RATWATTE

v.

GOONESEKERA

SUPREME COURT.
SHARVANANDA, C. J., L. H. DE ALWIS J. AND SENEVIRATNE, J.
S. C. APPEAL No. 48/84; CA No. 86/75 (F); D. C. COLOMBO No. 2543/52.
DECEMBER 1, 2, 3, 4 AND 9, 1986.

Sale–Shares–Setting aside of sale on grounds of laesio enormis, duress, undue influence, wilful misrepresentation, and fraud–Meaning of undue Influence.

Civil Procedure–Civil Procedure Code, Section 772–Cross Appeal–Failure to give notice of objection of undue influence–Inherent jurisdiction–Meaning of undue influence.

The plaintiff held 500 shares in Consolidated Commercial Agency Ltd. (CCA) and 1251 shares in Ceylon Manufacturers and Merchants Ltd. (CMM). He was also a Director of these two companies which had been formed on the initative of one E. W. Miller to take over some of the lines of business of Colombo Commercial Co. Ltd.

About 1967 the plaintiff became ill and in December 1968 and January 1969 *suffered a serious nervous breakdown. He was given six months leave to proceed to* London for treatment. His disease was diagnosed as manic depression. On 25.01.1969 Miller and the defendant obtained plaintiff's signature to a letter of resignation from the directorate of CMM and CCA. On 26.01.69 the defendant and one Mallory Wijesinghe both directors of the two companies visited the plaintiff at his residence when he was just about to leave for the airport and obtained his signature to several share transfer forms and receipts and handed him some cheques representing to him that he was being paid a fair value for his shares in the two companies. In July 1969 the plaintiff returned to Sri Lanka fully restored to health. On 08.06.1970 the plaintiff wrote to the Chief Accountant CCA and calling for a cheque for Rs. 5,000 for his 500 CCA shares. After sending a letter of demand on 18.05.1971 plaintiff filed this action complaining that the defendant had pressurised him into transferring his 17,499 CMM shares at Rs. 13 per share when a share was worth Rs. 57.78 and his 500 CCA shares at Rs. 10 per share when a share was worth Rs. 122.09. The plaintiff claimed rescission of the sales on the ground of laesio enormis and on grounds of undue influence, duress, wilful misrepresentation and fraud. The District Judge upheld the plea of laesio enormis but rejected the other grounds. The defendant appealed to the Court of Appeal which ordered rescission of the sale on the ground of undue influence. The defendant appealed to the Supreme Court and as a preliminary matter submitted that it was not open to the Court of Appeal to review the finding of the District Judge on undue influence in the absence of a cross-appeal by the plaintiff or written notice giving seven days notice under s. 772 CPC that a review of the District Judge's finding on undue influence will be sought.

(1) Where no cross-appeal has been filed, the plaintiff's failure to give seven days written notice under s. 772 CPC will not entitle him to a right to take objection to the decree. But s. 772 of the CPC does not bar the court, in the exercise of its powers to do complete justice between the parties, from permitting objection to the decree even though no notice had been given. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice.

A respondent not taking any objection can without filing any cross objections support the decree not only on the grounds decided in his favour but also by urging that the grounds decided against him should have been decided in his favour. He may thus challenge a finding against him although the decree may be in his favour. But a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or giving notice of objections under s. 772 CPC.

(2) Undue influence is the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract. The victim of such pressure may be entitled to relief under the common law of duress or under the equitable doctrine of undue influence. Equity gives relief where an agreement has been obtained by certain forms of improper pressure which did not amount to duress at common law because no element of violence to the person was involved. Mere persistence or pestering by a person not in any fiduciary relationship is not undue influence.

Contracts which may be rescinded for undue influence fall into two categories:

1. Where there is no special relationship between the parties.
2. Where a special relationship of confidence exists.

In the first case undue influence must be proved as a fact and the onus of proof is on the donor. In the second case undue influence is presumed to exist and the onus is on the party taking the benefit to justify that it was free from undue influence. The Court will not save a person from his folly, imprudence or want of foresight but it will intervene if the plaintiff proves that the defendant exerted domination and by the use of improper pressure prevailed on him to consent to a transaction that would otherwise not have been entered into.

There is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction. The question to be decided in such case is whether the party was a free and voluntary agent, whether there was actual coercion by the other party, whether the latter exercised over the mind of the other such a degree of general domination or control that his independence of decision was substantially undermined.

In the instant case there was no fiduciary relationship between the contracting parties. Mere persisting, worrying and pestering is not undue influence. There was no evidence whatsoever of any threat or infusion of any fears for the future or the present in plaintiff's mind. Further there was significant delay in repudiating the sale which tends to show the absence of compulsion. Hence the Court of Appeal misdirected itself in concluding that undue influence vitiated the transfer of shares.

(3) Laesio enormis is a Roman and Roman-Dutch law concept applicable to rescind sales and leases where the damage suffered is more than half of the value of the subject-matter.

(4) In Sri Lanka laesio enormis is applicable to rescind sales of immovable property but it cannot be applied to rescind transfers of shares in a limited liability company as shares do not fit into the Roman and Roman-Dutch law classification of movables and immovables.

Quaere:

Does laesio enormis apply to sales of movables in Sri Lanka?

(5) Although s. 63 of our Companies Ordinance 1939 provides that shares shall be movable property this is for the purposes of the provisions of the Companies Ordinance only and not for purposes outside the province of Company Law. A share is neither movable or immovable property as known to the Roman or Roman-Dutch law. It is a bundle of rights and liabilities. It is an English law concept and a typical item of property of the modern commercial era in a distinct class of its own. It is a chose in action.

(6) The District Judge misdirected himself in applying the principle of laesio enormis to rescind a transfer of shares.

Cases referred to:

(1) *Bridget Antony v. Imelda Weerasekera–(1953) 54 NLR 553 PC.*

(2) *Earl of Aylesford v. Morris–(1873) 8 Ch. App. 484, 490.*

(3) *Mutual Finance Ltd.v. Wetton (John) & Sons Ltd.–[1937] 2 All ER 657, 661.*

(4) *Allcard v. Skinner–(1887) 36 Ch. D. 145, 181, 182.*

(5) *William v. Bayley–(1866) L.R. 1 H.L. 200; 35 L.J. Ch. 717; 14 L.T. 802.*

(6) *Tufton v. Sperni–(1952) 2 LTR 516, 526, 530 C.A.*
(7) *National Westminister Bank v. Morgan–[1985] 1 All ER 821, 828.*
(8) *Tate v. Williamson–(1866) 2 Ch. App. 55, 60; 15 L.T. 549.*
(9) *Kaufman v. Gerson–[1904] 1 KB 591.*
(10) *McGee v. Mignon–(1903) T.S. 89.*
(11) *Coetze v. Pretorins–(1903) TS 638.*
(12) *Tjollo Ateljees (Eins) Bpk v. Small– 1949 (1) SALR 856 (AD).*
(13) *Gooneratne v. Don Philip–(1899) 5 NLR 268.*
(14) *Jayawardene v. Amerasekera–(1912) 15 NLR 280.*
(15) *Punchirala v. Ahamat–(1924) 5 CL Rec 227.*
(16) *Sobana v. Meera Lebbe–(1940) 5 CLJ 46.*
(17) *Fernando v. Fernando–(1916) 19 NLR 21.*
(18) *Wijesiriwardene v. Gunasekera–(1917) 20 NLR 92.*
(19) *Bodiga v. Nagoor–(1943) 45 NLR 1.*
(20) *Ponnupillai v. Kumaravetpillai–(1963) 65 NLR 241.*
(21) *Appuhamy v. Keerala–(1970) 73 NLR 422.*
(22) *Short v. Treasury Commissioners–[1948] 1 KB 116, 122.*
(23) *Barland's Trustee v. Steel Bros. & Co. Ltd.–[1901] 1 Ch. 279, 288.*
(24) *Rex v. G.M. Holdings Ltd.–[1942] 1 All ER 224, 226.*

APPEAL from judgment of the Court of Appeal.

Mark Fernando P.C. with *Daya Pelpola* and *Miss S. Wijegunasekera* for defendant appellant.

D. R. P. Gunatillake with *S. D. de S. Gunasekera, Neil Perera* and *Victor Unantenne* for the respondent.

Cur. adv. vult.

May 26, 1987.

SHARVANANDA, C.J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted this action on 21.1.72 to set aside his sale to the defendant of 500 shares in Consolidated Commercial Agency Ltd., (hereinafter referred to as 'CCA'). and 1,251 shares in Ceylon Manufacturers and Merchants Ltd., (hereinafter referred to as 'CMM'). The date of sale was 26.1.69. The grounds upon which the defendant sought to set aside the transfer/sale of the shares are–

(*a*) Laesio enormis and
(*b*) Duress and/or undue influence and/or wilful-misrepresentation and/or fraud.

The defendant in his answer denied these allegations.

At the outset of the trial it was admitted that the plaintiff was on 26.1.1969, the owner of 500 shares in CCA and was an Executive Director of the Company. It was also admitted that the plaintiff was the owner of 17,499 shares in CMM and was a Director of the said Company on the said date. The case for the plaintiff as set out in his plaint was that the said 17,499 shares which the plaintiff held in CMM had been transferred by the plaintiff as follows: –

(1) To Mrs. C. Seneviratne, 13,746 shares at the rate of Rs. 13.00 per share;
(2) To Mallory Wijesinghe 1,251 shares at the rate of Rs. 13.00 per share.
(3) To the defendant 1,251 shares at the rate of Rs. 13.00 per share and
(4) To one S. H. P. M. Nizar, 1,251 shares at the rate of Rs. 13.00 per share.

The plaintiff had also transferred 500 shares which he held in CCA to the defendant at the rate of Rs. 10/– per share.

The plaintiff stated that at the date of the said transfer of shares the true value of the said 17,499 shares in CMM was Rs. 1,011,092.22 at the rate of Rs. 57.78 per share and the true value of said 500 shares in CCA was Rs. 61,045/– at the rate of Rs. 122.09 per share. The case of the plaintiff was that the price paid by the defendant to the plaintiff for the transfer of the said 1,251 shares in CMM was less than 1/2 the true value of the said shares, at the time and date of transfer to the defendant and the said sale of 500 shares in CCA was also less than 1/2 the true value of the shares at the date of transfer to the defendant.

The plaintiff stated "that from 1967 he was not keeping good health and on 27.12.68, he was granted six months' medical leave to enable him to proceed overseas for treatment and accordingly the plaintiff made the necessary arrangements to leave for the United Kingdom on 26.1.1969 by plane. According to Plaintiff in December 1968, and January 1969, he was suffering from a serious nervous breakdown.

It appears that the two companies CMM and CCA were floated by one E. W. Miller, who had an interest in Colombo Commercial Co., Ltd. CCA & CMM eventually took over the business of some of the departments of Colombo Commercial Co. Ltd., while CMM took over the business of Estate Supplies, hardware, electrical and agricultural equipment and became the successor to the Stores and Sales Department of Colombo Commercial Co. Ltd. CCA took over the

Estate Agency business of Colombo Commercial Co. Ltd. In 1963 Miller invited the plaintiff and the defendant to become shareholders and Directors of CCA & CMM.

E. W. Miller was a very close friend of the plaintiff from about 1950. In paragraph six of the plaint the plaintiff states "on 24.1.69 the said E. W. Miller sent for him and requested him to resign from the Directorate of the two companies on the plea that they were considering an expansion program and that plaintiff's ill-health would constitute an impediment to their implementation."

According to plaintiff on 25.1.69, when he was in a weak state of mind and in ill-health, the said Miller and the defendant brought typed letters of resignation and obtained his signature to the said letters; by the said letters of resignation he resigned from the Directorate of CCA and CMM. The said resignation was according to plaintiff obtained from him by duress and pressure exercised by the said Miller and defendant.

In paragraph 7 of the plaint the plaintiff states–

"On the 26.1.69, shortly before he left for Katunayake to catch his plane to U.K. the defendant and one Mallory Wijesinghe, both of whom were directors of the said Company, came to the plaintiff's residence while the plaintiff was in the final stages of packing his baggage, produced certain transfer forms, transferring his shares in the said two companies, several cheques and receipts and informed the plaintiff that he should sign these documents and thereby transfer his shares in the said two companies and represented to the plaintiff that he was being paid a fair value for the said shares; when he stated that he thought that the par value was much more the defendant and Mallory Wijesinghe assured him that they had placed a fair value and thereby induced the plaintiff by the exercise of duress, fraud, undue influence and wilful misrepresentation, while the petitioner was in a weak state of mind and health and when he was about to get into the car to proceed to Katunayake to sign the said transfer documents and receive the said cheques.

At the time of the said transfer he was under severe mental stress and strain and also was in a feeble state of health and mind. Taking advantage of plaintiff's state of mind and body the said Mallory Wijesinghe and the defendant obtained the said transfer by the exercise of duress and/or undue influence and/or fraud and or wilful misrepresentation on the plaintiff."

By his answer the defendant denied in December 1968 and July 1969 the plaintiff was suffering from any serious nervous breakdown; admitted that plaintiff was not keeping in good health, and that the plaintiff was on 27.12.68 granted six months medical leave, to enable him to proceed overseas for treatment. The defendant denied the allegations of duress and undue influence, fraud and wilful misrepresentation made by the plaintiff and also denied the averments relating to the value of the shares purchased by him.

The case proceeded to trial on ten issues, covering the grounds of laesio enormis and duress etc. After trial the District Judge answered the issues relating to the cause of action based on laesio enormis in favour of the plaintiff but found against the plaintiff's alternative cause of action based on duress, fraud, undue influence and wilful misrepresentation. He accordingly made order that the defendant should pay the plaintiff Rs. 99,857/- which represented the difference between the purchase price and what he considered to be the true value of the shares. The District Judge made further order that if this sum was not paid within six months the sale of the shares would stand cancelled and the plaintiff return the purchase price to the defendant. He held that a share in CMM and CCA was worth Rs. 97.90 and Rs. 57.69 respectively. The defendant preferred an appeal from the said judgment. At the hearing of the appeal before the Court of Appeal, counsel for the plaintiff-respondent contended that the finding of the trial Judge relating to the exercise of undue influence was wrong and invited the court to reverse that finding. Counsel for the defendant unsuccessfully objected to the plaintiff being heard on the issue of undue influence as the trial Judge had found in his favour on that issue, and the plaintiff had not filed any cross appeal as required by Section 772 of the Civil Procedure Code.

Counsel for the plaintiff-respondent urged that on the totality of the evidence accepted by the trial Judge, his finding on the issue of undue influence was unreasonable and untenable. He did not challenge the correctness of the finding of the Distirct Judge that duress, misrepresentation and fraud had not been established. The Court of Appeal by its Judgment set aside the finding of the trial Judge on the issue of undue influence and directed that decree be entered setting aside the sale by the plaintiff to the defendant of the shares in the two companies and ordered the plaintiff to return to the defendant the consideration paid in respect of the aforesaid shares. The defendant has preferred this appeal from the judgment of the Court of Appeal.

At the outset of the hearing before this court, Mark Fernando, counsel for the defendant-appellant referred to his preliminary objection that it was not open to the plaintiff to canvass before the Court of Appeal the finding of the trial Judge on the issue of undue influence against the plaintiff, as the plaintiff had not filed any cross appeal in terms of section 772 of the Civil Procedure Code which provides that:

> *Sec. 772* (1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in court below, but take any objection to the decree which he could have taken by way of appeal provided he has given to the appellant or his Proctor seven days notice in writing of such objection.
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> (2) Such objection shall be in the form prescribed in paragraph (1) of section 758.

This section requires the respondent, if he had not filed a cross-appeal to give the appellant or his Proctor seven days notice in writing to entitle him to object to the decree or any part of the decree, entered by the trial court. Only if he had duly given the said notice, will he have a right to object to the decree; if he had failed to give such notice, he cannot claim, as a matter of entitlement, the right to take any objection to the decree; but the provision does not bar the court, in the exercise of its powers to do complete justice between the parties, permitting him to object to the decree, even though he had failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice. If however the respondent is not taking any objection to the decree, it is competent to him without filing any cross objections to support the decree not only on the grounds decided in his favour but also on the grounds decided against him, by asserting that the points decided against him should have been decided in his favour; he may thus challenge a finding against him although the decree may be in his favour. But a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or cross-objections under this section.

In this case the decree entered in the trial court was founded on the alternative cause of action based on the plea of laesio enormis and hence there was the conditional order to pay the difference between the purchase value and the true value.

Had the decree been entered on the main cause of action based on undue influence the decree would have declared the sale of shares void and the plaintiff might have been better off.

Admittedly the plaintiff had not complied with the provisions of section 772 of the Civil Procedure Code to entitle him to agitate in appeal for a decree avoiding the sale of the shares on the ground of exercise of undue influence. But the Court of Appeal granted him permission to challenge the finding of the trial Judge on the question of undue influence and heard him on that issue, as it was of the view that–

> "the main object of section 772 of the Civil Procedure Code was to prevent the appellant from being taken by surprise at the hearing of the appeal and as the appeal was heard over a long period of time and between the date on which counsel for the plaintiff indicated to court that he was challenging the finding of the trial Judge on the issue of undue influence and the date on which counsel for the defendant replied to the submission of counsel for the plaintiff on that aspect of the case, a period of no less than seven weeks intervened and the court was satisfied that the defendant's counsel had an opportunity of making his submissions fully on the question of undue influence, both orally and in writing and as in the circumstances no prejudice whatever was caused to the defendant by the failure on the part of the plaintiff to file cross-objections in terms of section 772 of Civil Procedure Code."

We cannot say that the Court of Appeal had in the circumstances, erred in granting permission to counsel for plaintiff to canvass the finding on undue influence. After granting that permission the court heard both parties and revised the finding of the District Judge. On the appeal before us counsel for both parties addressed us fully on the issue of undue influence and on the findings on it by the court below.

The English law relating to undue influence is part of the Law of Ceylon, vide *Bridget Antony v. Imelda Weerasekera,* (1).

A contract may be avoided or set aside at the instance of one of the parties to it on the ground that his consent thereto was obtained by duress or undue influence, where his consent had been obtained by some form of pressure which the law regards as improper. Undue influence may be defined, for this purpose, as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract (*Earl of Aylesford v. Morris* (2) per Lord Selbourne, LC).

The victim of such pressure may be entitled to relief under the common law of duress or under the equitable doctrine of undue influence. Equity gives relief where an agreement has been obtained by certain forms of improper pressure which did not amount to duress at common law because no element of violence to the person was involved. For example, a promise to pay money can be set aside if obtained by a threat to prosecute the promiser or his close relative. *Mutual Finance Ltd. v. Wetton* (3).

Contracts which may be rescinded for undue influence fall into two categories. Firstly, those where there is no special relationship between the parties; secondly, those where a special relationship exists. *In the first case,* influence must be proved as a fact, *in the second* it is presumed to exist. In the *first case,* it must be affirmatively proved that one party in fact exerted influence over the other and thus procured a contract that would otherwise not have been made. Undue influence has been described as "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally though not always some personal advantage obtained by the guilty party (*Allcard v. Skinner* (4) per Lindley, L. J). The cases in which this jurisdiction has been exercised are instances where dominion has been exercised by one person over another, thereby precluding the exercise of free and deliberate judgment. A leading case on the subject is *William v. Bayley* (5) where the facts were as follows—a son gave to his bank several promissory notes upon which he had forged the endorsements of his father. At a meeting between the three parties, the banker made it reasonably evident that if some arrangement were not reached the son would be prosecuted. This impression was conveyed in such expressions as: "We have only one course to pursue; we cannot be parties to compounding a felony; this is a serious matter, a case of transportation for life!". The effect of these expressions upon the father is shown by his somewhat despairing words: What be I to do? How can I help myself. You see these men will have their money." In the result the father agreed in writing to make an equitable mortgage to the bank in consideration of the return of the promissory notes. This agreement was held to be invalid on the ground that undue pressure had been exerted. The bankers had clearly exploited the fears of the father for the safety of the son and had thus brought themselves within the equitable principle that, where there is inequality between parties and one of them by taking an unfair advantage of the situation of the other forces an agreement upon him, the transaction will be set aside—per Lord Chelmsford at 216. This is a case of actual coercion.

Undue influence connotes domination. Evidence of express influence must be adduced by the party seeking to impeach the transaction. If it can be shown that one party exercised such domination over the mind and will of the other, that his independence of decision was substantially undermined, the party whose will was overborne will be entitled to relief on the ground of undue influence. There is no need for any special relationship, as in the second case to exist between the parties. The mere fact that domination was exercised is sufficient; no abuse of confidence need be proved. The plaintiff will have to prove that his mind was "a mere channel through which the will of the defendant operated" (*Tufton v. Sperni* (6)), that there was actual coercion by the defendant or that the defendant exercised over the plaintiff's mind such a degree of general domination or control that his independence of decision was substantially undermined.

In the second case, if the parties were at the time of the transaction in a particular relationship of confidence with each other, undue influence is presumed. The onus is on the party taking the benefit to justify that it was free from undue influence. Where the donee stands in a fiduciary relation to the donor, a presumption of undue influence arises which prevails unless rebutted by the donee.

Lindley L. J., in *Allcard v. Skinner* (supra) sets out the principle on which the court had proceeded to deal with cases of undue influence—

> "What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction . . . . On the other hand, to protect people from being forced, tricked or misled in any

way by others into parting with their property is one of the most legitimate objects of all laws . . . . . . The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another."

Lord Scarman with whom all the other Law Lords agreed, in *National Westminister Bank v. Morgan* (7) approved the above enunciation of Lindley L. J. and stressed that the principle justifying the court setting aside a transaction for undue influence is not vague public policy but specifically the victimisation of one party by the other.

In *Tufton v. Sperni* (supra) Jenkin L. J., observed–

"There can be no doubt that the plaintiff was overreached by the defendant in the transaction concerning No. 36 Doughty Street . . . . .But the mere fact that a simpleton in business has made an improvident, or even ruinous, bargain with a person astute and unscrupulous enough to take advantage of his simplicity does not of itself entitle the victim to relief, at all events, where, as here, the transaction has been completed. The court will not intervene unless the case can be brought within some recognised exception to the general rule that a person who in the eye of the law, is capable of managing his own affairs is bound by a disposition he chooses to make however damaging to himself it may be. A familiar exception to the general rule occurs in cases where the bargain has been held to have been induced by fraudulent representation; but that is not in question here. It is however, argued on the part of the plaintiff that in the circumstances of the present case the defendant stood in fiduciary relationship to the plaintiff, which he abused by prevailing on the plaintiff, to purchase the defendant's own property on terms outrageously favourable to the defendant; and that in such circumstances the court can and should set aside the transaction."

In *Tufton v. Sperni* (supra) the plainiff who was the purchaser of defendant's house on terms grossly unfair to him, sought to have the transaction set aside on the ground of undue influence. The trial Judge found that undue influence–the domination of the purchaser by the seller–was not proved. The purchaser appealed on the ground that the court of equity had a broad jurisdiction to relieve a person from a bargain made with another where that other person stood in such a relation to the first person that he owed him a duty to make full disclosure of all material facts. Held, allowing the appeal, that in all the circumstances of the case there was a fiduciary relationship between them and that the purchaser reposed confidence in the seller which was abused. The transaction was accordingly set aside. It is to be noted that when the plaintiff set out to prove that the defendant had, by virtue of his professional position and otherwise, acquired a complete control or domination over the plaintiff, that the latter ceased in effect to be a free agent, and his mind became a mere vehicle for defendant's schemes, the trial Judge held that the plaintiff failed to discharge the onus of proof laid on him. But the plaintiff succeeded in appeal on a fresh ground disclosed by the facts, namely on the broad jurisdiction of the court of equity to relieve a party from a bargain made with another where it is shown that the other stood in such a relation to the first party that he owed him a duty of care and candour and was bound to make to him full disclosure of all material facts. Sir R. Evershed, M.R. correctly said at page 525–

> "In my judgment, the question is not of domination but of influence, well short, no doubt of domination, based on and arising out of a particular association and an advisory capacity. . . ."

In that case, the Court of Appeal had held that a fiduciary relationship existed between the parties which had the result that one reposed confidence on the other.

> "When this is so the person receiving and accepting the confidence is inevitably so placed that he can exercise influence over the other. It would seem to be but common decency that personal profit should not then be gained by exploiting the influence resulting from the confidence reposed and acknowledged." Morris L. J. at 533.

The court set aside the transaction on the ground of undue influence flowing not from domination by the defendant over the plaintiff but from the fiduciary relationship between the plainfiff and defendent with the result that the latter had the influence inevitably stemming therefrom. The court said that the relation between the parties was such that, in such matters confidence was reposed and influence was necessarily possessed. The jurisdiction of the court to interfere is founded on the principle of correcting abuses of confidence. Lord Chelmsford, L.C., stated the principle in *Tate v. Williamson* (8)–

"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 the position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

In the present case, the plaintiff does not suggest the existence of any special relationship between him and the defendant which attracts any presumption of undue influence. Both plaintiff and defendant were business men. Both regarded the impugned transaction as a business transaction and were dealing with each other at arms' length. They were both share holders in the aforesaid two companies. But share holders are not trustees of one another. True that plaintiff was a sick man preparing to leave for England for treatment but there was not that fiduciary relationship between plaintiff and defendant which resulted in confidence being reposed by plaintiff on defendant. There was no question of any confidential relationship existing between the two, such as to give rise to the presumption of influence of one over other. Hence, the plaintiff has to prove that defendant exerted domination over him and by improper pressure prevailed on him to consent to the transaction that would otherwise not have been made. Did the defendant use undue influence to procure the contract – the entire onus was on plaintiff to prove undue influence in the sense of some coercion, some overreaching; was the sale of the shares obtained by any form of improper pressure on him?

As to what kind of influence can vitiate a contract between third parties, Porter, J., quoted with approval in *Mutual Finance Ltd. v. Wetton & Sons Ltd.* (supra) the following passage from Salmond and Winfield on Contracts (1927) at page 259:

"Assuming, then, that the common law of duress has been thus superseded by the equitable doctrine of undue influence, the question remains, what forms of coercion, oppression or compulsion amount to undue influence invalidating a contract as between strangers between whom there exists no fiduciary relation. How is this line to be now drawn between those forms of coercion or persuasion which are permissible and those which the law recognises as unlawful and as a ground of contractual invalidity? To this question it is impossible, as the authorities at present stand to give any definite or confident reply. In the case already cited of *Kaufman v. Gerson* (9) it is suggested that the line should be drawn by reference to general considerations of public policy, the question in each case being; 'Is the coercion or persuasion by which this contract was procured of such a nature that the enforcement of a contract so obtained would be contrary to public policy?' Just as a contract may be invalid because it is contrary to public policy in its substance or its purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement...Where the instrument of coercion is the doing or threatening of a wilfully illegal act of any description..a contract so procured will *in general be held invalid*. But even although the instrument of coercion is not thus in itself illegal as in the case of a threat of prosecution, the enforcement of a contract so procured may nevertheless be held in appropriate cases to be contrary to public policy."

There is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction. The question to be decided in each case is whether the party was a free and voluntary agent, whether there was actual coercion by the other party, whether the latter exercised over the mind of the other such a degree of general domination or control that his independence of decision was substantially undermined.

However damaging to himself the transaction may be the court will not intervene unless the case can be brought within some recognised exception of the general rule that a person who, in the eye of the law, *is capable of managing his own affairs is bound by the disposition he* chooses to make. It is not the case of the plaintiff that though he was a sick person, he was not at the relevant time mentally capable of managing his affairs. His mental or contractual capacity to enter the transaction in question was not in issue. He understood the nature of the transaction, though according to his doctor, his judgment was impaired. Weakness of mind, short of mental disorder as prevents a person understanding the nature of the transaction does not afford per se ground for relief at law or in equity, although undue influence by the other party may permit the transaction to be set aside as inequitable – vide Chitty on Contracts, Vol. I, 23rd Ed. para 381, page 183.

It was common ground between the plaintiff and defendant that the plaintiff was not in good health since 1967. In 1968 the company had granted him three months leave for reasons of health. Again the Company gave him six months leave in December 1968 to proceed to London for medical treatment. He had been treated by Dr. Sittampalam, a psychiatrist in 1967 and 1968. The particular ailment from which the plaintiff was suffering is known as manic depression. According to Dr. Rodrigo, Professor of Psychiatry in the Medical Faculty of the Peradeniya Campus who had once seen the plaintiff before he left the Island on 26th January 1969, a patient suffering from manic depression would have his judgment fairly seriously impaired and that the depressed condition would affect his judgment not merely in regard to certain matters but practically in regard to all matters.

The Court of Appeal after referring to the evidence of Dr. Sittampalam and Professor Rodrigo, has concluded that–

> "Thus, it is seen that on the medical evidence, it was clearly established that the plaintiff had been suffering from a mental disorder known as manic depression for a long time prior to January 1969. In January 1969, also he was in a depressed state of mind, was under severe medication and was lacking in the power to concentrate.... This then was the state of mind of the plaintiff on the day he transferred the shares to the defendant, namely, on 26th January 1969."

The sequence of events during the period 22nd to 26th January 1969, is relevant to appreciate whether the plaintiff was the victim of any domination or pressure by the defendant causing the plaintiff to transfer his shares to the defendant. In this context the important role played by Miller to whom both plaintiff and defendant were grateful for having made them shareholders and directors of the two companies, which he had established, in the transaction in issue has to be kept in mind. No allegation has been made by plaintiff against Miller that he was more interested in defendant than in the plaintiff or that Miller had conspired with the defendant and other shareholders to terminate his connection with the two companies or that what motivated Miller to persuade plaintiff to part with his shares in the two companies was anything other than the welfare and expansion of the two companies. Unfortunately the court does not have the benefit of Miller's evidence which would have shown the transaction, complained of, in its true perspective.

Miller arrived in Ceylon on the 23rd or 24th of January 1969. He and defendant met the plaintiff at about 3 p.m. on the evening of the 24th. According to plaintiff, Miller and defendant told him at that meeting "You have been ill periodically. We have nothing against you. This will be an impediment to the expansion of the Company, we are intending to undertake, so it will be in the company's interest if you call it a day" and they wanted him to resign from the directorate and promised to compensate him adequately for the interests–shareholdings he held in the companies; they mentioned a figure in the region of 2 or 2 1/2 lakhs. The plaintiff continued–

"I was not agreeable. I wanted time to think it over and come back from leave and decide. They knew that I was going to London on leave in two days time. I had arranged to leave for London on 26th January. The defendant and Miller were fully aware of that. I said that I will come back and decide on the request. They kept on pestering. I said 'come and see me in my bungalow' and I left. That evening they were worrying me and they were pressing me to accept these conditions and all sorts of things. As they kept worrying me, I said 'If you want to meet me you come to my bungalow.... The defendant and Miller came to my bungalow at about 7 o'clock. They kept worrying me. I could not take it any longer and I just signed the resignation from the directorate... I just wanted to get rid of the worry and I signed resigning from the directorate of the two companies. Then they indulged in my hospitality. They said that they will settle about my shares the next morning.... On 26th January when I was in the final stage of packing and prior to half-an-hour of my leaving Mr. Mallory Wijesinghe and Mr. Ratwatte (the defendant) came. They came with a whole sheaf of papers, receipts, cheques, most of which I could not even familiarise myself with; collecting a whole heap of cheques and signing a receipt in full and final settlement I signed several transfer forms and several receipts. I put the cheques into my pocket and went to the airport. I stopped at Madras. At Madras I examined the cheques. According to the cheques listed one cheque for the purported value of the shares of C.C.A. was missing. I posted the cheques from Madras to the Bank of Ceylon asking them to deposit it with John Keel on fixed deposit. I got cheques to the total value of about Rs. 225,000. I knew these were for the transfer of shares of both these companies." To the question in examination in chief 'Did you at that time know, for what you were selling the shares?' Plaintiff's reply was "All I told Mr. Mallory Wijesinghe and Kenneth Ratwatte before I left was "I think you were doing me down." I also said "You have not paid my Provident Fund." They said 'Don't worry, please go and get well and come, we will look after you. They were good friends."

The plaintiff returned to Ceylon in good health in July 1969. He says that he did not meet the defendant because 'I thought they had done me down.' But plaintiff until he sent the letter of demand P23 dated 18.5.71 and filed this action on 21st January 1972, never protested to the defendant or to Mallory Wijesinghe or to Miller or to anybody else, that his sale of the shares was not voluntary though on 8th June 1970, in his letter to the Chief Accountant CCA Ltd. (D11) he had complained that he did not receive payment from defendant for the 500 shares in CCA Ltd., and requested that a cheque for Rs. 5000 be sent to him. The delay in repudiating the sale of the shares is significant. The trial judge had adverted to this delay and remarked "I am of opinion that the delay to intimate a claim to the defendant is construable as an affirmation of the transaction, assuming without so holding that there was undue influence. As I have held that there is no undue influence, the question of affirmation is irrelevant." The Corut of Appeal has countered "the question of affirmation of the transaction by delay or acquiescence was never put in issue at the trial. The plaintiff had no opportunity of leading evidence on this matter. In the absence of an issue, I am of the view that this finding is unwarranted." In my view, the Court of Appeal has missed the significance of the time lag relevantly referred to by the trial judge. Had the transfer of the shares by the plaintiff been forced out of the plaintiff by undue influence, and not been a voluntary one, would not the plaintiff have complained of the undue influence and disowned the transaction as soon as he returned, fully restored in health, to Ceylon in July 1969? The delay only tends to show that there was no question of the plaintiff being compelled to transfer the shares, that plaintiff never regarded himself as being coerced by the defendant or by anybody else to transfer the shares. It was not a question of affirmation of a transaction vitiated by undue influence, but evidence that he was a consenting party. In my view, the plaintiff did not complain of any undue influence for about two and a half years because he did not look upon the transaction as one that had been forced out of him. It is to be noted that in the aforesaid letter dated 8th June 1970 (D11) the plaintiff had called for the sum of Rs. 5000 which represented the price of the five hundred shares in CCA Ltd. This request was made on the basis that the transaction was a voluntary one. The Court of Appeal has commented that "the suggestion was made, the decision was taken and it was fully implemented between the afternoon of 24th January and the mid-day of the 26th January and it is clear that the suggestion that the plaintiff should resign and sell his shares was suddenly sprung upon him prior to his departure to London for treatment and that too, for a mental ailment." From this hustling one cannot spell coercion and rule out independent judgment on the part of plaintiff.

The plaintiff and defendant are more or less agreed on the times and dates between 24th and 26th January in which they along with Mr. Miller and Mr. Mallory Wijesinghe met and discussed the question of plaintiff's resignation and the transfer of the shares. However while the plaintiff states that the defendant and Miller kept on persisting, worrying and pestering him to agree to their suggestion, the defendant asserts that the discussions were friendly, cordial and devoid of any antagonism. The trial judge has preferred to accept the evidence of the defendant to that of the plaintiff. With regard to the comparative veracity of Ratwatte and Gunasekera the plaintiff himself complemented Ratwatte as not being as astute businessman. He did not show a flashing imagination of the type Gunasekera is endowed with and did not display the ready wit. He spoke of the few significant events and incidents he was called upon to depose to convincingly. He appeared to be not as clever as Gunasekera in the witness box. I prefer to believe him.

The plaintiff's case is that he resigned his directorship and transferred the shares, not on his initiation but because Miller and defendant kept on "*persisting, worrying and pestering him when he was in a weak state of mind and health to agree to their suggestion.* It is this 'persisting, worrying and pestering' indulged in by defendant and Miller that influenced him to agree to their suggestion. It is very significant that the plaintiff does not anywhere in his pleading or in his testimony, go so far as to state specifically that he was pressurised or coerced to resign from his directorate and transfer the shares. He not say that the defendant and Mallory Wijesinghe would not allow him to depart to the airport until and unless he transferred the shares to them. The trial Judge has found that "there is no evidence whatsoever that there was a threat of any kind or the infusion of any fears for the future or the present into Gunasekera's mind." Counsel for the plaintiff did not challenge this finding. The Court of Appeal has failed to address its mind to the ingredients of undue influence. The court's finding that the defendant exercised undue influence is based on its conclusion that the plaintiff to the knowledge of the defendant, suffered from a serious mental ailment and that Miller and the defendant kept on worrying and pestering him with their suggestion and this is indicative of the exercise of undue influence. No authority has been cited for the proposition that persistence or pestering by a person who is not in any fiduciary relationship to the other is sufficient to qualify as undue influence. The defendant did not possess at any stage, any power over the plaintiff and the plaintiff was not in the power of the defendant or of Miller or of Mallory Wijesinghe. There was no question of the defendant or the others having a dominating influence over the plaintiff. Pestering may annoy a person but is not sufficient to compel or coerce him to do something against his will. The classic case of undue influence is the victim's intentional submission arising from the realisation that there is no other practical choice open to him where the victim succumbs under pressure. There must be pressure, the practical effect of which is compulsion or the absence of choice. The evidence of the defendant does not show any such compulsion or pressure on the part of the defendant. The repeated appeals to the plaintiff to resign from the two companies and to sever all connections with those companies in view of his ill-health and in the interest of the future development and expansion of those companies were calculated to persuade the defendant to do the correct thing by the companies. At the worst the appeals amounted only to pressure of a kind which the law regards as legitimate, in a commercial transaction. The backdrop in which the impugned transaction took place has been described by the trial Judge as follows:

"Gunasekera is a man weak in mind due to his illness. Miller is, so to say, guardian angel of the commercial group of companies. Ratwatte is a shareholder and director similar to Gunasekera but with his mind perhaps in a better state, both keep on insisting that Gunasekera must give up his job as director and his shares as a block at a price more than he paid for the sake of the future of the company which had given him leave and passage money to go to England. It must be noted that there is no other promise but payment of more than he paid for the shares, six months leave, salary less the Provident Fund contribution and ex gratia payment of Rs. 92,513.00."

The evidence further discloses that the discussions and decisions between the several parties did not relate to a single transaction, involving the transfer of shares between the plaintiff and defendant; it was a complex transaction involving not merely plaintiff as vendor and defendant as purchaser, but other shareholders also as buyers and the severance of all connection between the plaintiff and the two companies; it was for this reason that the Board meetings were necessary; the scheme involved transfer of shares not only to the plaintiff but also to the three other shareholders of the two companies; the scheme was evolved in the interest of the development and expansion of those companies and as plaintiff had become a sick person and did not fit into the scheme. Miller was impelled to persuade him to drop out, by resigning his directorship and transferring his shares to the other shareholders of the Companies. Pestering the plaintiff to co-operate with them in implementing the scheme cannot be regarded as illegitimate pressure vitiating the consent of the plaintiff to play his part. The Court of Appeal has failed to view the impugned transaction in its proper perspective, and has erred in coming to the conclusion that the defendant "by persisting, worrying and pestering" coerced the plaintiff into the bargain. The plaintiff's consent to the contract did not cease to be voluntary because he gave into such worrying and chose to get rid of the worrying by acceding to defendant's request. There was no coercion of his will such as to vitiate his consent. The evidence discloses that the plaintiff has in accordance with the arrangement between him and the other parties received on account of his parting from the companies a sum of Rs. 227,487 from C.M.M. Ltd., (P12) and a sum of Rs. 92,513 being exgratia payment plus a sum of Rs. 5,000, representing the price of the 500 shares held by plaintiff in C.C.A. and Rs. 26,400 being six months leave salary less Provident Fund contribution. It may be that the plaintiff might not have been too happy about the transaction, but it cannot be said that the defendant dominated him and imposed himself on him to bring about the transaction. It is not plaintiff's case that he apprehended some untoward consequences to himself if he failed to comply with the request of the defendant and the others and that was why he sold the shares at that price offered by the defendant. The importuning on the part of the defendant and Miller, testified to by the plaintiff does not measure up to undue influence in the eye of law or equity and does not import improper pressure.

The Court of Appeal misconceived the nature of undue influence that would permit a party to avoid a transaction to which he had apparently consented. The court was not justified on the evidence on record, in reversing the finding of the trial Judge with regard to the issue of undue influence. In my view the evidence does not show that the plaintiff was constrained to transfer his shares in the two companies consequent to the exercise on him of any undue influence by the defendant or his agents.

The trial Judge found in favour of the plaintiff on the issue of laesio enormis and has ordered the cancellation of the sale of the shares by plaintiff to defendant, if defendant failed to pay the difference between the purchase price and, what according, to him, was the true value. Counsel for the defendent-appellant has submitted that the District Judge has misdirected himself in law in holding that the doctrine of laesio enormis applies in the case of transfer of shares and has misdirected himself on the facts in computing what was the true value of the said shares.

The Court of Appeal did not address itself to the question of the applicability of the doctrine of laesio enormis since it had held with the plaintiff on the issue of undue influence. Since this court is holding against the plaintiff, that his transfer of the shares is not vitiated by undue influence, it has become necessary to determine whether the doctrine of laesio enormis applies to the sale of shares in a company limited by shares, incorporated under the provisions of the Company Law.

Wessels in his treatise on the Law of Contracts, Vol. II, section 5081, (2nd Ed.) says–

> "There is hardly a proposition with regard to laesio enormis which has not been the subject of considerable controversy. In many cases we can ascertain what the actual practice was in Holland; in other cases the practice is not clear. When the Dutch jurists discuss some of their commonest points regarding the remedy of laesio enormis their views must often be taken as the expressions of individual opinions rather than as definite statements of law as accepted in Holland."

Laesio enormis, as one of the grounds on which a contract can be rescinded in Roman-Dutch Law is quite unknown to and contrary to the policy of English Law. That doctrine is applied to have contracts such as sale, lease set aside on the ground that the party who asks for rescission has been damaged to the extent of more than half of the value of the subject-matter of the contract. The tendency in South Africa is to restrict the operation of rescission on the ground of laesio enormis: *McGee v. Mignon* (10): *Coetze v. Pretorius* (11)

Wessels further states:– *Sec. 5075* –

"According to the texts of the Roman Law, laesio enormis could only be resorted to when land was sold at less than half its true value. The law of Justinian probably did not extend the remedy to movable property. It has been suggested that the doctrine was introduced in order to protect poor land owners and their children in times of stress. The remedy may, perhaps, also have been limited to land, because land has always a more constant value than movables."

Sec. 5077 – The Code of Justinian only speaks of the sale of land, but the commentators extended the remedy to houses and then to movables of considerable value.

Sec. 5079–There has been much controversy as to the desirability of continuing this remedy. Thomasius denied that there was any natural equity in 'laesio enormis'. The compilers of the French Code were divided in their opinions though eventually they passed Article 1674 CC. as a compromise. They restricted the operation of laesio enormis to the vendor and to immovable property.

Sec. 5084 – "In order to set aside a sale on the ground of laesio enormis the plaintiff, if a vendor, must prove that the true value of the article sold at the time of the sale, and at the place where it was sold, was more than twice the contract price –

Sec. 5097 – '(1) The remedy of laesio enormis only applies to cases where the value of the subject matter of the sale is known and certain at the time of the sale. If therefore the value of the thing sold cannot be determined at the time of the sale, there cannot be laesio enormis.

If the value of the thing sold was not known *at the time of the sale,* either because it could not be ascertained or because it was not known, the remedy will not apply."

In *Tjollo Ateljees Bpk v. Small* (12) Schreiner, J.A., said at page 860 – "Laesio enormis is out of place in a modern world, with its highly complicated commercial organisation and its ingenious selling devices." Hoexter A.J.A., observed at page 882 that "the doctrine of laesio enormis is obviously one that does not accord with our modern ideas of 'contract'."

The doctrine should not be applied to ordinary commercial transactions for if applied it would unduly hamper commerce. The doctrine should not be extended to a case to which it is not undisputably applicable; such extension is not suited to the conditions of today.

It was submitted by Counsel for the defendant that the doctrine of laesio enormis is applicable in Ceylon only to transfer of immovables and not that of movables. He based his submission on the fact that all the case law in Ceylon relating to the doctrine concerned immovable property: *Gooneratne v. Don Philip* (13), *Jayawardene v. Amerasekera* (14), *Punchirala v. Ahamat* (15); *Sobana v. Meera Lebbe* (16), *Fernando v. Fernando* (17), *Wijesiriwardene v. Gunasekera* (18), *Bodiga v. Nagoor* (19), *Ponnupillai v. Kumaravelpillai* (20), *Appuhamy v. Keerala*(21), and there is no reported decision supporting the applicability of the doctrine to movables. Even assuming that the doctrine does apply to contracts of tangible movables the question arises whether it applies to transfer of shares in limited liability companies. No reported decision of any of the courts in South Africa or in Ceylon applying the doctrine to such shares was cited to us and there does not appear to be any such reported decision. A share in a limited liability company is certainly not an immovable. It is a moot question whether it was a movable, as understood by the Roman-Dutch Law jurists. The concept of shares in a limited liability company was unknown to Roman Law or to the Roman-Dutch Law. It is essentially an English Law concept. Section 63 of our Company's Ordinance 1939 provides that "shares shall be movable property and shall not be of the nature of immovable property." Our Company's Ordinance is based on the English Company Law. The English provision corresponding to the aforesaid section 63 is section 182 (1) of the Companies Act of 1929 which provides that shares are personal estate and not reality; shares are certainly not tangible chattels and when our section 63 provides that shares shall be movable property, it assigns shares to the category of movable property for the purposes of the application of the provisions of the Companies Ordinance only and not for purposes outside the province of Company Law.

A share in a company is the expression of a proprietory relationship; the share-holder is the proportionate owner of the company but does not own the company's assets which belong to the company as a separate and independent legal entity. "Shareholders are not, in the eye of the law, part owners of the undertaking" Per Evershed J., in *Short v. Treasury Commissioners* (22). A share in a company does not represent the beneficial ownership of a certain proportion of the Company's property but represents the benefit of a contract made by the shareholder with the company. In *Barland's Trustee v. Steel Bros. & Co. Ltd.* (23). Farwell, J., made clear the legal nature of shares–

> "A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with section 16 of the Companies Act 1862. The contract contained in the Articles of Association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."

Lord Greene in *Re. G. M. Holdings Ltd.,* (24) said–

> "A share is a chose in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession."

A chose in action confers no right to possession of a physical thing.

Shares are objects of property which are bought, sold, mortgaged and bequeathed. They are indeed the typical items of property of the modern commercial era.

The distinction between movables and immovables is applicable to material objects only. Yet the law applies it to rights also. Rights, no less than things, are conceived by the law as either movable or immovable. It has divided the whole sphere of proprietory rights by reference to this distinction. The Roman law and Roman-Dutch law regarded a right as having the same quality as its subject matter. All rights over immovable things, whether rights in *re propria* or rights in *re aliena* have themselves been classed as immovable property. Similarly all rights over movables are *bona mobilia* themselves. The following incorporeals are regarded as movables; actions in personam; actions in rem for the recovery of movables. A mortgage bond is a movable for its principal feature is a personal obligation and the right of security is merely accessory to it. But shares are incorporeal rights which do not lend themselves to satisfactory classification on the basis of mobility or immobility adopted by Roman or Roman-Dutch Law. They form a distinct class of their own. A share is a bundle of several rights and liabilities. The principal rights which a share may carry are—

(1) the right to dividend, if while the Company is a going concern, a dividend is duly declared;

(2) the right to vote at the meetings of members; and

(3) the right in the winding up of the company, after payment of the debts to receive a proportionate part of the capital or otherwise to participate in the distribution of assets of the company.

The principal duty of a shareholder, as far as the company is concerned, is to pay what is due on the shares. The moneys payable on the share have to be paid by the shareholder when a call for payment is made upon him by the company.

The holding of a share in a company limited by shares generally carries the right to receive a proportion of the profits of the company and of its assets in the winding up, and all other benefits of membership combined with an obligation to contribute to its liabilities, all measured by a certain sum of money which is the nominal value of the shares, and all subject to the memorandum and articles of the company—Palmer's Company Law, Vol. I (23rd Ed.) at page 385.

It is manifest that a share does not dovetail into the Roman or Roman-Dutch Law categorisation of movables and immovables. To the jurists of those sytems the concept of an incorporated company and the nature of a share with its peculiar attributes was something inconceivable. Hence, it will be incongruent to apply their doctrine of laesio enormis to a share which is neither a movable nor an immovable as conceived by them. It is a matter of controversy whether the doctrine applies to contracts relating to movables. Even assuming that it does apply in Ceylon to movables, it does not follow that its application can be extended to apply to transfer of shares in companies, as shares do not fit into the Roman or Roman-Dutch Law classification of movables or immovables. The legislature has stepped in to enact by section 63 that a share is to be regarded as a movable but it does not follow that thereby the legislature intended to import all the incidents of Roman or Roman-Dutch Law relating to movables and make applicable the doctrine of laesio enormis to commercial transactions relating to shares, as if they are movables according to the concepts of Roman-Dutch Law jurists. Further the estimation of the value of a share must be a matter of opinion and does not admit of precise scientific or mathematical calculation and hence the requirements of the remedy of laesio enormis that the value of the subject matter of the sale must be known and certain at the time of the sale, cannot be satisfied in the case of the sale of shares. These considerations militate against the application of the remedy of laesio enormis to dealings in shares of incorporated companies. Hence the District Judge misdirected himself in applying the doctrine of laesio enormis and avoiding the sale of the said shares by Plaintiff to Defendant. The doctrine does not apply to the sale of shares in incorporated companies. Commercial realities militate against the adoption of such a doctrine. In my view the doctrine instead of facilitating will be obstructing commercial development. In view of my conclusion that the remedy of laesio enormis is not available to cancel the sale of shares in incorporated companies, it is not necessary to examine the correctness of the Judge's determination of the true value of the said shares even though counsel for the defendant attacked the finding.

I allow the appeal, set aside the judgments of the Court of Appeal and of the District Court and dismiss plaintiff's action. In the special circumstances of the case parties will bear their own costs in all the courts.

L. H. DE ALWIS, J.–I agree.

SENEVIRATNE, J.–*I agree.*

Appeal allowed.
Plaintiff's action dismissed.