LETTERS PATENT APPEAL.

Before Bhandari, C. J. and Tek Chand, J.

THE KARNAL DISTILLERY COMPANY, LIMITED AND OTHERS,—*Defendants-Appellants.*

versus

LADLI PARSHAD JAISWAL,—*Plaintiff-Respondent.*

Letters Patent Appeal No. 100 of 1954.

1957

Oct. 18th

Indian Contract Act (IX of 1872)—Section 16—Undue influence—Ingredients of—Burden of proof—On whom lies—Doctrine of undue influence—Meaning and scope of—Relief in equity—When granted—Presumptions and inferences of undue influence—When can be raised—Hindu Shastras and Society—Elder brother or uncle—Position of, Vis-a-vis *his younger brothers and nephews—'Person in loco parentis'—Meaning of—Person in a position to dominate the will of another—When can be deemed to be—Fiduciary relation—How and when constituted—Position of dominance—How far deemed to continue—Code of Civil Procedure (Act V of 1908)—Section 100—Finding as to the existence of undue influence—Whether finding of fact—Whether open to question in second appeal—Pleadings—Written statement not giving particulars of undue influence—Plaintiff not asking for further and better particulars—Issue framed as to the exercise of undue influence—Plaintiff, whether can be said to have been prejudiced or taken by surprise—Court, if can grant relief when facts on record justify the inference of undue influence—Evidence Act (I of 1872)—Sections 106 and 114—Party knowing facts—if bound to give evidence—Failure to give evidence—Adverse presumption, whether and when can be drawn—Presumption to be drawn—Nature of—Specific relief Act (I of 1877)—Sections 54 and 56—Suit by a director against other directors for injunction restraining them from committing illegal acts—Whether maintainable—Injunctive relief—Principles for the grant of, stated—Conduct of the plaintiff—Whether to be taken into consideration.*

Held, that for purposes of determining the exercise of undue influence, the first question that requires examination is whether the plaintiff was in a position to dominate

the will of his younger brother and nephews; *secondly*, whether he used that position to obtain an unfair advantage over them; *thirdly*, if it be found that he held a real or apparent authority over them or he stood in a fiduciary relation to them, he would be deemed to be in a position to dominate their will; and *lastly*, if it be found that the plaintiff was in a position to dominate the will of the defendants, then if the contract or transaction entered into by him appears on the face of it or on evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the plaintiff.

Held, that the word 'undue' when qualifying "influence" has a legal meaning of 'wrongful', as opposed to' excessive, inordinate or disproportionate. Undue influence is understood to be held, when it overpowers the will without convincing the judgment. It is a grip on another's mind subjugating his will to that of the other. It is an influence which acts to the injury of a person, who is swayed by it, and is exerted by exercising an ascendency or power, which results in a person being impelled or compelled to do what he would not have done, if he had been a free agent. It is said to be a subtle species of fraud, whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion, importunity or other domination, calculated to prevent expression of the victim's true mind. It is a constraint undermining free agency overcoming the powers of resistance, bringing about a submission to an over-mastering and unfair persuasion, to the detriment of the other.

Held, that the equitable doctrine of undue influence covers cases of 'undue influence' not only in particular relations but cases of coercion or pressure outside the special relation and relief in equity is not restricted to cases of fiduciary relationship, strictly so called, but the principle applies to all cases where influence is acquired and abused, where confidence is reposed and betrayed.

Held, that presumption of undue influence is raised where the Court regards the transaction as *prima facie* unfair, and the person, who is benefited by it, is required to show that in fact it was a fair and a reasonable deal, and

he did not take advantage of his position or of the necessitous circumstances or inexperience of the other. Of course, where there are not any such fiduciary relations between the parties as to create a presumption of influence, the burden of proof rests on the promisor to show that undue influence was in fact exercised. The law does not require that there should be direct evidence of actual exercise of undue influence. Having regard to the relationship of the parties, the course of dealings, the position of vantage occupied by the plaintiff, the undue benefits derived by him in consequence of that position, and from the consideration of the further circumstances set out in section 16 of the Indian Contract Act, it is open to the Court to draw a presumption in favour of the exercise of undue influence.

Held, that undue influence may be inferred when the benefit is such as the taker had no right to demand (i.e., not natural or moral claim) and the grantor had no rational motive to give. Cases of undue influence arise not only where family or confidential relationship exists between the parties, but also where one of the parties is necessitous or in duress. Wherever one member of the family exercises weighty influence in the domestic counsels either from age, from character or from superior position acquired from other circumstances, an inference as to existence of undue influence has been drawn.

Held, that according to Hindu Shastric injunctions and highly-cherished Hindu sentiments, the elder brother in relation to his younger brothers, or an uncle in relation to his fatherless nephews, is placed on a high pedestal next after parents. According to Manu Simriti, Chapter 9, verse 108 " the elder brother was enjoined to support his younger brothers as father provides for his sons" (Sanskrit Shalok) and according to verse 110. "If the eldest brother behaves as an eldest brother ought to do, he must be treated like a mother and like a father". (Sanskrit Shalok). Under laws of Manu an elder brother who through avarice defrauded the younger ones was deprived from receiving the honours due to him and was punished by the King,—*vide*, Manusmiriti, Chapter 9, verse 213.

Held, that whatever may be said of other civilized societies, among Hindus the elder brother on the death of the parents has always been in *loco parentis*. According to Narada in Virmitrodaya, the father had the first claim to

guardianship of minor son, after him came the mother and if neither were alive, the elder brother took the place of a guardian (Sanskrit Shalok). Apart from strict Hindu Law the status of an elder brother in Hindu society is of considerable superiority not only in matters of veneration and obedience but also for discharging responsibilities and obligations and the elder brother comes immediately after the parents.

Held, that by the expression "a person in *loco parentis*" is meant a person who puts himself in the situation of a lawful father of the child with reference to the father's office and duty of making provision for the child. "A person in *loco parentis*" is "a person assuming the parental character or discharging parental duty". It is a relationship which a person assumes towards a child not his own and towards whom he discharges parental obligations.

Held, that a person is deemed to be in a position to dominate the will of another where he stands in a fiduciary relation to the other. A person who is not in *loco parentis* to another may still stand in a fiduciary relation to him. A fiduciary relation is said to exist where a person acquires an influence and then abuses it, or confidence is reposed which subsequently is betrayed, the origin of confidence and the source of influence being immaterial. The rule embraces both technical fiduciary relations, and those formal relations, which exist, whenever one man places his trust in, and relies upon another. The term "fiduciary relation" is a broad one and not susceptible of precise definition.

Held, that a position of dominance, if proved to exist, is deemed to continue till its termination is established.

Held, that a finding as to the existence of undue influence is one of fact and is not open to question in second appeal especially when it had been arrived at after a review of the evidence placed on the record and after having surveyed the facts and circumstances of the case, and was not based either on misconception of evidence or by adopting a procedure contrary to law.

Held, that where the written statement did not contain the particulars of coercion and undue influence and the plaintiff in his replication did not object to it on the score

of want of particulars nor asked for further and better particulars and the first issue framed in the suit put in the forefront the question of coercion and undue influence and no objection was at any time raised to this issue, either on the ground that plea of undue influence had not been taken or that particulars of the alleged coercion or undue influence had not been clearly stated, it cannot be said that the plaintiff had been in any way prejudiced or taken by surprise. If there are facts on the record to justify the inference of undue influence, the Court will be justified in granting the relief, notwithstanding inartistic pleadings. All that the Court has to see is that the opponent of the party pleading undue influence is not taken by suprise.

Held, that it is the bounden duty of a party personally knowing the facts and circumstances of the case, to give evidence, and to submit to cross-examination. Courts have rightly drawn a presumption against the party avoiding the witness-box, and not submitting himself to cross-examination. The party who does not enter the witness-box runs a great risk of a presumption being drawn against him. In the case of a party on whom burden of proving a certain issue lies, the risk run by withholding himself from the witness-box may be very great. This presumption, however, is permissive. Section 114 of the Indian Evidence Act does not, in all cases, make it obligatory on Courts to act on such a presumption. The Courts, before making such a presumption, also take into consideration the facts of a particular case, before determining, whether the presumption from withholding evidence should be raised in the circumstances of that case.

Held, that in suitable cases a suit by a director against the other directors for an injuction restraining the latter from committing illegal acts is maintainable in a civil Court, provided, of course, other conditions for allowing such relief have been fulfilled. The question of Court's jurisdiction to entertain a suit, is distinct from the question whether having jurisdiction, it should exercise it in view of the circumstances of the particular case. The granting or refusing of injunctive relief rests within the Court's judicial discretion, guided by law and in harmony with the well-established principles of enquity, after exercise of due care and caution. The claimant for such a relief must show, that he has a superior equity in his favour, entitling him to the injunction asked as against defendants. He has

also to show, that he has been acting towards the defendants in a fair and equitable manner, free from any taint of fraud, sharp practice, undue influence or illegality. It is a cardinal principle of broad applicability, that he who seeks equity must do equity. The other maxim, that he who comes in equity must come with clean hands, also embodies a principle of wide amplitude and expresses the basic concept of equity jurisprudence. According to this rule, equity declines to lend its aid to a person whose conduct has been inequitable in relation to the subject-matter of the suit. The principle is, that he who has done inequity shall not have equity. If the plaintiff who is seeking equity has himself not done equity, the Courts should stay their hands. When plaintiff's own acts and dealings cannot be characterized fair and free from the blemish of undue influence, he is not entitled to such a relief. When the plaintiff's own dealings with the defendants have been such, which cannot be characterized as honest or just, the Courts having regard to the provisions of section 56(j) of the Specific Relief Act will not lend their assistance.

Case law discussed.

Appeal under Clause 10 of the Letters Patent from the judgment of Hon'ble Mr. Justice Bishan Narain, dated the 29th day of October, 1954, passed in R.S.A. 211 of 1954, reversing that of Shri Sansar Chand, District Judge, Karnal, dated the 19th day of December, 1953 (which reversed that of Shri Badri Parshad Puri, Senior Subordinate Judge, Karnal, dated the 25th May, 1953), and granting the plaintiff a decree for a declaration that the proceedings of the meeting of the Board of Directors held on the 3rd of March, 1946, and the extraordinary general meeting held on 28th March, 1946 and all meetings of directors held thereafter are not binding on the plaintiff and on the defendant company that the resolutions of the extraordinary general meeting, dated the 16th October, 1945, are in force; and granting a permanent injunction restraining the defendants from acting upon, or carrying into effect the resolutions passed in the meeting, dated the 3rd March, 1946 and 28th of March, 1946 and all meetings held thereafter with the proviso that this declaration and injunction shall not affect the rights and liabilities of third parties who are not members of the company unlessthereby the rights of the plaintiff in the company are adversely affected. The defendants

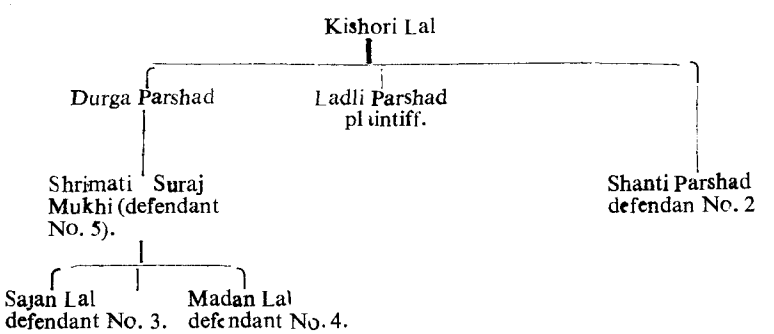
respondents other than the company shall pay the plaintiff's costs throughout.

S. N. BALI and A. N. KHANNA, for Appellants.

B. R. TULI, for Respondents.

JUDGMENT

TEK CHAND, J.—This is Letters Patent Appeal presented by the Karnal Distillery Co., Ltd., Shanti Parshad, Madan Lal, and Shrimati Suraj Mukhi, defendants, from the judgment of learned Single Judge allowing Regular Second Appeal No. 211 of 1954, granting reliefs to the plaintiff Ladli Parshad Jaiswal in the terms mentioned in that judgment, and reversing the judgment passed by the District Judge, Karnal, and partially restoring that of the Senior Subordinate Judge. The pedigree-table reproduced below indicates the relationship of the parties *inter se* :— Tek Chand, J.



Kishori Lal, father of the plaintiff and defendant No. 2 and grandfather of defendants 3 and 4, had started in 1900 the business of distillation of alcoholic beverages under the name and style of 'Kishori Lal and Sons'. It was a joint Hindu family business the members of which were Kishori Lal, his sons and grandsons. The same business was conducted also under the name of 'Karnal Distillery, Karnal'. In 1928, Kishori Lal died leaving a

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widow and three sons. Durga Parshad was the eldest, Ladli Parshad comes next and Shanti Parshad is the youngest. On the death of Kishori Lal in 1928 the joint family business was continued by the sons with Durga Parshad as the *karta* of the joint family. In 1934, Durga Parshad died leaving two sons, defendants 3 and 4, and widow Shrimati Suraj Mukhi defendant 5. On the death of Durga Parshad, Ladli Parshad, as the second son of Kishori Lal, became the *karta* of the family and the joint family business was continued till November, 1940, when the joint family disrupted and converted itself into a contractual partnership. The three branches of the family held equal shares. The contractual partnership did not last for more than a few months and its business was taken over by a private limited company known as the Karnal Distillery Co. Ltd., which was incorporated on 23rd March, 1941, and which started working from 1st of April, 1941. The membership of this private limited company, was confined to the members of the family and the three branches held almost equal shares at the time of the company's incorporation. The shares of the branch of Durga Parshad were 1004 while those of Ladli Parshad and Shanti Parshad were 1003 shares each. The Articles of Association *inter alia* provided—

(a) The maximum number of Directors would not exceed five and minimum two (*vide* Article 102).

(b) Ladli Parshad, Shanti Parshad and Shrimati Suraj Mukhi, widow of Durga Parshad, were appointed first Directors of this company (*vide* Article 103).

(c) With the exception of the Managing Director one-third of the Directors were

to retire by rotation at the end of every year (*vide* Article 112).

(d) The terms on which the Managing Director was appointed and which later on became a sore point with the other members were to the following effect—

> The Managing Director was Mr. L. P. Jaiswal and he was to continue to be Managing Director of the Company unless he voluntarily resigned his office, for a period of ten years from the date of the registration of the Company. His term of office was to continue for a further period of ten years unless notice to that effect was given within fifteen days of the expiry of the first eight years by a two-third majority at a special General Meeting convened for that purpose. During this period the appointment of the Managing Director, Mr. L. P. Jaiswal, was not liable to be revoked or cancelled. He was to devote as much of his time as he considered necessary or desirable to devote in the interests of the Company. There was no bar to the Managing Director engaging himself in any other business or profession provided such business or profession did not in any way compete with the business of the Company (*vide* Article 132).

(e) Article 134 stated that the responsibility of the Managing Director for the due and proper management of the company's business shall not be lessened or

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abrogated by the existence of the Board of Directors, the function of such Board during the continuance of the Managing Director in that office being to advise the Managing Director without taking any active part in the management of the company's business.

(f) The members would be expelled from membership at the instance of holders of two-third of the subscribed capital (*vide* Article 47).

On the first of August, 1941, Ladli Parshad was allotted 500 shares in addition to his previous holding. The immediate effect of this additional allotment was, that so far as Ladli Parshad was concerned, he became invulnerable to Article 47, and so long he held his shares he could never be expelled, as there could never be a two-third majority even if all the other members were to join hands against him.

In the matter of emoluments received by the three groups there was great disparity. Relevant clause of Article 132 of the Articles of Association read as under :—

"The said Managing Director shall draw (a) an allowance of Rs. 1,850 per month (b) a commission of 7½ per cent on the net profits of the Company (c) a car allowance of Rs. 350 per month, (d) one and half first class fare and an allowance of Rs. 30 per day shall be allowed for the period he remains on tour and (e) a new car will be supplied by the Company to him every third year for use."

On the other hand, the other Directors did not get anything more than Rs. 250 per mensem. Each Director who attended the Board meeting was allowed Rs. 25 per day. The invidious distinction marked by the extra-lucrative emoluments receivable by Ladli Parshad, as against the nigardly lot of the others, seems to be the principal cause of the dissensions which had been simmering for a considerable time and reached boiling point in early 1945. On the 20th of February, 1945, at an extraordinary general meeting, a resolution was passed, removing Ladli Parshad from Managing Directorship, and in his stead, Shanti Parshad was appointed as the Managing Director. This resolution was passed at a meeting, of which no notice was given to Ladli Parshad, and he could not be present on this occasion. The plaintiff refused to deliver charge to Shanti Parshad, defendant No. 2, as he contended that the decision was vitiated by illegality, inasmuch as, he did not receive any notice of the meeting.

On the 10th of April, 1945, Shanti Parshad, defendant No. 2, instituted a suit in the Court of Senior Subordinate Judge, Karnal, seeking declaration that he was the Managing Director of the company. Ladli Parshad countered by filing a suit in which he sought declaration that Shanti Parshad had ceased to be a Director. In the first suit, the trial Court at Karnal appointed Shrimati Suraj Mukhi and her son Madan Lal to act as Receivers during the pendency of the suit. Ladli Parshad successfully appealed to the High Court against the order appointing Receivers and obtained a stay order, the effect of which was, that he continued to remain in full and effective control of the affairs of the company. The litigation did not proceed further as the parties composed their differences and on 16th October, 1945, at an extraordinary general meeting of the company,

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held at New Delhi, the compromise was given effect to in the form of several resolutions passed on that date. The salient features of the compromise were, that the resolutions passed on the 20th of February, 1945, were withdrawn and cancelled. It was also resolved that the resignation of Ladli Parshad from the Managing Directorship was accepted, and all acts done by him and contracts entered into in the name of or on behalf of the company during his period of Managing Directorship, were ratified and accepted. The accounts and assets of the company were deemed to have been accounted for by Ladli Parshad Jaiswal and the accounts relating to the company were treated as correct, and he was released and for ever discharged from all liabilities relating to the management of the company during the period of his office, and he was given a clear receipt in respect of all property, books, assets, etc. By another resolution the resignation of Shrimati Suraj Mukhi was accepted. It was also resolved, that Ladli Parshad was to be a permanent Director of the company and not liable to retirement by rotation. He was also elected and appointed permanent Chairman of the company. The other two Directors of the company were to be Shanti Parshad and Madan Lal. It was also resolved, that the number of Directors was not to be less than two nor shall exceed three and a quorum for a Directors meeting was fixed at three Directors present in person. This appears to be self-contradictory, as the number of Directors could not fall below three if the quorum for directors' meeting required the presence of three Directors in person. By another resolution, it was decided that in future no Director or shareholder of the company would contract in the name of the company for his personal benefit. It was, however, provided that all the contracts executed, business done, benefits derived by

the plaintiff Ladli Parshad under facilities granted to him by a previous resolution of 30th April, 1941, were confirmed and ratified. Resolution No. 11 stated, that in future, no notice for meetings whether of Directors or Members shall be a valid notice unless sent on a post card by a registered post. It was also resolved, that only unanimous decisions reached, at the meeting of the Directors or Members, would be deemed to be valid and the proceedings recording the decisions taken, were to be signed by the Chairman, and all the Directors and Members, as the case might be, present at the meeting. The meetings of the Board of Directors were to be held on the first Sunday of every calendar month. All transactions recorded in the accounts of the company from 1st April, 1945 to date were ratified, and the accounts for the preceding four years were confirmed. A dividend of 65 per cent, free of income-tax, was declared with effect from 1st October, 1945. The Director's remuneration was fixed at Rs. 900 per mensem besides a fee of Rs. 25, for each meeting attended. The bank accounts would, hereafter, be operated under the joint signatures of the Chairman and the other two Directors. Transfer of certain shares, held by Ladli Parshad, in favour of the defendants, was also effected. Shanti Parshad defendant was appointed Manager of the Company for a period of five years, and he was empowered to manage day-to-day business of the company, under the directions and control of the Board of Directors. It was, however, resolved that Shanti Parshad would not draw any salary, remuneration or office allowance or any travelling expenses, while on tour on company's business. Certain consequential amendments necessitated by the resolutions passed at that meeting were also made.

The net result of this compromise was that the status of the Directors approximated to

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equality in certain matters. Every Director began receiving Rs. 900 per mensem and no extra payment was made to Shanti Parshad who was appointed the Manager or to Ladli Parshad who became permanent Chairman. The latter was made to forego his several emoluments indicated above. A dividend at the rate of 65 per cent was also declared and distributed. Ladli Parshad ceased to be the Managing Director, but he received a clean discharge, with respect to all previous accounts, which were ratified and confirmed. He became a permanent Chairman. In order to obviate the danger of decisions arrived at in the absence of any one of the Directors the quorum of the Directors' meeting was fixed at three. In other words, all Directors had to be present at every meeting and no decision was deemed to be valid unless arrived at unanimously. An extraordinary precaution was also taken by a resolution requiring that the notice of the meeting was to be given on a post card sent by registered post. This precaution seems to have been taken in order to ensure that the agenda had been notified in fact and not simply that a registered envelope had been despatched without there being any guarantee as to the nature of its contents. A number of these resolutions suggest that the three Directors were extremely mistrustful of one another, and were endeavouring to adopt extraordinary measures, with a view to secure themselves, in case the suspicion of one against the other turned out to be real. It seems that on 16th October, 1945, the storm that had previously been blowing had been averted, a certain calm had been restored but the atmosphere had not been cleared off the clouds of mistrust. This *entente cordiale* was short lived. Ladli Parshad gave expression to his annoyance in letters adressed to Shanti Parshad in a language which was unnecessarily provocative and designedly acrimonious. In letter Exhibit P. 6, dated 1st

November, 1945, addressed to Shanti Parshad, Ladli Parshad went out of the way to be offensive. He was indignant because Shanti Parshad used the word "Director" below his signatures, in his correspondence, and he directed him to refrain from styling himself as such and he could correspond only as a "Manager". He also took exception to his having changed the designation of the Company's Office Manager to that of Personal Assistant to him (Shanti Parshad). This offensive attitude towards, and carping criticism of, Shanti Parshad, is reflected in a number of letters addressed by Ladli Parshad which are Exhibit P. 6, dated 1st November, 1945, P. 7, dated 7th November, 1945, P. 10, dated 13th November, 1945, P. 11, dated 4th December, 1945, and P. 3, dated 3rd April, 1946. The bitterness had become so intense that Shanti Parshad could not put up any more with the domineering and hectoring treatment meted out to him by his elder brother. The first meeting under the amended Articles was held on 4th November, 1945, but Ladli Parshad did not sign the minutes of that meeting, and contended that Exhibit D. 1 did not correctly represent the proceedings of that meeting. On the 2nd of December, 1945, the meeting could not be held as Madan Lal, the other Director, had expressed his inability to attend the meeting. The next meeting was to be held on the 6th of January, 1946, but on this date also Madan Lal could not make himself available. On the 3rd of February, 1946, a meeting was held but no notice of it was given to Ladli Parshad, and it is recorded that as Mr. Ladli Parshad Jaiswal was not present, the meeting was adjourned to the 3rd of March, 1946, at 11 a.m., for want of quorum (*vide* Exhibit D. 10). Minutes of the Directors' meeting of the 3rd of March, 1946, show, that only Shanti Parshad and Madan Lal were present, but not Ladli Parshad. He was not

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sent any notice of this meeting either. It was decided to call an extraordinary general meeting of the Company, as a requisition, dated 25th of February, 1946, had been received from Shrimati Suraj Mukhi and Madan Lal. The requisition was with a view to cancel certain special resolutions passed at the meeting, held on the 16th of October, 1945, making Ladli Parshad a permanent Director and permanent Chairman of the company, and fixing the quorum at three and requiring unanimous support for the validity of every resolution. The other object of requisitioning the extraordinary general meeting was, to appoint Shanti Parshad as the Managing Director, and for making necessary and consequential changes in the Articles of Association. On 28th of March, 1946, a special resolution was passed at an extraordinary general meeting of the company, removing Ladli Parshad from the Directorate and Chairmanship of the company. In his place Shrimati Suraj Mukhi was appointed a Director. At a meeting of the Board of Directors held on the 28th day of March, 1946, it was also resolved that necessary information be given to the banks of the company, regarding the changes effected (*vide* Exhibit D. 12). On the 3rd of April, 1946, Ladli Parshad sent a letter to the Registrar of Joint Stock Companies, Punjab, Lahore (Exhibit P. 3), stating that the resolutions passed regarding his removal, etc., were illegal and the proceedings of the meeting of the 28th of March, 1946, should not be accepted for filing, and that the Registrar should institute an inquiry regarding the illegal change in the constitution of the company, with a view to exclude him and while forwarding copy of this letter to Shanti Parshad, Ladli Parshad appended a note which reads as under :—

> "I note with regret that you have again started committing these illegal and

criminal acts. I forgave you last time, but there is a limit to brotherly affection. If you have anything to say I must know it by the 10th instant."

In the meanwhile Ladli Parshad had sent a notice through his counsel to Shanti Parshad, dated 23rd February, 1946, making several allegations and threatening action.

On the 1st of May, 1946, Ladli Parshad presented a petition in the High Court at Lahore for an order for the winding up of the company. The liquidation Judge directed the company to be wound up. The company filed an appeal under the provisions of the Letters Patent of that High Court. The Letters Patent Bench allowed the appeal (L. P. A. 8 of 1955), on the 19th of January, 1956, and set aside the order of winding up.

On 13th December, 1946, the present suit was instituted by him in the Court of the Senior Subordinate Judge, Karnal. The suit is for a declaration that the meeting of the Board of Directors alleged to have been held on the 3rd of March, 1946, and the extraordinary general meeting alleged to have been held on the 28th of March, 1946, and all meetings of Directors held after 28th of March, 1946, were *ultra vires,* illegal, ineffective and a fraud on the company and on the interest of the minority members of the company, and that the unanimous resolutions of the extraordinary general meeting, dated the 16th of October, 1945, continue to be in force, with a consequential relief in the form of a permanent injunction restraining the defendants from acting upon, or carrying into effect the resolutions of the 3rd of March, 1946, 28th of March, 1946, and those that were passed thereafter.

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Separate written-statement was filed by the company; and defendants 2 to 5, filed a joint written-statement but both the written-statements raised the same pleas in defence. The main pleas of the defendants were, that the suit as framed did not lie, that the relief for permanent injunction could not be granted in such a case, that as the matters raised concerned the internal management of the company, the Court should not interfere, that the plaintiff's removal from the chairmanship was not illegal, that the compromise resulting in the passing of resolutions at the meeting held on the 16th of October, 1945, was a result of coercion and undue influence exercised by Ladli Parshad on the other defendants, whereby the plaintiff succeeded in getting dictatorial powers for himself and deprived the defendants of their statutory rights. The plaintiff thus obtained a veto power over the entire affairs of the company and this he did "more or less at the point of a dagger". The plaintiff refused to hand over charge of the monies, books and the entire assets of the company and was using the funds of the company for ruinous litigation against the defendants who were finding it difficult to prosecute their cases out of their meagre resources. Under this pressure and coercion he succeeded in compelling the defendants to submit to his dictates. It was also contended that as it had been decided to hold meetings on the first Sunday of every month no notice of any meeting was necessary. It was further contended that in the Board meeting held on 4th November, 1945, the plaintiff had refused altogether to co-operate with the other Directors and created a deadlock. They averred that the meetings held on 3rd March, 1946, and 28th March, 1946, were in accordance with law and the resolutions passed at those meetings were legally binding on the plaintiff, and that a due notice had been sent to

him for the meeting held on the 28th March, 1946. The plaintiff deliberately avoided attending the meeting despite notice and the resolutions passed and the amendments made to the Articles of Association of the company were in accordance with law. They also stated, that the plaintiff wanted to send the company into liquidation, with the object of causing injury to it, and to further the interest of Jagatjit Distilling and Allied Industries, Limited, at Hamira, in which he had a great interest. It was denied that any fraud had been perpetrated on the company or the members in minority.

In his replication the plaintiff reiterated what was averred in his plaint and denied the allegations of the defendants.

The trial Court framed the following issues—

(1) Whether the resolutions mentioned in para 6 of the plaint and passed at the extraordinary general meeting, dated 16th October, 1945, were ineffective as having been passed under coercion or undue influence ?

(2) Whether the resolutions mentioned in issue No. 1 are invalid either because they amount to veto or result in creating a deadlock or being in contravention of the statutory provisions of the Companies Act ?

(3) If issue Nos. 1 or 2 are not proved or proved respecting some of the resolutions, does the non-compliance with each resolution amount to a mere irregularity and what is its effect on the subsequent impugned meeting ?

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(3-a) Whether a Directors' meeting was held on 3rd March, 1946 ? If so, what resolutions were passed in that meeting ?

(3-b) Whether a general meeting of the defendant-company was held on 28th March, 1946 ? If so, what resolutions were passed therein ?

(4) Whether a notice for the impugned meeting of 3rd March, 1946, was necessary under the Articles of Association ?

(5) If issue No. 4 is proved, what is the effect of non-compliance on that meeting ?

(6) If issues Nos. 1 or 2 are proved and issue No. 4 is not proved, was the meeting of 3rd March, 1946, illegal or *ultra vires ?*

(7) Did not the plaintiff receive a notice of the meeting of 28th March, 1946 ?

(8) If issue No. 7 is decided against the plaintiff, was the notice not sent in proper form and what is its effect ?

(9) If issue No. 7 is decided in plaintiff's favour, was the meeting, dated 28th March, 1946, valid for any reason ?

(10) If the meeting, dated 3rd March, 1946, is found to be illegal or *ultra vires,* is the meeting, dated 28th March, 1946, valid and binding ?

(11) Whether resolution passed at the meeting, dated 3rd March, 1946, and 28th

March, 1946, amounted to a fraud on the minority members or otherwise, for reasons given in the plaint, were illegal and *ultra vires* ?

(12) Does the matter agitated in the plaint relate to the internal management of the company and what is its effect ?

(13) Whether the relief of injunction in effect amounts to reinstatement of the plaintiff as Chairman and Director of the company ? If so, is the plaintiff entitled to injunction to that extent ?

(14) Whether the plaintiff is entitled to injunction as prayed for ?

(15) Are the defendants entitled to special costs under section 35-A, C. P. C., and how much ?

(16) Relief.

The trial Court decided all the issues in favour of the plaintiff and against the defendants and granted the plaintiff a decree for declaration and injunction as prayed for with costs against the defendants.

The District Judge, Karnal, decided issues 1, 2, 3, 3-A, 3-B, 12, 13 and 14 in favour of the defendants and issues 4, 5, 6, 7, 8, 10 and 11 against them. He reversed the judgment of the trial Court, allowed the appeal of the defendants and dismissed the plaintiff's suit, but left the parties to bear their own costs in both the Courts.

Plaintiff Ladli Parshad Jaiswal instituted Regular Second Appeal No. 211 of 1954, which was

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heard by the learned Single Judge who set aside the judgment of the District Judge and held that the plaintiff was entitled to a decree for declaration that the proceedings of the meeting of the Board of Directors held on the 3rd of March, 1946, and the extraordinary general meeting held on the 28th March, 1946, and all meetings of the Directors held thereafter were not binding on the plaintiff and on the defendant-company. It was also held that the resolutions of the extraordinary general meeting, dated 16th October, 1945, were in force. A permanent injunction was issued restraining the defendants from acting upon and carrying into effect the resolutions passed in the meeting, dated the 3rd of March, 1946, and the 28th of March, 1946, and all meetings held, thereafter, with the proviso that this declaration and injunction shall not affect the rights and liabilities of third parties who were not members of the company, unless thereby the rights of the plaintiff in the company were adversely affected. The defendants, other than the company, were ordered to pay the plaintiff's costs throughout. Against the aforementioned judgment of the learned Single Judge, the defendants have instituted this Letters Patent Appeal.

The findings of the three Courts on the first issue, which is pivotal in this case, may be examined in some detail. The trial Court was of opinion, that prior to 16th of October, 1945, the defendants could be under the undue influence of the plaintiff, but some days before 16th of October, 1945, they had asserted their rights and were not prepared to allow them to be trampled upon by the plaintiff. Previously, there was a great disparity in the matter of emoluments drawn by the plaintiff amounting to nearly Rs. 2,500 a month besides a right to have a new car every third year for his use, Rs. 30 per day during tour and 1½ first

class fare, as aaginst the meagre allowance of Rs. 250 per mensem which was allowed to the defendants as Directors with an additional fee of Rs. 25 for each meeting attended by a Director. The trial Court expressed the view that this disparity showed that the defendants from the time of the incorporation of this company had been placed under a disadvantage, and this was, because at that time the other male defendants were of tender years, and had not reached the age when they could assert their rights. But according to the trial Court, they had risen in revolt against the plaintiff and asserted their rights in early 1945, when they took the bold step of removing the plaintiff from the office of the Managing Director of the company. From this act of defiance and from the passing of the resolutions of 16th of October, 1945, the trial Court thought, that the plaintiff had ceased to occupy the dominant position, and the defendants did not remain under his undue influence, and therefore, the first issue was answered in the negative and decided against the defendants.

On the first issue the learned District Judge found that the plaintiff was in a dominating position, the defendants were helpless and having been hard hit by want of funds they were induced to give their consent as a result of pressure put by the plaintiff and the compromise had been effected on the 16th of October, 1945. The lower appellate Court based his conclusion as to the exercise of undue influence by the plaintiff on his brother and nephews on the following facts :—

(i) He had taken into his possession the entire jewellery which belonged to the defendants and which was restored after the compromise of 16th of October, 1945.

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(ii) After the joint family concern had been dissolved and converted into a private limited company he drew large sums on account of monthly salary, daily allowances, motor allowance and under other miscellaneous heads, leaving for the other Directors an allowance of Rs. 250 per mensem only, besides a fee of Rs. 25 per day for attending the meetings of the Board of Directors.

(iii) The plaintiff had started another company in the name of Jagatjit Distilling and Allied Industries, Hamira, from which he made large profits and had acquired influence and power.

(iv) When the compromise was entered into, the financial position of the defendants was very weak and they were not doing any other business and had no other source of income. Their only hope of getting a fair deal from the plaintiff was diminished when the order for the appointment of Receivers passed by the trial Court was stayed by the High Court and they were not in a position to defend their rights on account of lack of money and at that time their jewellery was in the possession of the plaintiff. The plaintiff taking advantage of their helplessness dictated terms which were not fair.

(v) The plaintiff was interested in creating a deadlock so as to prevent the smooth and successful business of this company while he went on making large profits from his other distilling concern at Hamira.

From these and other circumstances, the District Judge came to the conclusion that the plaintiff was in a dominating position and exercised undue influence and, therefore, imposed onerous terms on his younger brother, Shanti Parshad, and on the sons and widow of his deceased brother Durga Parshad. The District Judge discountenanced the plaintiff's arguments that the compromise was fair and that its reasonableness was assured by the presence of the relations of the parties, as no material had been placed on the file as to what part these relatives of the parties had played. The District Judge also considered in detail the implications of the resolutions passed at the meeting of the Board of Directors held on the 16th of October, 1945, and came to the conclusion that the plaintiff obtained undue advantage in so far as he was appointed a permanent Director of the company who was not liable to retirement by rotation and he became a permanent Chairman and no other person could take the chair at a meeting of the Board of Directors or Members, except his nominee. By another resolution (No. 2) the plaintiff was absolved from all liabilities, as all acts done by him, and contracts entered into on behalf of the company, during the period of his Managing Directorship, were ratified and accepted, By that resolution the accounts, assets, and movable and immovable property of the company were treated as having been accounted for by the plaintiff who was released from all liability to account, to the other Directors. No decision arrived at by the majority could be binding as according to the new terms a decision in order to be binding had to be unanimous. ..... This meant that a deadlock could be created at any time and the voice of the majority could never be effective. After taking into consideration the facts and circumstances summarised above, the

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learned District Judge disagreed with the findings of the trial Court and found the first issue in favour of the defendants and held that the defendants were subjected to coercion and undue influence.

The learned Single Judge disagreed with the above findings of the District Judge for reasons which will be considered presently in seriatim. He held that the compromise dated the 16th of October, 1945, had not been vitiated by coercion or undue influence and was binding on the parties to this litigation.

The learned counsel for the defendants-appellants has, in the first place, urged that the findings of the District Judge on the issue relating to undue influence were of fact, and therefore, could not be gone into, in second appeal, even if they be erroneous. In support of his contention, he cited the decision of the Judicial Committee of the Privy Council in *Satgur Prasad* v. *Har Narain Das* (1). In that suit the question as to the validity of a deed by which the plaintiff purported to make over a valuable estate to the defendant-appellant, subject to certain conditions, arose, and the plaintiff sued to get the deed set aside on the ground that it had been procured by undue influence and fraud. The Courts in India had concurrently found that this allegation had been established. Being "undoubtedly findings of pure fact," the Privy Council declined to disturb them.

In *Gopal Bhaurao Jape* v. *Jagannath Pandit Vasudeorao Pandit Maharaj,* (2), the question arose, as to whether, an instrument had been obtained by undue influence. It was held, that the question, as to whether an instrument was

(1) A.I.R. 1932 P.C. 89
(2) A.I.R. 1935 Bom. 326

obtained from a person by undue influence, was a question of fact, and could not be agitated in second appeal.

In an earlier case, a Division Bench of Bombay High Court refused to disturb the finding of the District Judge, that the defendant had used undue influence to compel the plaintiff to pass a deed of sale. Fulton, J., at page 128 observed—

> "The question, whether the relations between the parties were such, that one of them was in a position to dominate the will of the other, and used that position to obtain an unfair advantage over the other, was one of fact, with the finding on which he could only interfere if there were no evidence to support it."

[See *Bhimbhat* v. *Yeshwantrao* (1).] In a case reported in *Probhat Chandra Shome and others* v. *Shashadhar Kumar Gose* (2), a Division Bench of Calcutta High Court, declined to interfere with the finding of the lower appellate Court, that the plaintiff had been subjected to pressure, and that unfair advantage had been taken of him. The second appeal failed, despite the fact, that the High Court doubted very much, whether the lower appellate Court should have reached the same result on the merits, holding, that the merits were not open in second appeal and that the jurisdiction of the High Court to interfere was limited. The finding of the lower appellate Court was not disturbed.

There is a decision reported in *Lala Ganga Prasad* v. *Jang Bahadur Khan* (3), where the

(1) I.L.R. 25 Bom. 126
(2) A.I.R. 1918 Cal. 590
(3) A.I.R. Oudh. 254

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argument, advanced on behalf of the respondent, that the finding of the lower appellate Court, that a certain bond was executed owing to undue influence was a finding of fact, and therefore could not be disturbed by that Court, was not entertained. In that case the view expressed was, that the finding was not a pure finding of fact and was rather a legal inference from the facts of the case. Reliance was also placed upon the following observations of their Lordships of the Judicial Committee in the case of *Dhanna Mal* v. *Moti Sagar* (1).

> "Now their Lordships would be the last to seek to abridge the effect of Ss. 100 and 101, Civil Procedure Code, or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below. They are well aware moreover that questions of law and of fact are often difficult to disentangle. It is clear however that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them in a case like the present, to be a legal inference from facts and not itself a question of fact."

With respect to the Hon'ble Judges of Oudh Chief Court I do not see how the *dicta* of their Lordships of the Judicial Committee could be relied upon for the proposition that a finding as to undue influence was not a pure finding of fact, and that it was "rather a legal inference from the facts of the case." The authorities referred to by me above and in particular the view expressed by

(1) A.I.R. 1927 P.C. 102

their Lordships of the Privy Council in *Satgur Prasad* v. *Har Narain Das*, (1), was not brought to the notice of the Bench in the Oudh case. The view expressed in the Oudh ruling is neither supported by authority nor by any compelling or convincing reason. I am of the view, that the finding of the learned District Judge as to the existence of undue influence exercised by the plaintiff over his younger brother and nephews was one of fact and it was not open to question in second appeal.

The next question is whether this finding of fact is vitiated in any manner so as to justify interference by Court of second appeal. The learned Single Judge has observed, that certain findings of the District Judge went "far beyond the pleadings of the defendants", and "that besides the fact that the plaintiff was the eldest surviving brother and the High Court stayed the operation of the order appointing the Receiver, there is no evidence in support of the findings of the District Judge." With respect, I cannot persuade myself to agree with his conclusion. Apart from the fact that the plaintiff was the eldest surviving brother and that the High Court had stayed the operation of the order appointing the Receivers, I find the following evidence in support of the conclusion of the District Judge :—

Ladli Parshad Jaiswal appeared as P. W. 3 and in his examination-in-chief, he stated, that the Karnal Distillery was initially a joint Hindu family concern and was run by the joint Hindu family firm known as Messrs Kishori Lal and Sons. The whole business belonged to the joint family consisting of Kishori Lal and his sons and grandsons. He then stated, that on the disruption

(1) A.I.R. 1932 P.C. 89.

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of the joint family in 1940, a partnership was formed, and on 23rd of March, 1941, it was converted into a private limited company known as the Karnal Distillery Limited and the shareholders of the private limited company were the same as members of the partnership.

Ladli Parshad then proceeded on to state, that Jagatjit Distilling and Allied Industries Limited, was incorporated in 1944, when he was the Managing Director of the Karnal Distillery Company. The investment of Ladli Parshad Jaiswal and Sons Limited in the Jagatjit Distilling Company was considerable and L. P. Jaiswal and Sons are the Managing Agents of that Company. The shareholders of L. P. Jaiswal and Sons, are Ladli Parshad Jaiswal himself, and the members of his family, and they were receiving Rs. 5,000 as their remuneration and 10 per cent of the profit. As Managing Director of Karnal Distillery Limited, he stated, he was drawing Rs. 2,200 per month, Rs. 1,850 being his salary and Rs. 350 was the car allowance. He was also drawing 7½ per cent of the net profit. He was also getting Rs. 250 per month as Director's remuneration plus Rs. 25 for each meeting. He then admitted that no dividend was paid to the shareholders before 16th of October, 1945. He also stated that there were pieces of jewellery of the defendants with him but could not give the approximate value. He said "it may be worth five lacs or fifty lacs. I could not give the weight of the gold." This jewellery, according to him remained with him from 1941 to 16th October, 1945. He stated that the accounts of the company were gone into at the time of the compromise on 16th October, 1945, but he did not obtain the signatures of the defendants as, according to him, that was unnecessary. He stated, that a particular zone is allotted to Karnal Distillery for supply of liquor in the Punjab and for

some period some of the requirements of liquor from their zone were supplied from Jagatjit Distilling Company, though later, on the representation of Karnal Distillery, Jagatjit Distillery was required to confine its activities to its own zone.

D. W. 1 Mohan Singh, Excise Sub-Inspector, stated that for some time the supply of liquor in the area of Karnal Distillery was made by Jagatjit Distillery.

D. W. 2 Raghu Nandan, Works Manager of Karnal Distillery, stated that the compromise between the parties was finalized at midnight or 1 a.m. when he was present. The accounts were not gone into at that time, and the books were never sent for during the talk of compromise. He also stated, that Shanti Parshad Jaiswal had no other source of income except the remuneration which he got as a Director. The other Directors, too, had no other sources of income. He then said, that Shanti Parshad Jaiswal insisted on seeing the accounts, but was told by Ladli Parshad Jaiswal abruptly, that if he wanted the compromise he must sign it or else he might do as he liked.

Besides the oral evidence, there are also letters from "L. P. Jaiswal Esquire, Chairman, the Karnal Distillery Company Limited" to "Mr. S. P. Jaiswal, Manager" or just to the Manager, full of acrimony and couched in a language which is overbearing, and almost insulting. In his letter, Exhibit P. 6, dated 1st November, 1945, he returns 24 cheques which were sent to him for his signatures finding fault with the manner of filling them. He takes serious exception to the use of the word "Director" below his signature by Shanti Parshad and requires him to correspond as the

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"Manager" of the company. He then takes umbrage to the changing of designation of the company's office manager to "P. A. to Mr. S. P. Jaiswal". On several other matters pertaining to ordinary affairs of the company the criticism is carping, rather than constructive. This hectoring attitude persists in subsequent letters,—*vide* Exhibit P. 7 dated 7th November, 1945, P. 10 dated 13th November, 1945, and P. 11 dated 4th December, 1945, and a further indication of continued animosity can also be gathered from the postscript under Exhibit P. 3 and the notices. I cannot say, that it would be an unwarrantable conclusion for the District Judge to draw, after taking into consideration the domineering behaviour of Ladli Parshad as evidenced in the letters referred to above, the immense financial superiority that he had, as against the meagre and dwindling resources of the defendants, that they were not browbeaten and intimidated into signing the compromise on the mid night of 16th October, 1945, much against their inclination but in consideration of receiving their valuable jewellery, payment to them of the dividend, and of the removal of disparity in the matter of their emoluments. The price at which they gained those advantages was, that they had to forego the right to claim rendition of past accounts, and they had to agree to the imposition of conditions, conducive to a complete deadlock being created at the whim and caprice of Ladli Parshad, and regardless of the wish of majority.

The learned Single Judge was however of the view, 'that by the compromise in question the defendants secured complete control over the business of this company and effectively ousted the plaintiff from its chairmanship and all that the plaintiff was able to retain was that he should

not be ignored at the Directors' meetings, or should not be expelled from the business altogether.' As has been pointed out previously, one of the decisions taken on 16th October, 1945, was that every question submitted to a meeting of Directors or Members would be deemed to have been passed only if the decision thereon was unanimous and the proceedings recording the decision taken were signed by the Chairman and all the Directors or Members, as the case might be, present at the meeting. So long as this resolution was there the defendants could not under the compromise secure complete control over the business. So long as this resolution stood the majority could not touch the plaintiff without violating its terms. From the subsequent act of the defendants in expelling the plaintiff it cannot be said that they were enabled to do so by the compromise in question. That act of theirs was not in accord with, but in defiance of, the compromise. While the compromise stood the defendants could not, in view of its terms, remove the plaintiff who was to be the Chairman at all meetings of the Board of Directors or of shareholders and unless he took the chair, no proceedings could be valid. Moreover Ladli Parshad was made a permanent Director and was not liable to retire by rotation. On the facts on the record of this case, and referred to in the judgment of the District Judge I would be inclined to arrive at the same conclusion.

The learned Single Judge was also of the view that the findings of the District Judge went "far beyond the pleadings of the defendants." The defendants in para 6 of the written statement averred, that by passing the resolutions on 16th October, 1945, the plaintiff succeeded in getting dictatorial powers over the business of the company, practically usurping all the powers of the

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general body of the shareholders, and thereby purporting to deprive them from exercising even those rights to which they were legally entitled under the law, e.g., the statutory rights of the members to amend the company's constitution by special resolution, etc. Those resolutions, the defendants contended, gave the plaintiff a complete veto over the entire affairs of the company and they were obtained by the plaintiff "more or less at the point of a dagger." The plaintiff was refusing to hand over charge of the monies, books and the entire assets of the company and was using the funds for ruinous litigation against the defendants who had meagre funds which too were dwindling fast. It is then stated, that taking full advantage of his strong position, and knowing full well the slender resources of the defendants, he was successful in coercing them into submitting to his dictates and compelled them to pass the resolutions which were unconstitutional and unjust. In para 9 the defendants averred that the plaintiff had refused altogether to co-operate with the Directors of the company and thereby attempted to create a deadlock. The plaintiff, they further pleaded, had a large interest in Jagatjit Distilling and Allied Industries Limited at Hamira, a rival concern, and the plaintiff was making an all-out effort to send the defendant-company into liquidation and thus eliminate competition. They also stated that the plaintiff had in fact moved a petition before the High Court of Judicature at Lahore for sending the defendant-company into liquidation. In para 10 of the written statement the defendants pleaded, that the plaintiff as Managing Director had drawn a total remuneration from 1st April, 1941 to 18th October, 1945, amounting to Rs. 1,37,445, besides a commission of 7½ per cent on the net profits of the company

while he was holding the office of the Managing Director.

The plaintiff in his replication did not object to the written statement on the score of want of particulars which he could, in view of the provisions of Order 6, Rule 4, of the Code of Civil Procedure. It was also open to the plaintiff, to apply under Order 6, Rule 5, Civil Procedure Code, for further and better particulars, but he did not do so at any stage. The language of the issues would have left no doubt in the mind of the plaintiff as to the precise nature of the defendants' pleadings. The first issue put in forefront the question of coercion and undue influence. At no stage of these proceedings, was any objection raised to this issue, either on the ground that plea of undue influence had not been taken or that particulars of the alleged coercion or undue influence had not been clearly stated. At no stage was it the case of the plaintiff, that he had been taken by surprise, or was prejudiced for want of clear pleadings on the part of the defendants. Taking into consideration the circumstances of this case, and the omission on the part of the parties to raise any objection to the pleadings or to the issues, it is not possible for me to find, that the plaintiff had been in any way prejudiced or taken by surprise. Taking into view the substance of the case as pleaded, I cannot come to the conclusion, that the written statements of the defendants disclosed a flaw fatal to the plea of coercion and undue influence. I am of the view that the findings of the District Judge do not extend beyond the pleadings.

Moreover, if there are facts on the record to justify the inference of undue influence, the Court will be justified in granting the relief, notwithstanding inartistic pleadings. All that the Court

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has to see is, that the opponent of the party pleading undue influence, is not taken by surprise,— *vide Sheocharan* v. *Channulal* (1), and *Narayanbhat Bhimbhat Joshi* v. *Akkubai Manoharbhat Joshi* (2),

In *Sayad Muhammad* v. *Fatteh Muhammad* (3), Lord Halsbury at page 331 observed :—

> "Whatever system of pleading may exist, the sole object of it is, that each side may be fully alive to the questions, that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues ;....."

At this stage I may now consider the first issue relating to the exercise of coercion or undue influence on the part of the plaintiff *vis-a-vis* the defendants.

The main point, which has been canvassed in this Court by the learned counsel for the appellants, is based upon the contention that the resolutions referred to in para 6 of the plaint were passed under coercion or undue influence of the plaintiff. "Under influence" is defined in section 16 of the Indian Contract Act, which runs as under :—

> "A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(1) A.I.R. 1931 Nag. 63
(2) A.I.R. 1916 Bom. 275
(3) I.L.R. 22 Cal. 324 (P.C.)

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this subsection shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (I of 1872)."

For purposes of determining the exercise of undue influence, the first question that requires examination is, whether the plaintiff Ladli Parshad was in a position to dominate the will of his younger brother and nephew ; *secondly,* whether he used that position to obtain an unfair advantage over them ; *thirdly,* if it be found that he held a real or apparent authority over them or he stood

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in a fiduciary relation to them, he would be deemed to be in a position to dominate their will ; and *lastly,* if it be found that the plaintiff was in a position to dominate the will of the defendants, then if the contract or transaction entered into by him appears on the face of it or on evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the plaintiff. The above ingredients of what is undue influence may now be considered.

The order in which the matters referred to in section 16 of the Indian Contract Act are to be dealt with is pointed out by their Lordships of the Judicial Committee in *Raghunath Prasad Sahu* v. *Sarju Prasad Sahu* (1), in the following words :—

> "Before, however, addressing themselves to the authorities cited, their Lordships think it desirable to make clear their views upon, in particular, Subsection 3 of Section 16 of the Contract Act as amended. By this subsection three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, viz., the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi.* The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

(1) A.I.R. 1924 P.C. 60

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties." [See also *Poosathurai* v. *Kannappa Chettiar* (1), 65 ; *Sanwal Das* v. *Kuremal* (2), *Kanto Mohan Mullick* v. *John Carapiet Galstaum* (3), and *Balla Mal* v. *Ahad Shah* (4).]

In support of the contention that Ladli Parshad was in a position to dominate the will of the others, it is urged on behalf of the appellants, that on the death of Kishori Lal his eldest son Durga Parshad became the *karta* of the joint Hindu family and on the death of Durga Parshad in March, 1934, Ladli Parshad, the second son of Kishori Lal, became the *karta*. This business was of the joint Hindu family till its disruption on 5th November, 1940, when a deed of partnership was executed. This partnership hardly lasted for five months, when a private limited company was formed and the shares of the three branches were almost equal. Ladli Parshad and Shanti Parshad had 1,003 shares each and the shares of the branch of Durga Parshad were 1,004. Ladli Parshad began to dominate soon after. It was stated at the Bar that the age of Shanti Parshad in 1941, was 19 years and the two nephews were still younger in age. Suraj Mukhi, widow of Durga Parshad, is said to be a woman without any education or experience. The disparity between the respective emoluments of the plaintiff on the one side and of the defendants on the other, dates from the incorporation of the private limited company. So

(1) A.I.R. 1920 P.C. 65
(2) A.I.R. 1928 Lah. 224
(3) A.I.R. 1930 Cla. 547 (2)
(4) 1918 P.R. 124

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long as joint family continued, the shares of the three branches were equal. The contractual partnership was short lived. Not only the plaintiff acquired 500 more shares, but he assumed the position of superiority, by becoming a Managing Director for ten years with an option to continue in that office for another ten years. His salary was fixed at Rs. 1,850 per month in addition to car allowance of Rs. 350 per month. He was also to get 7½ per cent on net profit, a new car every third year, and Rs. 30 per day as outstation allowance, besides the Director's fee of Rs. 250 per mensem and Rs. 25 for attending every Board meeting. The other Directors had to content themselves with the Director's fee and the fixed allowance for attending Board meetings. There is no explanation forthcoming for this sudden disparity. This business was founded by Kishori Lal as the *karta* of the joint Hindu family and on his death, Durga Parshad carried on the same business as *karta* till his death in 1934. There is no suggestion, that either of them claimed extra emoluments. Even Ladli Parshad while he was the *karta* of the family, did not claim a greater share than the rest. As *karta* and elder brother of Shanti Parshad and as uncle of Sajjan Lal and Madan Lal, he was in a position to dominate their will, and thereby he obtained an unfair advantage over them. No explanation whatsoever is forthcoming, why since the incorporation of the private limited company, when Shanti Parshad had just attained majority and was qualified to be a Director of the company, the difference between the respective emoluments of the two brothers should have been so much. In a business, which was of the joint Hindu family at its inception, and even after it was taken over by a private limited company, the shareholders were no other than the existing members of the family. The plaintiff, both as *karta* of the joint

Hindu family while it lasted, and as elder brother and uncle of the respective defendants, was in *loco parentis* and his relations with the defendants were of fiduciary nature. Both as *karta* and as elder brother, in charge of the business, he occupied a position of trust and confidence. This was the origin of the source of his influence which gathered strength with acquisition of extra emoluments and increased power as Managing Director.

According to Hindu Shastric injunctions and highly cherished Hindu sentiments, the elder brother in relation to his younger brothers, or an uncle in relation to his fatherless nephews, is placed on a high pedestal next after parents. According to Manu Smriti, chapter 9, verse 108, "the elder brother was enjoined to support his younger brothers as father provides for his sons."

पितेव पालयेत्पुत्राञ्ज्येष्ठो भ्रातृन्यवीयस :

and according to verse 110 "if the eldest brother behaves as an eldest brother ought to do, he must be treated like a mother and like a father".

यो ज्येष्ठो ज्येष्ठवृत्ति स्यान्मातेव स पितेव स :

Under laws of Manu, an eldest brother who through avarice defrauded the younger ones was deprived from receiving the honours due to him and was punished by the king,—*vide* Manusmirit, Chapter 9, verse 213.

Whatever may be said of other civilized societies, among Hindus the elder brother on the death of the parents has always been in *loco parentis*. According to Narada in Virmitrodaya, the father had the first claim to guardianship of minor son, after him came the mother and if neither were alive, the elder brother took the place of a guardian.

तयोरपि पिता श्रेयान् वीज प्राधान्य दर्शानात्।
अभावे वोजिनो माता तम्दावेतु पूर्व्वज :—

[See Hindu Jurisprudence by P. N. Sen, page 301,

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Trevelyan's Hindu Law, Third Edition, page 231, and Macnaghten's Hindu Law, 1894 Edition, page 85 ; and *Amar Chandra Chakravarty* v. *Sarodamoyee Debi* (1).]

Apart from strict Hindu Law the status of an elder brother in Hindu society is of considerable superiority not only in matters of veneration and obedience but also for discharging responsibilities and obligations and the elder brother comes immediately after the parents.

By the expression "a person in *loco parentis*" is meant a person who puts himself in the situation of a lawful father of the child, with reference to the father's office and duty of making provision for the child : See *Powys* v. *Mansfield,* 40 English Reports (Ch.) 964 ; *Bnnet* v. *Bennet,* 10 Ch. D. 474 (477) ; *Montagu* v. *Earl of Sandwich,* 32 Ch. D. 525 (537) ; *Re* : *Hamlet,* 38 Ch. D. 183 (190) ; and *Re* : *Ashton* (1897) 2 Ch. D. 574.

According to Sir William Grant, M. R., in *Wetherby* v. *Dixon,* 19 Ves. 412, a person in *loco parentis*' is "a person assuming the parental character or discharging parental duty." It is a relationship which a person assumes towards a child not his own and towards whom he discharges parental obligations,—*vide* 42 C.J.S., page 489.

According to section 16(2) (a) of the Indian Contract Act, a person is deemed to be in a position to dominate the will of another where he stands in a fiduciary relation to the other. A person who is not in *loco parentis* to another may still stand in a fiduciary relation to him [*Smith* v. *Kav,* 11 English Reports 299(307)]. Now, what is a

(1) A.I.R. 1929 Cal. 787

"fiduciary relation"? In the words of Justice Stone—

> "A fiduciary relation is not limited to cases of trustee and *cestui-que trust*, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and resulting superiority and influence on the other side arises therefrom. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal. If the confidence in fact exists, is reposed by the party and accepted by the other, the relation is fiduciary, and equity will regard the dealings between the parties according to the rules which apply to such relations." [*Vide Schweickhardt* v. *Chessen* (1).]

In cases in which a person acquires an influence and then abuses it, or confidence is reposed which subsequently is betrayed, a fiduciary relation is said to exist regardless of the origin of confidence and the source of influence. The rule embraces both technical fiduciary relations, and those formal relations, which exist, whenever one man places his trust in, and relies upon another. The term "fiduciary relation" is a broad one and not susceptible of precise definition.

> "Certain transactions are presumed, on grounds of public policy, to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence one towards another. The presence of such relationship creates a presumption of influence which can

(1) 161 North Eastern Reporter page 118-123

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generally be rebutted by proof that the parties dealt as strangers, at arm's length ; that no unfairness was used, and that facts in the knowledge of the one in the position of influence affecting the matter were communicated to the other." [27 Am. & Eng. Enc. Law (1st Ed) 456 cited in *Thomas* v. *Whitney* (1).]

From the above discussion of the facts and circumstances of this case, and from the examination of legal principles, there is left no doubt in my mind, that Ladli Parshad, not only held an authority over the defendants which was both real and apparent, but he also stood in a fiduciary relation to them. Taking advantage of his position, he could and did dominate the will of the defendants.

The learned Single Judge, criticised the conduct of the defendants, in not appearing as witnesses in support of their plea, despite several opportunities having been given and not having been availed of, on one pretext or the other. The learned Single Judge was of the view, that defendants were resorting to dilatory tactics with a view to continue their hold on the concern. The defendants' application at the stage of arguments to be allowed to examine themselves was belated and, therefore, the trial Court declined to accede to their request. I am aware of the rule that it is the bounden duty of a party personally knowing the facts and circumstances of the case, to give evidence, and to submit to cross-examination. Courts have rightly drawn a presumption against the party avoiding the witness-box, and not submitting himself to cross-examination. The person, who advised them against their appearing as their

(1) 57 N.E.R. 808—810

witnesses, did a disservice to them. The party who does not enter the witness-box runs a great risk of a presumption being drawn against him. In the case of a party on whom burden of proving a certain issue lies, the risk run by withholding himself from the witness-box may be very great. This presumption, however, is permissive. Section 114 of the Indian Evidence Act does not, in all cases, make it obligatory on Courts to act on such a presumption. As observed by the Federal Court in *Emperor* v. *Sibnath Banerjee* (1)—

> "The words 'may presume' in section 114, Evidence Act, leave it to the Court to make or not to make the presumption, according to the circumstances of the case, and the presumption when made is rebuttable".

The Courts before making such a presumption, also take into consideration the facts of a particular case, before determining, whether the presumption from withholding evidence should be raised in the circumstances of that case. I am of the view, that no adverse presumption need be drawn against the defendant who fails to appear as his witness, in a suit filed against him, when there is sufficient other material on the record in support of his case. [*See Kansi Ram* v. *Jai Ram* (2).]

In a case arising under section 16 of the Indian Contract Act, if the facts justify the inference, that a party was in a position to dominate the will of another, and held a real and apparent authority over the other, or stood in a fiduciary relation to him, and the transaction entered into appeared on the face of it to be unconscionable, the

(1) A.I.R. 1943 Federal Court 75—84
(2) A.I.R. 1956 Him. Pradesh 4

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burden of proving that such contract was not induced by undue influence lies upon the person in a position to dominate the will of the other. Similarly, section 111 of the Indian Evidence Act provides—

> "Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

In view of the above provisions which place the burden of proof on the plaintiff, can it be said that the omission on the part of the defendants to appear as their own witnesses should be deemed to be fatal to their defence ? If on the facts and circumstances of this case, an inference as to the exercise of undue influence on the part of the plaintiff, can be drawn, the failure on the part of the defendants to examine themselves cannot shift the burden of proof, the effect of the proof being otherwise, on the record, cannot be obliterated. In *Mrs. Swaranam Iswariah* v. *K. M. S. R. M. Kanappa Chetty* (1), the appellant had to prove, that he was the real owner, and that the sale in favour of the respondent was a Benami transaction. Wadsworth and Patanjali Sastri, JJ., expressed the view, that when no evidence at all had been tendered on behalf of the party, on whom burden of proof lay, and apparently no request had been made for the cross-examination of the opposite side, it could not be held that the theory, in respect of which the onus clearly lay, was established merely by the failure of the opposite side to offer himself for cross-examination. In *A. L. Rama Patter and Bros.* v. *Manikkam* (2), a bench

(1) A.I.R. 1941 Mad. 704
(2) A.I.R. 1935 Mad. 726

consisting of Varadachariar and Burn, JJ., observed at page 729—

> "As we have already pointed out, the written statement of defendant three sets out all material facts and his claim to relief must be decided with reference to them independently of their being labelled as fraud or undue influence : see *Smith* v. *Kay* (1), per Lord Cranworth. The mere fact, that on one or two matters, the lower Court was not prepared to accept the defendant's evidence, will not disentitle him to relief, for, in such cases, the conclusion of the Court rests not so much upon direct evidence showing that any deception was practised, as upon inferences arising from the situation of the parties and the nature and effect of the transaction. That the transaction is seriously detrimental to the interests of defendant 3 can admit of no doubt."

From the fact that the defendants did not offer themselves as witnesses in the case, their omission, though improper, cannot be considered to be fatal.

What then is the doctrine of undue influence and what is its scope ? The word 'undue' when qualifying 'influence' has a legal meaning of 'wrongful', as opposed to 'excessive, inordinate or disproportionate'. Undue influence is understood to be held, when it overpowers the will without convincing the judgment. It is a grip on another's mind subjugating his will to that of the other. It is an influence which acts to the injury of a person, who is swayed by it, and is exerted by exercising an ascendancy or power, which results in a

(1) 1.1 E.R. 307

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person being impelled or compelled to do what he would not have done, if he had been a free agent. It is said to be a subtle species of fraud, whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion, importunity or other domination, calculated to prevent expression of the victim's true mind. It is a constraint undermining free agency by overcoming the powers of resistance, bringing about a submission to an overmastering and unfair persuasion, to the detriment of the other.

The equitable doctrine of undue influence covers cases of 'undue influence' not only in particular relations but cases of coercion or pressure outside this special relation.

In the words of Lord Chelmsford L. C. in *Tate* v. *Williamson* (1) :—

> "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Relief in equity is not restricted to cases of fiduciary relationship, strictly so called, but the

(1) (1866) 2 Ch. A. 55 at page 61

principle applies to all cases where influence is acquired and abused, where confidence is reposed and betrayed.

In the words of Dr. Cheshire, "Law of Contract", Fourth Edition, page 250—

> "There are certain special relations where undue influence is invariably presumed, but they do not cover all the possible cases, for the basis of the doctrine is that 'the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another."

See also *Huguenin* v. *Basely* (1).

Presumption of undue influence is raised, where the Court regards the transaction as *prima facie* unfair, and the person, who is benefited by it, is required to show that in fact it was a fair and a reasonable deal, and he did not take advantage of his position or of the necessitous circumstances or inexperience of the other. Of course, where there are no such fiduciary relations between the parties as to create a presumption of influence, the burden of proof rests on the promisor to show that undue influence was in fact exercised. In the words of Lord Hatherley in *Turner* v. *Collins* (2) :—

> "Nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have

(1) 14 Ves. 273 at page 286
(2) (1891) L.R. 7 Ch. 329 at page 338

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influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy, "——" a "jealousy almost invincible" in Lord Eldon's words,—*vide Hatch* v. *Hatch* (1).

On the placing of burden of proof, Lord Penzanc in *Parfitt* v. *Lawless* (2), observed :—

> "In equity persons standing in certain relations to one another, such as parents and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumption when transactions between them are brought in question ; and if a gift or contract made in favour of him who holds the position of influence is impeached by him, who is subject to that influence, the Courts of Equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers ; that the weaker was not unduly impressed by the natural influence of the stronger, or inexperienced over-reached by him of more mature intelligence."

Undue influence may be inferred when the benefit is such as the taker had no right to demand (i.e., not natural or moral claim) and the grantor had no rational motive to give,—*vide* Pollock on Contract, 12th Edition, page 494. Cases of undue

(1) (1804) Ch. 9 Ves. at page 297
(2) 1872 (L.R.) 2 P and D, page 462

influence arise not only where family or confidential relationship exists between the parties, but also where one of the parties is necessitous or in duress. Wherever one member of the family exercises weighty influence in the domestic counsels either from age, from character or from superior position acquired from other circumstances, an inference as to existence of undue influence has been drawn,—*vide* 17 C.J.S., page 541.

It has been stressed on behalf of the respondent that undue influence, if any, exercised by Ladli Parshad should be deemed to have ceased a considerable time before the compromise of the 16th of October, 1945, when the parties started quarrelling among themselves. On the 20th of February, 1945, at an extraordinary general meeting a resolution was passed removing Ladli Parshad from the Managing Directorship and in his stead Shanti Parshad became the Managing Director. On the 10th of April, 1945, Shanti Parshad had instituted a suit in the Court at Karnal seeking declaration that he was the Managing Director of the Company. This was followed by a counter suit by Ladli Parshad seeking declaration that Shanti Parshad had ceased to be a Director. In the first suit, the trial Court had appointed Shrimati Suraj Mukhi and her son Madan Lal to act as Receivers during the pendency of the suit.. Ladli Parshad appealed to the High Court against this order and obtained a stay order whereby the Receivers could not function. The argument raised by the respondent is that when Shanti Parshad went to Court against Ladli Parshad, such undue influence as he was supposed to have exercised must have come to an end. When the parties started fighting in a Court of law they must have taken independent legal advice. Any compromise arrived at could not be deemed to be under coercion. This reasoning is

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specious. The fallacy in the argument is that the dominating position, which Ladli Parshad was occupying and against which the other members were rebelling, had not come to an end. During the period when the parties were litigating among themselves, not only Ladli Parshad had the possession of the account books, papers, etc., of the Company, but the entire funds of the Company were under his control. By the mere fact of taking the disputes in a law Court, Shanti Parshad did not get control over the Company or of its funds. Even their share of the family jewellery was with Ladli Parshad. The attempt to get Receivers appointed to manage the affairs of the Company did not ultimately succeed. The position of the defendants just before the compromise had not materially improved. It is no satisfaction that Shanti Parshad and the other defendants were in a position to obtain independent legal advice, which by itself could not give them any succour or relief.

According to the statement of D.W. 2 Raghu Nandan, the compromise was finalised on the 16th of October, 1945, at about midnight. The accounts were not gone into and not even sent for despite the keen desire of the defendants. Shanti Parshad was told by Ladli Parshad that he could either accept the terms offered or else he might do what he liked. At that time the defendants were in no bargaining position as all the monies falling to their share including their jewellery were with Ladli Parshad. The alternative before them was either to recover their jewellery and the dividend which was being distributed for the first time, and to treat the accounts as closed without scrutiny or inspection, or, to fight out their claims in Court with their slender resources. The onerous nature of the other terms of the compromise has already been referred to and need not be reiterated.

It is true, as argued on behalf of the respondent, that after the compromise the status of the other Directors had improved considerably. It was contended that the situation after the compromise approximated to equality. To a certain extent, no doubt, the hold of Ladli Parshad over the defendants, as it appears from the litigation, that had just been started. was relaxed. but it was not released, especially, when he succeeded in getting the order of appointment of Receivers made by the trial Court stayed by the High Court.

The subsequent letters of Ladli Parshad, who had become an irremovable Chairman, addressed to Shanti Parshad, which have already been noticed, leave no doubt as to the continuance of the dominating position of Ladli Parshad and the overbearing manner in which Shanti Parshad was being treated.

The learned counsel for the respondent has referred to certain rulings in which inferences in favour of cessation of undue influence had been drawn from the acts of the litigating parties in negotiating a compromise. These authorities, in which conclusions depended upon the peculiar facts of these cases, are no guide for determining the question of withdrawal of undue influence, on such facts, as appear in this case. In *Raja Shiba Prasad Singh* v. *Tincouri Banerji and another* (1), the terms offered by the plaintiff were considered by the defendant when he was his own master, and after having had an opportunity of thinking over the matter seriously for 10 or 15 days, he decided to accept them. The High Court of Patna decided that the compromise, in the circumstances, was not vitiated by undue influence. This authority does not lay down any proposition which

(1) A.I.R. 1939 Pat. 477

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could be a guide in giving a decision on the facts of this case. Similarly, in *Eric Gnapp, Limited* v. *Petroleum Board* (1), all that was held was, that entering into a contract with the Board having a monopoly as the sole supplier, did not make the contract as one obtained by duress or undue influence. In this case Ladli Parshad was in a position to dominate the will of the defendants, and making full use of that position, he made the defendants enter into a bargain which was unconscionable and which they would not have entered into, had they been free agents. I cannot accept the contention of the learned counsel for Ladli Parshad, that in view of the litigation between the parties and of the compromise which followed, the undue influence had ceased.

I feel convinced, that Ladli Parshad was throughout in a position of commanding influence over his brother and younger nephews, and in consequence thereof, he benefited himself very substantially. This superiority and position of vantage that he occupied continued up to and even after the 16th of October, 1945. Under the circumstances, it was for him to rebut the presumption that the benefits which he had thus obtained, did not stem from his undue influence, but had been given by the defendants, freely and without any pressure, or coercion.

A position of dominance, if proved to exist, is deemed to continue till its termination is established.

> "When once it has been established that one party to the contract possesses a general influence and dominance over the will of another (for this is what is

(1) 1949 All Eng. Law Reports, Volume I, page 980

meant by undue influence) it need not be shown how, in the particular instance, such influence was used, and it will be presumed to have been used unless contrary is shown.....Once established, the presumption "covers transactions between the parties other than original one which raised it, if confidence continued to exist in those other transactions." See Sutton and Shannon on Contract, 5th Edition, pages 210 and 211; *Mc Master* v. *Byrne* (1), *Tufton* v. *Superni* (2), and *Smith* v. *Kay*, (3).

The words of Lindley, L.J., in *Allcard* v. *Skinner* (4), may be recalled :—

> Courts of Equity "have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence ; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable."

"Equity may relieve against a transaction on the ground of undue influence where it is the result of a moral, social, or domestic force exerted

(1) 1952 (1) A.E.R. 1362
(2) 1952, 2 T.L.R. 516
(3) 11 English Reports 299 (307)
(4) (1887) 36 Ch. D. 145 at page 183

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upon a party, controlling the free action of his will and preventing any true consent, even though there is no coercion amounting to duress and no invalidity at law. Whenever the relationship between the parties appears to be of such a character as to render it certain, that they do not deal on terms of equality, but that unfair advantage in a transaction is rendered probable either because of superior knowledge of the matter derived from a fiduciary relationship or from overmastering influence on the one side, or from weakness, dependence, or trust justifiably reposed on the other side, the presumption is that the transaction is invalid, and it is incumbent on the stronger party to show affirmatively that no deception was practised or undue influence used and that everything was fair, open, voluntary, and well understood. In order to render this rule applicable, it is not necessary that one of the parties occupy such a dominant position towards the other as to justify the inference that the latter was without power to assert his will in opposition to the former. Nor is the rule confined to cases in which the relationship between the parties is of a strictly fiduciary nature. It applies whenever a confidential relationship exists as a fact or dominion may be exercised by one of the parties over the other". *Vide* 12 Amercian Jurisprudence page 641.

It is stated that some of the relations of the parties were present. They included father-in-law and mother-in-law of Ladli Parshad, Shrimati Sharbati Devi, sister of plaintiff and Shanti Parshad, and her husband, Shri Jagdish Parshad. They have not appeared in the witness-box, and it cannot be said in the absence of any proof on the record, which way they exercised their influence,

and to what extent were they in a position to give an advice which was really free and successful, in dispelling the influence of Ladli Parshad. The meeting was held in Delhi and there is nothing on the record to suggest that any outside advice of a disinterested nature was really available to the defendants and that it was in fact given.

In the words of Wright, J., in *Morley* against *Loughnan* (1) :—

> "The 'burthen' lies on the recipient to show that the donor had independent advice or adopted the transaction after the influence was removed or some equivalent circumstances." See also *Rhodes* v. *Bate* (2), *Powell* v. *Powell* (3), *Allcard* v. *Skinner* (4), *Lancashire Loans Ltd.*, v. *Black* (5), and *Smith* v. *Kay* (6).

The law does not require that there should be direct evidence of actual exercise of undue influence. Having regard to the relationship of the parties, the course of dealings, the position of vantage occupied by the plaintiff, the undue benefits derived by him in consequence of that position, and from the consideration of the further circumstances set out in section 16 of the Indian Contract Act, it is open to the Court to draw a presumption in favour of the exercise of undue influence. In *Dubash D. K. Ahmad Ibrahim Sahib* v. *A. K. R. M. R. Meyyappa Chettiar* (7), Varadachariar, J., remarked at page 289—

> "As observed in *Narayan Dass* v. *Bucharaj* (8), at page 852, the result of the authorities is that if it is shown that two

(1) (1893) Law Reports 1 Ch. 736 at page 752
(2) (1866) Law Reports 1 Ch. 252 at page 257
(3) (1900) E.R. 1 Ch. 243 at 245
(4) (1888) L.R. 36 Ch. D. 145 at 171
(5) (1934) Law Reports I K.B. 380
(6) 11 Eng. Reports 299 (307)
(7) A.I.R. 1940 Mad. 285
(8) 53 M.L.J. 842.

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parties stood in such a situation as to give rise to confidence between them and the third party who derives the benefit was aware of the existence of this relation, the third party is not entitled to retain the benefit unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in *loco parentis* towards him ;"

To sum up, the conclusion of the District Judge on the first issue to the effect that the resolutions mentioned in para 6 of the plaint and passed at the extraordinary general meeting, dated the 16th of October, 1945, were ineffective as having been passed under undue influence, was a finding of fact ; and this conclusion had been arrived at after a review of the evidence placed on the record and after having surveyed the facts and circumstances of the case. This finding was not based either on misconception of evidence or by adopting a procedure contrary to law. Such evidence as there is on the record, the history of the business from its very inception till the final disputes between the parties, their relationship *inter se*, and the manner in which the plaintiff derived benefit for himself, and the circumstances of the case go to show :—

(a) that the plaintiff was in a position to dominate the will of the defendants and used that position to obtain unfair advantages for himself over the other ;

(b) that he held an authority over them which was real and apparent by dint of

his being formerly a *karta* and later on an elder brother in *loco parentis*. He stood in a fiduciary relation to the others standing in a position of active confidence ;

(c) that the plaintiff in consequence of the resolutions passed on the 16th of October, 1945, obtained for himself unfair advantages to their serious detriment by virtue of his position of dominance and the transactions entered into on 16th October, 1945, appear to be unconscionable ; and

(d) that the burden of proof that the transactions were not induced by undue influence was upon the plaintiff, he being in a position to dominate the will of others which he failed to discharge.

On the first issue I am of the opinion that the resolutions mentioned in para 6 of the plaint were ineffective as having been passed under undue influence. I do not, however, find any adequate proof of coercion having been committed by the plaintiff. It is true that the jewellery and the monies belonging to the defendants had been kept with himself by the plaintiff for very many years and were given to them on 16th October, 1945, but I ought not to find a case of coercion either on suspicion or on probability. I regret I cannot concur with the conclusions of the learned Single Judge on the first issue.

In view of my findings on the issue No. 1, detailed discussion of the other issues is not required. The District Judge while allowing the appeal and dismissing the plaintiff, suit gave his dicision on issues Nos. 4 to 11 in favour of the

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plaintiff and against the defendants. The findings were rightly arrived at, and no case has been made out by the learned counsel for the defendants to disturb those conclusions. On issue No. 4 he expressed the view that twenty-one days' notice was necessary according to Regulation under Table 'A' of the Indian Companies Act, 1913, and the mere fact that a Directors' meeting was to be held on every Sunday in the first week of every month was not sufficient to dispense with the statutory requirements of a notice. It, therefore, follows that omission to comply with the condition as to giving of a notice would not affect the rights of the plaintiff. Proceedings conducted at the meeting of 3rd of March, 1946, of which no notice was given to the plaintiff cannot bind him as was held by the District Judge while deciding issues Nos. 5 and 6. The 7th and 8th issues were decided against the defendants and it was found that the defendants had failed to prove that notice of the meeting held on 28th March, 1946, was received by the plaintiff. In view of this finding, issue No. 9 has also to be decided against the defendants. The meeting held on 28th March, 1946, for want of proper notice lacks validity and the resolutions passed at that meeting do not bind the plaintiff who has been adversely affected by the resolutions passed. Decision on issue No. 10 depends on findings on issues Nos. 6 to 9. It was rightly held that neither of the meetings held on 3rd Mrach, 1946, and 28th March, 1946, was valid or binding on the plaintiff. Decision on issue No. 11 depends on decision of issue No. 10 and it was rightly held that the resolutions passed at the meetings dated 3rd March, 1946, and 28th March, 1946, were illegal and *ultra vires* and in effect amounted to fraud upon the plaintiff.

On the second issue the learned Single Judge has disagreed with the District Judge, and has

decided it against the defendants, holding that the articles of association as amended according to the terms of the compromise dated the 16th of October, 1945, were not invalid in law. In view of my decision on the first issue it is unnecessary to decide this issue. While I am willing to assume that the conclusions of the learned Single Judge as to the validity in law of the amendment of the articles of association in pursuance of the compromise are correct, I, however, cannot subscribe to the suggestion made by him that paras 458 and 562 of Halsbury's Laws of England, Volume 6, Simonds Edition, do not relate to private companies. Para 458 reads :—

> "The members of a company collectively have statutory rights, some of which are exercisable by a bare majority, as, for instance, a resolution at the statutory meeting ; others "by a particular majority, as in the case of a reconstruction; and others by a minority, as in the case of a requisition for a meeting of shareholders, or of an application to the Board of Trade to appoint an inspector to investigate the company's affairs, or of an application by an oppressed minority to the court for relief.
>
> Statutory rights cannot be taken away or modified by any provisions of the memorandum or articles."

The last sentence that statutory rights cannot be taken away or modified by any provisions of the memorandum or articles applies to both classes of companies, public or private. The private companies have certain statutorily defined privileges

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and exemptions. The most important of these are that—

(1) a private company may carry on business with a minimum of two shareholders and even one member may carry on business for a period of six months before his liability becomes unlimited (sections 12 and 45) ;

(2) it may commence business without the formalities to which a public company is subject under section 69 ;

(3) it is not required to hold a statutory meeting or to file a statutory report (section 165);

(4) no minimum subscription need be subscribed before allotment of shares is made (section 69);

(5) it need not disclose in the statement in lieu of prospectus but in a statement in the prescribed form signed as in the case of a statement in lieu of prospectus and filed with the Registrar any underwriting commission paid (section 76); and

(6) business may be commenced as soon as a certificate of incorporation is received without complying with the restrictions contained in section 149.

But its privileges and exemptions do not extend beyond the provisions defined in the statute and it must honour the obligations that are imposed under the Act in the same manner as a public

company. Lord Macnaghten in *Trevor and another* v. *Whitworth and another* (1), observed—

> "It was said that the company was a family company. But a family company, whatever the expression means, does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company. It can have no special privilege or immunity."

Besides declaratory relief, the plaintiff has also prayed for a consequential relief by way of grant of permanent injunction restraining the defendants from acting upon, the resolutions passed in the meetings dated 3rd March, 1946, and 28th March, 1946, and all meetings held after 28th March, 1946. This relief is the subject-matter of issues 13 and 14. Plaintiff's right to obtain relief by way of a permanent injunction depends upon the provisions contained in sections 54 and 56 of the Specific Relief Act. In suitable cases a suit by a Director against the other Directors for an injunction restraining the latter from committing illegal acts is maintainable in a civil Court, provided, of course, other conditions for allowing such relief have been fulfilled. The question of Court's jurisdiction to entertain a suit, is distinct from the question, whether having jurisdiction, it should exercise it in view of the circumstances of the particular case,—*vide Sarat Chandra Chakravarti* v. *Tarak Chandra Chatterjee* (2). The granting or refusing of injunctive relief rests within the Court's judicial discretion, guided by law and in harmony with the well established principles of equity, after exercise of due care and caution. The claimant for such a relief must show, that he has

(1) L.R. (1887) 12 A.C. 409 (434)
(2) I.L.R. 51 Cal. 916

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a superior equity in his favour, entitling him to the injunction asked as against defendants. He has also to show, that he has been acting towards the defendants in a fair and equitable manner, free from any taint of fraud, sharp practice, undue influence or illegality. It is a cardinal principle of broad applicability, that he who seeks equity must do equity. The other maxim, that he who comes in equity must come with clean hands, also embodies a principle of wide amplitude and expresses the basic concept of equity jurisprudence. According to this rule, equity declines to lend its aid to a person whose conduct has been inequitable in relation to the subject-matter of the suit. The principle is, that he who has done inequity shall not have equity.

Applying the above principles, one of such considerations will be, whether the plaintiff who has been found to have exercised undue influence over the defendants should be allowed such a relief or not. If the plaintiff who is seeking equity has himself not done equity, the Courts should stay their hands. When plaintiff's own acts and dealings cannot be characterized fair and free from the blemish of undue influence, he is not entitled to such a relief. When the plaintiff's own dealings with the defendants have been such, which cannot be characterized as honest or just, the Courts having regard to the provisions of section 56(j) of the Specific Relief Act will not lend their assistance. It will not be possible for me to grant the relief sought by the plaintiff in view of my findings on the first issue. A conduct towards the defendants as has been exhibited by the plaintiff, over a number of years would inhibit Courts from granting the equitable relief. If this relief is not granted in this suit, it does not mean that the plaintiff is condemned to suffer the consequence of resolutions passed at the meetings of

which proper notice had not been given to him. The equitable relief sought by the plaintiff is not being withheld on account of retribution or punishment. During the course of several years, after the exclusion of the plaintiff, a number of resolutions must have been passed and several steps taken by which the plaintiff might have been prejudiced. All these matters have to be sifted after careful scrutiny. The prayer made in the plaint that the consequential relief by way of permanent injunction should be granted restraining the defendants from carrying into effect the resolutions passed not only at the meetings dated 3rd March, 1946, and 28th March, 1946, but also at all meetings held after 28th March, 1946, suffers from vagueness. Some of the actions taken might have been innocuous, but of an urgent and necessary character. Other acts might have been merely administrative, formal and, therefore, unexceptionable. Some of the steps taken might have been of a defensive character or in compliance with the statutory requirements. The plaint contains an injunctive prayer of an omnibus character with respect to all resolutions passed at all meetings held after 28th March, 1946. There must have been occasions for taking a large number of decisions which the plaintiff himself would have taken, and would not have excused the defendants if they had not taken. I must also take into consideration the consequences that will follow the granting of permanent injunction by restraining the defendants from acting upon or carrying into effect the resolutions passed after the plaintiff's exclusion. Such an order would certainly create an immediate deadlock and it would not be possible for the concern to function at all. I am aware of the fact, that before the learned Single Judge the learned counsel for the plaintiff gave an undertaking that he would not question the defendants' dealings with third parties, but that undertaking by itself,

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cannot avert the deadlock, which is bound to ensue, the moment even the modified relief is granted. Moreover, the resolutions passed at the meetings held after 28th March, 1946, have not been singly and separately sifted and scrutinized at any stage of the case with a view to determine, as to which were acceptable to the plaintiff and which not. It is still open to the plaintiff to seek relief available to him under section 155 of the Companies Act of 1956, which is equivalent to section 38 of the Companies Act of 1913. The Court's jurisdiction in the matter of rectification of the register is extensive and general. The only objection to such a course of action may well be, that the proceedings under section 155 of the Companies Act are of a summary character and therefore, not suited. But, on the other hand, there is nothing on the record to suggest that the questions requiring determination in this case cannot be more appropriately disposed of by the Court under the Indian Companies Act of 1956. It is open to Ladli Parshad to invoke the powers of the Court or of the Central Government under Part VI, Chapter VI, of the Companies Act of 1956, if he is so advised. If, as stated above, the prayer of the plaintiff is granted, it will immediately result in a deadlock and the company's working will come to a standstill and in that event, perhaps its winding-up may be deemed by the members to be the only way out of the impasse. Taking an overall view of the facts and circumstances of this case, I do not consider that the prayer as to grant of a permanent injunction should be entertained.

For reasons stated above, I am of the view that this Letters Patent Appeal ought to succeed. In the result, the Letters Patent Appeal No. 100 of 1954, is allowed and the plaintiff's suit is dismissed. In the circumstances of this case, the parties shall bear their own costs throughout.

Bhandari, C. J. BHANDARI, C.J.—I agree.

B.R.T.