so one odd share out of 250 shares was held by the three parties jointly. This is undoubtedly so, and does give some colour to the argument that the three parties concerned in the

739

agreement intended that their shareholdings should remain equal even later. But this intention cannot be said to bind the Company, muchless so when the Company was not bound strictly speaking even by the express terms of the agreement. So far as the Company is concerned, it was free to dispose of shares as the directors or the shareholders in general meeting considered proper without regard to this agreement.

Another element came into the picture in January 1957 when the Company was converted into a public limited company. It is obvious that a public limited company was even much less bound by the agreement of July 1954 as compared to the private company. We have already pointed out that even when the Company was private its Articles of Association were not amended to bring them into line with the agreement and that shows that the agreement was only between two groups of shareholders and Jain with respect to the state of affairs as it was at the time of the agreement. When the Company became a public limited company and it was decided to issue new shares of the value of Rs. 39 lacs the question of allotment of these shares arose. By then some differences had developed between the three groups. The appellant wanted the shares to be allotted to the existing shareholders while the Patnaik and Loganathan groups wanted the matter to be decided by a general meeting as evidenced by what happened in the meeting of the Board of Directors dated March 1, 1958. It appears that the decision to issue new shares was taken sometime in 1956 when the Company was a private company. At that time the authorised capital was rupees one crore though only Rs. 61 lacs had been issued. The fresh issue of Rs. 39 lacs worth of shares was thus intended to bring the subscribed capital up to the limit of the authorised capital. The application to the Controller of Capital Issues was made for that purpose on September 17, 1956. At that time the intention was that the issue would be private and would be made to the existing shareholders, directors and/or their nominees. This was bound to be so as the Company was then private. As, however, the Company wanted a loan from the Industrial Finance Corporation and as that Corporation would only grant loans to a public company, the Company was converted into a public company, as already indicated, in January 1957.

The contention of the appellant, however, is that when the share capital was decided to be increased by fresh issue within the limit of rupees one crore, regulation 42 of the First Schedule to the 1913 Act was in force and that regulation required that direction to the contrary as to

allotment of shares should be given

740

by the resolution sanctioning increase of share capital. This was however not done at the time when the authorised share capital was decided to be increased in 1954 and consequently the new shares had to be allotted to the existing shareholders under regulation, 42. At that time, however, the Company was private and the shares had to be issued to the existing shareholders and no question of any direction to the contrary arose if the Company was to retain its private character. The sanction of the Controller of Capital Issues came in December 1957 when the Company had become a public limited company, and the question of allotment arose thereafter. By that time the Act (i.e. the 1956 Act) had been passed and regulation 42 of the First Schedule to the 1913 Act was no longer in force. Instead it had been replaced by s. 81 of the Act, which provides that "where at any time subsequent to the first allotment of shares in a company, it is proposed to increase the subscribed capital of the company, by the issue of new shares, then, subject to any direction to the contrary which may be given by the company in general meeting and subject only to those directions, such new shares shall be offered to the persons who at the time of the offer are holders of equity shares of the company, in proportion as nearly as circumstances admit, to the capital paid up on those shares at that time". Further sub-s. (3) of s. 81 provides that the section shall not apply to a private company. Thus S. 81 specifically applies to public companies only and comes into play when subscribed capital (as distinct from authorised capital) has to be increased. Therefore when the question of actually issuing new shares arose after the sanction of the Controller, regulation 42 was no longer in force as it had been repealed, and action had to be taken in accordance with s. 81 of the Act. Section 81 does not require that direction to the contrary must be given by the resolution sanctioning the increase of share capital as under regulation 42 of the First Schedule to the 1913 Act. Consequently it was open to the public company in 1958 when it proposed to increase the subscribed capital after the sanction of the Controller to act under s. 81 and this was what was done by the resolution of March 28, 1958 at the general meeting. The general meeting decided that new shares should not be issued to the existing shareholders but should be issued to others privately. The resolution of March 29, 1958 was in accordance with the law as it stood when it was passed and cannot 'be said to be vitiated in any way.

It is however urged that the notice for the general meeting of the 29th March, 1958 was not in accordance with s. 173, and so

741

the proceedings of the meeting must be held to be bad. This objection was however not taken in the petition and we have therefore not permitted the appellant to raise it before us, as it is a mixed question of fact and law. We may add that, though the objection was not taken in the petition, it seems to have been urged before the appeal court. Das J. has dealt with it at length and we would have agreed with him if we had permitted the question to be raised. This attack on the validity of what happened on March 29, 1958 must thus fail.

We have already said that the public company which came into existence in 1957 was not bound by the agreement of 1954 and could offer shares to such persons as it decided to do in

general meeting in accordance with s. 81. The mere fact that in the meeting of March 29, 1958 it was decided to offer shares to others and not to the existing shareholders would not therefore necessarily mean oppression of the minority shareholders. The majority shareholders were not bound to accept the view of the minority shareholders that new shares should be allotted only to the existing shareholders. It also appears that the Patnaik group was afraid at the time when the new shares were being issued that as they had no money the appellant group would take up the entire new issue and would thus obtain majority control of the Company. This they wanted to avoid and that is why the new issue was resolved in general meeting to be issued to others and not to the existing shareholders. If this was the reason why new shares were not issued to the existing shareholders it can hardly be said that the action of the majority shareholders in passing the resolution which they did on March 29, 1958 was oppressive to the minority shareholders. The matter would have been different if the seven persons to whom shares were eventually allotted in July 1958 were benamidars or stooges of the Patnaik or Loganathan group, for in that case it may be said that these two groups forming the majority in the general meeting had acted fraudulently and unfairly by depriving the appellant of what he would have got under s. 81. But there can be no doubt that the seven persons to whom the shares were eventually allotted are respectable persons of independent means. There is nothing to show that they were stooges or benamidars of the Patnaik and Loganathan groups. The action of the majority shareholders in allotting the new shares to outsiders and not to the existing shareholders cannot therefore in the circumstances be said to be oppressive of the appellant and his group.

742

it is true that by the beginning of 1958 there were differences between the appellant and the Patnaik and Loganathan groups and there was loss of confidence between them. But mere loss of confidence between these groups of shareholders would not come within S. 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the Company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his proprietary right as a shareholder. It cannot be said on the facts on record of this case that there was any lack of probity or fair dealing towards the appellant in the matter of his proprietary right as a shareholder. It is true that he did not get any part of the new issue; but equally the Patnaik and Loganathan groups also did not get any part of it, for there is no doubt that the persons to whom the shares were allotted eventually in July 1958 were not benamidars or stooges of the Patnaik and Loganathan groups. If the new allottees were benamidars or stooges of the Loganathan and Patnaik groups there might have been lack of probity or fair dealing in allotting the shares to them. Further the allotment of shares even at par did not in our opinion seriously affect the proprietary rights of the appellant as a shareholder. It is urged that the issue of new shares at par to others would depress the value of the existing shares. But the evidence shows that by 1958 the Company which had gone into production in 1955 was making profits and there is no reason to suppose that the same rate of profit would not have continued with the expansion envisaged by the increase in share capital. Besides, as the shares of the Company were not quoted on the Stock Exchange, it is

impossible to say what impact the issue of new shares had on the value of the existing shares and whether the value of existing shares was depressed, if at all, by the issue of new shares. It is not a case where new shares were issued as bonus, for the issue of bonus shares does necessarily affect the value of existing shares. But these were issued on payment of cash for the purpose of expansion. In the circumstances we cannot necessarily infer that the value of the existing shares would have been seriously affected by the issue of new shares at par. So it cannot be said that this was done in order to affect the proprietary rights of the appellant as a shareholder. The issue of new shares which was done in March and July 1958 cannot therefore in our opinion amount to oppression of the appellant as a minority shareholder.

It is however urged that the haste with which the new shares were issued on July 30, 1958 shows a design to harm the appellant as a minority shareholder. It is no doubt true that the shares were issued in haste. But as we have already indicated, the Company was in need of money for expansion and its getting the loan from the Industrial Finance Corporation also depended upon the increase of subscribed share capital. Therefore, the haste with which the shares were allotted on July 30, 1958 cannot really be said to be a part of a design to oppress the minority. The haste became necessary because the interim injunction was vacated on that day and it was felt that if immediate action was not taken and the new shares allotted, there might be further injunction which would further delay the issue of shares and getting the loan from the Industrial Finance Corporation. The haste therefore appears to have occurred because of the action taken by the appellant in bringing a suit and getting a temporary injunction. It was feared that even after the vacation of the temporary injunction the appellant would go in appeal and get another injunction from the appeal court. This fear was justified because the Subordinate Judge's court two hours later withheld the operation of its order vacating the temporary injunction. The haste in the particular circumstances of the case in allotment of shares cannot therefore lead to any inference of oppression but arose out of circumstances brought about by the appellant's conduct.

But it is urged that even though the Company was in urgent need of money it accepted only 5 per centum with the application and 10 per centum on allotment and that the remainder of the money did not come for a long time. Again it is true that the remainder of the money did not come for sometimes. It also appears that out of the seven persons who had applied to take shares six had to take loans from the Central Bank of India Limited to pay up the remainder of the money and that a part of the new capital (i.e. Rs. 7,65,000) was not received even till the time when the application under S. 397 was made. But that again in our opinion does not necessarily lead to the inference that there was oppression by the majority shareholders of the appellant, once it is held that the seven persons to whom the new shares were allotted were not stooges or benamidars of the Patnaik and Loganathan groups. There might be reasons why those persons were not in a position to pay the entire money at once and therefore borrowed money from the Bank to make up the full amount of the shares taken by them. Further it appears that there was a fight between the appellant group on the one side and the Patnaik and Loganathan groups on the

But it is urged that even though the Company was in urgent need of money it accepted only 5 per centum with the application and 10 per centum on allotment and that the remainder of the money did not come for a long time. Again it is true that the remainder of the money did not come for sometimes. It also appears that out of the seven persons who had applied to take shares six had to take loans from the Central Bank of India Limited to pay up the remainder of the money and that a part of the new capital (i.e. Rs. 7,65,000) was not received even till the time when the application under S. 397 was made. But that again in our opinion does not necessarily lead to the inference that there was oppression by the majority shareholders of the appellant, once it is held that the seven persons to whom the new shares were allotted were not stooges or benamidars of the Patnaik and Loganathan groups. There might be reasons why those persons were not in a position to pay the entire money at once and therefore borrowed money from the Bank to make up the full amount of the shares taken by them. Further it appears that there was a fight between the appellant group on the one side and the Patnaik and Loganathan groups on the

other for the control of the Company. If the fear of Patnaik was correct that the

7 44

appellant would have purchased all the shares worth Rs. 39 lacs for want of money on the part of Patnaik and Loganathan groups and would thus have obtained a dominating position in the Company, the action of the majority shareholders in preventing such domination by one group only and taking action for that purpose cannot in the circumstances be said to be oppressive of the minority shareholders. It is well to remember that if the appellant had got the entire new issue of Rs. 39 lacs because of the inability of the Patnaik and Loganathan groups to take up their two-thirds shares, the majority control would have vested in one group. But the action of the majority shareholders in issuing new shares to others and not to the existing shareholders has brought about a position where, after the issue of new shares even the Patnaik and Loganathan groups have no longer a majority and they have to carry the holders of the new shares with them in order to carry on the work of the Company. The new holders are not the stooges and benamidars of the Patnaik and Loganathan groups and therefore after the action taken in March and July 1958 the Company cannot be said to be dominated by any group but has become more broad-based as a public company should really be. The fact that the Patnaik and Loganathan groups may be able to get the support of the holders of new shares does not necessarily mean oppression of the appellant, for the new shareholders may support the Loganathan and Patnaik groups on the ground that such support would be for the benefit of the Company.

Finally it is urged that the whole object of the Patnaik and Loganathan groups was to get control over 75 per centum of shares of the Company, for a voting strength of 75 per centum is required to pass a special resolution without which complete control of a company is impossible. Therefore it is said that Loganathan and Patnaik groups so manoeuvred the affairs that they should be able to get over 75 per centum of the voting strength. It is urged that if the new shares had been divided equally between the three groups the Patnaik and Loganathan groups would not have been able to control over 75 per centum shares. This argument again would have some force if the new shares had been allotted to stooges and benamidars of the Patnaik and Loganathan groups. But as the shareholdings stand, after the action of March and July 1958, the position is that roughly Patnaik and Loganathan groups between themselves have got shares worth Rs. 38 lacs, the appellant has got shares worth Rs. 19 lacs and shares worth Rs. 39 lacs are held by the new

745

allottees and shares worth about Rs. 4 lacs by the French company. So unless the Patnaik and Loganathan groups are able to persuade the new allottees always to vote with them they would not be in control of over 75 per centum of shares. The argument that all this was done to give the Patnaik and Loganathan groups control over 75 per centum of shares in the Company does not therefore appear to be well-founded when we remember that the new allottees are not stooges or benamidars of these two groups. The fact that the shares were issued presumably to the friends of Patnaik and Loganathan groups is hardly of any significance in the matter of oppression, for if shares are issued privately they are bound to go to friends of the directors.

The case of oppression therefore based on the agreement of July 1954 as the sheet-anchor of the appellant's case must

fail. In the first place that agreement was strictly speaking not binding even on the private company-it was muchless binding on the public company when it came into existence in 1957. The agreement did not contain any specific provision as to future issue of capital. Further at the time when the agreement took place the appellant was not even a member of the private company and it was really an agreement between a non-member and two members of the Company, which would go to show that the agreement could in no circumstances bind the Company. It is true that for sometime the agreement was in the main carried out when the capital was actually increased up to Rs. 61 lacs, the appellant getting one-third of it barring the French company's shares. When, however, the Company was made into a public company some of the terms of the agreement could not be put even in the Articles of Association of the public company. But it is said that if the Patnaik and Loganathan groups had behaved like honourable men, the agreement could still have been carried out after the Company became a public company and that these two groups did not behave honourably when they gave the go-by to the agreement completely. There is some force in the contention that Loganathan and Patnaik groups, when they were -in need of the appellant, took his help; it also does appear that when the Company had turned the corner and it was felt that the appellant's help was not absolutely necessary, these two groups thought it unnecessary to carry out the spirit of the agreement (though not the terms for the terms had nothing to do with the future increase of capital and its distribution). But can it be said that the conduct of the affairs of the Company was carried on oppressively merely because these two groups which in March and July 1958 were in

746

majority did not carry out the spirit of the agreement? We have given anxious consideration to this aspect of the matter and we feel that, though the Patnaik and Loganathan groups did take advantage of the help given by the appellant when the Company was in a difficult situation the fact that when new issue was made on behalf of the public company, they decided to make it more broad based and issue the shares to others and not to the existing shareholders, cannot be said to be oppressive of the then minority shareholders, namely, the appellant's group. We have already pointed out that it cannot be said to have been proved in this case that the appellant suffered in his proprietary rights as a shareholder and in these circumstances it cannot be said that the action taken in March and July 1958 in the allotment of the new shares amounted to such oppression of the appellant as would justify an order under S. 397.

Reference then may be made to the proposed increase of shares for which a meeting was called on September 21, 1960 and which gave further cause to the appellant to move the application which he did on September 14, 1960. In that meeting it was proposed to increase the share capital by rupees two crores, one crore of which was to be in equity shares and the other crore in preference shares. It is said that this was part of the design to further reduce the shareholdings of the appellant in the Company so that he may be driven out of it, for after the issue of the new proposed capital the appellant's holding of equity shares would be hardly 10 per centum of the entire equity capital. In the first place, as the meeting of September 21, 1960 was never held because of the injunction obtained by the appellant, we

cannot say how the new shares would have been issued and whether they would have been offered to the public for subscription to make the Company even more broad-based than it was then. If that was the intention that could hardly be called oppression of the appellant. Apart from that we fail to see why the appellant should be driven out of the Company and should be compelled to sell his shares simply because his proportion of equity capital is only 10 per centum of the entire equity capital, for it is not in dispute that the Company is doing well and the appellant will get his dividends as any other shareholder. But if the appellant means that it is not worth his while to invest his money in a company in which he is unable to have an important-if not a controlling-voice, this shows that the real basis for the application in the present case was not the oppression of the appellant as a minority shareholder but the feeling that the appellant who hoped to get control

747

of the Company had been thwarted by what took place in March and July 1958. If that is the real position, then it cannot be said that the Loganathan and Patnaik groups acted with lack of probity or fair dealing in thwarting the desire of the appellant to get control of the Company; nor can such conduct be said to be oppressive of a minority shareholder. The case of the appellant based on the agreement of July 27, 1954 therefore must fail and it must be held that even if that agreement was not carried out by the Company, which was not bound by it, there can be no case of oppression of the appellant.

We now come to the case under s. 398. It provides that any members of a company who have rights to apply in virtue of S. 399 may complain (i) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or (ii) that a material change has taken place in the management or control of the company and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company. On such application being made, if the court is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the matter of management or control of a company, it is likely that the affairs of the company will be conducted as aforesaid, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit. This section only comes into play as the marginal note shows, when there is actual mismanagement or apprehension of mismanagement of the affairs of the company. It may be contrasted with s. 397 which deals with oppression to the minority shareholders, whether there is prejudice to the company or not. In the present case, the appellant relies on the following three circumstances to show that the affairs of the Company were being conducted in a manner prejudicial to its interests, namely-

- (i) that when the new shares worth Rs. 39 lacs were issued in July 1958 only a small part of the share money was received in the beginning;
- (ii) that the Patnaik and Loganathan groups removed Rs. 7 lacs from the coffers of the Company;
- (iii) that the Company lost the support of the appellant.

It is true that when new shares of the value of Rs. 39 lacs were issued, the Company received only 15 per centum of the

share

748

money to begin with, namely, 5 per centum with the application and 10 per centum on allotment. But the evidence shows that though there was some delay in the receipt of 85 per centum of share money, shares worth Rs. 30 lacs were fully paid up in the financial year 1959-60, and the only amount outstanding in that year was Rs. 7,65,000 (i.e. 85 per centum of shares worth Rs. 9 lacs). The slight delay in the payment of the full value of the shares cannot therefore in the circumstances be said to be so prejudicial to the interests of the Company as to call for any action under S. 398 of the Act.

As to the removal of Rs. 7 lacs from the coffers of the Company by the Loganathan and Patnaik groups, it does not appear from the application of the appellant that his complaint was that this sum was wrongfully removed by the two groups and there was any fraud with respect to its removal. The real complaint of the appellant in this connection appears to have been that he was entitled to one-third of this amount of Rs. 7 lacs under the agreement, and his share of this amount was not given to him. This appears from a letter written by the appellant to Patnaik on October 16, 1957 in which he asked that he should be paid his one-third share of this sum of Rs. 7 lacs with interest. It is not in dispute that the sum of Rs. 7 lacs was due from the Company to the Kalinga Industrial Development Corporation Limited and therefore the withdrawal of this amount from the Company by the Patnaik and Loganathan groups which controlled the Kalinga -Industrial Development Corporation which was the managing agent of the Company before July 1954 cannot be said to amount to conducting the affairs of the Company prejudicially to its interests, whatever may be the rights of the appellant in the matter of getting one-third of this amount from the Loganathan and Patnaik groups. If he has any right under the agreement of July 27, 1954 in this matter he can enforce it in such way as may be open to him; but it cannot be said in the circumstances that this withdrawal from the Company was in any way prejudicial to the affairs of the Company, when it is clear that the Company owed the amount to the former managing agent.

The last point that has been urged in this connection is that the Company lost the support of the appellant in view of the action taken by the Patnaik and Loganathan groups in March and July 1958. Here again it is true that the appellant was dissatisfied with what had happened in March and July 1958 with regard to the allotment of shares worth Rs. 39 lacs and withdrew his support from the Company. If the Company was able to

749

carry on without this support as it apparently was in 1958, it cannot be said that the action which resulted in the loss of the appellant's support to the Company was necessarily prejudicial to it, it may be that the appellant was sore inasmuch as he must have felt that his assistance was taken when the Company was in need of such assistance; but later the Patnaik and Loganathan groups acted in the manner in which they did when they felt that the appellant's support was no longer necessary to the Company. But if the appellant's support was no longer necessary to the Company by 1958 the action of the Patnaik and Loganathan groups which resulted in the loss of such support cannot be said to be prejudicial to the interests of the Company. We therefore agree with the High Court that no case has been made out for action under s. 398 on the ground that the

affairs of the Company were being conducted in a manner prejudicial to its interests.

Nor is there any ground for holding that because of the change which took place in the management after July 1958 it was likely that the affairs of the Company would be conducted in a manner prejudicial to its interests. the change that took place after July 1958 was that the appellant no longer remained the chairman of the Company and the Patnaik and Loganathan groups practically managed the Company without the appellant. But as the High Court has pointed out there were no facts before the court to come to the conclusion that the change in management was likely to result in the affairs of the Company being conducted in a manner prejudicial to its interests. In this connection reliance is placed on certain matters which transpired after the application was filed on September 14, 1960. These matters however cannot be taken into account for the application has to be decided on the basis of the facts as they were when the application was made Besides, as the High Court has pointed out, it has not been shown that in view of certain actions taken by the new management without consulting the appellant, the Company was landed in any difficulty and loss of profit which would show mismanagement of its affairs.

Lastly it was stated in the application that accounts had not been shown to the appellant and his group and in consequence of this the appellant was not able to give full particulars of the several acts of fraud, misfeasance and other irregularities committed by the new management. But as the High Court has pointed out, the appellant asked for production of certain documents in April 1961 and those documents were made available for inspection by the appellant and were produced in court. It was

750

for the appellant to take inspection of those documents if he so desired and the appeal court was right in pointing out that the learned Single Judge was not correct in drawing an adverse inference against the Company that it had disobeyed the orders of the court and had not produced the documents called for and had given no opportunity to the appellant for their inspection. It seems to us that the appeal court was right in this view and no case has been made out even prima facie for action under this part of S. 398 of the Act.

The appeals therefore fail and are hereby dismissed with costs, one set of hearing fee.

Appeals dismissed

751