IN THE SUPREME COURT OF SEYCHELLES

PALANI S. BATCHA **PLAINTIFF**

VERSUS

1. **DANIEL BELLE**

MR ANOOP VIDYARTHI
MS KARISHMA MOOLRAJ

2. **COLOUR PRINT & PAKAGING (PTY) LTD**
(Rep by Ms Karishma Moolraj GM)

5. **REGISTRAR OF COMPANIES**

DEFENDANTS

Civil Side No 230 OF 2005

Mr. Rajasundaram for the Plaintiff
Mr. F. Chang Sam for the Defendants

JUDGMENT

Perera J

The plaintiff, a naturalised Seychellois and a professional Chartered Accountant, avers that the 2nd defendant, a foreign national, approached him to venture a printing business. He claims that he acted as "*Promoter"* of that business and in that capacity submitted a "*business"* plan for a small scale print and Packaging Industry" to the cabinet of Ministers through the Ministry of Industries and International Business, and obtained approval. He further avers that due to his *"experience and well established public and business relationship*", the 4th defendant company, Colour Print and Packaging (Pty) Ltd, experienced a rapid

growth in business. The plaintiff further avers that the 2nd defendant, who in addition to being a director, of that company, was also the supplier of Machinery and Raw Materials, started to indulge in various activities against him, and exerted undue pressure, and abused and insulted him through phone and fax with a view to oust him claiming that he (*2nd defendant*) was the major shareholder of the Company. The plaintiff avers that he holds 500 shares, while the 2nd defendant holds 450 shares and the 1st defendant 50 shares.

As regards those averments, the defendants deny that the plaintiff was the promoter of the 4th defendant company. They aver that it was the 2nd defendant who conceived the idea of commencing the business now being carried on as the 4th defendant company, and that at that time, the plaintiff was only an employee of Printec Press Holdings (Pty) Ltd. The plaintiff claimed that he left Printec Holdings in December 2002, having gone on leave from November 2002. The defendants aver that the 4th defendant company which was established in the year 2000 bore the name "Pre-Press Systems (Pty) Ltd at that time, and it was changed to its present name "Colour Print and Packaging (Pty) Ltd, by special resolution on 16th December 2002. The defendants also deny that the plaintiff was appointed as "*Managing Director*" of the company as claimed, and as a matter of law pleads that "*Managing Directors"* are not appointed in proprietary companies. The defendants further aver that it was the 2nd defendant who furnished the entire venture capital for the business, and had he not done so, there would not have been any project to be presented to the cabinet of Ministers for approval. It is further averred that the plaintiff failed to keep proper accounts and records, failed to perform statutory duties in respect of business taxes and social security payments and exposed the 4th

defendant to penalties and other liabilities thus jeopardizing the entire business.

In answer to the claim of the plaintiff to 500 shares, the defendants aver that the whole shareholding consisting of 500 shares of one of the promoters, namely Christopher Gopal, was transferred to the plaintiff on the agreement that he would hold 400 of the 500 shares *as* a *nominee* for the 2nd defendant, and on that basis, an agreement dated 24th August 2001 was entered, and a blank share transfer was also signed by him the same day. Those 400 shares were later transferred to the 3rd defendant.

The defendants therefore pray for an order of this Court ordering the plaintiff to hand over all the records and books and other property of the 4th defendant company, confirm that the share transfer done in favour of the 3rd defendant on the basis of the agreement was valid in law, and for an order on the Registrar General to properly stamp the said share transfer and allow the notice of particulars of directors notifying the appointment of the 3rd defendant as director to be registered.

On the other hand, the plaintiff prays for an order declaring that the Annual General Meeting held on 25th May 2005 and subsequent meetings are null and void, declaring that the removal of the plaintiff from the post of Managing Director is invalid, declaring that the appointment of 3rd defendant as director is invalid, ordering a new Annual General Meeting, directing the 1st defendant to convene a proper board meeting and for an order that the defendants pay "*appropriate compensation"* for his loss of office as director of the Company.

Before the merits of the case are considered, it is necessary to state that upon considering an application for an *exparte* interim injunction filed by the plaintiff, Renaud J, has by order dated 8th July 2005 restrained the defendants from implementing or giving effect to resolutions passed at the Annual General Meeting of 25th May 2005, and subsequently on 1st June 2005 and 8th June 2005, "*removing the applicant from the Management and control of the said company".* They were also restrained from holding any meeting to remove the plaintiff from the Management.

The 1st , 2nd and 4th defendants thereupon filed a motion on 12th December 2005 for the interim injunction to compel the plaintiff to deliver to the 4th defendant company and its Auditor *"all books of records and accounts and related information which are in his custody, control or custody*", and restraining the plaintiff from operating the bank accounts of the company, in particular the accounts at the Nouvo Banq and at Barclays bank. That application was resisted by the plaintiff. Renaud J, by order dated 13th July 2006 held *inter alia* that on the basis of the affidavits and counter affidavits filed, it had not been established with certainty as to who was having the control and custody of the books of accounts and related documents. He also noted that the *exparte* interim injunction restraining the defendants from taking action to remove the plaintiff from "*the Management and Control of the Company*" had not been complied, and hence as the plaintiff had been denied access to the office, and the factory, he could not have custody and control of any of the documents sought. He further refused to make any order authorizing the 2nd defendant to operate the accounts of the 4th defendant company, as the exparte injunction issued on 8th July 2005 was to maintain the *status quo* of the company until final determination of this case.

However, the 2nd defendant testified that the business of the 4th defendant is being carried out through his other company "*Trade Supplies (Pty) Ltd*". He stated that the latter company supplies the goods, and work is done by the 4th defendant company. The revenue which should in fact go to the 4th defendant company now goes to the Account of Trade Supplies (Pty) Ltd, as the account is frozen. He further stated that had he not done so, the 4th defendant company had to be closed down. He stated that no resolution was passed by the board of the 4th defendant company to trade in that manner.

The pivotal issue in this case, is the removal of the managerial functions of the plaintiff, while he still remains a shareholder and director. Another vital issue is the validity of the transfer of 400 shares out of the 500 shares held by him, to the 3rd defendant. It was consequent to that transfer that the 3rd defendant became a director and shareholder, and participated in the meetings of the company at which resolutions were passed against the plaintiff. Hence if that transfer was invalid, any resolutions passed at these meetings would be null and void.

I shall first consider some of the relevant provisions of the companies Act relied on by Counsel for the plaintiff as those violated by the defendants. It was submitted that although Section 87 requires the company to issue share certificates to shareholders no such certificates were issued either at the time shares were transferred from Christopher Gopal to the plaintiff or at the time when the alleged share transfer was effected between the plaintiff and the 3rd defendant. Section 89(i) provides that, "*a certificate issued by a company and signed on its behalf stating that any shares or debentures of the company held by any person shall be*

prima facie *evidence, of the title of that person to the shares or debentures*". Although failure to issue such a certificate has penal consequences, the validity of the shareholding remains unaffected. One of the resolutions passed at the company meeting of 25th May 2005, was the issuance of share certificates. But the injunctions issued on the application of the plaintiff has stayed the implementation of that resolution.

The original directors of "Pre-Press Systems (Pty) Ltd were Christopher Gopal, with a holding of 500 shares, Anup Vidyarthi (2nd defendant) with 450 shares while Daniel Belle was a shareholder of 50 shares. (D6). The 2nd defendant claimed that Mr. Gopal held those shares nominally in trust for him, and that when those shares were transferred to the plaintiff on 24th August 2001 (P5), no consideration was paid by the plaintiff, as stated therein. That transfer was duly stamped and registered on 28th September 2001. Although Article 1341 of the Civil Code provides that no oral evidence shall be admissible beyond the contents of a document, the defendants relied on a "*declaration of trust*" signed before the 1st defendant in his capacity as Notary Public, on the same day as the transfer of shares to him by Mr Gopal, as writing providing initial proof, which is an exception under Article 1347. That declaration is as follows-

> "Know all men by these presents that I, the undersigned Sathasivan Batcha Palani of Mont Fleuri, Mahe, Seychelles, (Trustee), do hereby acknowledge *my nominal ownership of four hundred shares (400) of Pre-Press Systems (Proprietary) Limited of Victoria, Mahe, Seychelles (the company), and further acknowledge that the same are held in trust for the sole use benefit and advantage of Anup K. Vidyathi of 81, Arlington*

Road, Henden, London, U.K, his heirs, successors and assigns (owner)"

The covenants of that declaration are numbered 8 to 14. However, a similar declaration of trust made by the plaintiff the same day in favour of Mr Vidyathi acknowledging nominal ownership of 250 shares of "Trade Supplies (Pty) Ltd, (which is the subject matter in case no CS. 240/05 which is pending), was produced in this case as exhibit D20, and the covenants in that document are numbered 1-7. The covenants in both documents are identically worded through differently numbered.

The covenants in the "*declaration of trust*" in respect of the shares in "Pre-Press Systems (Pty) Ltd are as follows-

"The Trustee hereby irrevocably agrees, covenants, warrants and represents as follows:

8. *That the Company is duly registered and that said shares represent 40% of the company's outstanding stock.*
9. *That Trustee shall at all times not disclose during or after the term of this declaration of Trust (a) the existence thereof or; (b) the content thereof or; (c) any communications relating thereto or; (d) any instructions received there under or any act undertaken pursuant thereto to any third party.*
10. *That the Trustee shall at all times act in accordance with such instructions of the Owner or his authorized representatives and agents as maybe issued from time to time and that if by default absent such instructions the Trustee shall act in his discretion in the best interest of the Owner.*

That at Owner's request Trustee shall without delay assign the stock in full or in part to the Owner or such other assignee as Owner may direct.

11. *That Trustee shall not without prior written approval by Owner (a)*

create any interest in or related to the corporation, its stock or its assets or; (b) enter into any contract binding the corporation and/or affecting its assets or shareholders or; (c) make any declaration in the name of or on behalf of the Corporation, its shareholders and/or Owner.

That Trustee shall endorse a share transfer of the said Shares in blank and shall deposit said Share Transfer without delay at such place as may be designated by Owner in accordance with Owner's instructions.

12. *That this declaration of Trust is binding upon the Trustee, his heirs, administrators, executors, custodians, successors*."

The defendants have also produced a "*blank share transfer*" of 400 of the 500 shares by the plaintiff the same day as the transfer of shares to him by Mr Gopal, and the "*declaration of Trust".* Those three documents were relied on as counterparts to establish the equitable nature of the transaction. The defendants also rely on the unchallenged evidence of the 1st defendant who acted as notary to that document, the blank document of transfer (D2), which the plaintiff admitted signing but maintained that it was in respect of 400 shares of "*Pre-Press Systems (Pty) Ltd*" and not of the 4th defendant company. In that respect, the defendants rely on the resolution passed by the board of directors of Pre-Press Systems (Pty) Ltd on 26th November 2002 (D7) whereby the 2nd defendant *and the plaintiff*, as directors resolved that the name of the company be changed to "*Colour Print and Packaging (Pty) Ltd*" and to register the name "*Print Pack*" as the business name. The Registrar of Companies registered the change of name on 16th December 2002 (P7). Under Article 1347, a writing providing initial proof is a writing (a) which emanates from the person against whom the claim is made or from a person whom

he represents, and (2) which renders the facts alleged likely. The transfer of five hundred shares by Christopher Gopal to the plaintiff on 24th August 2001 (P5) was unconditional. Section 85(1) and (2) of the companies Act prohibits restrictions on the right of a person to transfer a debenture or share held by him. However sub section (5) thereof provides that such restrictions do not apply to a proprietary company. By the simulation contained in the "*declaration of Trust*" (D19), the plaintiff agreed to act in accordance with the instructions issued by the owner of the beneficial interest in 400 shares and for that purpose to endorse a share transfer in blank. The plaintiff, on being cross-examined stated-

"Q. Do you agree Mr Palani, do you agree that the 400 shares did not belong to you, they belong to Mr Vidyarthi.

A. *Still now, I fully agree that it did not belong to me when it was Pre-Press Systems Ltd, which company is different, from 2000 the company is in existence. There is no annual return file, there are no accounts done, you tell me now".*

However when questioned further whether he is now claiming ownership of all the 500 shares as the company name had changed, he stated that the 2nd defendant gave him 50% shares as there was no one to promote the business.

Learned Counsel for the plaintiff also raised the issue of Pre-Emption under Section 27, which provides that "the continuing members of a proprietary company shall be entitled to purchase shares of an outgoing member. When the shares of Christopher Gopal in "Pre-Press Systems (Pty) Ltd" where transferred to the plaintiff on 24th August 2001, he (the plaintiff) himself was not a "continuing member" of that company but an outsider. As Palmer states-

"A private company is normally what the Americans call a "close

corporation; This means that its members are connected by bonds of Kinship, friendship or similar close ties and that the intrusion of a stranger as shareholder would be felt to be undesirable unless his admission is accepted by those for the time being interested in the company".

The plaintiff was admitted as a shareholder due to the friendship the 2nd defendant developed with him when he was employed at Printec Press Holdings Ltd. It was on the basis of that same friendship and Trust that the 2nd defendant entrusted 400 shares to be held in Trust from him. It was provided in paragraph 11 of the declaration of Trust that upon the request of the 2nd defendant, the plaintiff would assign the "stock in full or in any part to him or any other assignee directed by him. Consequently, he was asked by the 2nd defendant to meet the 1st defendant to formalize the documentation to effect the transfer to the 3rd defendant, who, admittedly is his niece. As the plaintiff failed to meet the 1st defendant as requested, the blank transfer form was filled up with necessary particulars and presented to the Registrar of Companies for stamping. The plaintiff vehemently denied his signature on that document before the Registrar, but eventually it was stamped on 16th March 2005. Hence although the share certificate has not been issued, the 3rd defendant holds good title to 400 shares of the company.

To maintain his claim for loss of office as director of the company, the plaintiff, has averred that he was a *"promoter*" of "Pre-Press Systems Ltd, as the 2nd defendant was a non resident director of that company and that the entire responsibility of forming the company was entrusted by the 2nd defendant, to him. The memorandum of Association of that company was registered with the Registrar of Companies on 6th July 2000 (D6). At that time, the plaintiff was employed at Printec Press Holdings Ltd. The term "*promoter"* is defined in Section 2 of the Companies Act as –

> "Any person engaged in the *formation of a company, or in raising money to enable a company, to be formed, or to acquire any assets or an existing business, or in negotiating the acquisition of any assets or an existing business by or for a company, and includes any person engaged in doing any of those acts for the benefit of an overseas company, but does not include a person who acts only in a professional capacity on behalf of a promoter*".

Palmer on Company Law, Para 20-06 states that a person becomes a "*promoter"* from the moment he takes part in forming it or setting it going. In *Gluckstein v. Burns (1900*) AC. 240, members of a syndicate who agreed to combine to purchase a property with a view to selling it later to a company they intended to form, were held to have become "*promoters"* from the moment they took the first step to carry out that object. In the present matter, the company "*Pre-Press System (Pty) Ltd"* had been informed since 6th July 2000 by Mr. Gopal, Mr. Vidyarthi and Mr Belle. The plaintiff became a director in September 2001. The project plan was submitted to the cabinet of Ministers through the Ministry of Industries and International Business only on 10th March 2003, and it was approved by letter dated 22nd July 2003 (P9). The plaintiff had discussions with the Government for the lease of Parcel V. 11232 in the year 2004, and also negotiated a loan from the Development Bank of Seychelles in November 2003. However, the plaintiff testified that the business was inaugurated on 30th October 2003, in a different place. The approved loan amount was subsequently reduced by the D.B.S, as instalments were not paid for over one year. In these circumstances, the plaintiff could not have been considered as a "*promoter*" in the legal sense of the term. As the resident director, he undoubtedly had to pursue matters connected with the business. The 2nd defendant stated that 100 shares were given in contemplation of his services as the

resident director. He stated that he was paid a monthly salary of Rs12,000, and was provided with a company vehicle, and a rent allowance.

The plaintiff was neither a "*Promoter*" nor the "*Managing Director"* in the legal sense contemplated in the Companies Act, although he performed some of the functions of both positions for remuneration. The plaintiff claims that the 2nd defendant acted with an ulterior motive in getting him to sign a blank transfer of shares (D2), in that he had intended to remove him after he had established the business. Such an assertion is not logical, as even then, he remained a shareholder of 100 shares. The defendants have categorically admitted in Court that the plaintiff still remains both as a shareholder and director of the 4th defendant company. The defendants only sought to remove only his "*managerial functions"* in the interest of the company, and in his own interest as a shareholder. It was disclosed in evidence that the plaintiff, who was controlling the operation of finance of the company had failed to present the annual accounts for the years 2002, 2003, and 2004, and had also failed to prepare a director's report. Copies of correspondence produced by the 2nd defendant (D9) show that he had requested the plaintiff since May 2004 to prepare the accounts of the company. The 2nd defendant finding that the plaintiff was not responding to his fax messages, sent a letter dated 5th April 2005 to Mr Rajasudaram Counsel for the plaintiff stating-

> "As was agreed under your guidance and in your presence, Mr Palani has failed to deliver the records for the accounts both for Trade Supplies (Pty) Ltd, and Colourprint and Packaging Company Secretary or me.
>
> *This clearly shows not only a lack of total responsibility as the resident director of the company, but also that he is trying to hide something more sinister.*
>
> *His actions have left me with no other option but to give him the final ultimatum, which I have done. I would like to assure you that I will proceed with the complaints to the relevant authorities, even though I know this may adversely affect me, the other directors and shareholders of both companies*".

The plaintiff himself produced copies of several fax messages received by him from

the 2nd defendant, where the central theme was the maintenance of company accounts, his rude behaviour towards the staff and his general lack of diligence in the discharge of his duties. These complaints came with a dose of medical, and spiritual advice as Mr Palani was attributing his lapses to his health conditions. The 2nd defendant stated that he sent them out of frustration. On a consideration of the correspondence, the Court is unable to agree with the plaintiff that the 2nd defendant used intimidatory tactics to remove him from the company. Apart from that being a legal impossibility, such correspondence show that the 2nd defendant, who was providing the plant and machinery, supplying materials and the finances, was justifiably concerned with the future of his investment, as business tax returns had not been furnished, Social Security payments not made(D10) and thereby exposing the company to penalties and legal action. The plaintiff's explanation for the delays was that there was no accountant in the company, and since he had to carry out various duties relating to marketing and business development, he did not have sufficient time to maintain accounts and prepare business tax returns. The 2nd defendant in his testimony stated that the plaintiff was permitted by him to set up a business called "Sairam Traders" which was registered on 22nd November 2002 (D16). However he later found that he was using the 4th defendant company to execute printing orders undertaken by "*Sairam Traders"* and appropriating the proceeds. It was therefore claimed that he was devoting his time more to his own business than that of the 4th defendant company. In a fax message dated 28th May 2004, (D9) the 2nd defendant informed the plaintiff that if he was unable to maintain the accounts documents, he should employ a qualified bookkeeper. At the adjourned Annual General meeting of 1st June 2005 (P19) the plaintiff informed the board that he had appointed one Mary Lise Esparon, a licensed bookkeeper to

prepare the director's reports for 2002, 2003 and 2004. He promised to give a progress report at the next meeting on 8th June 2005. But on that day he failed to attend that meeting (P20). At the meeting of 25th May 2005 (P17), A.J. Shah and Associates were appointed as Company Auditor. The plaintiff stated in his testimony that he contacted Mr. A. J. Shah and that he told him that he could not undertake the work as he was too busy. He then decided to contact Nair & Company Auditors, but Mr Nair told him that his appointment should be approved at an Annual General meeting. Hence no auditing was done. Therefore there were sufficient reasons for the defendants to remove the *managerial duties* of the plaintiff while he still remained a shareholder with 100 shares, and as director of the company.

However the plaintiff avers that the resolutions to remove his managerial duties and the consequent removal of his mandate to sign company cheques relating to the bank accounts at Nouvobanq and Barclays, were contrary to the provisions of the Companies Act. Originally, it was resolved at a board meeting of 6th October 2003 (P28) that both Mr Palani and Mr Vidyarthi would operate the Nouvobanq account on *"either or"* basis and negotiate bills, loans, overdrafts and other facilities at the bank". After the plaintiff and the 2nd defendant had disputes regarding the management of the company both of them, by a document dated 17th January 2005 (D15) confirmed the appointment of Ms. Karishma Moolraj *(3rd defendant)* as Acting General Manager of the 4th defendant company. A list of 20 duties to be performed by her, were set out in that document. She was however to be responsible to the plaintiff, and was to carry out any instructions given by the 2nd

defendant. Among these duties were –

1. *To maintain proper stock records for all goods <u>currently in stock and any new consignments received</u>.*

2. *Proper NRM records to be maintained at all times.*

Weekly and monthly reports to respective heads and directors.
To maintain proper filing records, and proper filing of documents.

3. *<u>Keys to the factory</u> should always be maintained by her, and should not be given to any staff member, either to close or to open.*

4. *To sign all payment vouchers.*

5. *To hold regular staff and management meetings and file meeting reports with both directors.*

This sharing of duties ought to have given the plaintiff adequate time to perform the main duties connected with accounts and business.

With the transfer of 400 shares to Miss Moolraj under the Trust agreement of 24th August 2001, implemented on 15th October 2004 through the transfer document signed by the plaintiff as "*Trustee"* of those shares, she became a shareholder and director of the 4th defendant company. She presided as Chairman at the AGM of 25th May 2005 when the plaintiff absented himself after sending a medical certificate by fax at 13.40 hrs on that day (D21), when the meeting fixed for 2 p.m commenced at 3.17 pm. That medical certificate had been issued on 23rd May 2005. It was noted in the minutes of that meeting, that notice of the meeting and the agenda were sent to the plaintiff on 3rd May 2005 at 3.30 p.m. Hence he could well have sent it at least a day before the meeting to the Secretary. The plaintiff was however present at the adjourned AGM of 1st June 2005 (P19) where Ms Moolraj again presided as Chairman. He however registered his protest and wanted a board meeting of directors to be held first. At the meeting of 8th June 2005, the plaintiff

was absent without excuse. A notice of an extraordinary meeting of shareholders" to be *held on 11th July 2005* at 3 p.m. was sent to the plaintiff, signed by Miss Moolraj in her own behalf and for Mr Vidyarthi by Power of Attorney, and Mr. D. Belle, on 17th June 2005 (P21). The main resolution to be tabled was *"to remove Mr Sathasivan Palani as Director of the Company*". The plaintiff filed the present suit on 6th July 2005, and obtained an interim injunction on *8th July 2005* restraining the defendants from holding the meeting on 11th July 2005. Hence the plaintiff has not been *removed* from his position as director.

Admittedly, the plaintiff ceased managerial duties. The plaintiff stated that despite obstructions, he tried to run the company, but could not do so due to mental stress.

After obtaining the injunction, he went to the factory on *15th July 2005* with two orders for printing. But the staff refused to accept them. Then Ms. Moolraj came and asked him to go out of the factory and threatened to call the Police. The plaintiff stated that he felt humiliated in front of the staff and did not go to the factory thereafter. This situation was created by the plaintiff himself, who by his own negligence, exposed the company to legal penalties and other liabilities.

As regards the Annual General meeting fixed for 25th May 2005 at 2 p.m., Miss Moolraj stated that the medical report came only 20 minutes before the commencement. By ordinary resolutions tabled and approved unanimously, it was resolved that (1) A. J. Shah & Associates be appointed as Auditors (2) the shareholding qualification for a director to be 15% and (3) Miss Moolraj be appointed as director. Those resolutions were consistent with the provisions of Section 122 of the Companies Act. It was also accepted that the plaintiff be *suspended* from being a signatory to the bank account of the company until he resolved the position of the accounts and the actions threatened to be taken by government authorities for failure to perform statutory duties.

Ms. Moolraj in her testimony stated that consequent to the plaintiff obtaining the injunction from Court, that decision was not implemented and that although mandated, she herself cannot operate the accounts without the plaintiff's signature.

In his plaint, the plaintiff has not challenged the 3rd defendant's rights as a shareholder of 400 shares, but only sought a declaration that her appointment as director is invalid. She was appointed at the Annual General Meeting of 25th May

2005 (P17). At that meeting, the 3rd defendant was present as the shareholder of 400 shares, and also in her capacity of proxy to the 2nd defendant director. Mr Belle was also present as the shareholder or 50 shares. Hence with the absence of the plaintiff on medical grounds, the appointment of the 3rd defendant as director *by the company* was approved by one director and two shareholders. The 4th defendant company being a proprietary company, that appointment did not contravene Section 163 of the Companies Act. Moreover it was submitted by the plaintiff that the 2nd defendant was present in Seychelles when the meetings were held on 25th May, 1st June and 8th June 2005, but purposely avoided attending those meetings, and got miss Moolraj to appear on proxy. Section 128 of the Companies Act provides that –

> "Any person entitled to attend and vote at a general meeting of a company, or a meeting of a class of shareholders or debenture holders, shall be entitled to appoint another person (whether a member, shareholder or debenture holder of the class in question *or not) as his proxy to attend and vote on his behalf instead of him……."*

Hence the fact that the 2nd defendant was present in Seychelles during the relevant period does not contravene the provision of Section 128.

As a matter of law, the defendants have submitted that the plaintiff, is under Section 136, out of time to challenge the resolutions passed on 25th May 2005, as the period of one month provided had passed when the present plaint was filed on 6th July 2005. The plaintiff has submitted that he became aware of those resolutions only when he received a letter from Barclays bank on 12th June 2005 regarding the resolution giving Miss Moolraj Power of Attorney on the company account (P24). He therefore calculates the one month period from that day. However, the plaintiff was present at the meeting of 1st June 2005, and protested against the Chairmanship of Miss Moolraj. Ms Moolraj in her testimony stated that the meeting of 25th May 2005 was adjourned to 1st June 2005, to deal with matters that concerned the plaintiff, namely the presentation of accounts and the submission of director's reports. However, when he attended that meeting he was hostile and abusive. He wanted a copy of the previous minutes, and was told that they were posted to him. He did not state that he did not have books of accounts, but stated that he had appointed a person to prepare the accounts. If so, the plaintiff would

have had the books of accounts at that time.

At the further adjourned meeting of 8th June 2005 (P20), the plaintiff was once again absent without excuse. The same members who presided at the meeting of 25th May 2005, resolved to remove the plaintiff as signatory to the bank accounts of the company. That resolution though validly passed was not implemented due to the injunction issued by Court.

As regards the validity of those meetings, it was submitted that the Annual General meetings were not preceded by a shareholders meeting. As was held in the case of ***Shakara (Pty) Ltd v. Gracia Bastienne (1979) S.L.R. 31***, where the position of the voting power of the shareholders is clear, it will not be necessary to pass a resolution at a general meeting, as the result of the meeting would be a forgone conclusion. Hence at the AGM, the resolutions were passed by majority shareholders. Hence prayers (a), (b) and (c) of the plaint seeking declarations that the resolutions passed at those meetings are invalid cannot be sustained. In any event those declarations are prescribed under Section 136.

Another important point of contest between the parties was where the books of accounts in the company are at present. Section 139 provides that every company shall cause to be kept books of account with respect to –

(a) *All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*

(b) *The assets and liabilities of the company.*

Sub Section (3) provides that such books of account shall be kept at the Registered Office of the Company or such other place the directors think fit, and shall at all times be open to inspection by the directors. The 3rd defendant stated that after she was confirmed as General Manager on 17th January 2005, all the documents constituting the books of account from June 2005 are being kept in a room at the factory at Providence. Where then are the previous books of Account?

The plaintiff stated that the Office at Low's building, Revolution Avenue was purely

for administrative purposes, and that the books of account were kept at the factory. However, Cortney Sinon (DW1), the works Manager of the company stated that there was no office in the factory, and no books of accounts were kept there at that time. The plaintiff came there for only about 15 minutes, three times a week, with a photocopy of an order. That copy would only contain the details of the job, but not the pricing. The originals of those orders, invoices etc were at Low's Building. Even the printing was done, the finished product was delivered to the plaintiff at Low's building. Even the staff records were kept there.

Alfred Charles (DW2), the Production Manager of the company corroborated the evidence of Cortney Sinon as regards books of Accounts and other documents. He also stated that the original order forms were never received at the factory. He however stated that purchase orders are attached to the job cards and kept in the factory.

Michel Ange Valentin (DW3), the driver of the company stated that he delivered the works orders to the factory and performed other dispatch duties. He also drove the plaintiff to various places. He too stated that all administrative and business matters were dealt with at Low's Building. He stated that the plaintiff would pick up quarrels with all workers and one day he invited him to fight. He left thereafter, and later joined the "*new Management*", as a part time worker.

Ms. Moolraj (DW4) also stated that she too drove the plaintiff to the factory to deliver purchase orders. After she was confirmed as Acting General Manager on 17th January 2005 (D15) she moved to the factory at Providence. Her duties there were mainly administrative in nature. The original purchase orders were at Low's building, and when copies were sent to the factory, she processed them, and sent the finished product to the Office at Low's building. When she assumed duties there was no Office, but later a store room was converted into an Office. There were no books of Accounts when she came there. All these documents were at Low's building Office, and only the plaintiff had the keys to that Office. After the transfer of shares in her name, in October 2004, the plaintiff became hostile towards her. It was then that she moved to the factory in January 2005, with the joint approval of the plaintiff and the 2nd defendant..

At the adjourned AGM of 1st June 2005, the plaintiff, who was present, was asked to present his Director's report for the years 2002, 2003 and 2004. According to the minutes (P19), he stated that "he needed more time as he had on 31st May 2005 appointed one Mary Lise Esparon *(a licensed Book keeper*) "*to do the books*" for those years. Hence undoubtedly, those books were in his custody in June 2005. He had the keys of Low's building, where the books were. There is no evidence that any of the defendants or any other person removed them without his knowledge. Accordingly, on a balance of probabilities the books of Account for the years 2002, 2003, 2004 and up to June 2005 should be with the plaintiff. The plaintiff shall therefore handover all the records, books and other property belonging to the 4th defendant company to the 1st defendant in his capacity as company Secretary.
The plaintiff has, in prayer (g) of the plaint sought an order on the defendants "*to pay appropriate compensation to (him) for loss of office of director of the company".* The plaintiff did not cease to be a director of the company. Only his managerial duties were withdrawn as he was "*not running the business properly".* Admittedly he was paid Rs.12,000 per month and also given the use of a company vehicle for his services as the resident director who was entrusted with the administration of the business and was also paid a rent allowance. However those payments ceased at the end of December 2004. He has been given 100 shares for his initial organization of the work. Thereafter the 2nd defendant supplied the venture capital including plant and machinery. In these circumstances, the plaintiff cannot maintain a claim for loss of office. However at the AGM of 25th May 2005, a resolution was tabled to set the *"remuneration and expenses of directors of the company".* Since the plaintiff was absent, that resolution was taken up at the adjourned meeting of 1st June 2005. At that meeting, the plaintiff agreed to state the amount he would claim as directors remuneration, but he differed it to the next meeting, which he did not attend. Section 174(2) provides that no payment shall be made by a company as Director's remuneration, *"unless the payment has been authorized or approved by an ordinary resolution passed at a general meeting of the Company*". Hence the plaintiff should be entitled to only such director's remuneration which will be determined at a directors and shareholders meeting.
The defendants have admitted that the plaintiff is still a Director and was also asked as to what he claimed as fees at the meeting of 25th May 2005. As was held in the case of G.I.C. v. D. Bonte (S.C.A. no. 6 of 1994, payment of a director's fee would continue to be due until removal. His right accrued from time to time until that time. Further, as was held in the case of Re Lundy Granite Co. (1872) 26 LT 673, such fees are payable "whether profits are earned or not by the Company*".* In the circumstances of the present case, the Court holds that the plaintiff will be entitle to director's fees from 1st January 2005.

In view of these findings, the interim injunction issued on 8th July 2005 is discharged as the plaintiff was never the "*Managing Director*" nor the "*Promoter*" of the company. He still continues as a shareholder of 100 shares, and as director. At the meeting of 25th May 2005, it was resolved only to *suspend* the plaintiff from being a signatory to the bank accounts of the company, until the lapses on his part towards the company were resolved. He was not *"removed from the Management and control of the company",* as averred in the motion, and as stated in the order of injunction.

As the share transfer of 400 shares by the plaintiff to the 3rd defendant has been held to be valid, and such transfer has now been duly stamped on 16th March 2005, the Registrar General is directed to register the notice of particulars of directors notifying the appointment of the 3rd defendant as director.

The plaintiff has, in prayer (d) of the plaint, prayed for an order on the defendant to hold a proper Annual General meeting. Section 119 of the act empowers the Registrar of Companies to call such a meeting on the application of a shareholder. Hence the plaintiff, in his capacity as shareholder could make an application to the Registrar, if so advised.

In prayer (e) the plaintiff seeks an order on the 1st defendant to convene a board meeting to discuss and transact all business in the interest of the company. As the plaintiff is still a director, the Court is empowered under Section 124 of the Act to order such a meeting. In view of the findings in the case, the plaintiff should hand over the books of accounts to the 1st defendant. Further there are issues such as the fixing of director's remuneration to be resolved, the issuing of share certificates, the presentation of Annual accounts for the years 2002, 2003 and 2004 and such other important matters relating to the business of the company to be resolved. Hence it would be imperative that a meeting envisaged in Section 124 be called. The Court orders that a board meeting be called with due notice to the plaintiff. If he fails to attend, the Court directs under the provisions of that Section that one shareholder of the company present in person or by proxy shall be deemed to constitute a meeting.

Subject to the limited relief granted to the plaintiff by way of Director's fees, his action is otherwise dismissed with costs.

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A. R. PERERA

JUDGE

Dated this 28th day of May 2007