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MINORITY OPPRESSION: CORPORATE CONTROL†

THE SUPREME COURT has, at last, spoken and spoken well, with regard to an important remedy in the hands of the shareholder. In a judgment, which is a fine example of the correct judicial attitude and balance, Mr. Justice Wanchoo (as he then was) dealt with sections 397[1] and 398[2] of the Companies Act, 1956, which relate to oppression of a part of the shareholders and mismanagement of the affairs of a company respectively. Before the introduction of these provisions in the form of sections 153-C and 153-D in the Companies Act, 1913, by the amendment of 1951 the shareholdor had hardly an adequate remedy

†*Shanti Prasad Jain* v. *Kalinga Tubes Limited*, [1965] Com. Cas. 351.

1. Companies Act, 1956, § 397:

(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.

(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 thinks fit.

2. Companies Act, 1956, § 398:

(1) Any members of a company who complain—

(*a*) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or

(*b*) that a material change (not being a change brought about by, or, in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of Directors, or of its managing agent or secretaries and treasurers, or in the constitution or control of the firm or body corporate acting as its managing agent or secretaries and treasurers, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, 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;

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.

(2) If, on any application under sub-section (1), 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 management or control of the 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.

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for oppression, short of taking the company into liquidation under the "just and equitable" clause.[3] Such a step would be too drastic. It might result in the break-up of an existing profit-making unit and sale of the assets at their break-up value.[4] This would be as harmful to the aggrieved party as to the guilty one and moreover be harmful to the general economy and also cause unemployment. An intermediate remedy, therefore, empowering the court to pass such order as it thinks fit which would put an end to the matters complained of, and at the same time avoid the harmful affects of liquidation is valuable. The first judgment of the Supreme Court regarding this remedy which also covers a number of other points should therefore be noted.

To appreciate the points involved here, it is necessary to recount the facts a little elaborately. Kalinga Tubes Limited was floated as a private company in 1950. Except a few, all its shares were held equally by two shareholders Patnaik and Loganathan. In 1954 an agreement was entered into between Shanti Prasad Jain on the one hand and Patnaik and Loganathan on the other according to which Jain was to arrange for cash credit facilities up to Rs. 50 lakhs to the company. In return for this he was to be allotted shares in the company equal to those held by Patnaik and Loganathan each, by increasing the share-capital of the company and be made the chairman of the company. It was also agreed that the three would have equal number of representatives on the board of directors. The agreement was substantially carried out. In 1955 the share capital was further subscribed and the three held one-third of the shares leaving out a small portion held by a French company. One Rath sold his shares numbering 250 and these shares were equally divided between the three, and the odd share remaining after division was held by all the three jointly. In January 1957 the company was converted into a public company because the company wanted to borrow money from the Industrial Finance Corporation which made advances only to public companies. In response to an application by the company the Controller of Capital Issues sanctioned the issue of shares of the face value of Rs. 39 lakhs and debentures of the face value of Rs. 64 lakhs subject to the provisions of section 81 of the act. According to this section new shares have to be issued to the existing shareholders in proportion to their holdings subject to any directions which may be given by the company in general meeting. At a general meeting of the company in March 1958 a resolution sponsored on behalf of Patnaik and Loganathan,

3. Section 162 of the Indian Companies Act, 1913, corresponding to section 433 of the Companies Act, 1956.

4. For a discussion of the historical part see the judgment of Bhagwati, J., in *S. M. Ganpatram* v. *Sayaji Jubilee Cotton & Jute Mills Co.*, [1964] 34 Comp. Cas. 777, 803; Company Law Committee, Government of India, *Report* 147 *et seq.* (1952) (popularly known as the Bhabha Committee); *Shanti Prasad Jain* v. *Kalinga Tubes Limited*, [1965] Com. Cas. 351, 363.

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proposing that the new shares should be allotted privately in the best interest of the company at the sole discretion of the directors, was passed. Upon this Jain applied to the court of the Subordinate Judge, Cuttack and obtained an ex parte interim injunction restraining the company and Patnaik and Loganathan from issuing and allotting the new shares to persons other than the existing shareholders and from giving affect to the above resolution. The company then applied for setting aside this injunction. Hearing of this application was postponed from time to time and in the meantime an offer was made on behalf of the company to Jain 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 Jain had the shares been offered to the existing shareholders. This was not accepted by Jain. The interim injunction was vacated in July 1958. On the same day the new shares were allotted to seven persons who had applied for them. An extraordinary general meeting of the company was called in September 1960 to consider increasing the share capital from rupees one crore to rupees three crores by issue of additional equity shares. It was intended that these new shares should be offered to outsiders (*i.e.* other than existing shareholders) with a view to making the company more broad-based.

It was the calling of this meeting which led to the application under sections 397 and 398 of the act by Jain. The grounds were that this issue of new shares was in furtherance of the continuing and continuous process of oppression of Jain and to deprive him of all control in the affairs of the company and to derive the financial advantage to be gained by them by the issue of new shares at par to the exclusion of Jain, so that he would be forced to sell his holding to them 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. It was alleged in particular that the denial to the existing shareholders to subscribe to the new shares in proportion to their respective holding and their issue to benamidars of Patnaik and Loganathan was oppressive of him and also amounted to mismanagement of the company's affairs. This, it was alleged, was also a breach of the agreement of July 1954. Further, it was said that although in form the company was a public company, in reality, it was a partnership consisting of the three and that Patnaik and Loganathan had combined together against Jain which had resulted in justifiable lack of confidence on his part in the conduct of the affairs of the company by them. The affairs of the company were alleged to be conducted in a manner prejudicial to the interest of the company for the above reasons and there had been a material change in the management or control of the company by alteration in the board

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of directors and by fraudulent changes introduced in the ownership of the company's shares.

It was prayed, *inter alia*, that the board of directors be removed and reconstituted by at least two permanent representatives of Jain, that equal representation on the board for all the three be ensured and the articles be altered to incorporate therein the agreement of July 1954. It was sought that the resolution of the general meeting of March 1958 be declared null and void and passed in abuse of power. Finally, an injunction was prayed for restraining the company from holding the meeting of September 1960 and an investigation into its affairs was sought. The application was allowed by a single judge, dismissed on appeal by a division bench of the Orissa High Court and came to the Supreme Court in second appeal. It was held that no order under section 397 could be made because oppression had not been proved.

The Supreme Court first took up consideration of section 397 of the act and in that connection referred to various cases decided under section 210 of the English Companies Act of 1948[5] which is its basis. The following statement of law in this area was then made :

> 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 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.[6]

Valuable though this remedy may be, the act has at no place defined oppression. This raises a number of interesting, if difficult, questions. Although the Supreme Court here held that there was no oppression, its observations regarding continuity of acts are valuable. There has been considerable controversy over whether the act complained of should be continuous over a period of time or whether one single act will suffice. The following three cases illustrate the nature of this controversy.

In *In re Sindhri Iron Foundry (P.) Ltd.*[7] two rival groups set up two rival boards of directors holding meetings at two different addresses and

5. For these cases see *Shanti Prasad Jain* v. *Kalinga Tubes Limited*, [1965] Com. Cas. 351, 364.
6. *Id.* at 366-67.
7. [1964] 34 Comp. Cas. 510.

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purported to carry on the company's business. The lawfully constituted board of directors was ousted from possession, control and management of the company's factory and workshop. It was contended that before the court could make an order under section 397 of the act it must be satisfied that the act complained of was not a single isolated wrongful act but a persistent and continuous course of wrongful conduct. This contention was negatived. The court held that the act complained of here was a single act, namely, of raid and ouster from possession and control, as above. It felt that its effect was continuous and persistent oppression. This, in the opinion of the court, was enough for relief under section 397 of the act.

In *In re Clive Mills Co. Ltd.*[8] a director of the company had withdrawn the company's money without authority and shown it in the accounts as a loan to another company. This company, in turn, was shown to have given a loan of this sum to him and he used it for paying off a debt due from the petitioner to a bank and obtaining release of certain pledged shares of the company. Having got these shares released he got them registered in the names of his nominees. The Calcutta High Court felt that such conduct deserved unequivocal censure but since it was a single wrongful act for which the company could take legal action and since it had not produced a continuous course of oppression no order under section 397 or 398 could be made.

A different point of view is shown by the Gujarat High Court decision in *S. M. Ganpatram* v. *Sayaji Jubilee Cotton & Jute Mills Co.*[9] Mr. Justice Bhagwati, who delivered the judgment, observed:

> Sections 397 and 398 thus clearly postulate that there must be at the date of the application a continuing course of conduct of the affairs of the company which is oppressive to any shareholder or shareholders or prejudicial to the interests of the company and it is this course of oppressive or prejudicial conduct which would form the subject-matter of the complaint in the application.[10]

This would suggest that continuing effect of one single act which is oppressive would not suffice for an application under section 397 or 398. In this case the company had entered into an agreement with a firm, whereby the firm had agreed to supply working capital to the company and to purchase yarn for it on a commission. The company was incurring losses and its machinery had become obsolete. The mill was closed down, the machinery sold and the agreement terminated. It was held that these were concluded transactions and not continuing acts. It is possible to argue that insofar as the effect of these acts would be continuous it was necessary to decide whether such effect would be enough for relief under sections 397 and 398. The prayer in this case was, however, for setting aside the sale of the machinery. It

8. [1964] 34 Comp. Cas. 731.
9. [1964] 34 Com. Cas. 777.
10. *Id.* at 805.

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was in answer to this that it was said that there must be continuing acts and not a concluded transaction at the date of the petition and that the power of the court could not be exercised in order to set aside a concluded transaction. Under this head, therefore, there are three situations: (1) single isolated act which does not have a continuing effect; (2) continuing act which implies continuous effect; and (3) single act which has a continuing effect. It can be said that there is agreement on the point whether there should be continuity of effect; the difference is on the question whether there should be continuity of acts. Regarding the *Sindhri* case, it can be argued that it was not only the ouster from possession but the wrongful retention of it (a continuous act) which made the court grant the relief. Be that as it may, the Supreme Court has in *Shanti Prasad* said in unequivocal terms that there must be continuous acts. This would seem a very reasonable interpretation of the sections looking to the words "being conducted in a manner." In this case there were more acts than one. They were : The resolution in the general meeting of March 1958, empowering the company to allot shares worth Rs. 39 lakhs to such persons other than the existing shareholders as the directors may choose and the subsequent allotment to seven persons pursuant to this resolution. There was also the calling of the general meeting in September 1960 by a notice in August in order to empower the company to issue new shares worth rupees one crore to persons other than the existing shareholders. Continuity of acts and a trend of events is perceivable. The observation of the Supreme Court in this respect is therefore relevant.

In circumstances of unfair treatment, however, it would seem a pity that a shareholder should not have a remedy merely on the ground that the acts are not continuous. In this case it may be considered whether the above resolutions could be impugned on the ground of fraud on the minority. Most of the cases in this area are concerned with expropriation of the company's property,[11] release of the directors from their duty of good faith and expropriation of other member's property by the majority which passes the resolution in the general meeting.[12] These are cases where the resolution can be impugned irrespective of the motives of the majority. There is, however, a principle limiting the power of the majority and based on the impropriety of their motives. In *Greenhalgh* v. *Arderne Cinemas*[13] Evershed, M.R., while explaining the principle that resoultions should be passed bona fide for the benefit of the eompany as a whole, stated :

> [T]he case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit.

11. *Menier* v. *Hooper's Telegraph Works*, [1873-74] 9 Ch. App. 350 (1874).
12. *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290; *Dafen Tinplate Co.* v. *Llanelly Steel Co.*, [1920] 2 Ch. 124.
13. [1951] 1 Ch. 286 (1950).

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> I think the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived.[14]

In this case the resolutions enabling the allotment of new shares at the discretion of the directors meant the discretion of the majority. In allotting the new shares the minority would have no say and the majority would be enabled to allot shares to persons who would be amenable to their persuasions. Again, by passing the resolution, Patnaik and Loganathan deprived Jain of the opportunity to buy their shares which they would not have been able to subscribe to. Even if the resolution had not been passed Patnaik and/or Loganathan would have had the same opportunity of buying Jain's shares had he not been able to subscribe to the new shares. Their inability to subscribe to the new issue was an external fact, strictly pertaining to them of which they could not make use. The resolution was passed not with a view to benefiting the company but in order not to suffer the consequences of their inability to pay. They were not opposed to control but to control by Jain. Could all this not be attacked on the ground of discrimination and mala fides? This suggestion is put forward with some hesitation because it is arguable whether the above test was applied in the *Greenhalgh* case and it may be said that the resolution is not discriminatory just because it is capable of being used in that manner. But apart from the question what test should be applied in order to decide whether a particular case is of fraud on the minority the position of the minority shareholders must be considered in a broader perspective. The principles of fraud on the minority enable single acts of the majority to be attacked. Since all unfair treatment may not be continuous and repeated acts or amount to a continuous course of conduct, the courts in India might do well to develop the principles of fraud on the minority for the protection of the minority shareholders.

The other requirements regarding the conduct complained of mentioned here should also be noted. They are expressed in this case, in three slightly separate ideas. The first relates to the subjective feeling of the complaining members, *i.e.*, mere lack of confidence is not enough unless a certain condition regarding that is fulfilled. Could this mean that if such condition is fulfilled the subjective satisfaction of the aggrieved party is enough and the court cannot then apply an objective test? This would be whether a reasonable person under such circumstances has felt lack of confidence.

Next, the acts must be burdensome, harsh and wrongful and must involve an element of lack of probity or fair dealing. These expressions, according to this decision, are to be construed strictly. The new issue of shares was not to be in accordance with the old agreement. When

14. *Id.* at 291.

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earlier new shares were issued they were divided equally between the three so much so that one odd share was held jointly by them. This was held not to be within the above expressions because presumably this was not in the management of the company; the ageeement not being incorporated in the articles of association of the company and thus not binding on the company.[15] Further, it was acknowledged that if the shares were issued privately they were bound to go to friends of directors.[16] In order however to prove oppression in the above terms it was necessary to prove that these people were stooges. This was not proved and the fact that they had actually borrowed money to pay for the new shares was considered to be inadequate.[17] Finally, there was a bitter complaint by Jain that Patnaik and Loganathan together took his help when they needed it and gave a go-by to the spirit of the agreement when they no longer needed it. The Court acknowledged that there was some force in this.[18] There was, however, a contention that this was done in order to make the company more broad-based and it seems that it was accepted by the Court.[19] This, among other reasons, can be said to exclude the above fact from the meaning of oppression as explained here. In considering, therefore, the rights of the shareholder, greater benefit to the company seems to be an important factor.

Finally, these acts must concern the proprietary rights of the member as member. This has been construed here as something which can be translated in terms of money. Thus, it was urged that the issue of new shares at par in 1958 would depress the value of the existing shares. This plea was considered and negatived only on the ground that since the shares were not quoted on the stock exchange it was impossible to say what impact the issue of new shares had on the existing shares.[20] Violation of the spirit of the agreement certainly cannot pass this test.[21] By the resolution of 1958 Jain was deprived of the option to purchase a proportionate number of the new share and the effect of the proposed resolution of 1960 would have been the same. Looking to the decision this again would not come within the meaning of proprietary right as recognized by the Court.

Regarding the application for mismanagement under section 398 of the act, one point may be noted. It was contended on behalf of Jain 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. This change was

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15. [1965] Com. Cas. at 368.
16. *Id.* at 373.
17. *Id.* at 372.
18. *Id.* at 374.
19. *Id.* at 357 and 374.
20. *Id.* at 371.
21. *Id.* at 374 .

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that he no longer remained the chairman of the company and the Patnaik and Loganathan groups practically managed the company without him. This contention was negatived on the ground that it had not been shown that the company was landed in any difficulty and loss of profit.[22] Mismanagement, therefore, has to be understood in terms of money value. Any abstract advantage such as reputation of the company because of somebody being its chairman or being associated with it is not recognized.

Be all that as it may, the most important question in this case was of control of the company. None of the above questions would have arisen had it not been for the basic struggle for power between the two groups here. It was because Patnaik and Loganathan were afraid that if the new shares were issued to the existing holders proportionately to their present holdings they would not be able to pay for them and these shares would then go into the hands of Jain thus giving him control, that they proposed a resolution against such issue.[23] It was because Jain was interested in control that he was in favour of a proportionate issue and opposed the resolution empowering the majority of directors to allot the new shares to such persons as they may consider proper.[24] In this connection, it may be recalled that Jain had turned down an offer by the company that it may issue two-thirds of the earlier proposed issue of Rs. 39 lakhs keeping one-third (which is the maximum he would have got) pending the disposal of its application to vacate the ex parte interim injunction restraining it from allotting these shares at the discretion of the directors.

Regarding any corporation question of power and control does exist but in a private company such a question assumes a more acute form and is likely to arise more frequently. An important reason for having a private company is to retain control within a certain group. Nearly half the corporate economic activity in this country is in the form of private companies and this question is therefore of considerable importance. In a large public company the question of control is that of plain control, its use or abuse while in a small or private company such question may also assume the form of power struggle between groups. The submission by Jain that although the company had became a public company, in reality, it was a partnership consisting of the three is significant.

In the case of conflict between groups the court may be presented with the problem of adjusting the rights of the majority to those of the minority. When the problem presents itself in such a form the legislature has provided a certain formula in section 397 of the act. The court then has to see whether the situation before it comes within the

22. *Id.* at 377.
23. *Id.* at 357, 370 and 372.
24. *Id.* at 375.

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channel established by that section. Such conflict may however go outside this channel and it may no longer be a problem of adjusting existing rights but of recognizing new ones. Although the situation may be of conflict between groups the problem may be somewhat different from minority oppression. In such a case the Court may have before it a petition for preventing oppression while the problem may be of the right of control such as in this case and in the *Sindhri* case. Any attempt, therefore, to claim relief within the principles of minority oppression may not be successful and the real problem may not be laid threadbare.

In the present case it was said that merely because Jain was thwarted in his attempt to get control, it did not amount to oppression. From that it may be inferred that the Court felt that this was not a proprietary right. It was also regarded as proper that control may be so used that someone else may be prevented from getting control. Hence it has a kind of negative recognition. Although one may not claim control, one may exercise control to deny it to others. It was on the basis that Patnaik and Loganathan did not want the control themselves that they were enabled to deny it to Jain. The position then has come so far. All this, however, is a matter of inference and we have no detailed discussion on this by the Supreme Court. In the facts and circumstances here, question is whether the assumption that control is not a proprietary right is an adequate answer. First of all section 397 does not, in terms, speak about proprietary rights. The Supreme Court is free to evolve its own formula regarding oppression. Secondly, it may be asked whether it is advisable to use a formula which did not have the problem of control in contemplation when the Court is faced with such a problem. Thirdly, it is necessary to give reasons why control should not be regarded as a proprietary right.

In the United States two opposite points of view have been expressed by the courts. In *Perlman* v. *Feldman*,[25] one Feldman was the chairman and president of the Newport Steel Corporation and also its dominant shareholder. Due to the Korean war there was a shortage of steel. A company called the Wilport Company consisting of end users of steel brought control in Newport, by purchasing at a premium the shares of Feldman in order to secure a steady supply of steel to itself. The minority shareholders of Newport claimed, in a derivative action, restitution to the Newport Company, of the gain made by the sale of the control. The court of the first instance negatived this claim but the appeal court remanded to the district court the determination of the value of the defendant's stock without the appurtenant control over the corporation's steel output. The district court then awarded judgment which was the difference in price paid to Feldman and the valuation of his stock as above.

25. 219 F. 2d 173 (1955), reversing 129 F. Supp. 162 (1952).

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In *Honingman* v. *Green Giant Company*[26] one Cosgrove held twenty-six of the forty-four class 'A' shares which had all the voting rights in the Green Giant Company. The class 'B' shares in the company were held by outside shareholders and represented 99.9 per cent of the equity but did not carry any voting rights. Under a plan for recapitalization both the classes of shares were exchanged for new shares having voting rights but the holder of class 'A' shares would receive ten new shares for each share while the holder of class 'B' shares would receive only one new share for each share. The new shares were to be converted into hundred voting shares annually so that at the end of ten years the holders of the class 'A' shares would receive 44,000 shares and their participation in the company's assets would increase from 1 per cent to 9.3 per cent. A minority shareholder, on behalf of herself and other holders of class B shares and derivatively for the company, then sought, in an action against the directors and the company, to get the issuance of the new shares to the holders of class 'A' shares cancelled and the recapitalization set side. The action was based on the ground that the Cosgrove family was taking a premium for something they did not own because corporate control was corporate asset. The court rejected this claim on the ground that the holder of a class 'A' share could not be expected to give up the power of control over such a large company without getting in return something commensurate with what he gave up.

Although in both the above cases the question was whether the seller of the controlling block of shares was entitled to any rewards for it, the opposite decisions do not necessarily represent opposite points of view. They held that control was a separate item having a price which belonged either to the shareholders or to the company.

What is the attitude of the Indian courts and legislature regarding this problem going to be? Insofar as conditions in both the countries are similar, similar legal solutions may be adopted. Following are some of the considerations which may be taken into account while evolving the law in India. In the commercial world, control is definitely regarded as important and valuable. Large sums of money are in fact being paid to get control of companies. Is the law not going to fulfil the expectations of the community or recognize what is accepted? In suits for enforcing agreements to pay for 51 per cent of the shares of a company, a sum higher than collective price for the same number of individual shares, have the courts enforced the agreements or refused to do so? Certainly, there have been no cases when the courts have refused to do so. It would appear that in permitting companies to restrict the transfer of shares under section 111 of the Companies Act, 1956, and in giving a place to private companies in the scheme of the act the idea of maintaining control within a certain group is recognized. It may

26. 208 F. Supp. 754 (1961).

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even be argued that control of a corporation also offers a certain amount of prestige. Chairmanship of a large corporation offers considerable status and position in business life. It cannot be asserted without fear of contradiction that status, position or power mean nothing in our scheme of values or social structure. Control of a corporation and all the status that it involves may be considered as one of the legitimate prizes of a business career. If control means only so much with all the checks exercised on it by legislative measures and judicial pronouncements it may well be recognized in our social and legal order. This observation is made with some hesitation since not all issues involved here and not all the ramifications of control in Indian conditions may be known or appreciated yet.

On the other hand, it may be said that shareholders are entitled to dividends when declared by the board of directors, and a say in the management of the company insofar as the articles and the law permit and capital and surplus if any, on a winding up. The control produced as a result of a collection of votes and the right to appoint directors is merely a consequence of that collection and not a matter regarding which rights may be asserted. It is a matter for the concern of the company alone. Further, since directors are in the position of trustees for the company, the control which they have belongs to the beneficiary, *i.e.*, the company. This argument from analogy or precedent, however, oversimplifies the issue.

The concept of control[27] has developed with the concept of ownership. The essence of control, however, is custody and ownership is only one of the ways leading to custody. When it became necessary to treat control separately from ownership the law developed the idea of trust. In the complex and varied operations of business this idea would have limited application. The administration of a company cannot be comprised within the limits of a trust. Control, however, is vested in someone for the administration of the company and it has to be exercised for that purpose alone. In order to evaluate control the following elements in it have to be considered.

Since control has to be exercised for the benefit of the company there is an element of responsibility in it. This can hardly be considered of value to the person who has control. Power of disposal over the assets is another element. This is definitely of value. Emolument is still another element of value. Further, the controllers will benefit by the company placing its business with other companies in which they have an interest. They may also benefit in the matter of dividends.

27. See Weinberg, *Take-Overs and Amalgamations* 8-14 (1963); Berle & Means, *The Modern Corporation and Private Property* (1933); Leech, "Transactions in Corporate Control," 104 *U. Pa. L. Rev.* 725 (1956); Bayne, " Philosophy of Corporate Control," 112 *U. Pa. L. Rev.* 22 (1964); Berle, " 'Control' in Corporate Law," 58 *Colum. L. Rev.* 1212 (1958).

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If dividend is declared they will get return on their investment and an opportunity to speculate. If dividend is not declared, this will help to expand the company which they control. Since however all the above elements are there for the beneficial service of the company, ownership of control is not in the person who has a majority of the shares but in the company. The notion of owning control originates in the closely held private company where ownership of all the shares of the company coincided with the control. With public participation however this situation no longer obtains. The extent of economic concentration in industries should also be taken into account so as to consider whether a particular solution is likely to accentuate the effect of such concentration. The report of the Monopolies Inquiry Commission, 1965, is particularly useful here. It has "tried to ascertain the *substance* of the control and . . . not adhere to the deeming provisions about the 'same management and the same group' as contained in the Companies Act."[28] In this report " 'a business group' has been taken to comprise all such concerns which are subject to the ultimate and decisive decision making power of the ultimate interest in the group — the group master."[29] For our purpose its finding regarding country-wise concentration of economic power is important. This type of concentration means a large number of concerns producing or distributing different commodities being in the control of one individual or family or group of persons whether incorporated or not connected closely by financial or other business interest.[30] The following extract from the report is relevant:

> Altogether 2259 companies were examined for the purpose of ascertaining their group affiliation to the 83 groups in our tentative list; as regards 1316 out of these 2259, we had the advantage of admission by the different business houses that they belonged to their group. Closer examination was necessary of 943 companies. Out of these we decided 293 companies to belong to different groups. As regards 570, our decision was that the evidence did not show that they belonged to any of these groups, while as regards 80 we were unable to come to any conclusion either way because of lack of sufficient information. We ought to point out that fuller investigation of those 510, specially as regards the beneficial ownership of the shareholdings, and full information as regards the 80 companies for which we were unable to get full information might disclose that a fair number of these were also controlled by some of these groups under consideration.[31]

The paragraph shows that there is heavy concentration in the industrial and therefore the corporate sector. It shows that more than half and possibly more than three-fourths belong to or are under the control of eighty-three groups. Moreover, banking companies have not been included in these groups.[32] Considering how much part of the economic activity is also controlled by banks the facts are formidable.

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28. Monopolies Inquiry Commission, Government of India, *Report* 34 (1965). (Emphasis added.)
29. *Ibid.*
30. *Id.* at 2.
31. *Id.* at 34.
32. *Ibid.*

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Some indication of legislative policy might be found in sections 303 and 307 of the Companies Act. These sections require a register of directors and their shareholdings to be maintained by the company. For the purpose of these sections the legislature has provided that "any person in accordance with whose instructions, the Board of directors of a company is accustomed to act shall be deemed to be a director of the company."[33] *De facto* control is, therefore, regarded as such that it should come within the arms of the law.

It is hoped that on second opportunity the courts will examine the problem of corporate control in some detail and we shall then have the benefit of considered judicial opinion.

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33. Companies Act, 1956, § 301; see also § 307 (10)(a).

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