

TIN PLATE DEALERS ASSOCIATION PVT. LTD. & ORS. A

v.

SATISH CHANDRA SANWALKA & ORS.

(Civil Appeal No. 589 of 2010)

OCTOBER 07, 2016 B

[RANJAN GOGOI AND PRAFULLA C. PANT, JJ.]

Companies Act, 1956:

ss.397, 398, 53 – Company petition maintainability of – Company petition was filed by the respondents No.1-7 (Sanwalka group) against the appellants No.2-5 (Gupta group) – CLB held petition maintainable – Shares were allotted to the respondents after the forfeiture of the same in hands of the appellants – Plea of appellants that shares were held by the respondents as beneficiary holders on behalf of appellants and respondents failed to comply with the notice to pay the unpaid value of forfeited shares – Held: Share certificates disclose that the allotment was fresh and independent – Certificates do not contain any stipulation or condition that the same are being held either on account of a third person or as beneficiary on behalf of any third person – Shares were held by the respondents in their own right without any connection with the forfeited shares held by the appellants – Also, compliance of call notice in terms of s.53 was not proved by the appellants and its conformity with clauses of Articles of Association of the company – Therefore, company petition maintainable. C D E

ss.397, 398 – Oppression and mismanagement – Respondent-Sanwalka group filed company petition alleging oppression by the appellants-Gupta group and questioning the act of removal of two members of respondent-Sanwalka group from the Board of Directors and induction of two others of appellant-Gupta group in their place – Held: Satisfaction that oppression has been committed has to be reached in the facts of each case – Facts of the present case demonstrate a series of unacceptable decisions and actions on the part of the appellants-Gupta group. F G

s.205(3) – Issue of bonus shares – Held: Proviso of s.205(3) permits issue of bonus shares out of revaluation reserves of a H

- A *company – Also, Articles of Association of the company to permit and contemplate such an action – In the present case, the Articles of Association do not empower the Directors to issue bonus shares out of revaluation reserves – When the Articles of the company do not confer such power in the Board, exercise thereof, on the basis that the Act so provides would be impermissible – Enabling provisions*
- B *under the Act would require incorporation in the Articles of a company.*

Company Law:

- C *Issue of ordinary equity shares – Held: Power of the Board of Directors to issue fresh shares is an adjunct of its extensive powers under the Companies Act, 1956 – Fundamental fair play is expected from the Board of Directors in making fair and proportionate distribution/allotment of such shares – Issue of ordinary equity shares should be proportionate to the share holdings of the members of the company – Companies Act, 1956 – s.172(2)*
- D *r/w s.41.*

- E *Issue of ordinary equity shares in lieu of preference shares – Conversion of preference shares to equity shares – Held: Resolution of the Board relating to the conversion of preference shares into equity shares proceeded on basis that dividends have not been paid and shareholders agreed to accept equivalent equity shares, is unreliable – Just and proper to strike down the conversion of preference shares into equity shares and revert the preference shares to earlier status – Companies Act, 1956 – s.87(2)(a).*

- F **Dismissing Civil Appeal No.589 of 2010 and Disposing of Civil Appeal No.599 of 2010 with directions, the Court**

- G **HELD: 1.1. Share certificates disclose that the same constitute a fresh and independent allotment of the shares by reference to their distinctive numbers specified therein. The certificates do not contain any stipulation or condition that the same are being held either on account of a third person or as beneficiaries on behalf of any third person. The shares in question were allotted on payment of Rs.35 being the application money (Rs.25) and allotment money (Rs.10). A further amount of Rs.10/- per share was paid against the first call. Therefore, the share certificates, *ex facie*, do not support any of the contentions**
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advanced on behalf of appellants-Gupta Group. If the shares were held by the members of the respondents-Sanwalka Group in their own right without any connection to the erstwhile/forfeited shares held by M/s. Gupta Brothers, the second question arising i.e. failure to respond to the call notice really does not arise. Be that as it may, the said notice required the members of the Sanwalka Group to pay the unpaid value of the forfeited shares (which coincidentally was also Rs.55/- per share i.e. same as the unpaid amount of the shares at the time of forfeiture when held by M/s. Gupta Brothers) along with interest. In this regard it was found by the CLB as well as the High Court that even issue of notice of the call in terms of Section 53 of the Act had not been proved by the Gupta Group. That apart, the call notice and forfeiture of the shares held by the Sanwalka Group, upon alleged failure to comply with the said notice, does not appear to be in conformity with Clauses 14 to 18 of the Articles of Association of the Company. [Para 14][156-B-F]

1.2 Not only the call notice had not been proved to have been issued in the matter required under Section 53 of the Act, the notice also does not mention the consequences of non-payment i.e. forfeiture. Also the fastening of the liability on the Sanwalka Group to pay the unpaid amount of the forfeited shares along with interest is plainly contrary to the provisions of Article 18 of the Articles of Association. Besides, the date of the forfeiture also is not clear though it appears that in a Board Meeting a decision was taken to restore the said shares to M/s. Gupta Brothers. The reason for the said decision appears to be to comply with an order of attachment of the shares passed earlier by the Civil Court. All these would demonstrate the apparent falsity of the claim now made that the forfeiture was due to failure of the Sanwalka Group to comply with the terms of the call notice. The primary question i.e. maintainability of the company petition has to be answered in favour of the respondent-Sanwalka Group. [Paras 15, 18][157-F-H; 158-A]

2. In the present case, the Articles of Association of the Company do not empower the Directors to so act. No such situation i.e. issue of bonus shares out of revaluation reserve is contemplated. When the Articles of the Company do not confer

A any such power in the Board exercise thereof on the basis that
 the Act so provides would be impermissible. Enabling provisions
 under the Act would require incorporation in the Articles of a
 company. The resolution of the Board, in pursuant to which bonus
 shares were issued indicates that the real purpose for issue of
 B the bonus shares is to raise funds which were badly needed by
 the company at that point of time. On the very face of it, the
 purpose indicated in the resolution is a sham and a pretence
 inasmuch as revaluation of the existing assets of the company
 and issuance of bonus shares against such revaluation could not
 and did not generate any additional funds as the additional capital
 C available is purely fictional or notional. A self serving interest of
 the Gupta Group (who received all the bonus shares issued) in
 issuing the bonus shares, therefore, is evident. [Paras 20, 21][159-
 C-D, G-II; 160-A-B]

D *Bhagwati Developers v. Peerless General Finance &
 Investment Co. & Ors.* 2005 (2) Suppl. SCR 502;
*Claude-Lila Parulekar (Smt.) v. Sakal Papers (P) Ltd.
 & Ors.* (2005) 11 SCC 73 : 2005 (2) SCR 1063 – relied
 on.

E 3. So far as the issue of 25,000 equity shares is concerned,
 the power of the Board of Directors of the Company to issue
 fresh shares must always be viewed as an adjunct of its extensive
 powers under the Act and the bona fides of such an exercise
 cannot be called into question by construing the power to issue
 fresh shares to be limited by any particular purpose or purposes.
 F This was the view of the Company Law Board also. However,
 the same would not detract from the fundamental principle of fair
 play that is to be expected from the Board of Directors in making
 a fair and proportionate distribution/allotment of such fresh
 shares. The direction of the Company Law Board upheld by the
 High Court, namely, that allotment from the aforesaid 25,000 newly
 G issued ordinary equity shares should be proportionate to the share
 holding of the two groups taking the members of the Sanwalka
 Group as having continued to be members of the company, will,
 therefore, not require any interference. [Para 22][160-C-E]

H *Needle Industries (India) Ltd. & Ors. v. Needle
 Industries Newey (India) Holding Ltd. & Ors.* (1981) 3

SCC 333 : 1981 (3) SCR 698 – relied on. A

4.1 Insofar the issue of 3065 ordinary equity shares in lieu of 3065 preference shares is concerned, the apprehension of the Sanwalka group is that if the equity shares issued against the said preference shares are allowed to remain alive and valid the balance would still tilt in favour of the Gupta Group. A reading of the aforesaid Section 87(2) would clearly indicate that except in situations where dividends have not been paid, holders of preference shares do not have a right to vote except in matters which directly affects the rights attached to the preference shares. [Para 23, 26][160-F-II; 162-F-G] B

4.2 The Articles of Association of the Company must necessarily have to be understood in the light of the provisions of Section 87 particularly those contained in sub-Section (2). The meaning sought to be given to Articles 20, 21 and 22 of the Company, namely, that every share holder including the holder of a preference share has a right to vote cannot be readily accepted. The resolution of the Board relating to the conversion of preference shares into equity shares proceeds on the basis that dividends in respect of the 3065 shares have not been paid and in lieu thereof the shareholders had agreed to receive an equivalent number of equity shares. The above statement of fact is difficult to accept. Neither is the period during which dividends had not been paid is specified, nor is the amount due indicated. No material has been laid to show that the 3065 equity shares represent a fair value of the dividends claimed to be unpaid. The preference shares in question were held by the Gupta Group who was in control of the company at that point of time. A number of self serving decisions by the Gupta Group and its conduct of the business of the company in a manner detrimental to the interest of the company, as discussed hereinabove, would make it extremely perilous to rely on the version available in the resolution of the Board for allotment of 3065 equity shares in place of the preference shares in question. In the above circumstances it would be just and proper to strike down the conversion of the 3065 preference shares into equity shares and revert the preference shares to its earlier status to be dealt with in the future in accordance with law. [Para 28][163-H; 164-A-E] C D E F G

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A **5. The question whether a single act of oppression would enable the CLB to intervene or oppression must be the cumulative result of continuous acts should not require any debate in the facts of the present case which demonstrate a series of unacceptable decisions and actions on the part of the appellant-Gupta Group. In the last resort, satisfaction that oppression has been committed has to be reached in the facts of each case. [Para 32][165-C-D]**

Case Law Reference

	2005 (2) Suppl. SCR 502	relied on	Para 20
C	2005 (2) SCR 1063	relied on	Para 20
	1981 (3) SCR 698	relied on	Para 22

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 589 of 2010.

D From the Judgment and Order dated 14.09.2005 in APO No. 63 of 2001 passed by Hon'ble High Court at Calcutta

WITH

C.A. No. 599 of 2010.

E Arvind P. Datar, C. A. Sundaram, K. Radhakrishna, Sr. Adv., Nikhil Nayyar, N. Sai, Divyanshu Rai, Ramesh Singh, S. Patra, Ashwani Chawla, Ms. Rohini Musa, Zafar Inayat, Abhishek Gupta (For M/s Khaitan & Co.), Pratap Venugopal, Ms. Surekha Raman, Ms. Niharika (For M/s K. J. John & Co.), Asha Gopalan Nair, Ms. Sadhna Sandhu, M. K. Maroria, Pritha Srikumar Iyer, B. Krishna Prasad, Praveen

F Agrawal, Advs. for appearing parties.

The Judgment of the Court was delivered by

G **RANJAN GOGOI, J.** 1. Both the appeals being against the common judgment and order of the High Court of Calcutta dated 14th September, 2005 were heard together and are being dealt with by this common order.

H 2. The appellant in Civil Appeal No. 589 of 2010 is a private limited company incorporated in the year 1948 with its registered office at Calcutta. The appellants 2 to 5 (hereinafter referred to as the 'Gupta Group') had come into control of the company by actions and omissions

complained of by respondents 1 to 7 in the said appeal i.e. C.A. No.589 of 2010 which had led to the institution of the company petition under Section 397/398 of the Companies Act, 1956 (hereinafter referred to as the 'Act'). The said respondents may be conveniently referred to as the "Sanwalka Group".

3. At the time of its incorporation, the authorised capital of the company was Rs. 10 lakh consisting of 4,000 redeemable cumulative preference shares of Rs. 100/- each and 6,000 ordinary shares of Rs. 100/- each. The paid-up capital of the company before the issue of new, ordinary and bonus shares, which is the bone of contention between the parties, consisted of 4132 partly paid ordinary shares and 1868 fully paid ordinary shares besides 3065 fully paid preference shares. One M/s. Gupta Brothers originally held the 4132 partly paid shares. The said shares were forfeited sometime in the year 1966 and thereafter the same were issued to the Sanwalka Group who paid a total of Rs.45 for each share consisting of payment at the time of application and allotment and Rs.10/- per share on a call being made subsequently. Whereas, according to Gupta Group, these shares were held by the Sanwalka Group on behalf of Gupta Brothers, the said fact is denied by the Sanwalka Group. According to the Sanwalka Group, the Gupta Group without notice to them had increased the authorized capital of the company to Rs. 5 crores in an Extra Ordinary General Meeting of the Company held on 5.7.1994. No notice of the said meeting was given to the Sanwalka Goup. A Board Meeting was held on the same day i.e. 5.7.1994 to give effect to the above decision taken in the E.O.G.M. to increase the share capital of the company. In the said Board meeting, a follow up decision was taken to allot bonus shares at the ratio of 60 bonus shares for every fully paid up preference and equity share held. The said bonus shares were to be issued against revaluation of the industrial plot in Okhla Industrial Area, New Delhi which was the only asset of the company at that time. This was not contemplated by the Articles of Association of the Company, according to the Sanwalka Group. In any case, no bonus shares were allotted to them. Further more, according to the Sanwalka Group, pursuant to the decision taken on 5.7.1994, in August, 1995 the company issued 3065 equity shares to the holders of the preference shares (Gupta Group). In February, 1996, 25,000 ordinary equity shares were again issued to the members of the Gupta Group against which Rs.40 per share was paid. The said issue was ostensibly to raise additional

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A capital for the company. This allotment was, however, to the exclusion of the Sanwalka Group. Contending that the aforesaid acts had the effect of reducing the Sanwalka Group, which was otherwise in the majority, to a negligible minority in the company, the company petition alleging oppression was filed before the Company Law Board wherein the act of removing two members of the Sanwalka Group from the Board of Directors (w.e.f. 1.7.1991) and inducting two others of the Gupta Group in their place was also called into question.

4. From the reply filed by the Gupta Group to the company petition it transpired that the 4132 partly paid shares held by the Sanwalka Group stood forfeited. The aforesaid forfeiture was therefore challenged in the company petition with a claim that the said shares be restored to the members of the Sanwalka group. During the subsistence of the company petition, supplementary applications were also filed challenging the action of the Gupta Group in leasing out the industrial plot to sister concerns on terms claimed to be prejudicial to the interest of the company and of the shareholders.

5. The eventual reliefs prayed for in the Company Petition in the light of the averments made in the said petition and the supplementary applications were for:

- (1) restoration of the names of the members of the Sanwalka Group in the register of members of the company;
- (2) cancellation of the allotment of bonus shares;
- (3) cancellation of the issue and allotment of 25000 partly paid up ordinary equity shares to the Gupta Group;
- (4) cancellation of 3065 equity shares to the holders of the 3065 preference shares;
- (5) cancellation of the lease agreement in respect of the industrial plot and
- (6) restoration of the names of the concerned members of the Sanwalka Group as Directors of the Company.

6. The Company Petition was opposed by Gupta Group as not maintainable in law. According to the Gupta Group, the shares held by the members of the Sanwalka Group stood forfeited and the holders thereof had ceased to be members of the company. Such forfeiture,

according to the Gupta Group, was in the following circumstances. A

The said shares were held by the Sanwalka Group as beneficiaries on behalf of the original holders i.e. M/s. Gupta Brothers. As the shares held by the Gupta Brothers were partly paid, the Sanwalka Group as beneficiary holders, was liable to pay the unpaid value of the said shares along with interest therein on a call being made by the company. Such a call, according to the Gupta Group, was made on 05.01.1991 which went unanswered. Consequently, the aforesaid shares were forfeited. There was an alternative contention advanced by Gupta Group to the effect that in any event the Sanwalka Group were holders of partly paid shares and they having not responded to the call notice dated 5.1.1991, the company petition was not maintainable under Section 399 of the Act. B C

7. The claim of the Sanwalka Group that the issue of bonus shares was not authorized as the same could not have been issued against the revaluation reserve was resisted by the Gupta Group by specific reference to the relevant provisions of the Companies Act, details of which will be noticed later. It was claimed that in the Board Meeting dated 5.7.1994 proportionate allotment of bonus shares against the 4132 partly paid shares in which the Sanwalka Group held a beneficial interest was offered subject to payment of the dues against the said shares in term of the call notice dated 5.1.1991. Insofar as the issue of 25,000 ordinary shares is concerned, it was contended by the Gupta Group that the said shares were issued to infuse badly needed capital into the company. In view of the clear and expressed disinterest of the Sanwalka Group in the affairs of the company evidenced by their long silence and failure to respond to the call notice dated 5.1.1991 and also to participate in the Board meetings, it was understood by the Gupta Group that they would not be interested in allotment of any part of the newly issued share capital i.e. 25,000 shares. In any case, according to the Gupta Group, as the members of the Sanwalka Group had ceased to be members of the company (1995) by the time the 25,000 shares were issued/allotted (February, 1996) they were not entitled to allotment of any of the said newly issued shares. D E F

8. Insofar as the lease in respect of the industrial plot is concerned, it was urged on behalf of Gupta Group that the same was done in consideration of the funds made available by the lessees to raise construction on the land which was necessary to pre-empt an imminent forfeiture of the lease itself. The actions of the company, therefore, were claimed to be in the interest of the company. G H

A 9. The Company Law Board (CLB) by an elaborate order dated
1.3.2001 overruled the objections raised by the Gupta Group to the
maintainability of the petition. The CLB concluded that the shares held
by the members of the Sanwalka Group were in their own right,
independent of any right of M/s. Gupta Brothers all of which stood
extinguished upon forfeiture of the shares held by the said Gupta
B Brothers. The CLB further held that under Article 18 of the Articles of
Association of the Company, it is M/s. Gupta Brothers who were liable
to pay the dues, if any, on the said forfeited shares. The Board also
found that the members of the Sanwalka Group had paid Rs.45 per
share and though there were an obligation to pay the balance on a call
C being made the materials on record did not disclose that any such call
was made at any point of time. In this regard the notice dated 5.1.1991
was held by the CLB not to be duly proved to have been issued following
the procedure under Section 53 of the Act. It was also held that the said
notice dated 5.1.1991 did not contemplate forfeiture of the shares in the
event of failure to pay the call money as required under Clause 14 of the
D Articles of Association of the Company. On the basis of the said findings
the twin objections raised by the Gupta Group to the maintainability of
the company petition was held against them.

 10. The CLB by its order dated 01.03.2001 further held that the
issue of bonus shares against revaluation reserve was contrary to the
E provisions of Article 96 of Table A of the Act of 1956. So far as the issue
of 25,000 ordinary equity shares is concerned, the CLB decided the
issue in favour of the Gupta Group. However, as the members of the
Sanwalka Group continued to be members of the company, it was held
that proportionate allotment of the said equity shares should have been
F made to them also. The removal of the two representatives of the
Sanwalka Group from the Board was also held to be bad on the aforesaid
count. Of particular significance would be the finding of the Board that
notice of the EOGM held on 5.7.1994 in which decision was taken to
raise the share capital of the company was, admittedly, not given to the
Sanwalka Group though they were entitled to such notice. Insofar as
G correctness of the issue of 3065 ordinary equity shares against the
preference shares is concerned, the Company Law Board felt that it
would be inappropriate to go into the said question as a related issue was
pending before the Delhi High Court with regard to the very same
preference shares. In fact, the issue before the High Court involved the

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question as to whether the said shares did exist at all or stood extinguished prior to the date of conversion. Insofar as the lease of the industrial plot is concerned, the CLB felt that the same should be left open for an appropriate decision of the company in a General Body Meeting to be held on the basis of the revised share holding as ordered by the CLB. A

11. Aggrieved by the aforesaid order of the CLB with regard to the maintainability of the company petition, issue of bonus shares and 25,000 ordinary equity shares and also the re-induction of the members of the Sanwalka Group in the Board of Directors, the Gupta Group moved the Calcutta High Court by filing an appeal under Section 10F of the Act. Challenging the decision of the Board insofar as the issue of 3065 preference shares and the lease in respect of the industrial plot is concerned, the Sanwalka Group had filed a separate appeal. The High Court, by its impugned order dated 14.9.2005, dismissed both sets of appeal leading to the institution of the present appeals before this Court. B C

12. On the basis of the issues dealt with by the CLB and the High Court and the arguments advanced on behalf of the parties the issues arising in the two appeals may be summarised as follows: D

(i) Maintainability of the company petition filed by the Sanwalka Group before the Company Law Board.

(ii) Legality of the issue of bonus shares by the company; E

(iii) Legality of the issue of 25,000 new ordinary shares ;

(iv) Legality of the removal of the representatives of the Sanwalka Group from the Board of Directors and the induction of the members of Gupta Group in their place; F

(v) Legality of the lease agreement executed by the company in respect of the industrial plot;

(vi) Legality of the issue of 3065 ordinary equity shares as against the preference shares.

13. We have heard Shri Arvind P. Datar learned senior counsel appearing for the Gupta Group and Shri C.A. Sundaram learned senior counsel appearing for the Sanwalka Group. G

14. The questions arising, as noticed above, may now be taken up for consideration. H

A **Maintainability of the Company Petition –**

Notwithstanding the very elaborate and persuasive arguments made by both sides a resolution of the above question is possible by a close look of the share certificates issued to the members of the Sanwalka Group after allotment of the shares in question following the forfeiture of the same in the hands of M/s. Gupta Brothers. Some of the share certificates in question are on record. A reading thereof discloses that the same constitute a fresh and independent allotment of the shares by reference to their distinctive numbers specified therein. The certificates do not contain any stipulation or condition that the same are being held either on account of a third person or as beneficiaries on behalf of any third person. The shares in question were allotted on payment of Rs.35 being the application money (Rs.25) and allotment money (Rs.10). A further amount of Rs.10/- per share was paid against the first call made on 7.8.1986. Therefore, the share certificates, *ex facie*, do not support any of the contentions advanced on behalf of Gupta Group, details of which have been noticed hereinabove. If the shares were held by the members of the Sanwalka Group in their own right without any connection to the erstwhile/forfeited shares held by M/s. Gupta Brothers, the second question arising i.e. failure to respond to the call notice dated 5.1.1991 really does not arise. Be that as it may, the said notice required the members of the Sanwalka Group to pay the unpaid value of the forfeited shares (which coincidentally was also Rs.55/- per share i.e. same as the unpaid amount of the shares at the time of forfeiture when held by M/s. Gupta Brothers) along with interest. In this regard it was found by the CLB as well as the High Court that even issue of notice of the call in terms of Section 53 of the Act had not been proved by the Gupta Group. That apart, the call notice dated 5.1.1991 and forfeiture of the shares held by the Sanwalka Group, upon alleged failure to comply with the said notice, does not appear to be in conformity with Clauses 14 to 18 of the Articles of Association of the Company, which are extracted below:–

G “14. If any member fails to pay any call or instalment on or before the day appointed for the payment of the same the Directors may at any time thereafter during such time as the call or instalment or any part thereof remains unpaid serve a notice on such member requiring him to pay the same together with any interest that may have accrued and all expenses that the company may have incurred. They

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may also write in any such notice that in the event of failure to pay the amount so due before a particular date the Directors shall proceed to forfeit the shares.” (emphasis is ours) A

15. If the amount still remains unpaid the Directors may proceed to forfeit the shares. B

16. A notice of the resolution of forfeiture shall be given to the member whose shares have been forfeited.

17. Any shares so forfeited shall be deemed to held the property of the company and the Directors may sell, reallocate, annul the forfeiture or otherwise dispose of the same in such a manner as they may think fit. C

18. Any member whose shares have been forfeited shall notwithstanding such forfeiture be liable to pay, and shall forthwith pay to the company all calls instalments, interest and expenses owing upon or in respect of such shares at the time of forfeiture/together with interest thereon, from the time of forfeiture until payment at nine per cent per annum and the Director may enforce the payment of such moneys or any part thereof if they think fit, but shall not be under any obligation to do so. The member whose shares have been forfeited shall not be entitled to claim the sale proceeds of such shares.” D
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15. Not only the call notice dated 5.1.1991 had not been proved to have been issued in the matter required under Section 53 of the Act, the notice also does not mention the consequences of non-payment i.e. forfeiture. Also the fastening of the liability on the Sanwalka Group to pay the unpaid amount of the forfeited shares along with interest is plainly contrary to the provisions of Article 18 of the Articles of Association, extracted above. Besides, the date of the forfeiture also is not clear though it appears that in a Board Meeting held on 2.8.1995 a decision was taken to restore the said shares to M/s. Gupta Brothers. The reason for the said decision appears to be to comply with an order of attachment F
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A of the shares passed earlier by the Civil Court. All these would demonstrate the apparent falsity of the claim now made that the forfeiture was due to failure of the Sanwalka Group to comply with the terms of the call notice dated 5.1.1991.

B 16. To overcome the aforesaid difficulties, an argument has been made on behalf of Gupta Group that even if the call notice dated 5.1.1991 is not to be relied upon, in the Balance Sheet dated 31.3.1992 the amounts due have been shown as calls-in-arrears. The said document was duly circulated. The Sanwalka Group, therefore, had full knowledge that unpaid call money is due.

C 17. Besides the fact that there is no co-relation between the amounts mentioned in the call notice dated 5.1.1991 and the Balance Sheet dated 31.3.1992, the members of the Sanwalka Group were removed from the Board of Directors on 1.7.1991 i.e. before the finalisation of the Balance Sheet dated 31.3.1992. In any case, the procedure for forfeiture of shares as a consequence of failure to respond to a call notice are unambiguously set out in details in the Articles of Association of the Company, extracted above. A balance sheet does not and cannot operate as an alternative to a call notice.

D 18. If the primary question i.e. maintainability of the company petition has to be answered in favour of the Sanwalka Group, as we are inclined to, the other issues highlighted in the earlier part of this order would now have to be considered.

Issue of 25,000 ordinary equity shares -

F 19. There is no denial of the fact that notice of the E.O.G.M. dated 5.7.1994 was not given to the members of the Sanwalka Group though they, admittedly, continued to be members of the company on the date of the meeting. It is pursuant to the decision taken in the said E.O.G.M. dated 5.7.1994 to raise the share capital of the company from Rs.10 lakh to Rs.5 crores that the other decisions with regard to bonus shares; the issue of 25,000 ordinary equity shares and the conversion of preference shares to equity shares were made subsequently. Such notice is mandatory under Section 172(2) read with Section 41 of the Act. This is, *ex facie*, apparent from the reading of the said provisions of the Act. Reference to the elaborate case laid before us on this score would, therefore, not be required.

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20. Specifically, so far as the issue of bonus shares is concerned, the arguments laid down before us would require a consideration whether Section 205(3) of the Act, particularly, the proviso thereto permits issue of bonus shares out of revaluation reserves of a company. The further question that would arise is the correct interplay between the provisions of the Act and those contained in the Articles of Association of a Company. So far as the issue with regard to utilization of reserves arising from revaluation of assets for the purpose of issuing fully paid bonus shares is concerned, the same has been held to be permissible in Bhagwati Developers Vs. Peerless General Finance & Investment Co. & Ors.¹. However, it has to be noticed that in Bhagwati Developers (supra) the Articles of Association (Article 182) specifically permitted/contemplated such a course of action. In the present case, the Articles of Association of the Company do not empower the Directors to so act. No such situation i.e. issue of bonus shares out of revaluation reserve is contemplated. When the Articles of the Company do not confer any such power in the Board exercise thereof on the basis that the Act so provides would be impermissible. Enabling provisions under the Act would require incorporation in the Articles of a company. To the above effect the view of this Court in Para 25 of the Claude-Lila Parulekar (Smt.) Vs. Sakal Papers (P) Ltd. & Ors.² is relevant –

“25. Section 36 of the Companies Act, 1956 makes the memorandum and articles of the company, when registered, binding not only on the company but also the members inter se to the same extent as if they had been signed by the company and by each member and covenanted to by the company and each shareholder to observe all the provisions of the memorandum and of the articles. The articles of association constitute a contract not merely between the shareholders and the company but between the individual shareholders also. The articles are a source of power of the Directors who can as a result exercise only those powers conferred by the articles in accordance therewith. Any action referable to the articles and contrary thereto would be *ultra vires*.”

21. That apart, the resolution of the Board dated 5.7.1994 pursuant to which bonus shares were issued indicates that the real purpose for

¹ (2005) 6 SCC 718

² (2005) 11 SCC 73

A issue of the bonus shares is to raise funds which were badly needed by the company at that point of time. On the very face of it, the purpose indicated in the resolution is a sham and a pretence inasmuch as revaluation of the existing assets of the company and issuance of bonus shares against such revaluation could not and did not generate any additional funds as the additional capital available is purely fictional or notional. A self serving interest of the Gupta Group (who received all the bonus shares issued) in issuing the bonus shares, therefore, is evident.

22. So far as the issue of 25,000 equity shares is concerned, there can be no manner of doubt that the decision of the Board to issue the said shares has to be tested in the light of the wide powers of the Board to act in such matters as has been laid down by this Court in *Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors.*³. The power of the Board of Directors of the Company to issue fresh shares must always be viewed as an adjunct of its extensive powers under the Act and the bona fides of such an exercise cannot be called into question by construing the power to issue fresh shares to be limited by any particular purpose or purposes. This was the view of the Company Law Board also. However, the same would not detract from the fundamental principle of fair play that is to be expected from the Board of Directors in making a fair and proportionate distribution/allotment of such fresh shares. The direction of the Company Law Board upheld by the High Court, namely, that allotment from the aforesaid 25,000 newly issued ordinary equity shares should be proportionate to the share holding of the two groups taking the members of the Sanwalka Group as having continued to be members of the company, will, therefore, not require any interference.

23. Insofar the issue of 3065 ordinary equity shares in lieu of 3065 preference shares is concerned, the CLB and the High Court had thought it proper to leave the matter for a just determination by the Delhi High Court in view of the suit filed by the Sanwalka Group contending that the said shares had ceased to exist in the year 1967 and therefore no equity shares could have been issued in lieu of the said preference shares as has been done. The suit in question which is of the year 1996 may take some further time for resolution. In such circumstances, the apprehension of the Sanwalka group is that if the equity shares issued against the said preference shares are allowed to remain alive and valid

³ (1981) 3 SCC 333

the balance would still tilt in favour of the Gupta Group. A

24. It is not known whether the High Court had been requested by the parties to make an interim arrangement and if so the result thereof. However, before us, the Gupta Group has sought to contend that the above apprehension of the Sanwalka Group is unfounded. It is claimed that it is not correct that by virtue of the conversion of the 3065 preference shares into equity shares the Gupta Group has emerged in the majority for the first time. Even prior to such conversion, the Gupta Group was in a majority inasmuch as the preference shares always carried a right to vote. Therefore, even on the basis of the original share holding, the Gupta Group was in majority. B

25. We cannot countenance the aforesaid submission advanced on behalf of the Gupta Group in view of the provisions of Section 87 of the Act particularly sub-section (2) thereof which is in the following terms: C

“(2) (a) Subject as aforesaid and save as provided in clause (b) of this sub-section, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares. D

Explanation. : Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause. E

(b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid : F G

(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting : and H

- A (ii) in the case of non-cumulative preference shares, either
in respect of a period of not less than two years ending
with the expiry of the financial year immediately preceding
the commencement of the meeting or in respect of an
B aggregate period of not less than three years comprised in
the six years ending with the expiry of the financial year
aforesaid.

Explanation. : For the purposes of this clause, dividend
shall be deemed to be due on preference shares in respect
of any period, whether a dividend has been declared by the
C company on such shares for such period or not,

(a) on the last day specified for the payment of such dividend
for such period, in the articles or other instrument executed
by the company in that behalf ; or

- D (b) in case no day is so specified, on the day immediately
following such period.

- E (c) where the holder of any preference share has a right to
vote on any resolution in accordance with the provisions of
this sub-section, his voting right on a poll, as the holder of
such share, shall, subject to the provisions of section 89 and
sub-section (2) of section 92, be in the same proportion as
the capital paid up in respect of the preference share bears
to the total paid-up equity capital of the company.”

- F 26. A reading of the aforesaid Section 87 (2) would clearly indicate
that except in situations where dividends have not been paid, holders of
preference shares do not have a right to vote except in matters which
directly affects the rights attached to the preference shares.

- G 27. Reliance has been placed on Articles 20, 21 and 22 of the
Articles of Association of the Company to claim voting rights against the
preference shares held by the Gupta Group. It will therefore be necessary
to take note of the said Articles which are in the following terms:

“20. The following rights are attached to these shares as
regards dividends, voting rights and redemption –

- H

(a) Preference shares shall carry a fixed cumulative free of Income-tax dividend @ of 6% per annum in preference to ordinary or any other class of shares. A

(b) Preference shares shall be redeemable at any time after a period of 5 or 10 years from the date of allotment at the option of Directors of the company or at the option of the holder thereof respectively, provided a notice of three months in writing is given by the company to the holders thereof or vice-versa as the case may be. B

(c) After payment cumulative dividend of 6% free of tax on preference shares, the balance of the net divisible profits (as may be recommended by the directors) shall be utilized for payment of dividend @ 9% on ordinary shares. C

(d) Any net divisible profits as may be recommended by the Directors remaining after payment of cumulative dividend on preference shares and dividend on ordinary shares as mentioned above shall be divided between the preference and ordinary shares equally on the basis of paid up capital in the company. D

(e) Preference shares shall also have a preference for repayment of capital at the time of the winding up of the company in preference to any class of shares. E

21. On show of hand every shareholders present in shall have one vote and upon poll every shareholder present in person or any proxy shall have one vote for each share held by him or her. A poll may be demanded in accordance with law. F

22. A holder of any shares shall not be entitled to a vote either by show of hand or at poll unless there have been paid to the company all sums of money then due from that holder in respect of these shares.” G

28. The aforesaid Articles must necessarily have to be understood in the light of the provisions of Section 87 particularly those contained in

- A sub-Section (2). The meaning sought to be given to Articles 20, 21 and 22, extracted above, namely, that every share holder including the holder of a preference share has a right to vote cannot be readily accepted. The resolution of the Board dated 5.7.1994 relating to the conversion of preference shares into equity shares proceeds on the basis that dividends in respect of the 3065 shares have not been paid and in lieu thereof the shareholders had agreed to receive an equivalent number of equity shares. The above statement of fact is difficult to accept. Neither is the period during which dividends had not been paid is specified, nor is the amount due indicated. No material has been laid to show that the 3065 equity shares represent a fair value of the dividends claimed to be unpaid.
- B
- C What cannot also be lost sight of is that the preference shares in question were held by the Gupta Group who was in control of the company at that point of time. A number of self serving decisions by the Gupta Group and its conduct of the business of the company in a manner detrimental to the interest of the company, as discussed hereinabove, would make it extremely perilous to rely on the version available in the resolution of the Board for allotment of 3065 equity shares in place of the preference shares in question. In the above circumstances it would be just and proper to strike down the conversion of the 3065 preference shares into equity shares and revert the preference shares to its earlier status to be dealt with in the future in accordance with law. This is, of course, subject
- D
- E to the orders of the Delhi High Court in the appeal pending before it.

Lease of the Industrial Plot

29. If the forums below have left the above matter for a just determination in an Extra Ordinary General Meeting of the Company, in view of the directions hereinabove, we do not consider it necessary to deal with the said aspect of the case any further.
- F

30. Before parting, certain subsidiary issues raised on behalf of the parties may be briefly noticed if only to make the discussion complete.

- The failure of the High Court to frame a substantial question of law to hear the appeal before it can hardly invalidate the order passed. The order of the High Court is an order of affirmation; further there is no provision in Section 10F of the Act which is akin to the provisions contained in Section 100 (4) of the Code of Civil Procedure, 1908.
- G

31. The argument that having regard to the conduct of the Gupta Group in managing the affairs of the Company and all decisions taken
- H

being in the best interest of the Company, no case for winding up is made out so as to justify the exercise of powers under Section 397/398 of the Act by the CLB, would hardly require a detailed consideration in view of the specific findings of the High Court in this regard, which are wholly adverse to the Gupta Group. The said view and the conclusions reached have our approval, as already indicated. Besides, the High Court in the order under challenge has taken into account that apart from the industrial plot in question the Company has no subsisting business and that the terms of the lease entered into by the Gupta Group in respect of the said property are wholly adverse to the Company's interest.

32. The question whether a single act of oppression would enable the CLB to intervene or oppression must be the cumulative result of continuous acts should not require any debate in the facts of the present case which demonstrate a series of unacceptable decisions and actions on the part of the Gupta Group. In the last resort, satisfaction that oppression has been committed has to be reached in the facts of each case.

33. In view of the above discussions and for the reasons alluded, Civil Appeal No.589 of 2010 filed by the Gupta Group is dismissed whereas Civil Appeal No.599 of 2010 filed by the Sanwalka Group is disposed of with directions, as contained in the present order.